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January 21, 2021

VIA ELECTRONIC FILING

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

RE: Ackie, et al v. Philadelphia Gas Works
In Re: C-2019-3013933
Complainants' Response in Opposition to PGW's Motion in Limine

Dear Secretary Chiavetta:

Enclosed please find the Complainants Dwayne Ackie, Miguel Chavarria, Jr, Maurice Goodwin and Wayne Rauceo's Response in Opposition to Philadelphia Gas Works' Motion in Limine filed on January 19, 2021 along with Certificate of Service in the above captioned matter.

Thank you.

Yours truly,



Enclosures

cc: Certificate of Service w/ encl. (via email only)
Hon. Darlene Heep w/ encl. (via email only)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Dwayne Ackie, Miguel J. Chavarria, Jr., Maurice A. Goodwin and Wayne Rauceo	:	
	:	
v.	:	C-2019-3013933
	:	
Philadelphia Gas Works	:	

CERTIFICATE OF SERVICE

I do hereby certify that service of a true and correct copy of herein Complainants' Response in Opposition to PGW's Motion in Limine was made on the Presiding Officer and below counsel for Philadelphia Gas Works via electronic service:

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Date: January 21, 2021

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Dwayne Ackie, Miguel J. Chavarria, Jr.,	:	
Maurice A. Goodwin and Wayne Rauceo	:	
	:	
v.	:	C-2019-3013933
	:	
Philadelphia Gas Works	:	

**RESPONSE IN OPPOSITION TO
PHILADELPHIA GAS WORKS’ MOTION IN LIMINE
REGARDING THE REPLY TESTIMONY OF
DWAYNE ACKIE AND MIGUEL J. CHAVARRIA, JR.**

PRELIMINARY STATEMENT

Dwayne Ackie (“Ackie”), Miguel J. Chavarria, Jr. (“Chavarria”), Maurice A. Goodwin (“Goodwin”) and Wayne Rauceo (“Rauceo”)(collectively “Complainants” or “Employees”) respectfully submit this response in opposition to Respondent Philadelphia Gas Works’ (“PGW”) Motion in Limine pursuant to 52 Pa. Code § 5.103(c). PGW specifically seeks the exclusion of certain portions of the Reply Testimony of Dwayne Ackie (“EE Statement No. 1-Reply”) and Miguel J. Chavarria, Jr. (“EE Statement No. 3-Reply”)(“Contested Portions”)¹. The contested portions relate to the Supplemental Testimony provided on October 21, 2020 by Complainants related to the “valve incident.”

PGW first summarizes one portion of Mr. Ackie’s testimony as being impermissible because it this Judge’s November 30, 3030 order “did not authorize Complainants to further expand the scope of the reply testimony to address any other issue,” other than the October 15,

¹ PGW identifies the contested portions of Mr. Ackie’s Reply Testimony to be: EE St. No. 1-Reply at 2:13 (“Even Walker . . .) – 3:5 (. . . from entering there”), inclusive; and at 3:19 (“McGuire continues to . . .) – 4:9, inclusive. Relevant portions of Mr. Chavarria’s Reply Testimony are: EE St No. 3-Reply at 1:13 (“ . . . , and”) – 1:16, inclusive. (PGW Mot. Limine at 1).

2020 valve incident. Complainants respectfully disagree. The November 30, 2020 order states the verbal supplemental testimony proffered at the October 21, 2020 hearing “appears in the Transcript on pages 20-68 [Mr. Ackie’s] and 81-108 [Mr. Chavarria’s].” Thus, those parts of the October 21, 2020 testimony form the permissible scope of testimony. Mr. Ackie specifically stated “On October 15th at the Passyunk plant inodorous gas was vented off and vented into the atmosphere on a *project* that consisted testing – testing some LNG pumps.”² (emphasis added). The project the involved the testing of the LNG pumps began on October 14, 2020 with the “pack[ing] the LNG pumps header with LNG.”³

Furthermore, Mr. Ackie testified at the October 21, 2020 hearing that Passyunk General Supervisor, David Martinez “is required to come back to the plant after his hours or his shift” in emergency situations.⁴ The October 5, 2020 fire system incident being offline, as Mr. Ackie described it, left “the plant vulnerable” and required someone to come back to the Plant to correct the “vulnerable” situation.⁵ Thus, these incidents, i.e., October 5, 2020 and October 14, 2020, in Mr. Ackie’s reply testimony were in fact within the permissible scope of his supplemental testimony on October 21, 2020 relating to the valve incident.

