

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**REPLY BRIEF OF COMPLAINANTS  
DWAYNE ACKIE, MIGUEL J. CHAVARRIA, JR., MAURICE A GOODWIN  
AND WAYNE RAUCEO**

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## I. INTRODUCTION

Respondent Philadelphia Gas Works (“PGW”) throughout its Main Brief chooses to attempt to belittle and besmirch the character and integrity of their long term employees who have faithfully served this public utility for nearly 60 years combined, while at the same time tolerating and supporting an Operations management team at Passyunk Gas Processing Plant that itself violates safety and operations protocols, practices and policies with an air of superiority.<sup>1</sup> However degrading PGW chooses to be, Messrs. Dwayne Ackie (“Ackie”), Miguel J. Chavarria, Jr. (“Chavarria”), Maurice Goodwin (“Goodwin”) and Wayne Rauceo (“Rauceo”)(hereinafter “Complainants” or “Employees”) are brave men who are concerned about their working conditions, their safety, plant operations, and plant management as well as that of the residents of the City of Philadelphia and the immediate neighboring community. In providing this Reply Brief, Complainants will stay above the fray and only address competent cogent arguments and positions, and allow PGW to continue to show the PUC the true level of character of this regulated, public utility and its treatment of loyal employees.

First, PGW is more pre-occupied with Complainants’ valid claims of race, color and national origin discrimination/retaliation/harassment in their federal lawsuit than with the facts of

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<sup>1</sup> Of particular interest, and slight amusement, is PGW’s statement “Over a *period of years*, Complainants have *cobbled together a laundry list of petty grievances* against PGW in apparent preparation for their federal litigation.” (emphasis added)(PGW Main Br. at 1.) First, what? Over a period of years? Cobbled together? This language sounds more like paranoia than a legal brief based on the serious averments made in a formal complaint to a regulatory agency.

For the Commission’s information only, Complainants initiated their employment matters in Spring 2018 with inquiries made to the U.S. EEOC before filing charge of discrimination in the summer. (See EE St. No. 1, Ex. II) The explosion at neighboring Philadelphia Energy Solutions (“PES”), which is the catalyst for this action, occurred in June 2019. (See EE St. No. 4-SSR at 1:4-11). So, unless PGW is taking the extraordinary position that the PES explosion was part of Complainants’ cobbled together preparation for their federal lawsuit, it would be wise for it to be less fanciful and more contemplative.

this Formal Complaint.<sup>2</sup> The Commission made it clear that any discrimination allegations made in the Formal Complaint were not the basis for its handling of this matter.<sup>3</sup> PGW attempts to divert attention away from those facts including, but not limited to, its admission during the October 21, 2020 testimony of Passyunk Plant Manager Brian McGuire (“McGuire”) supporting the existence of a practice at the plant engaged in by Plant General Supervisor David Martinez (“Martinez”) in August 2017.<sup>4</sup> That practice involved Mr. Martinez using 2 of 3 essential personnel, i.e., Operations Supervisor and Senior Process Operator,<sup>5</sup> for 40 – 45 minutes as personal valets, while the latter two were on the clock, to escort him to Philadelphia International Airport for his vacation travel and take his personal vehicle back to the plant’s employee parking lot.<sup>6</sup> As competently testified to by Complainant Goodwin at the October 21, 2020 hearing, the Plant is a 24/7 operations where the three essential personnel are the Operations Supervisor, Working Foreman and Senior Process Operator.<sup>7</sup> Each essential personnel’s job functions and duties are specific and are not, generally, interchangeable.<sup>8</sup> Further, remote monitoring of pressure by the City’s Gas Control Department (“Gas Control”) at 9<sup>th</sup> and Montgomery is not a fail-safe but requires Passyunk plant workers to immediately manually control the flow of gas,

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<sup>2</sup> See PGW Main Br. at 1.

<sup>3</sup> Ackie, et al v. PGW, Docket No. C-2019-3013933 at 1-2 (Order entered Jan. 3, 2020)(“Prelim. Obj. Order”); see also EEs’ Main Brief at 5, n.9.

