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February 12, 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' Main Brief 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 Main Brief, 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: February 12, 2021

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

MAIN BRIEF OF PHILADELPHIA GAS WORKS

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I. INTRODUCTION

This Formal Complaint proceeding was initiated against Philadelphia Gas Works (“PGW” or “Company”) by four disgruntled employees (“Complainants”) who work at PGW’s liquefied natural gas (“LNG”) Passyunk Plant (“Passyunk Plant” or “Plant”) and have federal litigation pending against PGW raising claims of employment discrimination. Over a period of years, Complainants have cobbled together a laundry list of petty grievances against PGW in apparent preparation for their federal litigation. Now, Complainants point to these manufactured injustices and baldly assert that they constitute “safety violations” or “safety concerns,” in an effort to bring them under the Commission’s jurisdiction. When the allegations are examined, however, it is clear that PGW has not engaged in any conduct that constitutes a safety violation, or otherwise violated the Public Utility Code or Commission regulations or orders. Notably, Complainants fail to point to any incident that caused harm or created a proven exposure of harm to customers, employees or the public, let alone any incident that actually occurred. Further, the allegations are based on little more than rumors that Complainants attempt to establish as fact through uncorroborated hearsay statements.

Complainants’ claims of “safety violations” include the following alleged instances: an employee arrived late for his shift; an employee left a company radio at a store for ten minutes; an employee was involved in a fender bender in a parking lot with a Company vehicle; two employees left the Plant to drive a supervisor to the airport; the Plant Manager returned to the LNG Plant after his shift one evening without his identification badge; and PGW promoted individuals, who Complainants do not view as qualified, to supervisor positions. Certainly, none of these allegations, even if true, amount to a safety violation, especially since Complainants have failed to draw a link between these events and any harmful incident or proven exposure to harm.

Complainants make other averments regarding the vaporization process at the Plant, the repressurization system, a valve incident and other general management practices. While some of these claims, at first blush, may appear to raise safety concerns, an examination of the evidence demonstrates that PGW's practices and responses in each of these instances were appropriate and consistent with safe protocols and procedures.

While Complainants are Plant employees, the Plant Manager and PGW management are the ones with the responsibility to ensure that it operates safely. In contrast to Complainants' approach of making bald assertions as to "safety violations," PGW presented substantial evidence showing that it designs its policies and procedures to ensure the safe operation of the Plant. Further, this evidence demonstrated that PGW, at all times pertinent to this case, used reasonable efforts and care to keep its employees, customers, and the public safe. With engineering backgrounds and lengthy careers of having responsibility for the safe operation of the LNG Plant, the testimony of PGW's witnesses effectively refutes Complainants' inconsequential and frivolous claims, which are often based on uncorroborated hearsay rather than their own knowledge.

II. PROCEDURAL HISTORY

On October 31, 2019, Dwayne Ackie, Miguel J. Chavarria, Jr., Maurice A. Goodwin and Wayne Rauceo (collectively, "Complainants") filed a Complaint against PGW alleging "safety violations and other concerns" regarding the operation of PGW's Passyunk LNG Plant. Complainants are currently employees at the LNG Plant and have litigation pending against PGW in the United States District Court for the Eastern District of Pennsylvania where they are alleging employment discrimination. PGW timely filed an Answer on November 20, 2019, denying all material allegations, and filed Preliminary Objections on that date.

On January 3, 2020, Administrative Law Judge Darlene Heep (“ALJ Heep”) issued an Order Granting in Part and Denying in Part Preliminary Objections (“January 3, 2020 Order”). The January 3, 2020 Order sustained PGW’s Preliminary Objections regarding employment discrimination and dismissed these allegations as being outside the jurisdiction of the Commission to address.¹ The January 3, 2020 Order also sustained PGW’s Preliminary Objections relating to allegations in Paragraph Nos. 14 and 16 of the Complaint because they are not within the 3-year statute of limitations in Section 3314(a) of the Public Utility Code.²

ALJ Heep convened a Prehearing Conference on February 6, 2020, at which time a procedural schedule was established. This procedural schedule, which was memorialized in an Order issued on February 11, 2020, was subsequently modified several times due to COVID-19 health directives and to accommodate the requests of the parties.

In accordance with the revised litigation schedule, Complainants served the Direct Testimony of Mr. Ackie,³ Mr. Goodwin,⁴ Mr. Chavarria,⁵ and Mr. Rauceo⁶ on July 2, 2020. While Mr. Chavarria’s Direct Testimony indicated that he no longer intended to pursue the Complaint, Complainants served the Amended Direct Testimony of Mr. Chavarria⁷ on July 27, 2020, setting forth substantive allegations.

PGW served the Rebuttal Testimony of Raymond M. Snyder, the former Senior Vice-President of Gas Management,⁸ Daniel J. Cassidy, Vice President of Technical Operations,⁹ and

¹ January 3, 2020 Order at 4-5, citing *N.A.A.C.P. v. P.U.C.*, 5 Pa. Commw. 312, 290 A.2d 704 (1972).
² January 3, 2020 Order at 6-7, citing *Margaret Collins v. Pennsylvania-American Water Company*, Docket No. F-2017-2628770 at 17-18 (Order entered August 29, 2019); 66 Pa.C.S. § 3314(a).
³ EE Statement No. 1 (Direct).
⁴ EE Statement No. 2 (Direct).
⁵ EE Statement No. 3 (Direct).
⁶ EE Statement No. 4 (Direct).
⁷ EE Statement No. 3 (Amended Direct).
⁸ PGW Statement No. 1 (Rebuttal).
⁹ PGW Statement No. 2 (Rebuttal).

Brian McGuire, LNG Plant Manager,¹⁰ on August 17, 2020, in response to the Direct Testimony of Mr. Ackie, Mr. Goodwin and Mr. Rauceo. Complainants served the Surrebuttal Testimony of Mr. Ackie¹¹ and Mr. Rauceo¹² on August 31, 2020, responding to the Rebuttal Testimony of Mr. Snyder, Mr. Cassidy and Mr. McGuire. PGW served the Supplemental Rebuttal Testimony of Mr. McGuire¹³ on August 31, 2020 to address Mr. Chavarria's Amended Direct Testimony. Complainants served Mr. Chavarria's Surrebuttal Testimony on September 14, 2020¹⁴ to respond to Mr. McGuire's Supplemental Rebuttal Testimony.

On October 19, 2020, consistent with the timeframe established by ALJ Heep's February 11, 2020 Prehearing Order (which required Motions in Limine to be filed by 1 p.m. the day before the first evidentiary hearing), PGW filed a Motion in Limine contesting certain portions of Complainants' pre-served Direct and Surrebuttal Testimony, on the basis of the hearsay rule ("Motion in Limine I"). Complainants filed a Response in Opposition to the Motion in Limine I on October 20, 2020.

The evidentiary hearing convened on October 21, 2020. At the outset, ALJ Heep ruled on Motion in Limine I, excluding lines two through three on page 4 of Mr. Ackie's Surrebuttal Testimony.¹⁵ ALJ Heep denied the remainder of PGW's Motion in Limine I.

In their Response in Opposition to PGW's Motion in Limine I and at the hearing, Complainants contended that PGW had not provided all responsive discovery to Set III-4 relating to the alleged incident on February 23, 2018 addressed by Paragraph 11 of the Complaint. ALJ Heep directed PGW to provide any additional responses by November 4,

¹⁰ PGW Statement No. 3 (Rebuttal).
¹¹ EE Statement No. 1-SR (Surrebuttal).
¹² EE Statement No. 4-SR (Surrebuttal).
¹³ PGW Statement No. 3-SR (Supp. Rebuttal).
¹⁴ EE Statement No. 3-SR (Surrebuttal).
¹⁵ EE Statement No. 1-SR (Surrebuttal); Tr. at 6-7.

2020.¹⁶ Although PGW continued to believe, as it had originally advised Complainants on April 9, 2020, that no other information was available within the parameters of ALJ Heep's Order issued on March 19, 2020, in the spirit of cooperation, it provided security logs for the LNG Plant covering that time period.¹⁷

Consistent with an Interim Order of ALJ Heep dated November 24, 2020, Complainants served Supplemental Direct Testimony of Mr. Rauceo¹⁸ on December 18, 2020 to address PGW's additional discovery responses. Complainants provided both proprietary and non-proprietary versions of this testimony. On January 8, 2021, regarding Mr. Rauceo's Supplemental Direct Testimony, PGW filed a Motion in Limine ("Motion in Limine II"), contending that Complainants were improperly using testimony to address a discovery dispute. PGW also sought to exclude two proffered exhibits as being beyond the permissible scope pursuant to the November 24, 2020 Order. On January 12, 2021, Complainants filed a Response in Opposition to PGW's Motion in Limine II. By Order dated February 9, 2021, ALJ Heep granted the portion of PGW's Motion in Limine II with Mr. Rauceo's testimony raising legal issues and a discovery dispute, but did not exclude the contested exhibits.

Also on January 8, 2021, PGW served the Supplemental Rebuttal Testimony of Mr. Cassidy,¹⁹ responding to Mr. Rauceo's Supplemental Direct Testimony. Complainants served the Supplemental Surrebuttal Testimony of Mr. Rauceo on January 15, 2021.²⁰

During the evidentiary hearing on October 21, 2020, Complainants raised new allegations regarding an alleged valve incident on October 15, 2020.²¹ Pursuant to an Interim Order of ALJ

¹⁶ Tr. at 7-9.

¹⁷ EE Statement No. 4-SUP (Supp. Direct), Exhibit V (non-proprietary version).

¹⁸ EE Statement No. 4-SUP (Supp. Direct).

¹⁹ PGW Statement No. 2-SR (Supp. Rebuttal).

²⁰ EE Statement No. 4-SSR (Supp. Surrebuttal).

²¹ Tr. at 20-68; 81-108.

Heep dated November 30, 2020, PGW served the Surrebuttal Testimony of Mr. McGuire²² on December 18, 2020 addressing those issues. In response, Complainants served the Reply Testimony of Mr. Ackie²³ and Mr. Chavarria²⁴ on January 8, 2021. Regarding this Reply Testimony, PGW filed a Motion in Limine on January 19, 2021, contending that it contained hearsay statements and exceeded the scope of permissible testimony by raising incidents that allegedly occurred on October 5 and 14, 2020, prior to the hearing, and were unrelated to the October 15, 2020 valve incident. Complainants filed a Response in Opposition to PGW's Motion in Limine III on January 22, 2021. By Order dated February 9, 2021, it appears that Motion in Limine III was denied in its entirety.

ALJ Heep's November 24, 2020 Order established the briefing schedule for this proceeding, with Main Briefs due on February 12, 2021 and Reply Briefs due on March 5, 2021. Consistent with that Order, PGW is filing its Main Brief.

III. SUMMARY OF ARGUMENT

It is well-settled that complainants, in order to prevail before the Commission, must carry their burden of showing that the named utility is responsible for the problem(s) described in the complaint. Further, any alleged offense must violate the Public Utility Code, a Commission regulation or a Commission order. The complainant has the burden of proof, meaning that he or she must present a preponderance of the evidence. Adjudications by the Commission must be supported by substantial evidence, which is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

²² PGW Statement No. 3-SUR (Surrebutttal).

²³ EE Statement No. 1-REPLY (Reply).

²⁴ EE Statement No. 3-REPLY (Reply).

Under Section 1501 of the Public Utility Code, a public utility has an obligation to furnish and maintain adequate and safe service. For a natural gas utility, this duty entails the use of reasonable efforts and care to keep its employees, customers and others safe. A utility is not expected to provide perfectly safe service, particularly given the inherent hazards in operating such a business. Further, it is not sufficient for a complainant to point to a potential for harm, but rather a complainant must demonstrate that the utility's conduct either caused harm or created a proven exposure to harm.

While Complainants seek to portray a careless approach to safety on the part of PGW management, they have supplied no more than personal opinions, and more importantly, have failed to point to any harmful consequences that resulted from any of their allegations. If PGW operated the Passyunk Plant in the manner that the Complainants try to depict or if PGW's management had a careless mentality toward Plant operations, it seems that Complainants would have no difficulty referring to safety-related incidents occurring on a regular basis. Yet, Complainants have presented no evidence to show that any PGW practice caused harm, created a proven exposure to harm or violated any provision of the Public Utility Code, the Commission's regulations or Commission orders. Rather, Complainants' case is based, largely, on uncorroborated hearsay and bald assertions of "safety violations" made by unreliable witnesses who lack the requisite experience and expertise to make such determinations.

By contrast, PGW demonstrated through its testimony, including the testimony of the Passyunk Plant Manager, that it employs policies and procedures to ensure the safe operation of the LNG Plant. The Plant Manager writes the protocols for ensuring the safe operation of the Passyunk Plant, and he takes those responsibilities seriously. As a result, the Passyunk Plant operates safely at all times in accordance with those policies and procedures. PGW's witnesses

presented numerous examples of safety devices and measures that the Company takes to both prevent and timely respond to human error and equipment malfunction.

The Commission should dismiss the Complaint for the failure of Complainants to carry their burden of proof to show that PGW's conduct created a proven exposure to harm or otherwise resulted in harm to its employees, customers or the public. The record simply does not lay the foundation for finding any violation of the Commission's regulatory requirements.

IV. ARGUMENT

A. Applicable Legal Standards

1. Burden of Proof – Complaint Proceedings

To establish a legally sufficient claim, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail.²⁵ The alleged offense must be a violation of the Public Utility Code, a Commission regulation or a Commission order.²⁶

As the party seeking affirmative relief from the Commission, a complainant in a formal complaint proceeding has the burden of proof.²⁷ The burden of proof is the “preponderance of the evidence” standard.²⁸ To establish a fact by a preponderance of the evidence means to offer the greater weight of the evidence, or evidence that outweighs, or is more convincing than, by even the smallest amount, the probative value of the evidence presented by the other party.²⁹

The burden of proof is comprised of two distinct burdens: the burden of production and the burden of persuasion.³⁰ The burden of production, also called the burden of going forward

²⁵ *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990).

²⁶ 66 Pa. C.S. § 701.

²⁷ 66 Pa. C.S. § 332(a).

²⁸ *Suber v. Pennsylvania Com'n on Crime and Delinquency*, 885 A.2d 678, 682 (Pa. Cmwlth. 2005); *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992).

²⁹ *See Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 48-49, 70 A.2d 854, 855 (1950).

³⁰ *Hurley v. Hurley*, 2000 Pa. Super. 178, 754 A.2d 1283 (2000).

with the evidence, determines which party must come forward with evidence to support a particular claim or defense.³¹ The burden of production goes to the legal sufficiency of a party's claim or affirmative defense.³² It may shift between the parties during a hearing. A complainant may establish a *prima facie* case with circumstantial evidence.³³ If a complainant introduces sufficient evidence to establish legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant's evidence.³⁴

If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant's burden of proof has not been satisfied and the burden of going forward with the evidence shifts back to the complainant, who must provide some additional evidence favorable to the complainant's claim.³⁵

Having produced sufficient evidence to establish the legal sufficiency of a claim, the party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling.³⁶ While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission.³⁷ It is entirely possible for a party to carry the burden of production, but not be entitled to a favorable ruling because the party did not carry the burden of persuasion.³⁸ In determining whether a complainant has met the burden of persuasion, the

³¹ *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Initial Decision issued May 11, 2015) (*Moore*).

³² *See Id.*

³³ *See Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217, 1220 (Pa. Cmwlt. 2001) (*Milkie*).

³⁴ *See Moore*.

³⁵ *See Milkie*, 768 A.2d at 1220; *see also Burlison v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlt. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

³⁶ *See Moore*.

³⁷ *See Milkie*, 768 A.2d at 1220; *see also, Riedel v. County of Allegheny*, 633 A.2d 1325, 1328, n.11 (Pa. Cmwlt. 1993); *see also, Burlison*, 443 A.2d at 1375.

³⁸ *See Moore*.

ultimate fact-finder may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence.³⁹

Adjudications by the Commission must be supported by substantial evidence in the record.⁴⁰ Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.⁴¹ More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.⁴²

2. Burden of Proof – Alleged Violation of Section 1501 of the Public Utility Code

Section 1501 of the Public Utility Code obligates public utilities to “furnish and maintain adequate, efficient, safe and reasonable service and facilities” and to “make all such repairs, changes, alterations, substitutions, extensions and improvements to or in such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of patrons, employees, and the public.”⁴³ This provision further requires the service and facilities to comply with the regulations and orders of the Commission.

The Commission’s regulations promulgated pursuant to Section 1501 mandate that natural gas utilities “use every reasonable effort to properly warn and protect the public from danger” and to “exercise reasonable care to reduce the hazards to which employees, customers and others may be subjected to by reason of its equipment and facilities.”⁴⁴ This provision does not obligate natural gas utilities to provide perfectly safe service at all times. Rather, it

³⁹ See Moore, citing Suber.

⁴⁰ 2 Pa. C.S. § 704; Lansberry, 578 A.2d at 692.