Finally, PGW summarizes the remaining contested portions of Mr. Ackie’s and Mr. Chavarria’s testimony as “uncorroborated hearsay.”⁶ As it relates to Mr. Ackie’s reply testimony regarding Operations Supervisor John Walker’s (“Walker”) statements are covered by the hearsay exception of excited utterance, Pa.R.E. 803(2). In his October 21, 2020 testimony, Mr.

² Tr. at 20:10-13.

³ EE Statement No. 1-REPLY at 3:22-23.

⁴ Tr. at 26:11-27:2

⁵ EE Statement No. 1-REPLY at 4:3-9. Furthermore, PGW did not object to any of the specific testimony proffered by Mr. Ackie on October 21, 2020 as noted in n.2 and n.4, *supra*.

⁶ PGW Mot. Limine at 2.

Ackie described Mr. Walker as being “like panicking”.⁷ By definition, excited utterance is “a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that is caused.” Pa.R.E. 803(2). Under this hearsay exception, the declarant does not have to be available as a witness. (*Id.*) Mr. Ackie was present on October 15, 2020, when the facts surrounding the discovery of the valve leak occurred and when Mr. Walker made his statements. Mr. Ackie testified credibly about the nature of the valve leak being an emergency and Mr. Walker’s state of mind, “panicking” at the time of the “startling event or condition.” Thus, Complainants reasonably believe the reply testimony regarding Mr. Walker’s statements are permissible as excited utterance hearsay exception.

Complainants equally believe Mr. Chavarria’s reply testimony in question is also covered by hearsay exceptions of present sense impression and/or records of regularly conducted activity regarding Working Foreman Steve Edwards’ (“Edwards”) statements. Pa.R.E. 803(1), (6). Both Rules do not require the declarant to be available as a witness. Rule 803(1) is “a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it” (present sense impression) and Rule 803(6) is “a record (which includes a memorandum, report, or data compilation in any form) of an act, event or conditions if,” and gives various conditions under which the record can be made. One such condition involved records “kept in the course of a regularly conducted activity of a ‘business’, when term includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit.”

Mr. Ackie testified he discussed the valve leak with Mr. Edwards, who was described as

⁷ Tr. at 22:16-18.

being “upset”.⁸ Ackie and Edwards decided to “secure the truck unloading area” “to make it safe”.⁹ Later, when Mr. Chavarria came to work to relieve working foreman Edwards at which time Mr. Edwards discussed with Chavarria “a whole list of things” going on at the plant, which was a normal course of shift change.¹⁰ Part of their discussions included the caution tape and gas “escaping from . . . a braided stainless steel hose, which we use to unload LNG trailers.”¹¹

Thus, Complainants reasonably believe the contested portions of Mr. Ackie’s and Mr. Chavarria’s reply testimony are within the permissible scope of testimony and/or covered by an appropriate hearsay exception, and all such testimony should be ADMITTED into the record and considered in this proceeding.

I. BACKGROUND

1. Admission as to PGW.
2. Admitted.
3. Admitted.
4. Admitted in part, denied in part. It is admitted ALJ Heep entered an order on November 30, 2020 related to Supplemental Testimony regarding “an alleged valve incident on October 15-16, 2020,” permitting both PGW and Complainants to submit Testimony and Reply Testimony on December 18, 2020 and January 20, 2021, respectively. All other allegations in this paragraph are denied as stated. By way of further response, the document speaks for itself.
5. Admission as to PGW.
6. Admitted in part, denied it part. It is admitted Complainants served Reply Testimony

⁸ Tr. at 23:22-25. Note, the transcript incorrectly identifies Steve Edwards as Dave Edwards.

⁹ Tr. at 24:15-25:12.

¹⁰ Tr. at 85:18-86:11.

¹¹ Tr. at 85:18-22, and EE Statement No. 3-REPLY at 1:13-16.

of Mr. Ackie and Mr. Chavarria on January 8, 2021. All other allegations in this paragraph are denied as stated. By way of further response, *see* Preliminary Statement at 2-4, *supra*.

7. Conclusion of law for which a response is not required. To the extent a response is required, denied.

II. LEGAL STANDARD

8. Admitted.

9. Conclusion of law for which a response is not required. To the extent a response is required, denied. The document/case speaks for itself.