<sup>4</sup> Tr. at 154:5-10 (Testimony of Brian McGuire)

<sup>5</sup> Tr. at 127:14-21 (Testimony of Daniel J. Cassidy); *but also* Tr. at 128:25 – 129:11.

<sup>6</sup> EE St. No. 1 at 3:16-5:12 & Exhibits I-A and I-B. See also EE St. No. 1-SR at 2:10-3:7 and EE St. No. 4-SR at 4:3-16.

<sup>7</sup> Tr. at 70:20-73:6 (explaining dangers of not having essential personnel present based on job limitations of other essential personnel); see also Tr. at 51:5-24; EE St. No. 3 at 1:22 – 2:3; EE St. No. 2 at 2:3-5; EE St. No. 1 at 2:3-7 and EE St. No. 4 at 2:3-8.

<sup>8</sup> *Id.*

when Gas Control loses remote connection to the monitors and regulators, *inter alia*.<sup>9</sup>

Mr. McGuire further tried to minimize Mr. Martinez’s actions by citing an alleged “ten-minute drive to download DETEX unit data from the Penrose M&R station” as an equivalent action.<sup>10</sup> And, more importantly to Mr. McGuire, August, when Martinez removed 2 of 3 essential plant personnel, is a “non-vaporization season” implying only the working foreman was needed at the Plant during those times.<sup>11</sup> However, August is “peak season when high pressure boilers were on and left unattended” due to Mr. Martinez’s actions.<sup>12</sup> Thus, these complaints are not “petty grievances” but rather serious safety and operations violations that occur at the Plant in varying degrees and frequencies. In fact, with regards Mr. Martinez’s behavior, Plant manager McGuire reluctantly testified PGW “frown[s] upon” such actions.<sup>13</sup>

Moreover, Complainants testified credibly and competently regarding the October 15 – 16, 2020 incident where inodorous liquefied natural gas (LNG) began leaking and blowing hard flammable LNG into the atmosphere from a braided stainless steel hose used to unload LNG trailers due a defective 1027 valve, which remained defective at the time of the October 21, 2020 hearing.<sup>14</sup> Passyunk Plant management, never fully taking responsibilities for their actions even when exposed, continues to side step these issues.<sup>15</sup> For instance, in addition to his rebuttal testimony containing legal opinion and interpretation of laws/statutes as well as a waiver of

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<sup>9</sup> EE St. No. 1-SR at 3:3-7

<sup>10</sup> PGW St. No. 3 at 4:18-22; *but see* EE St. No. 1-SR at 2:10-18

<sup>11</sup> PGW St. No. 3 at 4:22 – 5:2

<sup>12</sup> EE St. No. 1-SR at 2:19-22

<sup>13</sup> Tr. at 136:17-137:11

<sup>14</sup> Tr. at 22:16-22, 27:17-22, 46:11-24, 50:8-12, and 85:13-86:2

<sup>15</sup> PGW St. No. 3-SUR at 3:14-4:23; *but see* EE St. No. 1-REPLY at 1:7-2:3, 2:6-3:10 and EE St. No.3-REPLY at 1:10-3:21, 4:4-5:3 (both noting McGuire not present during events, *inter alia*).

attorney-client privilege, Mr. McGuire incorrectly states “even if true, [Complainants’ statements and allegations in their direct testimony] do not show any kind of safety violations or concerns with the way the Plant was being operated.”<sup>16</sup> Plant manager McGuire seems to make a tenuous distinction between “safety” and “security” violations that falls flat.<sup>17</sup>

PGW fails to see a “link between events [complained of] and any harmful incident or proven exposure to harm.”<sup>18</sup> However, “the proper focus of an inquiry regarding the safety of a utility facility or service is whether the preponderance of the evidence demonstrates that a utility facility or service *caused or will cause harm to the public.*”<sup>19</sup> (emphasis added) Specifically, the Commonwealth Court affirmed the PUC’s ability to prevent harm, which does not require actual harm and where “proven exposure to harm” does not require its occurrence to be certain or probable.<sup>20</sup>