⁴¹ Consolidated Edison Company of New York v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217.

⁴² Norfolk & Western Ry. Co. v. Pa. PUC, 489 Pa. 109, 413 A.2d 1037 (1980) (Norfolk); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 166 A.2d 96 (Pa. Super. 1961); Murphy v. Comm. Dept. of Public Welfare, White Haven Center, 480 A.2d 382 (Pa. Cmwlth. 184).

⁴³ 66 Pa. C.S. § 1501.

⁴⁴ 52 Pa. Code § 59.33(a).

recognizes the inherent hazards of operating a natural gas utility. The Commission’s regulations also establish minimum safety standards for natural gas utilities by adopting the federal pipeline safety laws.⁴⁵

In adjudicating safety-related complaints under Section 1501 and its safety regulations, the Commission has established a standard for making such determinations. A complainant must demonstrate by a preponderance of the evidence a “conclusive causal connection” between the utility’s conduct and exposing its customers, employees or the public to harm.⁴⁶ The Commission noted in *Povacz*, “[w]hen the prevention of harm is involved, the question becomes whether the preponderance of the evidence demonstrates that a utility’s service or facilities will cause harm.”⁴⁷ In establishing this standard, the Commission expressly rejected a “potential for harm” or “capable of causing harm” standard, observing that a complainant would be able to prevail by presenting a preponderance of the evidence that a hazard exists, without considering whether the utility has taken steps to reduce exposure to the hazard. As explained by the Commission, “even a layperson knows that public utility operations are not, as a general matter, hazard-free.”⁴⁸ A public utility’s statutory duty under Section 1501 is to use reasonable efforts to properly warn and protect the public from danger and to exercise reasonable care to reduce the

⁴⁵ 52 Pa. Code § 59.33(b).

⁴⁶ *Maria Povacz v. PECO Energy Company*, Docket No. C-2015-2475023 (Order entered March 28, 2019) (*Povacz*), at 28. See also *Cynthia Randall and Paul Albrecht v. PECO Energy Company*, Docket No. C-2016-2537666 (Order entered May 9, 2019) (*Randall*); *Laura Sunstein Murphy v. PECO Energy Company*, Docket No. C-2015-2475726 (Order entered May 9, 2019) (*Murphy*). The discussions in *Randall* and *Murphy* regarding these issues significantly quote *Povacz* and the results mirror the outcome in *Povacz*. See also *Letter of Notification of Philadelphia Electric Company Relative to the Reconstructing and Rebuilding of the Existing 138 kV Line to Operate as the Woodbourne-Heaton 230 kV Line in Montgomery and Bucks Counties*, 78 Pa.P.U.C. 486, 1993 WL 383052 (Pa.P.U.C.), 1992 Pa. PUC Lexis 160, Docket No. A-110550F0055 (Remand Order entered March 26, 1993) (it must be demonstrated by a preponderance of the evidence that there is a “conclusive causal connection” between electromagnetic field exposure from an EDC transmission facility and adverse human health effects; when the record evidence demonstrates a body of inconclusive scientific research and studies as to the causal connection, the burden of proof is not satisfied).

⁴⁷ *Povacz* at 29.

⁴⁸ *Povacz* at 30.

hazards to which customers, employees or the public may be subjected because of the provision of utility service and the utility's associated equipment and facilities.⁴⁹

On appeal, the Commonwealth Court reviewed the Commission's decisions in *Povacz*, *Randall* and *Murphy* and upheld this interpretation as to the proper standard for addressing safety-related complaints under Section 1501.⁵⁰ Specifically, the Commonwealth Court agreed with the Commission that complainants must demonstrate a lack of safety by a preponderance of the evidence. A potential for harm is insufficient. It is necessary for complainants to demonstrate that the utility's conduct would create a "proven exposure to harm."⁵¹

Accordingly, in order for a Section 1501 safety-related complaint to be sustained, the complainant(s) must prove a conclusive causal connection between a utility's conduct and exposing its customers, employees or the public to harm. It is not enough to establish that certain conduct is capable of causing harm, particularly since the mere operation of a public utility has that potential.

3. Uncorroborated Hearsay Evidence and Due Process Considerations

Rule of Evidence 801 defines "hearsay" as an out-of-court statement offered to prove the truth of the matter asserted.⁵² Pennsylvania and Commission case law make it clear that a finding based wholly on hearsay cannot support a legal conclusion by an administrative

⁴⁹ *Povacz* at 30-31.

⁵⁰ *Povacz et al. v. Pa. P.U.C.*, 2020 Pa. Commw. LEXIS 714, 241 A.3d 481 (2020) ("*Povacz Order on Appeal*"). Although separate Petitions for Review were filed, the Commonwealth Court consolidated them on June 3, 2019. The Court affirmed, reversed, remanded and vacated other portions of the Commission's Orders. As the Respondent, the Commission filed Petitions for Allowance of Appeal with the Pennsylvania Supreme Court on November 9, 2020, which are docketed at 619-621 MAL 2020. Intervenor PECO Energy Company also filed Petitions for Allowance of Appeal on November 9, 2020, which are docketed at 622-624 MAL 2020. Petitioners filed Petitions for Allowance of Appeal on November 23, 2020, which are docketed at 663-665 and 666-668 MAL 2020. These Petitions are pending the issuance of Orders by the Pennsylvania Supreme Court.

⁵¹ *Povacz Order on Appeal* at *24

⁵² Pa.R.E. 801.

agency.⁵³ As explained in *Walker*, hearsay is not competent evidence and may support a finding only if it is corroborated by competent evidence. The Commonwealth Court expressly concluded that "a finding of fact based solely on hearsay will not stand."⁵⁴

Similarly, the Commission has held: "Although the Pennsylvania Rules of Evidence are relaxed in an administrative proceeding, crucial findings of fact may not be established solely by hearsay evidence."⁵⁵ Even when hearsay is not excluded, the Commission has refused to make findings of fact without separate evidence corroborating it.⁵⁶ As such, it is clear that, even when admitted into the record, uncorroborated hearsay cannot establish a finding of fact or support a conclusion of law in a proceeding before the Commission.

The idea that uncorroborated hearsay cannot support findings of fact or conclusions of law is also consistent with due process considerations. As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard.⁵⁷ Correspondingly, due process would not be satisfied if findings and conclusions were based solely on out-of-court statements made by individuals who are unavailable for cross-examination.

⁵³ *Walker v. Unemployment Compensation Board of Review*, 27 Pa. Cmwlth. 523, 367 A.2d 366 (Pa. Cmwlth. 1976) (*Walker*).

⁵⁴ *Id.* at 527; *see also, Anderson v. Pa. Dep't. of Pub. Welfare*, 79 Pa. Cmwlth. Ct. 182,468 A.2d 1167 (1983).

⁵⁵ *Pa. Pub. Util. Comm'n., Bureau of Investigation & Enforcement v. Yellow Cab Co. of Pittsburgh*, Docket No. 2012-2249031, 2013 WL 5912555 (Initial Decision served October 24, 2013 at 3; adopted in relevant part by Commission Order entered February 6, 2014); *see also Frompovich v. PECO Energy Company*, Docket No. C-2015-2474602, Opinion and Order (May 3, 2018) ("For evidence relied upon in an administrative proceeding to be considered competent, the evidence must be authenticated and follow the applicable hearsay rules.").

⁵⁶ *See, e.g., Jackson v. PECO Energy Co.*, Docket No. F-2013- 2351046 (July 5, 2013); *Davis v. Equitable Gas, LLC*, Docket No. C-2011-2252493, 2012 WL 3838095 (April 27, 2012).

⁵⁷ *Schneider v. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984), *citing Fusaro v. PUC*, 382 A.2d 794 (Pa. Cmwlth. 1978).

B. Complainants Have Failed to Present Evidence of Harm or a Proven Exposure to Harm Resulting From the Incidents Alleged in the Complaint or that any of the Allegations Support the Finding of a Violation of the Public Utility Code, a Commission Regulation or a Commission Order

Complainants have baldly asserted that incidents alleged in the Complaint, along with others raised during testimony, constituted “safety violations.” However, they presented no evidence demonstrating that any of the alleged incidents, even if true, created a proven exposure to harm, and did not establish any conclusive causal connection between PGW’s conduct and any alleged harm. Moreover, they failed to show that any conduct engaged in by PGW caused actual harm to its customers, employees or the public. Indeed, they pointed to no consequences resulting from any of their allegations.⁵⁸ Absent substantial evidence of actual safety violations, their Complaint cannot be sustained under Section 1501 of the Public Utility Code.

Besides failing to produce a preponderance of evidence in support of their allegations of safety violations by PGW, Complainants also did not refer to any Commission regulations or orders with which PGW did not comply. Notably, Complainants did not refer to any of these industry standards, present evidence of non-compliance or point to any regulatory enforcement actions against PGW relating to the incidents alleged by their Complaint.

Moreover, PGW presented evidence showing that it has established policies and procedures that are designed to ensure the safe operation of the LNG Plant. For example, as Plant Manager, Mr. McGuire’s responsibilities include ensuring that the Plant operates in a safe and productive manner, which entails writing the protocols for doing so.⁵⁹ As he further testified, Mr. McGuire takes those responsibilities seriously, and at all times, the Plant operates safely in accordance with those established procedures and protocols.⁶⁰ Mr. Snyder, who is a

⁵⁸ PGW Statement No. 1 (Rebuttal) at 2; PGW Statement No. 3 (Rebuttal) at 2.

⁵⁹ PGW Statement No. 3 (Rebuttal) at 1.

⁶⁰ PGW Statement No. 3-SR (Supp. Rebuttal) at 3.

Professional Engineer and was the Senior Vice-President of Gas Management before his retirement in 2019, echoed these sentiments.⁶¹ Similarly, Mr. Cassidy, who is currently Vice President of Technical Operations and is an engineer with thirty years of experience, emphasized that nothing occurred to compromise or jeopardize the safe operation of the Plant.⁶²

Mr. McGuire further noted that PGW continually works to improve the LNG vaporization process and updated the procedures in October 2017 and June 2019.⁶³ He also described a safety device at the Plant that prevents over-pressurization when a valve malfunctions.⁶⁴ In addition, Mr. McGuire explained that the LNG tank is equipped with vacuum breakers to back up the repressurization system in the event of failure.⁶⁵ Finally, he testified that the Plant has numerous detectors, which serve as a safety measure because they are programmed to detect natural gas in the atmosphere, whether odorized or not.⁶⁶

1. Complainants failed to prove that PGW personnel have manipulated the readings of the temperature indicator (“TE1019”) or otherwise engaged in any conduct during the vaporization process that resulted in harm, created a proven exposure to harm or violated the Public Utility Code, Commission regulations or Commission orders

- a. Summary of Positions

In Paragraph 7 of the Complaint, Complainants allege that during “the past winter vaporization seasons (i.e., November – March), plant personnel have manipulated the readings of TE1019 to reduce the frequency of alarms and avoid the labor of insuring that the vaporization operation is safe.” Complainants further allege that plant personnel have “wrapped a steam lance around the temperature indicator, artificially raising the temperature and negating the early

⁶¹ PGW Statement No. 1 (Rebuttal) at 2.

⁶² PGW Statement No. 2-SR (Supp. Rebuttal) at 3-4.

⁶³ PGW Statement No. 3-SR (Supp. Rebuttal) at 4.

⁶⁴ PGW Statement No. 3-SR (Supp. Rebuttal) at 5.

⁶⁵ PGW Statement No. 3-SR (Supp. Rebuttal) at 6.

⁶⁶ PGW Statement No. 3-SUR (Surrebuttal) at 4.

warning capabilities of TE1019,” which allows a worker to “leave the Central Control Room or the property without drawing attention.”⁶⁷

PGW’s testimony shows, however, that Complainants’ allegations are wholly unsupported and devoid of any proof of conduct that constitutes a safety violation of any kind. PGW’s Plant operates at all times in accordance with established procedures and protocols that are regularly reviewed and updated as needed. PGW has never “manipulated” any TE-1019 readings; to the contrary, PGW has engaged in the common practice of applying heat to *external* instruments in cold ambient temperatures by utilizing a steam lance. This practice ensures that the *internal* system works properly. Tellingly, even Complainant witness Rauceo has testified that “some type of housing” around TE1019 is appropriate. PGW has chosen to use a steam lance due to the particular configuration of the vaporization system. Additionally, PGW has never engaged in any conduct to “reduce the frequency of alarms.” Not surprisingly, there have been no reports of safety issues relating to TE1019, including by Complainants themselves.

b. Complainants’ Testimony

As to Complainants’ allegations regarding the alleged use of a steam lance on the TE1019 during the LNG vaporization process, Complainant witness Rauceo claimed that when a steam lance is placed around the TE1019, the electrical element in the TE1019 will never get down to 0 degrees and sound the alarm in the LNG control room. According to Mr. Rauceo, a steam lance negates the proper functioning of the TE1019 device because of the constant flow of steam around the indicator, and the TE1019 can work efficiently by putting some type of housing over it, instead of a steam lance.⁶⁸

⁶⁷ Complaint at ¶ 7.
⁶⁸ EE Statement No. 4 (Direct) at 10-12.

Additionally, Complainant witness Chavarria testified that the LNG vaporization process was manipulated in 2000 with the use of a steam lance, “setting off an explosion,” and that the same operating conditions that existed then are being used in 2020.⁶⁹

c. PGW’s Testimony

In response to Mr. Rauceo’s testimony, PGW proffered the testimony of Raymond Snyder, a Professional Engineer and the former Senior Vice President of Gas Management for PGW prior to his retirement in 2019. Mr. Snyder confirmed that PGW’s Plant operates at all times in accordance with established procedures and protocols. He explained that a steam lance, which is a connection to a steam source that allows steam to be directed and sprayed to a desired location similar to a water hose, has never been used to prevent an alarm from occurring in the LNG control room. Rather, Mr. Snyder indicated that steam has been used to ensure the *internal* system works properly by ensuring the *external* components of instruments exposed to ambient temperatures do not freeze in cold ambient temperatures. The TE1019 detects internal, not external temperatures, and the steam has no effect on the process temperature inside the pipe or the sensor inside the pipe; just the opposite, it allows the process temperatures to be accurately transmitted to the control system by preventing the external instrument from freezing in cold ambient temperatures, or by warming up an instrument that may have frozen. Per Mr. Snyder, application of heat to external instruments in cold ambient temperatures is a common practice in process plants.⁷⁰

Mr. Snyder also testified that the two vaporizers at the Plant have redundant safety shutdown systems. The TE1013 and TE1015 are upstream and would be the initial shutdowns, while the TE1019 is a *third* safety device downstream of both vaporizers that can sense low

⁶⁹ EE Statement No. 3 (Amended Direct) at 3.

⁷⁰ PGW Statement No. 1 (Rebuttal) at 3-6.

process temperature; it is not the primary safety device that would initiate a shutdown in the event of low process temperature.⁷¹

With respect to Mr. Rauceo's contention that "some type of housing" should be used rather than steam around the TE1019, Mr. Snyder explained that Mr. Rauceo appears to be referencing an enclosure with a heater inside of it, which would have the same effect as the steam that the Plant uses. Mr. Snyder noted that there are various ways to apply heat to external instruments in cold ambient temperatures. In addition to using steam, Mr. Snyder testified that electric heat tracing is common, and enclosures with heaters are also common and are typically used where there are multiple instruments at one location that can be inside one heated enclosure. The Passyunk Plant vaporization system, however, has a number of standalone external instruments, and therefore steam is the heating medium used in the vaporization process, so it is available in close proximity to instruments such as TE1019 at minimal incremental cost.⁷²

Finally, in response to Mr. Chavarria's testimony regarding alleged manipulations in connection with the vaporization process, Brian McGuire, Manager of PGW's Passyunk Plant, testified that although what may or may not have been happening in 2000 is irrelevant to this proceeding, the vaporization process control system and safety shutdowns were completely redesigned (from 2000-2001); thus, there is no basis for comparison between current operating conditions and those in 2000. Mr. McGuire went on to say that PGW also updated its procedures in October 2017 and June 2019 as part of its continuous effort to improve the LNG vaporization process. Mr. McGuire further confirmed that he is not aware of any time during which Plant personnel manipulated readings on the temperature indicators.⁷³

⁷¹ PGW Statement No. 1 (Rebuttal) at 3-4.

⁷² PGW Statement No. 1 (Rebuttal) at 5-6.

⁷³ PGW Statement No. 3-SR (Supp. Rebuttal) at 4.

Regarding Complainants' allegation that workers can leave the control room, Mr. Snyder explained that it is the Operations Supervisor's responsibility to ensure that the operators remain in their area or at the Plant, and that additional resources are scheduled during periods of vaporization for more frequent checks. Additionally, if an Operations Supervisor, Working Foreman or Process Operator observes an unsafe condition, he/she is required to address it and report it immediately. Mr. Snyder confirmed that there are no records of any reports related to TE1019. Mr. Snyder also testified that there are monthly Safety Committee meetings in the Plant and at the corporate level where anything unsafe should be reported and addressed. Mr. Snyder again confirmed that there are no records of safety concerns relating to TE1019 being raised at these meetings.⁷⁴

d. Complainants Failed to Carry Burden of Proof

Complainants have the burden of proving that PGW engaged in unsafe practices during the LNG vaporization process that caused harm, created a proven exposure to harm or otherwise violated the Public Utility Code, Commission regulations or Commission orders. Complainants have failed to meet their burden.