10. Admitted in part, denied in part. It is admitted as a matter of public policy, the Commission may exclude “any oral or documentary evidence” that is irrelevant or immaterial. It is further admitted the quoted text is a true and correct statement of the text in cited cases as noted in footnote 7. All other allegations in this paragraph are denied as stated. By way of further response, the Commission is a Commonwealth agency and as such “shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received.”¹²

11. Admitted. By way of further response, the Pennsylvania Rules of Evidence speak for themselves.

12. Admitted. By way of further response, “witnesses must have first-hand knowledge of the subject matter on which they are testifying for that testimony to be admissible.”¹³

III. ARGUMENT

A. Mr. Ackie’s reply testimony concerning the October 5 2020 and October 14, 2020 incidents is within the permissible scope of testimony in this proceeding in

¹² *Gibson v. WC.A.B.*, 861 A.2d 938, 947 (Pa. 2004)(citation omitted)

¹³ *Id.*

general and the “valve incident” in particular.

13. Admitted in part, denied in part. It is admitted Mr. Ackie’s reply testimony includes his reference to Brian McGuire (“McGuire”), Passyunk Plant Manager “continu[ing] to downplay safety problems and incidents at Passyunk plant and to hide Dave’s incompetency as General Supervisor, this is a pattern.” It is further admitted “Dave” refers to Passyunk Plant General Supervisor, Operations David Martinez, and examples given related to October 5, 2020, plant fire system offline, and October 14, 2020, procedure to pack LNG pumps header. All other allegations are denied as stated. By way of further response, the statement/testimony speaks for itself.

14. Complainants re-aver and incorporate by references their statements in the Preliminary Statement section, *supra* at 1-2.

15. Complainants re-aver and incorporate by reference their statements in the Preliminary Statement section, *supra* at 1-2.

16. Conclusion of law for which a response is not required. To the extent a response is required denied.

17. Conclusion of law for which a response is not required. To the extent a response is required, denied. Complainants re-aver and incorporate by reference their statements in Preliminary Statement section, *supra* at 1-2.

18. Conclusions of law for which a response is not required. To the extent a response is required, denied.

19. Conclusions of law for which a response is not required. To the extent a response is required, denied. Complainants do not believe their claims of plant safety and operations as well as other concerns are not valid.

B. The testimony of Mr. Ackie and Mr. Chavarria relating to John Walker's and Steven Edwards' statements fall within permissible hearsay exceptions.

20. Admitted in part, denied in part. It is admitted Mr. Ackie's reply testimony includes out of court statements of John Walker and Steven Edwards related to the October 15-16, 2020 valve leak incident at the Passyunk Plant since the incident occurred at the plant and PGW did not offer Mr. Walker or Mr. Edwards to provide testimony in this matter. All other allegations in this paragraph are denied as stated. By way of further response, the document speaks for itself. Furthermore, Complainant re-aver and incorporate by reference their statements in the Preliminary Statement section, *supra* at 2-4.

21. Admitted in part, denied in part. It is admitted Mr. Chavarria's reply testimony included out of court statements of Steven Edwards related to the October 15-16, 2020 valve leak incident at the Passyunk Plant since the incident occurred at the plant and PGW did not offer Mr. Edwards to provide testimony in this matter. All other allegations in this paragraph are denied as stated. By way of further response, the document speaks for itself. Furthermore, Complaints re-aver and incorporate by reference their statements in the Preliminary Statement section, *supra* at 2-4.

22. Conclusions of law for which a response is not required. To the extent a response is required, denied. By way of further response, denied.

23. Conclusion of law for which a response is not required. To the extent a response is required, denied. By way of further response, PGW failed to provide any discussion or legal argument related to the enumerated hearsay exceptions that it acknowledged exists, but if failed to apply or analyze. Complainants re-aver and incorporate by reference their statements in the Preliminary Statement section, *supra* at 2-4 related to hearsay exceptions.

IV. CONCLUSION

For the reasons set forth above, Complainants respectfully request ALJ Heep rule in favor of Complainants and against PGW by DENYING their Motion in Limine and allowing all Contested Portions of Employee Ackie's and Chavarria's statements admitted into the evidentiary record and considered in this proceedings.

Respectfully submitted:

LAW OFFICE OF KARIN M. GUNTER

Dated: January 21, 2021

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