The Code provides the Commission with the ability to make a determination as to whether service or facilities of a public utility “are unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory, or otherwise in violation” of the Code.<sup>21</sup> Based on the Complainants’ averments of a pattern and practice of safety and operations violations, they have demonstrated by the preponderance of the evidence PGW’s Passyunk Plant caused or will cause

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<sup>16</sup> PGW St. No. 3 at 2:8-13, 6:22-7:2

<sup>17</sup> EE St. No.4-SUP at Ex. VI (proprietary version).

<sup>18</sup> PGW Main Br. at 1.

<sup>19</sup> Randall v. PECO, Docket No. C-2016-253766, Opinion and Order at 31 (May 9, 2019), *appeal docketed*, No. 607 CD 2019 (Pa. Commw. May 22, 2019)

<sup>20</sup> Povacz v. Pa. PUC, 241 A.3d 481, 493 (Pa. Commw. 2020)(utility’s conduct creating “a proven exposure to harm” that need not be probable or certain)

<sup>21</sup> 66 Pa.C.S. § 1505(a). Operations violations that cause an unsafe, inadequate facility due to unmanned equipment and insufficient essential personnel being on duty, *inter alia* are well within the Commission’s purview. See Povacz, 241 A.3d at 491 (disjunctive burden of proof required for violations)

harm to the public do to “faulty override valves, dangerously unmanned plant apparatus, abandonment of work areas, manipulation of temperature indicators and uncontrolled, unsafe gas mitigation,” *inter alia*.<sup>22</sup>

In the remainder of the Introduction section of its Main Brief, PGW cites the “engineering backgrounds and lengthy careers” of its witnesses as the basis for refuting all Complainants’ “inconsequential and frivolous claims” in this matter.<sup>23</sup> PGW provided witness testimony of Raymond M. Snyder, PE (“Snyder”), Daniel J. Cassidy (“Cassidy”) and Passyunk plant manager McGuire.<sup>24</sup> However, none of these witnesses were presented as subject matter experts in this proceeding with regards to safety and operations of facilities as contemplated by 66 Pa.C.S. § 1501, *et seq.* and averred.<sup>25</sup> Only Mr. Snyder has ever testified before the Commission in the past, and that testimony related to “computation annual purchased gas costs,” “establish the availability, rates, and terms of service for eligible customers under a proposed Negotiated Liquefied Natural Gas Service.”<sup>26</sup> Moreover, Mr. Cassidy left PGW in January 2003, not

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<sup>22</sup> EEs’ Main Br. at 4-5. *See also* Formal Complaint, ¶16; Tr. at 20:10-67:25; 81:24-108:13 and EE St. No. 3 at 3:24-25, 4:7-5:10.

<sup>23</sup> PGW Main Br. at 2.

<sup>24</sup> Snyder provides testimony as PGW St. No. 1 with respect to vaporization process; and Cassidy as PGW St. No. 2 with respect to staffing and safety/security protocols at the Plant. McGuire provided testimony regarding various topic as PGW St. No. 3.

<sup>25</sup> All three PGW witnesses state the same conclusory refrain/mantra “Complainants allegations do not show any kind of safety violations, including any violations of the Public Utility Code” perhaps with a hope that repetition and not facts will produce a desired result. This was also a tactic used by counsel for PGW in its Answer and Preliminary Objections, when it erroneously alleged Complainants had to allege they “are customers of PGW” and “allege an issue with the utility’s rates or public utility services.” Prelim. Obj. at 5. Employees hope facts, truth, proof, legal precedent and their desire for a safe workplace will outweigh legal gimmicks.