Although Complainants are generally alleging unsafe practices, presumably pursuant to Section 1501 of the Public Utility Code, they have not supported these allegations with a preponderance of the evidence. Moreover, Complainants have not pointed to any specific provision of the Public Utility Code, a Commission regulation or a Commission order that establishes a standard or requirement with which PGW, allegedly, failed to comply. Indeed, they have not proven a safety violation of any kind at all, nor have they proven any harm to PGW personnel, or anyone else.

⁷⁴ PGW Statement No. 1 (Rebuttal) at 4.

Contrary to the conclusory statements that Mr. Rauceo and Mr. Chavarria have made, no “manipulation” of readings occurs at the Plant, and safety shutdown systems have not been bypassed. Rather, the Plant operates according to established procedures and protocols, which PGW continuously revises as needed. As Mr. Snyder testified, the steam lance used around the TE1019 allows the process temperatures to be accurately transmitted to the control system by preventing the external instrument from freezing, or by warming up an instrument that may have frozen. Importantly, Mr. Snyder explained that the use of a steam lance has the same effect as putting “some type of housing” around the TE1019. Moreover, as Mr. Snyder noted, the Plant utilizes a redundant shutdown system, with the TE1019 being the *third* safety device to initiate the shutdown. Thus, any claim that the use of a steam lance around the TE1019 will prevent alarms from sounding is unfounded.

In short, other than a reference to an event that occurred in 2000 (over 20 years ago), none of Mr. Rauceo’s or Mr. Chavarria’s statements alleges that any incident has occurred because of the manner in which management has operated the Plant. Likewise, Mr. Snyder has testified that there have been no reports of unsafe conditions at the Plant relating to TE1019. Thus, Complainants have failed to meet the burden of proof required of them, and their claims must therefore be dismissed.

2. Complainants failed to prove that one of the LNG tanks has structural cracks that require engineering or other professional attention or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders

- a. Summary of Positions

In Paragraph 8 of the Complaint, Complainants allege that “one of the current LNG tanks has structural cracks that require engineering or other professional attention.”⁷⁵ They further

⁷⁵ Complaint at ¶ 8.

aver that LNG Plant management was welding the cracks. Complainants make similar allegations concerning boilers at the LNG Plant and suggest that these alleged practices “pose potential for future mishaps” and unsafe conditions.

PGW denied these averments in its Answer to the Complaint. As Complainants did not provide supporting testimony, they failed to establish a *prima facie* case.

b. Complainants’ Testimony

Complainants presented no testimony and offered no evidence to support the allegations made in Paragraph 8 of the Complaint. Therefore, Complainants did not establish a *prima facie* case and the burden of production never shifted to PGW.⁷⁶

c. PGW’s Testimony

As Complainants offered no testimony or other evidence regarding these allegations, PGW likewise did not address them in testimony. However, PGW’s Answer denied the allegations of Paragraph 8.

d. Complainants Failed to Carry Burden of Proof

Complainants bear the burden of proving that PGW welded cracks in a tank and a boiler at the LNG Plant, thereby causing harm or creating a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders. Complainants have failed to meet their burden.

Although Complainants are generally alleging unsafe practices, presumably pursuant to Section 1501 of the Public Utility Code, they have not supported these allegations with a preponderance of the evidence. Moreover, Complainants have not pointed to any specific

⁷⁶ See Moore.

provision of the Public Utility Code, a Commission regulation or a Commission order that establishes a standard or requirement with which PGW, allegedly, failed to comply.

Because Complainants did not present any testimony or other evidence to support the allegations of Paragraph 8 of the Complaint, they failed to carry their burden of proof.

Accordingly, the Commission should dismiss Paragraph 8 of the Complaint.

3. Complainants failed to prove that a PGW employee left the Passyunk Plant without notification causing harm or creating a proven exposure to harm, or that the employee caused or created a proven exposure to harm when he left a Company radio at a nearby store, or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders

- a. Summary of Positions

In Paragraph 9 of the Complaint, Complainants allege that in September 2019, Ryan O'Donnell, an Operations Supervisor at the LNG Plant, "left the plant during his shift without telling anyone and took a company radio with him." Complainants further allege that Mr. O'Donnell left the Company radio at a Rite Aid and that a Rite Aid employee discovered the radio and used it to contact Plant personnel. According to Complainants, Mr. O'Donnell's actions were a "safety violation."⁷⁷

Responding to these allegations, PGW showed that employees are permitted to leave the Plant, as long as they are available by cell phone or radio, and that Mr. O'Donnell was available for this short 10-minute period by cell phone. No incidents occurred during this brief period. No basis exists to warrant the allegation that Mr. O'Donnell's actions were a violation of any rule or requirement – let alone a "safety violation."

⁷⁷ Complaint at ¶ 9.

b. Complainants' Testimony

In support of this allegation, Complainants relied solely on the testimony of Complainant Miguel Chavarria. Mr. Chavarria testified that a Rite Aid employee attempted to contact Mr. O'Donnell to notify him that he left his radio at the store. Afterwards, Mr. Chavarria called Mr. O'Donnell on his cell phone, and Mr. O'Donnell answered and informed Mr. Chavarria that he had already retrieved the radio.⁷⁸

c. PGW's Testimony

In response to this allegation, PGW provided the testimony of Passyunk Plant Manager Brian McGuire. Mr. McGuire explained that PGW's employees are permitted to leave the Plant for a variety of reasons, provided that they are available by radio or cell phone.⁷⁹ Mr. McGuire explained that, consistent with the testimony of Mr. Chavarria, Mr. O'Donnell was available by cell phone. Indeed, he answered the phone when Mr. Chavarria called him. Further, Mr. McGuire testified that Mr. O'Donnell retrieved his radio within 10 minutes of leaving it at the store. Mr. McGuire noted that Mr. Chavarria did not identify any incidents that occurred during the time Mr. O'Donnell was away from the Plant. Additionally, Mr. McGuire testified that members of management were available as needed.⁸⁰ The record also demonstrates that PGW's staffing models contemplate the brief absence of Plant personnel.⁸¹

d. Complainants Failed to Carry Burden of Proof

Complainants bear the burden of proving that Mr. O'Donnell left the Passyunk Plant without proper notification and left his radio at a nearby store, thereby causing harm, creating a

⁷⁸ EE Statement No. 3 (Amended Direct) at 5-6.

⁷⁹ PGW Statement No. 3-SR (Supp. Rebuttal) at 6-7.

⁸⁰ PGW Statement No. 3-SR (Supp. Rebuttal) at 6-7.

⁸¹ PGW Statement No. 3-SR (Supp. Rebuttal) at 6-7; PGW St. No. 2 (Rebuttal) at 3-4.

proven exposure to harm, or otherwise violating the Public Utility Code, Commission regulations or Commission orders. Complainants have failed to meet their burden.

Although Complainants are generally alleging unsafe practices, presumably pursuant to Section 1501 of the Public Utility Code, they have not supported these allegations with a preponderance of the evidence. Moreover, Complainants have not pointed to any specific provision of the Public Utility Code or a Commission regulation or order that establishes a standard or requirement with which PGW, allegedly, failed to comply. The record is also completely devoid of evidence that would be necessary to demonstrate that PGW failed to comply with an internal protocol or procedure, thereby creating a safety violation. For example, neither Mr. Chavarria, nor any other witness, provided testimony establishing that Mr. O'Donnell failed to follow PGW protocol prior to leaving the Plant. While Mr. Chavarria alleged that he was unaware of Mr. O'Donnell's whereabouts, there is no evidence to demonstrate that Mr. O'Donnell was required to notify Mr. Chavarria prior to leaving the Plant. That is not to suggest that PGW has no protocol for employees when leaving the Plant, but rather that Complainants failed to demonstrate that PGW's protocol was violated in this case. To the contrary, the evidence establishes that, as long as Mr. O'Donnell was available by radio or cell phone (which he was), he was permitted to leave.

Further, as noted by Mr. McGuire (and not disputed by Complainants), Mr. O'Donnell's absence did not result in any harm. While actual harm is not required for the Complainants to meet their burden, there needs to be more than a *potential* for harm. Indeed, there must be a proven exposure to harm and a conclusive, causal connection between Mr. O'Donnell's actions and the alleged harm. Certainly, the Complainants' speculative claims that there *could have been* an unspecified incident during Mr. O'Donnell's absence does not meet the standard

required for the Complainants to meet their burden. The evidence demonstrates that, at all times, Mr. O'Donnell was available by cell phone and was available by radio, except for a very brief period – no more than 10 minutes – when he left his radio at a nearby store. Further, Mr. McGuire provided unrefuted testimony that other management members were available as needed. As such, the Complainants have failed to meet their burden pertaining to Paragraph 9 of the Formal Complaint and it should be dismissed.

4. Complainants failed to prove that a PGW employee left the LNG Plant without notification causing harm or creating a proven exposure to harm, or that his involvement in a vehicle accident caused harm or created a proven exposure to harm, or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders

- a. Summary of Positions

In Paragraph 10 of the Complaint, Complainants allege that on September 11, 2018, Mr. O'Donnell, Operations Supervisor at the LNG Plant, left “without proper notification of plant personnel.” Complainants allege that Mr. O'Donnell left the property in a company vehicle and was involved in a car accident. The Complaint further alleges that had an emergency occurred at the Plant, staff would have wasted valuable time looking for Mr. O'Donnell.⁸²

Responding to these allegations, PGW showed that employees are permitted to leave the Passyunk Plant for a variety of reasons, so long as they are available by cell phone or radio. Mr. O'Donnell notified the Working Foreman on shift (Gary Nelson) of his whereabouts prior to leaving the Plant, and Mr. O'Donnell was available, at all relevant times, by cell phone and/or radio. The evidence also demonstrates that the accident in which Mr. O'Donnell was involved was merely an accident, which was properly reported and documented.

⁸² Complaint at ¶ 10.

b. Complainants' Testimony

In support of these allegations, Complainants offered only the testimony of Complainant Mr. Ackie, Senior Process Operator. According to Mr. Ackie, Mr. O'Donnell left the Plant on the evening of September 11, 2018 without notifying him or Gary Nelson, a Working Forman. Mr. Ackie testified that Mr. O'Donnell's actions created an "unsafe situation" and that if there had been an accident, Mr. O'Donnell would have been unable to respond as quickly. Mr. Ackie also testified that he was notified by John Walker, Operations Supervisor, (who was notified by Dave Martinez, General Supervisor of Gas Processing Operations at the Passyunk Plant) that Mr. O'Donnell was in an automobile accident that evening.⁸³

c. PGW's Testimony

To refute these allegations, PGW provided the testimony of Brian McGuire, Passyunk Plant Manager. Mr. McGuire testified that this incident did not constitute a safety violation and that these allegations are simply inaccurate and require clarification. Mr. McGuire explained that PGW's employees are permitted to leave the Passyunk Plant for a variety of reasons when there is sufficient coverage, including but not limited to, the need to report to different locations or during breaks, so long as they are available by cell phone or radio. In this case, Mr. O'Donnell left the Plant and went to 7-Eleven, which is two blocks away from the Plant. Mr. O'Donnell notified Mr. Nelson of his whereabouts. Mr. McGuire further provided the unrefuted testimony that Mr. O'Donnell was still available by Plant radio and that Mr. O'Donnell would have been able to respond to any issues that arose at the Plant.⁸⁴

Mr. McGuire also addressed the allegations regarding the automobile accident. Mr. McGuire explained that PGW's Passyunk Plant General Supervisor, David Martinez, filled out

⁸³ EE Statement No. 1 (Direct) at 17-19.

⁸⁴ PGW Statement No. 3 (Rebuttal) at 3.

an Automobile Accident Report regarding the incident. Per the Automobile Accident Report, Mr. O'Donnell was backing out of a parking spot at the same time as another driver. When Mr. O'Donnell realized that the other driver did not see him, Mr. O'Donnell attempted to avoid the accident by pulling back into the parking spot. Despite Mr. O'Donnell's efforts to avoid the accident, the two vehicles collided. Mr. McGuire explained:

The damage was very minor; there was a small scratch on the rear, driver-side bumper of the other vehicle, and there was no damage to the PGW vehicle. As demonstrated from this Accident Report, the incident was an accident, was properly reported and documented by PGW, and was not an issue of a PGW safety violation.⁸⁵

d. Complainants Failed to Carry Burden of Proof

Complainants bear the burden of proving that Mr. O'Donnell left the Passyunk Plant without proper notification, thereby causing harm or creating a proven exposure to harm, that his vehicle accident caused harm or created a proven exposure to harm, or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders. Complainants have failed to meet their burden.

Although Complainants are generally alleging unsafe practices, presumably pursuant to Section 1501 of the Public Utility Code, they have not supported these allegations with a preponderance of the evidence. Moreover, Complainants have not pointed to any specific provision of the Public Utility Code or a Commission regulation or order that establishes a standard or requirement with which PGW, allegedly, failed to comply. The record is also completely devoid of evidence that would be necessary to demonstrate that PGW failed to comply with an internal protocol or procedure, thereby creating a safety violation. For example, neither Mr. Ackie nor any other witness, provided testimony establishing that Mr. O'Donnell

⁸⁵ PGW Statement No. 3 (Rebuttal) at 3-4; EE Statement No. 1 (Direct), Exhibits VI-A and VI-B.

failed to follow PGW protocol prior to leaving the Plant. While Mr. Ackie alleged that he and Mr. Nelson were unaware of Mr. O'Donnell's whereabouts (which has been refuted by PGW), there is no evidence to demonstrate that Mr. O'Donnell was required to notify Mr. Ackie or Mr. Nelson prior to leaving the Plant. That is not to suggest that PGW has no protocol for employees when leaving the Plant, but that Complainants failed to demonstrate that PGW's protocol was violated in this case. To the contrary, the evidence establishes that, as long as Mr. O'Donnell was available by radio or cell phone (which he was), he was permitted to leave.

Additionally, Complainants did not allege that any harm resulted from or during Mr. O'Donnell's absence. While actual harm is not required for Complainants to meet their burden, there needs to be more than a *potential* for harm. Indeed, there must be a proven exposure to harm and a conclusive causal connection between Mr. O'Donnell's actions and the alleged harm. Certainly, Complainants' speculative allegation that there *could have been* a non-specific accident during Mr. O'Donnell's absence does not meet the necessary standard for Complainants to meet their burden in this case. Importantly, Complainants also failed to provide any evidence that Mr. O'Donnell was unavailable, at any time, by radio and/or cell phone. As such, Mr. Ackie's testimony that Mr. O'Donnell's actions created an unsafe situation and that Mr. O'Donnell was not in a position to provide a quick response in the event of an incident at the Plant is wholly unsupported.

Specific to the allegations related to the accident, the record is devoid of any evidence that would support a finding and/or conclusion that this incident was anything other than an accidental fender bender, which was properly reported and documented.

Further, Mr. Ackie's testimony pertaining to this incident is based, largely, on uncorroborated hearsay evidence. For example, Mr. Ackie testified about what he overheard Mr.

Nelson tell Operations Supervisor John Walker (neither of whom is a witness in this proceeding) about Mr. O'Donnell leaving the Plant on September 11, 2018.⁸⁶ Similarly, Mr. Ackie's testimony regarding the automobile accident is based entirely on hearsay within hearsay statements allegedly made by Mr. Walker and Mr. Martinez, neither of whom is a witness in this proceeding.⁸⁷ These out-of-court statements are being offered to prove the truth of the matters asserted.⁸⁸ Uncorroborated hearsay statements, made by individuals who were not available for cross examination, and offered by witnesses with no first-hand knowledge of the events, cannot support findings of fact or conclusions of law in this proceeding.⁸⁹

The clear record evidence, provided by Mr. McGuire, a witness whose job responsibilities include ensuring that the Plant operates in a safe and productive manner, demonstrates that Mr. O'Donnell: 1) acted in accordance with PGW policy; 2) notified Mr. Nelson prior to leaving the Passyunk Plant; 3) was available by Plant radio at all times; 4) was available to respond to any necessary situations at the Plant; 5) did not create a proven exposure of harm to PGW employees, or the public; and 6) was involved in an accident which was properly reported and documented and was not an issue of a PGW safety violation.

For the reasons explained above, Complainants failed to prove that Mr. O'Donnell left the Passyunk Plant without notification, thereby causing harm or creating a proven exposure to harm, or that his automobile accident caused harm or created a proven exposure to harm, or that

⁸⁶ See EE St. No. 1 (Surrebuttal) at 1.

⁸⁷ See EE St. No. 1 (Direct) at 18.