<sup>26</sup> PGW St. No. 1 at 18-22. Snyder retired in 2019. *Id.* at 1:4. A review of that earlier testimony shows he has provided other rate related testimony. It also provides what is perhaps a reason for PGW’s dismissive and aggressive attitude in this proceeding based on its financial interest in the P3 project with private partner Passyunk Energy Center, LLC, which includes adding facilities to liquefy natural gas at

returning until September 2019, well after the majority of the incidents that form the basis of this Complaint.<sup>27</sup> Neither he nor Mr. Snyder provided rebuttal testimony regarding the October 15-16, 2020 valve incident.<sup>28</sup> Mr. Cassidy makes bald assertions such as “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,” without providing any corroborating evidence as support.<sup>29</sup> Such testimony requires neither an engineering degree nor a lengthy career.

Ironically, Messrs. McGuire, Martinez and Operations Supervisor Ryan O’Donnell (“O’Donnell”), persons in Operations management positions at the Plant and the subjects of much of the formal complaint, do not have engineering backgrounds.<sup>30</sup> Complainants, McGuire, Martinez and O’Donnell are the persons who actually have first-hand knowledge of the practices, protocols and patterns at the Plant on a daily basis. Further, Messrs. Martinez and O’Donnell are specifically shown to not meet the qualifications of their positions when promoted, which Messrs. Snyder nor Cassidy addressed.<sup>31</sup> However, matters of frivolity, evidentiary weight, credibility and sufficiency of evidence are best left for the Commission to determine. And finally, as argued consistently throughout the numerous motions in limine filed by PGW, the competent

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Passyunk Plant. (PGW Gas Service Tariff, Docket No. R-2019-3009016 at 23-34 (April 8, 2019)

<sup>27</sup> PGW St. No. 2 at 1:7, 15-17. Cassidy also testified his last visit to the Plant occurred on March 2020. Tr. at 118:7-11.

<sup>28</sup> PGW St. No. 1 (Snyder – Vaporization Process); PGW St. No. 2 and 2-SR (Cassidy – Staffing, Admission Policy).

<sup>29</sup> PGW St. No. 2-SR at 3:9-11. *But see* EE St. No. 1 at 12:19-13:2.

<sup>30</sup> EE St. No.4-SR at 5:13-19 (noting retired PGW witness Snyder, witness Cassidy not in the chain of command in cases of Passyunk plant emergencies). *See also* EE St. No. 3-REPLY at 4:13-17 (discussing strict gas release protocol); and EE St. No.4-SSR at 2:4-11 (noting PGW maintains 0-30 station on PES property).

<sup>31</sup> EE St. No. 4 at 4:8-6:23, Ex. I; *but see* PGW St. No. 1 and No. 2.

evidence produced by Complainants is not solely based on hearsay but is corroborated by their firsthand knowledge and documentary evidence, and, in some instances, hearsay exceptions, where the declarant's presence is not required.<sup>32</sup>

## II. PROCEDURAL HISTORY

The procedural histories proffered by both parties are substantially similar. Complainants provide no further discussion.

## III. SUMMARY OF ARGUMENT

Complainants as long term employees in PGW Gas Processing Department in general and at Passyunk Plant in particular have firsthand view of its operations as “boots on the ground.” The June 2019 explosion at Philadelphia Energy Solutions (“PES”) right next door served as an impetus for Complainants to finally speak out about the ongoing patterns and practices of safety, operational and other concerns at Passyunk plant.<sup>33</sup> Long term faulty valves,<sup>34</sup> manipulation of temperature indicators, unreported and uncontrolled gas leaks,<sup>35</sup> promotion of unqualified plant management personnel,<sup>36</sup> use of essential plant workers for personal valet service during work shifts leaving the plant understaffed,<sup>37</sup> timekeeping and security violations allowing essential personnel to be clocked in though they are not present,<sup>38</sup> and after hours appearance at the Plant

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<sup>32</sup> Response to Initial Motion in Limine, *as amended* ¶¶ 12-24; and January 21, 2021 EEs' Response in Opposition of January 19, 2021 PGW Motion in Limine at 2-4, 7.

<sup>33</sup> EE St. No. 4 at 3:21-4-7; *see also* n.22 *supra*

<sup>34</sup> Tr. at 22:17-22.