⁸⁸ It should also be noted that Mr. Ackie's journal entries, which purport to be his own documentation of the events in question, are equally not competent. The journal entries themselves are filled with hearsay statements, consistent with the hearsay statements discussed above. See EE Statement No. 1 (Direct) Exhibit IV. Moreover, by Mr. Ackie's own admission, the journal entries were prepared for the purpose of documenting "retaliation, hostility and unsafe working practice." In other words, the journal entries were not prepared in the course of Mr. Ackie's regularly conducted business activity, but rather were prepared for the very purpose of pursuing litigation against PGW. Therefore, these journal entries are equally unreliable.

⁸⁹ See *supra* Section IV.A. (Legal Standards).

PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders. Therefore, Paragraph 10 should be dismissed.

5. Complainants failed to prove that a return to the LNG Plant by the Plant Manager after his shift caused harm or created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders

a. Summary of Positions

In Paragraph 11 of the Complaint, Complainants allege that in February 2018, Brian McGuire, the Plant Manager of the LNG Plant, “snuck onto the property close to midnight without using his employee ID or informing the duty supervisor that he was on the property.” The Complaint alleges that once inside, Mr. McGuire “turned off the lights of a company vehicle and snuck into a Central Control room.” The Complaint also implies that Mr. McGuire was “inebriated” when he drove a Company vehicle, creating a dangerous situation.⁹⁰

In response, PGW demonstrated that Mr. McGuire, as the Plant Manager, is permitted to enter the Plant at any time, and he has all the credentials to do so. The evidence also showed that Mr. McGuire was not inebriated on the night in question and that Mr. McGuire’s actions did not create any safety or security risk.

b. Complainants’ Testimony

Complainants Mr. Ackie and Mr. Rauceo testified that Passyunk Plant Manager Mr. McGuire entered the Plant the evening of February 23, 2018 without his employee badge or protective equipment.⁹¹ Additionally, Mr. Ackie and Mr. Rauceo alleged that, on the same evening, Mr. McGuire drove a Company vehicle on the Plant without headlights.⁹² Mr. Ackie also alleged that Mr. McGuire smelled of alcohol that evening.⁹³

⁹⁰ Complaint at ¶ 11.

⁹¹ EE Statement No. 1 (Direct) at 12-13; EE Statement No. 4 (Direct) at 7.

⁹² EE Statement No. 1 (Direct) at 12-13; EE Statement No. 4 (Direct) at 8-9.

⁹³ EE Statement No. 1 (Direct) at 12, 15-16; EE Statement No. 4 (Direct) at 9.

c. PGW's Testimony

Mr. McGuire provided testimony refuting the allegations of Mr. Ackie and Mr. Rauceo pertaining to the evening of February 23, 2018. Mr. McGuire explained that he returned to the Passyunk Plant that night after his regularly scheduled shift to retrieve personal documents from his office. Mr. McGuire specifically denied that his entrance constituted a safety violation. Mr. McGuire testified: "As the Plant Manager, I am permitted to enter the plant at any time, and I have all of the 'credentials' required to enter the plant." Mr. McGuire specifically denied that he was inebriated when he came into the Plant that evening. Mr. McGuire justified why Mr. Ackie's might make this false accusation as follows: "I believe Mr. Ackie made this (false) accusation because I caught him sleeping in the Control Room that night, and I reported this incident to the Operations Supervisor to ensure that it would not happen again."⁹⁴

PGW witness Mr. Cassidy also refuted the allegations against Mr. McGuire pertaining to the evening of February 23, 2018. Mr. Cassidy explained that PGW has both an "Admission to Philadelphia Gas Works' Properties" policy and an "Identification of Employees and Visitors" policy. Mr. Cassidy explained that the purpose of these policies is to govern admission to PGW properties by unauthorized individuals. He further expounded:

As the Plant Manager, Mr. McGuire is authorized to enter the Plant at any time and has all of the necessary credentials to do so. Mr. McGuire is known by everyone working at the Plant, including the security guards, and there is no one who works at the Plant from whom he would need to obtain permission before entering the Plant. Therefore, he did not violate any [of] PGW's security protocols for the Plant, let alone some alleged safety policy which Mr. Rauceo has failed to identify.⁹⁵

Mr. Cassidy also testified that in his role as Vice President of Technical Operations, he is responsible for the continued safe and reliable operations of PGW systems. Mr. Cassidy

⁹⁴ PGW Statement No. 3 (Rebuttal) at 6-7.

⁹⁵ PGW Statement No. 2-SR (Supp. Rebuttal) at 3.

testified: “[I]t is my opinion that by entering the Plant after his regularly scheduled shift that day without his ID badge or without signing in at the security guard shack, Mr. McGuire posed no security or safety risks.”⁹⁶

d. Complainants Failed to Carry Burden of Proof

Complainants bear the burden of proving that Mr. McGuire’s return to the Plant after his shift caused harm, created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders. The Complainants have failed to meet their burden.

Although Complainants are generally alleging unsafe practices, presumably pursuant to Section 1501 of the Public Utility Code, they have not supported these allegations with a preponderance of the evidence. Moreover, Complainants have not pointed to any specific provision of the Public Utility Code or a Commission regulation or order that establishes a standard or requirement for which PGW, allegedly, failed to comply. Further, the evidence provided by the Complainants is unreliable, based almost entirely on uncorroborated hearsay of which the Complainants have no first-hand knowledge,⁹⁷ and which has been refuted by Mr. McGuire and Mr. Cassidy. First, Mr. Rauceo was not even present at the Plant on the evening in question, and his account of events is based entirely on uncorroborated hearsay.⁹⁸ Mr. Rauceo testified that his knowledge of Mr. McGuire’s entry into the Plant came from Security Supervisor Freddy Fernandez (a non-PGW employee), who allegedly told him about conversations that occurred between the security officer on duty the evening of February 23, 2018 and Mr. McGuire.⁹⁹ Second, Mr. Ackie lacked first-hand knowledge of many of the

⁹⁶ PGW Statement No. 2-SR (Supp. Rebuttal) at 3.

⁹⁷ PGW objected to the introduction of the hearsay testimony in its Motion In Limine dated October 19, 2020.

⁹⁸ PGW Statement No. 3 (Rebuttal) at 6.

⁹⁹ EE Statement No. 4 (Direct) at 7.

allegations pertaining to the evening of February 23, 2018. Mr. Ackie's testimony concerning Mr. McGuire's entry into the Plant was similarly based on information he allegedly received from the main gate security guard.¹⁰⁰ Mr. Ackie further testified that he does not know the name of the security guard who allegedly made this out-of-court statement, nor is the security guard an employee of PGW.¹⁰¹ With their witnesses having no first-hand knowledge of this alleged incident, Complainants rely exclusively on hearsay to prove the truth of the matters asserted.

Additionally, Mr. Ackie's and Mr. Rauceo's allegations pertaining to Mr. McGuire driving a Company vehicle without headlights and entering security gates without proper authentication are also based on uncorroborated hearsay. Mr. Ackie testified that his knowledge of this incident came from Wayne Rauceo,¹⁰² a clear indication that Mr. Ackie lacks first-hand knowledge of his claims. Similarly, while Mr. Rauceo testified that he saw the security video allegedly supporting his claims, his interpretation of the video and his conclusions that Mr. McGuire's actions constitute safety violations are based entirely on out-of-court statements allegedly made by Mr. Fernandez (a non-PGW employee). For example, Mr. Rauceo testified that Mr. Fernandez explained to him what was allegedly happening in the video and provided his account of a supervisor's interpretation of the video.¹⁰³ All of this testimony constitutes hearsay, as these out-of-court statements made by Mr. Fernandez are being offered to prove that Mr. McGuire drove a Company vehicle on the evening in question in a manner that was unsafe. Moreover, Mr. Rauceo's testimony violates the Best Evidence Rule.¹⁰⁴

¹⁰⁰ EE Statement No. 1 (Direct) at 12.

¹⁰¹ EE Statement No. 1 (Direct) at 12-13.

¹⁰² EE Statement No. 1 (Direct) at 13.

¹⁰³ EE Statement No. 4 (Direct) at 8-9.

¹⁰⁴ The Best Evidence Rule provides that an original recording is required to prove its contents, except as otherwise provided in the Pennsylvania Rules of Evidence, by the Pennsylvania Supreme Court, or a statute. Pa. R.E. 1002. While the strict rules of evidence have been relaxed in agency hearings, the Commission has not abandoned all of these rules. *Frompovich v. PECO Energy Company*, Docket No. C-2015-2474602, Opinion and Order (May 3, 2018), 2018 Pa. PUC LEXIS 160, *23; citing *Ronald and*

Likewise, Mr. Ackie’s allegations that Mr. McGuire was suspended with the intent to terminate as a result of this alleged incident is based, entirely, on uncorroborated hearsay. As discussed above, Mr. Ackie makes this allegation by relying on information that was allegedly relayed to him by Charles Grant, who was not a witness in this proceeding.¹⁰⁵ Clearly, these statements are uncorroborated, out-of-court statements, and they are being offered to prove the truth of the matter asserted. Moreover, this testimony is inconsistent with other evidence provided by Complainants, which indicates that Mr. Grant, in fact, said that Mr. McGuire was placed on “administrative leave pending the outcome of the ongoing investigation.”¹⁰⁶

These uncorroborated hearsay statements, made by individuals who were not available for cross examination, and offered by witnesses with no first-hand knowledge of the events, cannot support findings of fact or conclusions of law in this proceeding. Complainants could have utilized the Commission’s procedures for depositions,¹⁰⁷ requests for admissions,¹⁰⁸ or subpoenas,¹⁰⁹ in an attempt to corroborate their testimony but they did not. As such, Complainants have failed to meet their burden pertaining to these allegations.

Mr. Ackie’s claim that he smelled alcohol on Mr. McGuire’s breath is also unreliable and was directly refuted by Mr. McGuire. As Mr. McGuire explained, he believes Mr. Ackie made this false accusation because Mr. McGuire found Mr. Ackie sleeping in the Control Room that evening, and Mr. McGuire reported the incident to the Operations Supervisor. Mr. Ackie’s claims are not corroborated by anyone with first-hand knowledge. While Mr. Rauceo provided

Beverly Dawes v. Pennsylvania Gas and Electric, Docket No. F-2013-2361655, Initial Decision (January 14, 2014) (related to the authentication per Pa. R.E. Rules 901 of a third-party recording of a customer call and the application of the Best Evidence Rule).

¹⁰⁵ ES Statement No. 1 (Direct) at 16-17.

¹⁰⁶ ES Statement No. 1 (Direct), Exhibit II at 2.

¹⁰⁷ 52 Pa. Code §§ 5.343-5.348.

¹⁰⁸ 52 Pa. Code § 5.350.

¹⁰⁹ 52 Pa. Code § 5.421.

testimony in an effort to support these allegations, Mr. Rauceo's testimony is based entirely on hearsay within hearsay statements, allegedly made by Freddy Fernandez and security guards, none of whom are PGW employees or witnesses in this proceeding. Simply put, this evidence is not competent evidence that can support a finding that Mr. McGuire was inebriated during the evening of February 23, 2018.

Finally, it is undisputed that Mr. McGuire's actions on the evening of February 23, 2018 did not result in any harmful consequences. While actual harm is not required for the Complainants to meet their burden, there needs to be more than a *potential* for harm. Indeed, there must be a proven exposure to harm and a conclusive causal connection between Mr. McGuire's actions and the alleged harm. The evidence demonstrates that the Complainants' witnesses lack the qualifications to make determinations pertaining to the safe operation of the plant. Rather, it is the responsibility of Mr. McGuire and Mr. Cassidy to ensure that the Plant operates in a safe and productive manner.¹¹⁰ As discussed, Mr. McGuire and Mr. Cassidy clearly refuted the testimony of the Complainants that sought to establish that Mr. McGuire's actions on the evening of February 23, 2018 posed a safety or security risk.

For the reasons discussed above, the Complainants have failed to meet their burden with respect to Paragraph 11 of the Formal Complaint. Therefore, it should be dismissed.

6. Complainants failed to prove that two employees leaving the LNG Plant to drive another PGW employee to the airport caused harm or created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders

- a. Summary of Positions

In Paragraph 12 of the Complaint, Complainants allege that David Martinez, LNG Plant General Supervisor, "demanded the operation supervisor and senior process operator on shift at

¹¹⁰ See PGW Statement No. 2-SR (Supp. Rebuttal) at 3.

the time to follow him to Philadelphia International Airport and return his empty car to the PGW employee lot while he was on vacation.” Complainants further allege that this left the LNG Plant “without two vital employees during essential operations.”¹¹¹

In response, PGW provided evidence demonstrating that the actions of the LNG Plant General Supervisor were permitted and did not create a safety violation. PGW demonstrated that the Plant, at all times, was adequately staffed and that the incident had no impact on the ability to monitor and control City gas pressure.

b. Complainants’ Testimony

Mr. Ackie testified that he was the Senior Process Operator on shift who made the drive to and from the airport. Importantly, Mr. Ackie testified that Working Foreman, Jose Ortiz, was also on shift that day. Mr. Ackie alleged that Mr. Martinez jeopardized the safety of the Plant by removing “essential employees” and by allowing employees to use Company vehicles for “personal leisure.” Mr. Ackie also made the entirely unsupported allegation that, to the best of his knowledge, this situation occurred more than once, although Mr. Ackie made it clear that this instance was the first time that Mr. Martinez made this request of Mr. Ackie.¹¹²

c. PGW’s Testimony

To refute these allegations, PGW provided the testimony of Passyunk Plant Manager Brian McGuire. Mr. McGuire testified that this incident did not create a safety violation. Mr. McGuire explained that, while this practice has since been discontinued, at the time, employees were permitted to leave their vehicles at the Passyunk Plant when traveling to the airport, which is less than ten minutes away from the Plant. Mr. McGuire further noted that Operations Supervisors must leave the Passyunk Plant several times each week for business purposes and, as

¹¹¹ Complaint at ¶ 12.

¹¹² EE Statement No. 1 (Direct) at 3-5.

such, this short amount of time away from the Plant is common workplace practice. Mr. McGuire also explained that the Plant, at all times, was adequately staffed and that the incident had no impact on the ability to monitor and control City gas pressure. Specifically, Mr. McGuire testified, “Most importantly, in this case, it was August (Non-Vaporization Season), and a Working Foreman was present at the Plant to monitor City pressure and other Passyunk Plant systems.” Additionally, Mr. McGuire explained that “City pressure is controlled, with monitors and downstream regulators, remotely by the City’s Gas Control Department (“Gas Control”) [...], not by operators at PGW’s Passyunk Plant. Personnel at Passyunk Plant monitor City pressure only as a backup to Gas Control.”¹¹³

d. Complainants Failed to Carry Burden of Proof

Complainants have the burden of proving that PGW caused harm, created a proven exposure to harm or otherwise violated the Public Utility Code, Commission regulations or Commission orders when two employees left the Plant to drive another employee to the airport. Complainants have failed to meet their burden.

Although Complainants are generally alleging unsafe practices, presumably pursuant to Section 1501 of the Public Utility Code, they have not supported these allegations with a preponderance of the evidence. Moreover, Complainants have not pointed to any specific provision of the Public Utility Code or a Commission regulation or order that establishes a standard or requirement with which PGW, allegedly, failed to comply.

It is unrefuted that this incident resulted in no harmful consequences, and Complainants failed to demonstrate that this situation created a proven exposure to harm. First, Mr. Ackie’s claim that PGW violated a safety policy by allowing employees to use a Company vehicle for

¹¹³ PGW Statement No. 3 (Rebuttal) at 4-5.

personal leisure is wholly unsupported. Mr. Ackie offers no examples or evidence to explain how this situation creates a “proven exposure of harm.” Similarly, Mr. Ackie makes the overbroad and unsupported conclusions that the Plant was “under staff” (sic) and put “the City in great danger.” Mr. Ackie fails to provide any specific examples of *proven* “incidents” that could arise *as a result of* this situation and pose a threat to PGW employees and/or the public at large. To the contrary, the unrefuted evidence demonstrates that Operations Supervisors, by the nature of their business, must leave the Plant for similar periods of time. A Working Foreman was, at all times, present at the Plant to monitor City Pressure and other Passyunk Plant systems. Further, at all times, Gas Control was monitoring and regulating City pressure. For these reasons, the Complainants failed to carry their burden pertaining to Paragraph 12 of the Formal Complaint, and it should be dismissed.

7. Complainants failed to prove that a Foreman was late for his shift or that a Foreman being late for his shift caused harm or created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders

a. Summary of Positions

In Paragraph 13 of the Complaint, Complainants allege that on December 25, 2017, a Working Foreman at the LNG Plant was not present at the beginning of his shift and that the prior Working Foreman left without being relieved. Complainants make allegations about “job abandonment” and theft of time.¹¹⁴

PGW responded to these allegations by explaining that the Supervisor on shift has the necessary visuals and capabilities from his/her office computer to operate the system remotely (if necessary) when a Working Foreman leaves his/her station. Further, PGW noted that since it is not uncommon for a Working Foreman to have brief absences, its staffing model considers this

¹¹⁴ Complaint at ¶ 13.

reality. PGW also explained that no rule or requirement governs staffing levels, and emphasized that the brief absence of a Working Foreman presents no safety concerns, let alone safety violations.

b. Complainants' Testimony

Through the testimony of Mr. Ackie and Mr. Goodwin, Complainants claimed that no Working Foreman was at the LNG Plant for about two hours, between the departure of one Working Foreman and the alleged late arrival of another. Mr. Goodwin also discussed tasks that need to be performed in the LNG Control Room, which he claimed can only be done by the Working Foreman.¹¹⁵ Notably, they made no references to this allegation as constituting a safety violation; described no harm that resulted from this alleged incident; offered no explanation for how this allegation created a proven exposure to harm; and pointed to no provisions in the Public Utility Code, Commission regulations or Commission orders that require a natural gas utility to have a Working Foreman present at the LNG Plant at all times.

c. PGW's Testimony

In response, the LNG Plant Manager, Mr. McGuire explained that “if a Working Foreman leaves his/her station for whatever reason, the Supervisor on shift has the same visuals and capabilities from his/her office computer to operate remotely (if need be) as a Working Foreman does.”¹¹⁶ He further noted that it is “not uncommon for a Working Foreman to briefly leave their stations” and cited examples, including: (i) transporting paperwork; (ii) picking up lunch; (iii) retrieving items from vehicles; and (iv) undergoing random drug tests.¹¹⁷ Finally, Mr. McGuire indicated that at any given time, the LNG Plant can and does operate safely and

¹¹⁵ EE Statement No. 1 (Direct) at 5-7; EE Statement No. 2 (Direct) at 3-6.

¹¹⁶ PGW Statement No. 3 (Rebuttal) at 5.

¹¹⁷ PGW Statement No. 3 (Rebuttal) at 5-6.

adequately without being fully staffed, since at various times throughout a day, one or more essential worker may be away from the Plant for any number of reasons.¹¹⁸

Mr. Cassidy also refuted Complainants' claims on this issue. As Vice President Technical Operations for PGW, and an engineer, he explained that the LNG Plant "is staffed at all times as necessary for PGW to fulfill its obligations under the Public Utility Code, Commission regulations and Commission orders."¹¹⁹ Mr. Cassidy further noted that no policy, rule, law, or regulations exists that establishes staffing levels for the Plant or that prevents the Plant from operating unless a specific number of individuals are present.¹²⁰ Disputing Mr. Ackie's claims regarding alleged understaffing, Mr. Cassidy emphasized that Mr. Ackie's accounts did not amount to a safety violation or otherwise pose "a threat of any kind to the public."¹²¹ He also noted that Mr. Ackie did not describe any instance that occurred at the Plant due to the absence or unavailability of staff. Per Mr. Cassidy, PGW's staffing model contemplates the brief absence of Plant personnel so that if a Working Foreman is not available, the Supervisor on shift has the same visuals and capabilities from his/her office computer to operate remotely (if need be) as a Working Foreman does, and the Supervisor can monitor the screens until relief comes in and/or the Working Foreman returns.¹²²

d. Complainants Failed to Carry Burden of Proof

Complainants have the burden of proving that the Working Foreman was late for a shift or that his alleged tardiness caused harm, created a proven exposure to harm or otherwise violated the Public Utility Code, Commission regulations or Commission orders. Complainants failed to meet their burden.

¹¹⁸ PGW Statement No. 3 (Rebuttal) at 6.

¹¹⁹ PGW Statement No. 2 (Rebuttal) at 3.

¹²⁰ PGW Statement No. 2 (Rebuttal) at 3.

¹²¹ PGW Statement No. 2 (Rebuttal) at 3.

¹²² PGW Statement No. 2 (Rebuttal) at 3-4.

Although Complainants are generally alleging unsafe practices, presumably pursuant to Section 1501 of the Public Utility Code, they have not supported these allegations with a preponderance of evidence. Moreover, Complainants have not pointed to any specific provision of the Public Utility Code or a Commission regulation or order that establishes a standard or requirement with which PGW, allegedly, failed to comply.

By failing to establish through testimony or other evidence that the Working Foreman arrived late or that the alleged late arrival of a Working Foreman at the Plant on a single day in 2017 constituted a safety violation, resulted in harm to any patron, employee or the public or created a proven exposure to harm, Complainants have failed to carry their burden of proof. Indeed, they have not presented a single shred of evidence to support a finding that PGW violated the Public Utility Code, Commission regulations or a Commission order. Therefore, the Commission should dismiss Paragraph 13 of the Complaint.

8. Complainants failed to prove that PGW promotes and protects employees who violate safety protocols, caused harm or created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders

- a. Summary of Positions

In Paragraph 15 of the Complaint, Complainants allege that PGW promotes and protects employees who violate safety protocols.¹²³ Similarly, Paragraph 17 alleges that PGW promotes employees who lack experience while more qualified and experienced employees are not provided these promotion opportunities.¹²⁴

Responding to these claims, PGW pointed out that the Commission does not have jurisdiction to decide matters regarding a utility's promotions. Further, PGW noted that

¹²³ Complaint at ¶ 15.

¹²⁴ Complaint at ¶ 17.

Complainants failed to offer any examples of how the promotions in question either caused harm or created a proven exposure to harm.

b. Complainants' Testimony

On behalf of Complainants, Mr. Rauceo claimed that PGW promotes personnel to management level positions who do not meet the posted job requirements, including work experience and education. He pointed to a General Supervisor position for which he applied in June 2015 and did not receive, criticizing the qualifications of the successful candidate. He also alleged that an unqualified candidate was promoted to Operations Supervisor in March 2016.¹²⁵ Mr. Rauceo failed to provide any evidence that he is at all qualified to determine who is or is not qualified for the positions to which is subordinate.

c. PGW's Testimony

In Rebuttal Testimony, Mr. McGuire noted his understanding that the Commission does not address employment issues.¹²⁶ Indeed, ALJ Heep's January 3, 2020 Order addressing PGW's Preliminary Objections makes this clear. In dismissing allegations involving employment matters, ALJ Heep explained that such matters are beyond the jurisdiction of the Commission and cited to the Commonwealth Court's decision in *N.A.A.C.P. v. P.U.C.*¹²⁷ Rather, these claims are within the domain of the Pennsylvania Human Relations Commission.¹²⁸

Mr. McGuire also testified that Mr. Rauceo referred only to "department guidelines" for a person to work in a certain position for a set number of years prior to promotion and he emphasizes, "guidelines are just that."¹²⁹ He explained that PGW was not required to adhere to the guidelines and instead hired individuals who were viewed as being the most qualified for the

¹²⁵ EE Statement No. 4 (Direct) at 4-6.

¹²⁶ PGW Statement No. 3 (Rebuttal) at 8.

¹²⁷ *N.A.A.C.P. v. P.U.C.*, 5 Pa. Commw. 312, 290 A.2d 704 (1972).

¹²⁸ *Id.*

¹²⁹ PGW Statement No. 3 (Rebuttal) at 8.

positions. Importantly, he stated that Mr. Rauceo did not “offer a single example of how either promotion resulted in the unsafe operation of the Plant or even placed safety in jeopardy.”¹³⁰

d. Complainants Failed to Carry Burden of Proof

Complainants have the burden of proving that PGW’s promotion of two employees to supervisory positions five or six years ago caused harm, created a proven exposure to harm or otherwise violated the Public Utility Code, Commission regulations or Commission orders.

Complainants have failed to meet their burden.

Although Complainants are generally alleging unsafe practices, presumably pursuant to Section 1501 of the Public Utility Code, they have not supported these allegations with a preponderance of evidence. Moreover, Complainants have not pointed to any specific provision of the Public Utility Code or a Commission regulation or order that establishes a standard or requirement with which PGW, allegedly, failed to comply.

As employment matters are beyond the jurisdiction of the Commission to adjudicate, Paragraphs 15 and 17 should be dismissed. Alternatively, they should be dismissed on the grounds that Complainants have not shown that the two promotions identified by Complainants are linked to a safety violation, caused any harm or created a proven exposure to harm.

9. Complainants failed to prove that PGW’s handling of a valve incident on October 15, 2020 caused harm or created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders

a. Summary of Positions

During the hearing on October 21, 2020, the Complainants alleged that on October 15, 2020, PGW allowed inodorous gas to be emitted into the atmosphere.¹³¹

¹³⁰ PGW Statement No. 3 (Rebuttal) at 8.

¹³¹ Tr. at 20-68 and 81-108.

PGW provided substantial evidence demonstrating that the situation was not as described by Complainants, but rather was merely “harmless human error,” and did not amount to an emergency. The amount of gas that was emitted was not enough to trigger any of PGW’s detectors, which sound an alarm when gas, including inodorous gas, is detected. This situation did not pose a threat of explosion or asphyxiation, as claimed by Complainants.

b. Complainants’ Testimony

Mr. Ackie testified that PGW allowed inodorous gas to be emitted into the atmosphere on October 15, 2020.¹³² Mr. Ackie asserted that, despite his securing two valves, gas continued to be emitted into the atmosphere because of a malfunction of the PCV-1027 valve. Mr. Ackie further testified that PGW has been aware of problems with the PCV-1027 valve for years, but has failed to address them.¹³³

Additionally, Mr. Ackie alleged that Passyunk Plant General Supervisor Dave Martinez tried to cover up this incident and failed to follow PGW protocol by contacting the appropriate emergency outlets. Mr. Ackie further testified that Mr. Martinez and Mr. McGuire both failed to return to the Plant, as required by PGW protocol in the event of an emergency.¹³⁴

Mr. Chavarria also provided testimony related to this alleged incident.¹³⁵ Mr. Chavarria testified that he was working as a foreman at the Passyunk Plant from October 15 at 10:00 p.m. through October 16 at 2:00 p.m. Mr. Chavarria claimed that, upon inspection, he noticed that a hose was frosted,¹³⁶ which he believes is a sign of LNG in the hose. According to Mr.

¹³² Tr. 20-68.

¹³³ Tr. at 20, 46-47, 55-58, 61-62.

¹³⁴ Tr. at 21-28, 33-35.

¹³⁵ Tr. 81-108.

¹³⁶ While Mr. Chavarria seems to dispute this statement in EE Statement No. 3-REPLY (Reply), he stated during the hearing, “I - and immediately you walk up, you can see that the line was frosted [...]” Tr. at 86.

Chavarria, this situation was an emergency.¹³⁷ Mr. Chavarria also made claims about the alleged malfunctioning of the PCV-1027 valve.¹³⁸

c. PGW's Testimony

PGW witness Brian McGuire provided substantial evidence refuting the allegations of Mr. Ackie and Mr. Chavarria. Mr. McGuire's testimony demonstrated that, not only did the situation not amount to an emergency, but also that Complainant Mr. Ackie was responsible for failing to notice and rectify the issue, which had nothing to do with the PCV-1027 valve. Specifically, Mr. McGuire explained that Mr. Ackie's testimony regarding the events of October 15, 2020 is inaccurate and, at times, demonstrates a complete lack of knowledge regarding Plant operations. Mr. McGuire testified that, on the day in question, the GLV-114 valve was open and, as a result, "a negligible and harmless amount of gas was emitted into an open, outdoor area." Mr. McGuire made clear that there was no valve malfunction, or emergency situation. As noted by Mr. McGuire, the amount of gas being emitted was not enough to trigger any of PGW's detectors, which sound an alarm when gas is detected.¹³⁹ Mr. McGuire explained that "[t]he gas detectors at the Plant are a safety measure and are programed to detect natural gas in the atmosphere, whether odorized or not."¹⁴⁰

Mr. McGuire further expounded that Mr. Ackie, in the normal course of performing his duties, should have found that the GLV-114 valve was open, but he apparently did not. Instead, the leak was subsequently detected by Supervisor John Walker, who attempted to address the issue by asking Mr. Ackie to shut the valves in the Truck Unloading area. Mr. McGuire testified that Mr. Ackie shut two valves, neither of which was GLV-114. Mr. McGuire testified: "A

¹³⁷ Tr. at 83-86.

¹³⁸ Tr. at 93-94, 103.

¹³⁹ PGW Statement No. 3-SUR (Surrebuttal) at 3.

¹⁴⁰ PGW Statement No. 3-SUR (Surrebuttal)

negligible amount of gas continued to escape through the truck unloading hose because Mr. Ackie failed to shut GLV-114 and because both Mr. Martinez and Mr. Walker had believed that the issue had been addressed by Mr. Ackie.”¹⁴¹

Mr. McGuire went on to explain that the night shift started at 10:00 p.m. and upon hearing of the earlier incident, Mr. Chavarria took it upon himself to visit the truck unloading area. Mr. Chavarria reported to Operations Supervisor Wallace Benson that he had observed frost on a truck unloading hose. To address the issue, Mr. Benson instructed Mr. Chavarria to open valve GLV-104, which Mr. Chavarria did. When opening the GLV-104 valve did not resolve the issue, Mr. Benson called Mr. Martinez. The call between Mr. Benson and Mr. Martinez resulted in Mr. Goodwin closing GLV-114, effectively shutting off the gas to the truck unloading hose and rectifying the issue.¹⁴²

Mr. McGuire also explained that the PCV-1027 valve had nothing to do with the events that occurred on October 15, 2020. In fact, he noted that despite being asked twice by own attorney, Mr. Chavarria did not explain why he believed that the valve was relevant. Mr. McGuire further refuted the allegations that the PCV-1027 valve has been malfunctioning for years. He explained that the PCV-1027 is inspected and tested on a yearly basis and no operational issues have been found. As Mr. McGuire testified, “PCV-1027 functions exactly as it is designed to.”¹⁴³

d. Complainants Failed to Carry Burden of Proof

Complainants have the burden of proving that PGW’s handling of the valve incident on October 15, 2020 caused harm, created a proven exposure to harm or that PGW otherwise

¹⁴¹ PGW Statement No. 3-SUR (Surrebuttal) at 3-4.

¹⁴² PGW Statement No. 3-SUR (Surrebuttal) at 4.

¹⁴³ PGW Statement No. 3-SUR (Surrebuttal) at 6-7.

violated the Public Utility Code, Commission regulations or Commission orders. Complainants have failed to meet their burden.

Although Complainants are generally alleging unsafe practices, presumably pursuant to Section 1501 of the Public Utility Code, they have not supported these allegations with a preponderance of the evidence. Moreover, Complainants have failed to point to a specific provision of the Public Utility Code, a Commission regulation or a Commission order that establishes a standard or requirement with which PGW, allegedly, failed to comply.

Additionally, it is unrefuted that this situation did not result in any harm, and Complainants have failed to demonstrate a proven exposure to harm. As noted by the Commission in *Povacz*, public utility operations are not, as a general matter, hazard-free, and even in situations where there is a potential for harm, the Commission must consider whether the utility took steps to reduce the exposure to harm.¹⁴⁴ In this case, the situation did not amount to an emergency, and PGW, certainly, took measures to address (and did address) the issue.

Specifically, the claims that this situation amounted to an emergency were directly and wholly refuted by the Passyunk Plant Manager, the individual responsible for ensuring that the Plant operates in a safe and productive manner.¹⁴⁵ Emphasizing that the events that occurred on October 15, 2020 in no way rose to the level of an emergency, Mr. McGuire described the incident as “a harmless human error.” Mr. McGuire explained that, even if GLV-114 had remained open that day, the cold gas in the system would have bled down to zero (run out) and dissipated within a couple of days. Mr. McGuire went on to explain that Complainants’ assertions that this situation could have caused an explosion or led to asphyxiation “are unreasonable and without any foundation in reality.” Mr. McGuire further explained that three

¹⁴⁴ *Povacz* Order at 30.

¹⁴⁵ PGW St. No. 3 (Rebuttal) at 1.

things are necessary for an explosion to occur: oxygen, fuel, and an ignition source. “In this case, the only thing that was present in any discernable amount was oxygen.” Additionally, the threat of asphyxiation was non-existent. “An extremely small quantity of gas was escaping through the truck unloading hose into an outdoor space; there was no possibility of the gas collecting in an amount that would have posed a danger of asphyxiation to anyone.”¹⁴⁶

Mr. McGuire also addressed Mr. Chavarria’s claims that the portable gas indicator demonstrated that there was 100% natural gas blowing out of the line: “[T]he only reason Mr. Chavarria got a reading of 100% gas on the portable gas indicator was because he took a device meant to detect natural gas *in the atmosphere* and held it to the ‘site of the venting gas’. In other words, Mr. Chavarria got the result one would expect when putting the sensor directly into the stream of gas flowing from the hose.”¹⁴⁷

Additionally, as noted above, Mr. McGuire refuted the claims that the PCV-1027 valve has been malfunctioning for years. Emphasizing that the PCV-1027 valve had nothing to do with the events that occurred on October 15, 2020, Mr. McGuire further testified, “PCV-1027 is inspected and tested on a yearly basis and no operational issues have been found. PCV-1027 functions exactly as it is designed to.”¹⁴⁸

Mr. McGuire also specifically refuted any allegations that PGW management failed to return to the Plant, failed to follow appropriate protocol, or otherwise failed to address the situation in an appropriate manner. Mr. McGuire testified that the situation did not require management to return to the Plant and that Mr. Martinez notified him of the incident on October

¹⁴⁶ PGW Statement No. 3-SUR (Surrebuttal) at 5-6.

¹⁴⁷ PGW Statement No. 3-SUR (Surrebuttal) at 6 (internal citation omitted).

¹⁴⁸ PGW Statement No. 3-SUR (Surrebuttal) at 6-7.

15, 2020, “which is consistent with PGW protocol and all that was required of him with regard to notifying anyone.”¹⁴⁹

Regardless of how Complainants wish to characterize it, the evidence in this case clearly demonstrates that the issue that occurred on October 15, 2020 was not an emergency situation, did not create a proven exposure to harm, and was effectively and efficiently addressed by PGW management. For these reasons, Complainants failed to meet their burden of proving that PGW’s handling of the valve incident on October 15, 2020 caused harm, created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders.

10. Complainants failed to prove that other incidents, which they claim occurred on October 5, 2020 and October 14, 2020, actually occurred, caused harm, created a proven exposure to harm or otherwise violated the Public Utility Code, Commission regulations or Commission orders

a. Summary of Positions

No issue was raised in the Complaint or during the hearing about PGW’s handling of the Plant’s fire system on October 5, 2020 or a procedure to pack the LNG pumps header with LNG on October 14, 2020. These issues were raised for the first time in Reply Testimony served on January 8, 2021 even though they allegedly occurred prior to the hearing on October 21, 2020. This testimony was unrelated to the valve incident, discussed above, and Reply Testimony was supposed to be limited to that issue, per ALJ Heep’s November 30, 2020 Order.

PGW filed Motion in Limine III on January 19, 2021, seeking to have this testimony excluded and alternatively to have an opportunity to respond. ALJ Heep denied this Motion. Therefore, the record currently contains new allegations raised for the first time in pre-served testimony more than two months after the evidentiary hearing and more than two months after

¹⁴⁹ PGW Statement No. 3-SUR (Surrebuttal) at 7-8.

the incidents allegedly occurred. PGW has been deprived of an opportunity to respond to these allegations. This is a violation of PGW's fundamental rights of due process.¹⁵⁰

b. Complainants' Testimony

Through Mr. Ackie, Complainants presented testimony about these two alleged incidents involving David Martinez, General Supervisor of the Plant. As to the alleged incident on October 5, 2020, Mr. Ackie claimed that Mr. Martinez placed the Plant's fire system offline so that contractors could complete testing and then did not place the fire system back online.¹⁵¹ With respect to his allegations concerning October 14, 2020, Mr. Ackie asserted that Mr. Martinez neglected to open the HCV-110 valve to introduce LNG into the heading during a procedure to pack the LNG pumps header with LNG.¹⁵²

c. PGW's Testimony

As noted above, PGW was not afforded an opportunity to respond to Mr. Ackie's testimony about the alleged incidents on October 5, 2020 and October 14, 2020. As such, inclusion of this testimony into the record violates PGW's due process rights.¹⁵³ As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it.¹⁵⁴ Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard.¹⁵⁵

The October 5, 2020 and October 14, 2020 allegations were introduced for the first time in the Complainants' last round of pre-served testimony on the valve incident, submitted after the

¹⁵⁰ *Schneider*.

¹⁵¹ EE Statement No. 1-REPLY (Reply) at 4.

¹⁵² EE Statement No. 1-REPLY (Reply) at 3.

¹⁵³ *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).

¹⁵⁴ *Schneider v. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984), *citing Fusaro v. PUC*, 382 A.2d 794 (Pa. Cmwlth. 1978).

¹⁵⁵ *Id.*

hearings in this proceeding.¹⁵⁶ On January 19, 2021, PGW filed a Motion in Limine seeking to exclude the allegations pertaining to October 5, 2020 and October 14, 2020. PGW argued that, *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. PGW proposed that if ALJ Heep followed this approach, PGW should be afforded two weeks from the date on which an Interim Order is served to submit this responsive testimony.

On February 9, 2021, ALJ Heep issued an Order, in which she denied the Motion in Limine pertaining to the October 14, 2020 allegation, and did not specifically address the Motion as it related to the October 5, 2020 allegation. The Order apparently permits the inclusion of Mr. Ackie's new testimony and provides no opportunity for PGW to respond, which constitutes a direct violation of PGW's due process rights.

While PGW obviously cannot point to the evidentiary record to refute the new claims made by Mr. Ackie, it is noteworthy that Mr. Ackie made only vague allegations about the October 14, 2020 incident, stating that Mr. Martinez was "negligent." As to the alleged October 5, 2020 incident, he made a general statement that Mr. Martinez's actions left the Plant "vulnerable." In neither instance did he describe any harm that occurred or any proven exposure to harm that was created.

d. Complainants Failed to Carry Burden of Proof

Complainants have the burden of proving that PGW's handling of the two incidents that allegedly occurred on October 5, 2020 and October 14, 2020 caused harm, created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders. Complainants have failed to meet their burden.

¹⁵⁶ EE Statement No. 1-REPLY (Reply).

Although Complainants are generally alleging unsafe practices, presumably pursuant to Section 1501 of the Public Utility Code, they have not supported these allegations with a preponderance of the evidence. Moreover, Complainants have failed to point to a specific provision of the Public Utility Code, a Commission regulation or a Commission order that establishes a standard or requirement with which PGW, allegedly, failed to comply. While actual harm is not required for the Complainants to meet their burden, there needs to be more than a potential for harm. Indeed, there must be a proven exposure to harm and a conclusive causal connection between Mr. McGuire's actions and the alleged harm. Therefore, these allegations should be dismissed.

11. Complainants failed to prove that PGW's handling of the LNG tank repressurization system caused harm, created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders

a. Summary of Positions

No issue was raised in the Complaint about PGW's handling of the LNG tank repressurization system from the summer of 2019 to the present. However, the issue was raised in pre-served testimony, to which PGW had a full opportunity to respond and be heard. Under the Commission's regulations and absent objection, when new issues are raised at hearings (or presumably earlier, in pre-served testimony), the pleadings are amended to conform to the evidence.¹⁵⁷ In testimony, Complainants alleged that after a valve was added in the Summer of 2019, the repressurization system was not restored.

PGW refuted this testimony by pointing out that the repressurization system was restored after a Capital upgrade was completed in the Summer of 2019. Also, PGW explained that during an upgrade, the repressurization system is always available manually.

¹⁵⁷ 52 Pa. Code § 5.92(a).

b. Complainants' Testimony

Mr. Chavarria raised a safety concern regarding the LNG tank when he noted that a valve was added in the Summer of 2019 and that allegedly the repressurization system was not restored. He claimed that this is a problem because in the event of low pressure, the LNG tank repressurization system would add natural gas to maintain normal pressures and keep the tank stable.¹⁵⁸

c. PGW's Testimony

Refuting these claims, Mr. McGuire noted that Mr. Chavarria is incorrect about the repressurization system not being restored. As explained by Mr. McGuire, during a Capital upgrade to the repressurization system controls, PGW replaced a regulator and added indicators to notify operators when the system has been activated. He further indicated that the repressurization system is always available manually and was so during this upgrade. As Mr. McGuire also testified, Operations personnel monitored LNG tank pressure and the associated alarms during the upgrades, but never had to manually operate the system. After Engineering completed the upgrade and the new system was verified to be safe and reliable, the “automatically controlled (and improved) repressurization system was put back in service.”¹⁵⁹ Finally, as Mr. McGuire explained, the LNG tank is also equipped with vacuum breakers to back up the repressurization system in the event of a failure, and these breakers have never activated or been required to activate.¹⁶⁰

¹⁵⁸ EE Statement No. 3 (Direct) at 5.

¹⁵⁹ PGW Statement No. 3-SR (Supp. Rebuttal) at 6.

¹⁶⁰ PGW Statement No. 3-SR (Supp. Rebuttal) at 6.

d. Complainants Failed to Carry Burden of Proof

Complainants have the burden of proving that PGW's handling of the repressurization system during and following the upgrade caused harm, created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders. Complainants have failed to meet their burden.

Although Complainants are generally alleging unsafe practices, presumably pursuant to Section 1501 of the Public Utility Code, they have not supported these allegations with a preponderance of the evidence. Moreover, Complainants have failed to point to a specific provision of the Public Utility Code, a Commission regulation or a Commission order that establishes a standard or requirement with which PGW, allegedly, failed to comply.

Complainants failed to present evidence that the repressurization system was not restored after the Capital Project upgrade performed in the Summer of 2019. To the contrary, Mr. Chavarria merely made that claim without any basis and without suggesting how, if true, it would create a proven exposure to harm. As the Plant Manager, Mr. McGuire demonstrated that Mr. Chavarria's claim was incorrect and provided a full explanation of how PGW placed the repressurization system back in-service following the upgrade. Therefore, these allegations should be dismissed.

12. Complainants failed to prove that their allegations concerning a release of gas in March 2016 continue today

a. Summary of Positions

Paragraph 16 of the Complaint makes allegations about the release of natural gas at the Plant in March 2016, claiming that it was not controlled as reported to the media. It further avers that a faulty override at 0-30 Gate Station allowed high pressure gas to enter the Plant. ALJ Heep's January 3, 2020 Order granted PGW's Preliminary Objections and dismissed this

paragraph due it being barred by the statute of limitations in Section 3314(a) of the Public Utility Code.¹⁶¹ During the prehearing conference held on February 6, 2020, ALJ Heep indicated that if Complainants presented evidence of a continuing pattern, she may be inclined to permit it.¹⁶²

In refuting these claims, PGW's testimony gave an accurate account of the events that occurred in March 2016, which is far different from Mr. Chavarria's understanding of what occurred. PGW also pointed out that since Complainants did not present evidence of a continuing pattern, their efforts to resurrect Paragraph 16 should be rejected.

b. Complainants' Testimony

Mr. Chavarria discussed the time-barred release of gas in March 2016, claimed that PGW lied to the public and offered his own rendition of what occurred at that time. He also made a general contention that "this continues today."¹⁶³

c. PGW's Testimony

Mr. Chavarria offered no details to support his averment that "this continues today" or even provide any explanation as to what exactly he views as continuing today. Moreover, Mr. McGuire refuted Mr. Chavarria's account of the 2016 event. While Mr. Chavarria described the incident as being due to human error by the roving operator, in fact no operator error occurred. To the contrary, as explained by Mr. McGuire, "[a] valve malfunctioned but the safety device in Passyunk Plant worked as designed to prevent over-pressurization."¹⁶⁴ He further testified that proper notifications to local authorities were made and that no safety violations occurred that can be the basis for Mr. Chavarria's claim as to any unsafe practices occurring today. Notably, Mr. Chavarria's account of what he believes happened in March 2016 was based on his

¹⁶¹ 66 Pa.C.S. § 3314(a).

¹⁶² Tr. at 8.

¹⁶³ EE Statement No. 3 (Amended Direct) at 3-5.

¹⁶⁴ PGW Statement No. 3-SR (Supp. Rebuttal) at 5.

“understanding,” but his responsibilities did not then, and do not now, place him in a position of knowing what occurred. Finally, Mr. McGuire testified that Plant management did not lie to the public in connection with the events in March 2016 and that he is not aware of any instance in which management has lied to the public.¹⁶⁵

d. Complainants Failed to Carry Burden of Proof

Complainants have the burden of proving what occurred in March 2016 and that it is a continuing pattern, thereby causing harm or creating a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders. Complainants have failed to meet their burden.

Although Complainants are generally alleging unsafe practices, presumably pursuant to Section 1501 of the Public Utility Code, they have not supported these allegations with a preponderance of the evidence. Moreover, Complainants have failed to point to a specific provision of the Public Utility Code, a Commission regulation or a Commission order that establishes a standard or requirement with which PGW, allegedly, failed to comply.

Paragraph 16 should be dismissed consistent with ALJ Heep’s January 3, 2020 Order since it is barred by the statute of limitations because the incident occurred in March 2016, more than three years before the Complaint was filed. Notwithstanding Mr. Chavarria’s attempt to bring this issue back by generally contending, “this continues today,” he offered no supporting details for that claim. Further, Mr. McGuire demonstrated that Mr. Chavarria’s rendition of the 2016 event was inaccurate. Even to the extent that the Commission allows this allegation to remain due to the general assertion that it continues today, Complainants have failed to carry their burden of proof showing any harm or proven exposure to harm and have not established a

¹⁶⁵ PGW Statement No. 3-SR (Supp. Rebuttal) at 5.

violation of the Public Utility Code, Commission regulations or Commission orders. Therefore, this paragraph should be dismissed.

13. Complainants failed to prove that the new plant truck rule caused harm, created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders

a. Summary of Positions

While not raised in their Formal Complaint, the Complainants alleged that PGW's "New Plant Truck Rule" has made employees' jobs unsafe and that PGW does not appear to be concerned with the safety of union personnel.¹⁶⁶ Under the Commission's regulations and absent objection, when new issues are raised at hearings (or presumably in pre-served testimony), the pleadings are amended to conform to the evidence.¹⁶⁷

PGW responded that it was not PGW's intention to make its workers feel unsafe, nor is there any basis for this allegation.

b. Complainants' Testimony

Mr. Ackie testified that PGW's "New Plant Truck Rule" made his job unsafe and that it did not appear that PGW was concerned with the safety of union personnel.¹⁶⁸

c. PGW's Testimony

On behalf of PGW, Mr. McGuire refuted this allegation. Mr. McGuire testified that PGW implemented this new rule in 2018 and that the rule requires union personnel to obtain management permission prior to using the plant truck. Mr. McGuire explained that PGW is concerned about the safety of union personnel. Mr. McGuire testified that it was not PGW's intention to make its workers feel unsafe, nor is there any basis for this allegation.¹⁶⁹

¹⁶⁶ EE Statement No. 1 (Direct) at 9-10.

¹⁶⁷ 52 Pa. Code § 5.92(a).

¹⁶⁸ EE Statement No. 1 (Direct) at 9-10.

¹⁶⁹ PGW Statement No. 3 (Rebuttal) at 7.

d. Complainants Failed to Carry Burden of Proof

Complainants have the burden of proving that the New Plant Truck Rule caused harm, created proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders. Complainants have failed to meet their burden.

Although Complainants are generally alleging unsafe practices, presumably pursuant to Section 1501 of the Public Utility Code, they have not supported these allegations with a preponderance of the evidence. Moreover, Complainants have failed to point to a specific provision of the Public Utility Code, a Commission regulation or a Commission order that establishes a standard or requirement with which PGW, allegedly, failed to comply.

Complainants have failed prove any connection between the New Plant Truck Rule and harm or a proven exposure to harm. They have not offered *any* explanation for their claims that a requirement to obtain management permission prior to driving a Company truck causes harm or creates a proven exposure of harm. Simply put, this claim is entirely unsupported, and the Complainants have not demonstrated any link between this new rule and a proven exposure to harm. Therefore, these allegations should be dismissed.

C. Complainants Have Not Presented Any Support for Their Requests for Relief

In their requests for relief, Complainants have asked the Commission to remove management personnel, become involved in PGW's promotion process, and impose civil penalties on PGW. Even if the Commission finds a violation of the Public Utility Code, Commission regulations or Commission orders arising from any of the allegations in the Complaint, Complainants have not established that the Commission should grant any of the requested relief.

It is well-settled that as a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly that are contained in the Public Utility Code.¹⁷⁰ The Commission must act within and cannot exceed its jurisdiction.¹⁷¹ As discussed earlier, the Commonwealth Court has already determined that employment matters are beyond the jurisdiction of the Commission. As such, the requests concerning Commission removal of management personnel and involvement in PGW's promotion process are not within the statutory authority of the Commission to grant.

Moreover, it is typically within the purview of a public utility to exercise reasonable judgment in choosing how it will meet its regulatory obligations. Under long-standing precedent, the Commission may not act as a "super board" of directors or micromanage the day-to-day operations of the utilities under its jurisdiction. This is particularly true when the utility's decisions are not affecting compliance with the Public Utility Code, Commission regulations or Commission orders.¹⁷²

As to the imposition of a civil penalty, it is important to recall that PGW does not have shareholders. The result is that any monetary payment that PGW is required to make would have to be funded by ratepayers. For this reason, and especially in the absence of any harm or proven exposure to harm to customers, employees or the public, no civil penalty should be imposed if the Commission finds any violations arising from the allegations in the Complaint.

¹⁷⁰ *Shedlosky v. Pa. Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

¹⁷¹ *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa.Super. 1945).

¹⁷² *See Bell Tel. Co. of Penna. v. Driscoll*, 118 A.2d 912, 916 (Pa. 1941); *Metropolitan Edison Co. v. Pa. P.U.C.*, 437 A.2d 76 (Pa.Cmwlth. 1981); *Pa. P.U.C. v. Philadelphia Electric Co.*, 501 Pa. 153, 159, 460 A.2d 734 (1983).

V. **CONCLUSION**

For the foregoing reasons, Philadelphia Gas Works respectfully requests that the Commission dismiss the Formal Complaint filed by Dwayne Ackie, Miguel J. Chavarria, Jr., Maurice A. Goodwin and Wayne Rauceo on October 31, 2019.

Respectfully submitted,

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PROPOSED FINDINGS OF FACT

Temperature Indicator/Vaporization Process

1. PGW's Liquefied Natural Gas Plant ("Passyunk Plant" operates in accordance with established safety procedures and protocols.¹
2. A steam lance is a connection to a steam source that allows steam to be directed and sprayed to a desired location similar to a water hose.²
3. PGW has never used a steam lance to prevent an alarm from occurring in the LNG control room.³
4. PGW has used steam to ensure its *internal* system works properly by ensuring the *external* components of instruments exposed to ambient temperatures do not freeze in cold ambient temperatures.⁴
5. The TE-1019 detects internal, not external temperatures, and the steam has no effect on the process temperature inside the pipe or the sensor inside the pipe.⁵
6. The TE-1019 allows the process temperatures to be accurately transmitted to the control system by preventing the external instrument from freezing in cold ambient temperatures, or by warming up an instrument that may have frozen.⁶
7. The application of heat to external instruments in cold ambient temperatures is a common practice in process plants.⁷
8. The Passyunk Plant has two vaporizers which have redundant safety shutdown systems.⁸
9. The TE1013 and TE1015 are upstream vaporizers at the Passyunk Plant that act as the initial shutdowns, while the TE1019 is a third device downstream of both vaporizers that can sense low process temperature, and it is not the primary safety device that would initiate a shutdown in the event of low process temperature.⁹
10. There are various ways to apply heat to external instruments in cold ambient temperatures.¹⁰

1 PGW Statement No. 1 (Rebuttal) at 3-6.
2 PGW Statement No. 1 (Rebuttal) at 3-6.
3 PGW Statement No. 1 (Rebuttal) at 3-6.
4 PGW Statement No. 1 (Rebuttal) at 3-6.
5 PGW Statement No. 1 (Rebuttal) at 3-6.
6 PGW Statement No. 1 (Rebuttal) at 3-6.
7 PGW Statement No. 1 (Rebuttal) at 3-6.
8 PGW Statement No. 1 (Rebuttal) at 3-4.
9 PGW Statement No. 1 (Rebuttal) at 3-4.
10 PGW Statement No. 1 (Rebuttal) at 5-6.

PROPOSED FINDINGS OF FACT

11. In addition to using steam, electric heat tracing is common, and enclosures with heaters are also common and are typically used where there are multiple instruments at one location that can be inside one heated enclosure.¹¹
12. The Passyunk Plant vaporization system has a number of standalone external instruments, and therefore steam is the heating medium used in the vaporization process, so it is available in close proximity to instruments such as TE1019 at minimal incremental cost.¹²
13. PGW's vaporization process control system and safety shutdowns at the Passyunk Plant were completely redesigned (from 2000-2001).¹³
14. PGW updated its procedures in October 2017 and June 2019 as part of its continuous effort to improve the LNG vaporization process.¹⁴
15. The Passyunk Plant Manager is not aware of any time during which Plant personnel manipulated readings on the temperature indicators.¹⁵
16. It is the Operations Supervisor's responsibility to ensure that the operators remain in their area at the Plant and that additional resources are scheduled during periods of vaporization for more frequent checks.¹⁶
17. If an Operations Supervisor, Working Foreman or Process Operator observes an unsafe condition, he/she is required to address it and report it immediately.¹⁷
18. There are no records of any reports related to TE1019.¹⁸
19. PGW holds monthly Safety Committee meetings in the Passyunk Plant and at the corporate level where anything unsafe should be reported and addressed.¹⁹
20. There are no records of safety concerns relating to TE1019 being raised at these meetings.²⁰

11 PGW Statement No. 1 (Rebuttal) at 5-6.

12 PGW Statement No. 1 (Rebuttal) at 5-6.

13 PGW Statement No. 3 (Supp. Rebuttal) at 4.

14 PGW Statement No. 3 (Supp. Rebuttal) at 4.

15 PGW Statement No. 3 (Supp. Rebuttal) at 4.

16 PGW Statement No. 1 (Rebuttal) at 4.

17 PGW Statement No. 1 (Rebuttal) at 4.

18 PGW Statement No. 1 (Rebuttal) at 4.

19 PGW Statement No. 1 (Rebuttal) at 4.

20 PGW Statement No. 1 (Rebuttal) at 4.

PROPOSED FINDINGS OF FACT

O'Donnell Leaving Plant – September 2019

21. PGW's employees are permitted to leave the Passyunk Plant for a variety of reasons, so long as there is sufficient coverage, provided that they are available by radio or cell phone.²¹
22. When Operations Supervisor, Ryan O'Donnell, left the Plant during his shift in September 2019, he was, at all times, available by cell phone.²²
23. Indeed, Mr. O'Donnell answered the phone when Complainant Mr. Chavarria called him in September 2019 to inform him that he left his Company radio at a Rite Aid store.²³
24. Mr. O'Donnell retrieved his radio within 10 minutes of leaving it at the store.²⁴
25. No incidents occurred during the time Mr. O'Donnell was away from the Plant in September 2019.²⁵
26. Members of management were available as needed at all times when Mr. O'Donnell was aware from the Passyunk Plant during the September 2019 incident.²⁶
27. PGW's staffing models contemplate the brief absence of Plant personnel.²⁷

O'Donnell Leaving Plant – September 11, 2018

28. PGW's employees are permitted to leave the Passyunk Plant for a variety of reasons when there is sufficient coverage, including but not limited to, the need to report to different locations or during breaks, so long as they are available by cell phone or radio.²⁸
29. On September 11, 2018, Operations Supervisor Ryan O'Donnell left the Passyunk Plant and went to 7-Eleven, which is two blocks away from the Plant.²⁹
30. Mr. O'Donnell notified the Working Foreman on shift (Gary Nelson) of his whereabouts.³⁰
31. Mr. O'Donnell was available by Plant radio when he left the Plant on September 11, 2018.³¹

²¹ PGW Statement No. 3-SR (Supp. Rebuttal) at 6-7.

²² PGW Statement No. 3-SR (Supp. Rebuttal) at 6-7; PGW St. No. 2 (Rebuttal) at 3-4.

²³ PGW Statement No. 3-SR (Supp. Rebuttal) at 6-7; PGW St. No. 2 (Rebuttal) at 3-4.

²⁴ PGW Statement No. 3-SR (Supp. Rebuttal) at 6-7.

²⁵ PGW Statement No. 3-SR (Supp. Rebuttal) at 6-7.

²⁶ PGW Statement No. 3-SR (Supp. Rebuttal) at 6-7.

²⁷ PGW Statement No. 3-SR (Supp. Rebuttal) at 6-7; PGW St. No. 2 (Rebuttal) at 3-4.

²⁸ PGW St. No. 3 (Rebuttal) at 3.

²⁹ PGW St. No. 3 (Rebuttal) at 3.

³⁰ PGW St. No. 3 (Rebuttal) at 3.

³¹ PGW St. No. 3 (Rebuttal) at 3.

PROPOSED FINDINGS OF FACT

32. Mr. O'Donnell would have been able to respond to any issues that arose at the Plant.³²
33. PGW's Passyunk Plant General Supervisor, David Martinez, filled out an Automobile Accident Report regarding Mr. O'Donnell's accident on September 11, 2018.³³
34. On September 11, 2018, Mr. O'Donnell was backing out of a parking spot at the same time as another driver.³⁴
35. When Mr. O'Donnell realized that the other driver did not see him, Mr. O'Donnell attempted to avoid the accident by pulling back into the parking spot.³⁵
36. Despite Mr. O'Donnell's efforts to avoid the accident, the two vehicles collided.³⁶
37. The accident involving Mr. O'Donnell on September 11, 2018 properly reported and documented by PGW.³⁷

McGuire Returning to Plant – February 23, 2018

38. Passyunk Plant Manager Brian McGuire returned to the Passyunk Plant on February 23, 2018 after his regularly scheduled shift to retrieve personal documents from his office.³⁸
39. As the Plant Manager, Mr. McGuire is permitted to enter the plant at any time, and he has all of the 'credentials' required to enter the plant.³⁹
40. Mr. McGuire was not inebriated when he came into the Passyunk Plant that evening.⁴⁰
41. PGW has both an "Admission to Philadelphia Gas Works' Properties" policy and an "Identification of Employees and Visitors" policy.
42. The purpose of these policies is to govern admission to PGW properties by unauthorized individuals.
43. As the Plant Manager, Mr. McGuire is known by everyone working at the Passyunk Plant, including the security guards, and there is no one who works at the Plant from whom Mr. McGuire would need to obtain permission before entering the Plant.⁴¹
44. In in his role as Vice President of Technical Operations, Mr. Cassidy is responsible for the continued safe and reliable operations of PGW systems, and he is of the opinion that

³² PGW St. No. 3 (Rebuttal) at 3.

³³ PGW St. No. 3 (Rebuttal) at 3-4.

³⁴ PGW St. No. 3 (Rebuttal) at 3-4.

³⁵ PGW St. No. 3 (Rebuttal) at 3-4.

³⁶ PGW St. No. 3 (Rebuttal) at 3-4.

³⁷ PGW St. No. 3 (Rebuttal) at 3-4.

³⁸ PGW Statement No. 3 (Rebuttal) at 6-7.

³⁹ PGW Statement No. 3 (Rebuttal) at 6-7; PGW Statement No. 2-SR (Supp. Rebuttal) at 3.

⁴⁰ PGW Statement No. 3 (Rebuttal) at 6-7.

⁴¹ PGW Statement No. 2-SR (Supp. Rebuttal) at 3.

PROPOSED FINDINGS OF FACT

Mr. McGuire posed no security or safety risks by entering the Plant without his ID badge or without signing in at the security guard shack on February 23, 2018.⁴²

Employees Leaving Plant – Airport Trip

45. At the time of the incident involving employees leaving the Passyunk Plant to go to the airport, employees were permitted to leave their vehicles at the Passyunk Plant when traveling to the airport.⁴³
46. The airport is less than ten minutes away from the Passyunk Plant.⁴⁴
47. Operations Supervisors must leave the Passyunk Plant several times each week for business purposes and, as such, this sort of time away from the Plant is common workplace practice.⁴⁵
48. The Passyunk Plant was, at all times, adequately staffed, and this incident had no impact on the ability to monitor and control City pressure.⁴⁶
49. This incident occurred in August (Non-Vaporization Season), and a Working Foreman was present at the Plant to monitor City pressure and other Passyunk Plant systems.⁴⁷
50. City pressure is controlled, with monitors and downstream regulators, remotely by the City’s Gas Control Department, not by operators at PGW’s Passyunk Plant.⁴⁸
51. Personnel at Passyunk Plant monitor City pressure only as a backup to Gas Control.⁴⁹

Working Foreman & Adequate Staffing

52. If a Working Foreman leaves his/her station for whatever reason, the Supervisor on shift has the same visuals and capabilities from his/her office computer to operate remotely (if need be) as a Working Foreman does.”⁵⁰
53. It is not uncommon at the Passyunk Plant for a Working Foreman to briefly leave his or her station in certain situations, including: (i) transporting paperwork; (ii) picking up lunch; (iii) retrieving items from vehicles; and (iv) undergoing random drug tests.⁵¹

⁴² PGW Statement No. 2-SR (Supp. Rebuttal) at 3.

⁴³ PGW Statement No. 3 (Rebuttal) at 4-5.

⁴⁴ PGW Statement No. 3 (Rebuttal) at 4-5.

⁴⁵ PGW Statement No. 3 (Rebuttal) at 4-5.

⁴⁶ PGW Statement No. 3 (Rebuttal) at 4-5.

⁴⁷ PGW Statement No. 3 (Rebuttal) at 4-5.

⁴⁸ PGW Statement No. 3 (Rebuttal) at 4-5.

⁴⁹ PGW Statement No. 3 (Rebuttal) at 4-5.

⁵⁰ PGW Statement No. 3 (Rebuttal) at 5.

⁵¹ PGW Statement No. 3 (Rebuttal) at 5-6.

PROPOSED FINDINGS OF FACT

54. At any given time, the LNG Plant can and does operate safely and adequately without being fully staffed, since at various times throughout a day, one or more essential worker may be away from the Plant for any number of reasons.⁵²
55. The LNG Plant is staffed at all times as necessary for PGW to fulfill its obligations under the Public Utility Code, Commission regulations and Commission orders.⁵³
56. PGW does not have any policy or requirement that establishes staffing levels for the Plant or that prevents the Plant from operating unless a specific number of individuals are present.⁵⁴
57. No instances occurred at the Plant due to the absence or unavailability of staff.⁵⁵
58. PGW's staffing model contemplates the brief absence of Plant personnel so that if a Working Foreman is not available, the Supervisor on shift has the same visuals and capabilities from his/her office computer to operate remotely (if need be) as a Working Foreman does, and the Supervisor can monitor the screens until relief comes in and/or the Working Foreman returns.⁵⁶

Employment Issues

59. PGW is not required to adhere to its "department guidelines" when hiring individuals.⁵⁷
60. PGW hires (and has hired) individuals who were viewed as being the most qualified for the positions.⁵⁸

Valve Incident – October 15, 2020

61. On October 15, 2020, valve GLV-114 was open and, as a result, a negligible and harmless amount of gas was emitted into an open, outdoor area.⁵⁹
62. The valve incident on October 15, 2020 did not involve a valve malfunction, or emergency situation.⁶⁰
63. The amount of gas that was emitted did not trigger any of PGW's detectors, which sound an alarm when gas is detected.⁶¹

52 PGW Statement No. 3 (Rebuttal) at 6.
53 PGW Statement No. 2 (Rebuttal) at 3.
54 PGW Statement No. 2 (Rebuttal) at 3.
55 PGW Statement No. 2 (Rebuttal) at 3-4.
56 PGW Statement No. 2 (Rebuttal) at 3-4.
57 PGW Statement No. 3 (Rebuttal) at 8.
58 PGW Statement No. 3 (Rebuttal) at 8.
59 PGW Statement No. 3-SUR (Surrebuttal) at 3.
60 PGW Statement No. 3-SUR (Surrebuttal) at 3.
61 PGW Statement No. 3-SUR (Surrebuttal) at 3.

PROPOSED FINDINGS OF FACT

64. The gas detectors at the Passyunk Plant are a safety measure and are programed to detect natural gas in the atmosphere, whether odorized or not.”⁶²
65. Mr. Ackie, in conducting his normal course of business, should have found that GLV-114 was open, but he apparently did not.⁶³
66. Instead, the leak was subsequently detected by Supervisor John Walker, who attempted to address the issue by asking Mr. Ackie to shut the valves in the Truck Unloading area.⁶⁴
67. Mr. Ackie shut two valves, neither of which was valve GLV-114.⁶⁵
68. A negligible amount of gas continued to escape through the truck unloading hose because Mr. Ackie failed to shut GLV-114 and because both Mr. Martinez and Mr. Walker had believed that the issue had been addressed by Mr. Ackie.”⁶⁶
69. The night shift started at 10:00 p.m. and upon hearing of the earlier incident, Mr. Chavarria took it upon himself to visit the truck unloading area.⁶⁷
70. Mr. Chavarria reported to Operations Supervisor Wallace Benson that he had observed frost on a truck unloading hose.⁶⁸
71. To address the issue, Mr. Benson instructed Mr. Chavarria to open GLV-104, which Mr. Chavarria did.⁶⁹
72. When opening the GLV-104 valve did not resolve the issue, Mr. Benson called Mr. Martinez.⁷⁰
73. The call between Mr. Benson and Mr. Martinez resulted in Mr. Goodwin closing GLV-114, effectively shutting off the gas to the truck unloading hose and rectifying the issue.⁷¹
74. The PCV-1027 valve had nothing to do with the events that occurred on October 15, 2020.⁷²
75. The valve incident on October 15, 2020 amounted to “a harmless human error.”⁷³

⁶² PGW Statement No. 3-SUR (Surrebuttal) at 4.

⁶³ PGW Statement No. 3-SUR (Surrebuttal) at 3-4.

⁶⁴ PGW Statement No. 3-SUR (Surrebuttal) at 3-4.

⁶⁵ PGW Statement No. 3-SUR (Surrebuttal) at 3-4.

⁶⁶ PGW Statement No. 3-SUR (Surrebuttal) at 3-4.

⁶⁷ PGW Statement No. 3-SUR (Surrebuttal) at 4.

⁶⁸ PGW Statement No. 3-SUR (Surrebuttal) at 4.

⁶⁹ PGW Statement No. 3-SUR (Surrebuttal) at 4.

⁷⁰ PGW Statement No. 3-SUR (Surrebuttal) at 4.

⁷¹ PGW Statement No. 3-SUR (Surrebuttal) at 4.

⁷² PGW Statement No. 3-SUR (Surrebuttal) at 6-7.

⁷³ PGW Statement No. 3-SUR (Surrebuttal) at 5-6.

PROPOSED FINDINGS OF FACT

76. Even if valve GLV-114 had remained open, the cold gas in the system would have bled down to zero (run out) and dissipated within a couple of days.⁷⁴
77. Three things are necessary for an explosion to occur: oxygen, fuel, and an ignition source.
78. The only thing that was present in any discernable amount in the area of the gas emission on October 15, 2020 was oxygen.⁷⁵
79. The threat of asphyxiation was non-existent, as an extremely small quantity of gas was escaping through the truck unloading hose into an outdoor space; there was no possibility of the gas collecting in an amount that would have posed a danger of asphyxiation to anyone.⁷⁶
80. Portable gas indicators are designed to detect natural gas *in the atmosphere*.⁷⁷
81. If a portable gas indicator is held to the site of the venting gas, it is reasonable to expect a reading of 100%.⁷⁸
82. The PCV-1027 valve is inspected and tested on a yearly basis and no operational issues have been found.⁷⁹
83. The PCV-1027 valve functions exactly as it is designed to function.⁸⁰
84. The situation did not require management to return to the Plant.⁸¹
85. Mr. Martinez notified Mr. McGuire of the incident on October 15, 2020, which is consistent with PGW protocol and all that was required of him with regard to notifying anyone.⁸²

Repressurization System

86. During a Capital upgrade to the re-pressurization system controls, PGW replaced a regulator and added indicators to notify operators when the system has been activated.⁸³
87. The re-pressurization system is always available manually and was during this upgrade.⁸⁴

⁷⁴ PGW Statement No. 3-SUR (Surrebuttal) at 5-6.

⁷⁵ PGW Statement No. 3-SUR (Surrebuttal) at 5-6.

⁷⁶ PGW Statement No. 3-SUR (Surrebuttal) at 5-6.

⁷⁷ PGW Statement No. 3-SUR (Surrebuttal) at 6 (internal citation omitted).

⁷⁸ PGW Statement No. 3-SUR (Surrebuttal) at 6 (internal citation omitted).

⁷⁹ PGW Statement No. 3-SUR (Surrebuttal) at 6-7.

⁸⁰ PGW Statement No. 3-SUR (Surrebuttal) at 6-7.

⁸¹ PGW Statement No. 3-SUR (Surrebuttal) at 7-8.

⁸² PGW Statement No. 3-SUR (Surrebuttal) at 7-8.

⁸³ PGW Statement No. 3-SR (Supp. Rebuttal) at 6.

⁸⁴ PGW Statement No. 3-SR (Supp. Rebuttal) at 6.

PROPOSED FINDINGS OF FACT

88. Operations personnel monitored LNG tank pressure and the associated alarms during the upgrades, but never had to manually operate the system.⁸⁵
89. After Engineering completed the upgrade and the new system was verified to be safe and reliable, the automatically controlled (and improved) re-pressurization system was put back in service.⁸⁶
90. The LNG tank is equipped with vacuum breakers to back up the re-pressurization system in the event of a failure, and these breakers have never activated or been required to activate.⁸⁷

Release of Gas – March 2016 & Today

91. The release of gas incident in March 2016 was due to human error and no operator error occurred.⁸⁸
92. The March 2016 incident involved a valve malfunctioned but the safety device in Passyunk Plant worked as designed to prevent over-pressurization.”⁸⁹
93. Following the March 2016 incident, PGW made proper notifications to local authorities.⁹⁰
94. PGW Plant management did not lie to the public in connection with the events in March 201.⁹¹
95. Passyunk Plant Manager Brian McGuire is not aware of any instance in which management has lied to the public.⁹²

New Plant Truck Rule

96. PGW implemented the New Plant Truck Rule in 2018.⁹³
97. The New Plant Truck Rules requires union personnel to obtain management permission prior to using the plant truck.⁹⁴

⁸⁵ PGW Statement No. 3-SR (Supp. Rebuttal) at 6.

⁸⁶ PGW Statement No. 3-SR (Supp. Rebuttal) at 6.

⁸⁷ PGW Statement No. 3-SR (Supp. Rebuttal) at 6.

⁸⁸ PGW Statement No. 3-SR (Supp. Rebuttal) at 5.

⁸⁹ PGW Statement No. 3-SR (Supp. Rebuttal) at 5.

⁹⁰ PGW Statement No. 3-SR (Supp. Rebuttal) at 5.

⁹¹ PGW Statement No. 3-SR (Supp. Rebuttal) at 5.

⁹² PGW Statement No. 3-SR (Supp. Rebuttal) at 5.

⁹³ PGW Statement No. 3 (Rebuttal) at 7.

⁹⁴ PGW Statement No. 3 (Rebuttal) at 7.

APPENDIX B - PROPOSED CONCLUSIONS OF LAW

Burden of Proof – Complaint Proceedings

1. To establish a legally sufficient claim, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail.¹
2. The alleged offense must be a violation of the Public Utility Code, a Commission regulation or a Commission order.²
3. As the party seeking affirmative relief from the Commission, a complainant in a formal complaint proceeding has the burden of proof.³
4. The burden of proof is the “preponderance of the evidence” standard.⁴
5. To establish a fact or claim by a preponderance of the evidence means to offer the greater weight of the evidence, or evidence that outweighs, or is more convincing than, by even the smallest amount, the probative value of the evidence presented by the other party.⁵
6. The burden of proof is comprised of two distinct burdens: the burden of production and the burden of persuasion.⁶
7. The burden of production, also called the burden of going forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense.⁷
8. The burden of production goes to the legal sufficiency of a party’s claim or affirmative defense.⁸
9. The burden of production may shift between the parties during a hearing.⁹
10. A complainant may establish a prima facie case with circumstantial evidence.¹⁰
11. If a complainant introduces sufficient evidence to establish legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant’s evidence.¹¹

¹ *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990).

² 66 Pa. C.S. § 701.

³ 66 Pa. C.S. § 332(a).

⁴ *Suber v. Pennsylvania Com’n on Crime and Delinquency*, 885 A.2d 678, 682 (Pa. Cmwlth. 2005); *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992).

⁵ *See Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 48-49, 70 A.2d 854, 855 (1950).

⁶ *Hurley v. Hurley*, 2000 Pa. Super. 178, 754 A.2d 1283 (2000).

⁷ *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Initial Decision issued May 11, 2015) (*Moore*).

⁸ *See Id.*

⁹ *See Id.*

¹⁰ *See Milkie v. Pa. Pub. Util. Comm’n*, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001) (*Milkie*).

¹¹ *See Moore*.

APPENDIX B - PROPOSED CONCLUSIONS OF LAW

12. If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant's burden of proof has not been satisfied and the burden of going forward with the evidence shifts back to the complainant, who must provide some additional evidence favorable to the complainant's claim.¹²
13. Having produced sufficient evidence to establish the legal sufficiency of a claim, the party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling.¹³
14. While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission.¹⁴
15. It is entirely possible for a party to carry the burden of production but not be entitled to a favorable ruling because the party did not carry the burden of persuasion.¹⁵
16. In determining whether a complainant has met the burden of persuasion, the ultimate fact-finder may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence.¹⁶
17. Adjudications by the Commission must be supported by substantial evidence in the record.¹⁷
18. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.¹⁸

¹² See *Milkie*, 768 A.2d at 1220; see also *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

¹³ See *Moore*.

¹⁴ See *Milkie*, 768 A.2d at 1220; see also, *Riedel v. County of Allegheny*, 633 A.2d 1325, 1328, n.11 (Pa. Cmwlth. 1993); see also, *Burleson*, 443 A.2d at 1375.

¹⁵ See *Moore*.

¹⁶ See *Moore*, citing *Suber*.

¹⁷ 2 Pa. C.S. § 704; *Lansberry*, 578 A.2d at 692.

¹⁸ *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 217.

APPENDIX B - PROPOSED CONCLUSIONS OF LAW

Burden of Proof – Alleged Violation of Section 1501 of the Public Utility Code

19. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.¹⁹
20. Section 1501 of the Public Utility Code obligates public utilities to “furnish and maintain adequate, efficient, safe and reasonable service and facilities” and to “make all such repairs, changes, alterations, substitutions, extensions and improvements to or in such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of patrons, employees, and the public.”²⁰
21. Section 1501 of the Public Utility Code requires the service and facilities to comply with the regulations and orders of the Commission.²¹
22. The Commission’s regulations promulgated pursuant to Section 1501 require that natural gas utilities “use every reasonable effort to properly warn and protect the public from danger” and to “exercise reasonable care to reduce the hazards to which employees, customers and others may be subjected to by reason of its equipment and facilities.”²²
23. The Commission’s regulations do not obligate natural gas utilities to provide perfectly safe service at all times.²³
24. The Commission recognizes the inherent hazards of operating a natural gas utility.²⁴
25. The Commission’s regulations establish minimum safety standards for natural gas utilities by adopting the federal pipeline safety laws.²⁵
26. In adjudicating safety-related complaints under Section 1501 and its safety regulations, the Commission has established a standard for making such determinations: A complainant must demonstrate by a preponderance of the evidence a “conclusive causal connection” between the utility’s conduct and exposing its customers, employees or the public to harm.²⁶

¹⁹ *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980) (Norfolk); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Comm. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 184).

²⁰ 66 Pa. C.S. § 1501.

²¹ 66 Pa. C.S. § 1501.

²² 52 Pa. Code § 59.33(a).

²³ 52 Pa. Code § 59.33(a).

²⁴ *See Maria Povacz v. PECO Energy Company*, Docket No. C-2015-2475023 (Order entered March 28, 2019) (*Povacz*), at 30.

²⁵ 52 Pa. Code § 59.33(b).

²⁶ *Maria Povacz v. PECO Energy Company*, Docket No. C-2015-2475023 (Order entered March 28, 2019) (*Povacz*), at 28. *See also Cynthia Randall and Paul Albrecht v. PECO Energy Company*, Docket No. C-2016-2537666 (Order entered May 9, 2019) (*Randall*); *Laura Sunstein Murphy v. PECO Energy Company*, Docket No. C-2015-2475726 (Order entered May 9, 2019) (*Murphy*). The discussions in *Randall* and *Murphy* regarding these issues significantly quote *Povacz* and the results mirror the outcome in *Povacz*. *See also Letter of Notification of Philadelphia Electric Company Relative to the Reconstructing and*

APPENDIX B - PROPOSED CONCLUSIONS OF LAW

27. When the prevention of harm is involved, the question becomes whether the preponderance of the evidence demonstrates that a utility's service or facilities will cause harm."²⁷
28. The Commission has expressly rejected a "potential for harm" or "capable of causing harm" standard, observing that a complainant would be able to prevail by presenting a preponderance of the evidence that a hazard exists, without considering whether the utility has taken steps to reduce exposure to the hazard.²⁸
29. A public utility's statutory duty under Section 1501 is to use reasonable efforts to properly warn and protect the public from danger and to exercise reasonable care to reduce the hazards to which customers, employees or the public may be subjected because of the provision of utility service and the utility's associated equipment and facilities.²⁹
30. In providing a violation of Section 1501 of the Public Utility Code, it is necessary for complainants to demonstrate that the utility's conduct would create a "proven exposure to harm."³⁰

Uncorroborated Hearsay Evidence and Due Process Considerations

31. Rule of Evidence 801 defines "hearsay" as an out-of-court statement offered to prove the truth of the matter asserted.³¹
32. A finding based wholly on hearsay cannot support a legal conclusion by an administrative agency.³²
33. Although the Pennsylvania Rules of Evidence are relaxed in an administrative proceeding, crucial findings of fact may not be established solely by hearsay evidence."³³

Rebuilding of the Existing 138 kV Line to Operate as the Woodbourne-Heaton 230 kV Line in Montgomery and Bucks Counties, 78 Pa.P.U.C. 486, 1993 WL 383052 (Pa.P.U.C.), 1992 Pa. PUC Lexis 160, Docket No. A-110550F0055 (Remand Order entered March 26, 1993) (it must be demonstrated by a preponderance of the evidence that there is a "conclusive causal connection" between electromagnetic field exposure from an EDC transmission facility and adverse human health effects; when the record evidence demonstrates a body of inconclusive scientific research and studies as to the causal connection, the burden of proof is not satisfied).

²⁷ *Povacz* at 29.

²⁸ *Povacz* at 30.

²⁹ *Povacz* at 30-31.

³⁰ *Povacz Order on Appeal* at *24

³¹ Pa.R.E. 801.

³² *Walker v. Unemployment Compensation Board of Review*, 27 Pa. Cmwlt. 523, 367 A.2d 366 (Pa. Cmwlt. 1976) (*Walker*); see also, *Anderson v. Pa. Dep't. of Pub. Welfare*, 79 Pa. Cmwlt. Ct. 182,468 A.2d 1167 (1983).

³³ *Pa. Pub. Util. Comm 'n., Bureau of Investigation & Enforcement v. Yellow Cab Co. of Pittsburgh*, Docket No. 2012-2249031, 2013 WL 5912555 (Initial Decision served October 24, 2013 at 3; adopted in relevant part by Commission Order entered February 6, 2014); see also *Frompovich v. PECO Energy Company*, Docket No. C-2015-2474602, Opinion and Order (May 3, 2018) ("For evidence relied upon in an

APPENDIX B - PROPOSED CONCLUSIONS OF LAW

34. Even when hearsay is not excluded, uncorroborated hearsay cannot support a finding of fact.³⁴
35. As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it.³⁵
36. Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard.³⁶
37. Due process would not be satisfied if findings and conclusions were based solely on out-of-court statements made by individuals who are unavailable for cross-examination.³⁷

Allegations

38. Complainants failed to prove that PGW personnel have manipulated the readings of the temperature indicator (“TE1019”) or otherwise engaged in any conduct during the vaporization process that resulted in harm, created a proven exposure to harm or violated the Public Utility Code, Commission regulations or Commission orders.
39. Complainants failed to prove that one of the LNG tanks has structural cracks that require engineering or other professional attention or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders.
40. Complainants failed to prove that a PGW employee left the Passyunk Plant without notification causing harm or creating a proven exposure to harm, or that the employee caused harm or created a proven exposure to harm when he left a Company radio at a nearby store, or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders.
41. Complainants failed to prove that a PGW employee left the LNG Plant without notification causing harm or creating a proven exposure to harm, or that his involvement in a vehicle accident caused harm or created a proven exposure to harm, or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders.

administrative proceeding to be considered competent, the evidence must be authenticated and follow the applicable hearsay rules.”).

³⁴ See, e.g., *Jackson v. PECO Energy Co.*, Docket No. F-2013- 2351046 (July 5, 2013); *Davis v. Equitable Gas, LLC*, Docket No. C-2011-2252493, 2012 WL 3838095 (April 27, 2012).

³⁵ *Schneider v. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984), citing *Fusaro v. PUC*, 382 A.2d 794 (Pa. Cmwlth. 1978).

³⁶ *Schneider v. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984), citing *Fusaro v. PUC*, 382 A.2d 794 (Pa. Cmwlth. 1978).

³⁷ See *Schneider v. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984), citing *Fusaro v. PUC*, 382 A.2d 794 (Pa. Cmwlth. 1978).

APPENDIX B - PROPOSED CONCLUSIONS OF LAW

42. Complainants failed to prove that a return to the LNG Plant by the Plant Manager after his shift caused harm or created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders.
43. Complainants failed to prove that two employees leaving the LNG Plant to drive another PGW employee to the airport caused harm or created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders.
44. Complainants failed to prove that a Foreman was late for his shift or that a Foreman being late for his shift caused harm or created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders.
45. Complainants failed to prove that PGW promotes and protects employees who violate safety protocols, caused harm or created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders.
46. Complainants failed to prove that PGW's handling of a valve incident on October 15, 2020 caused harm or created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders.
47. Complainants failed to prove that other incidents, which they claim occurred on October 5, 2020 and October 14, 2020, actually occurred, caused harm, created a proven exposure to harm or otherwise violated the Public Utility Code, Commission regulations or Commission orders.
48. Complainants failed to prove that PGW's handling of the LNG tank repressurization system caused harm, created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders.
49. Complainants failed to prove that their allegations concerning a release of gas in March 2016 continue today.
50. Complainants failed to prove that the new plant truck rule caused harm, created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders.

APPENDIX C - PROPOSED ORDERING PARAGRAPHS

THEREFORE,

IT IS ORDERED:

1. That the Formal Complaint of Dwayne Ackie, Miguel J. Chavarria, Jr., Maurice A. Goodwin and Wayne Rauceo against Philadelphia Gas Works, Docket C-2019-3013933, is dismissed.

2. That the Secretary mark the docket closed.