<sup>35</sup> Tr. at 25:13-18, 26:11-27:2, 27:12-22. *See also* EE St. No. 3-REPLY at 4:13-17 (discussing strict gas release protocol)

<sup>36</sup> EE St. No. 4 at 4:9-6:23 & Exhibits I-A, I-B.

<sup>37</sup> EE St. No. 1 at 3:16-5:12 & Exhibits I-A, I-B; EE St. No. 1-SR at 1:20-2:5, 2:10-3:7; *but see* Tr. at 154:5-10 (admitting practice in place but allegedly not done anymore)

<sup>38</sup> EE St. No. 2 at 3:12-4:16; EE St. No. 1 at 5:14-9:2 & Exhibit II.

unannounced, driving plant vehicle without headlights on and smelling of alcohol are just some of the safety and operations concerns raised by Complainants,<sup>39</sup> *inter alia*. Passyunk plant is a natural gas distribution, LNG storage and vaporization facility, and LNG is an inodorous gas whose “vapors are potentially flammable and dangerous” consisting primarily of methane (CH<sub>4</sub>).<sup>40</sup> LNG’s “handling and processing . . . requires great care in order to ensure public safety.”<sup>41</sup>

Under these circumstances, Employees assert section 1501 of the Code affords the Commission with the power to make certain PGW “maintain adequate, efficient, safe and reasonable” facility at the Passyunk plant for their safety and that of the public in general.<sup>42</sup> Though PGW attempts to argue Plant Manager McGuire “writes the protocols for ensuring the safe operation of the Passyunk Plant, and he takes those responsibilities seriously,”<sup>43</sup> the documentary and testimonial evidence shows otherwise.<sup>44</sup> Complainants do, however, agree with one thing PGW states, the human error of unqualified personnel David Martinez and Ryan O’Donnell consistently contribute to the unsafe operations and conditions at the Plant, *inter alia*.<sup>45</sup>

#### **IV. ARGUMENT**

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<sup>39</sup> EE St. No. 1 at 8:21-22, 10:20-17:11 & Exhibits II, IV, IV-A, IV-B, V; EE St. No. 1-SR at 4:3:4-20 (“Plant policy for after hours. . .”).

<sup>40</sup> EE St. No. 1, Exhibit II (A) – PGW Director of Gas Processing, Curt Malkemes 10/22/18 St, at 1-2.

<sup>41</sup> *Id.*

<sup>42</sup> 66 Pa.C.S. § 1501

<sup>43</sup> PGW Main Br. at 7 (another bald assertion not supported by the evidence).

<sup>44</sup> EE St. No. 4-SUP, Exhibit VI (proprietary version); EE St. No. 4-SSR at 1:19- 4:8; EE St. No. 4-SUP at 1:3-8 (“. . .February 23, 2018.”), 1:16-21, 2:1-8 & Exhibit IV; EE St. No. 4-SR at 3:23-5:12; EE St. No. 4 at 6:24-9:21; EE St. No. 1 at 10:20-16:2 & Exhibit IV; EE St. No. 1-SR at 3:18-4:20.

<sup>45</sup> *See generally* Formal Complaint ¶¶ 9, 10, 12, 13, 15, 17; EE St. No. 1-REPLY at 3:19-4:9; EE St. No.

## A. Applicable Legal Standards

Complainants, as provided in their Main Brief – Burden of Proof section, generally agree with PGW’s summary and legal standards provided in subsections Complaint Proceedings and Violation of Section 1501 of Public Utility Code.<sup>46</sup> However, Complainants state the standard as articulated in Randall v. PECO properly states what the Commission must determine in this matter, that is, “the proper focus of an inquiry regarding the safety of a utility facility or service is whether the preponderance of the evidence demonstrates that a utility facility or service caused or will cause harm to the public.”<sup>47</sup> Natural gas and hazardous liquid public utilities are inherently distinguishable from electric utilities.<sup>48</sup> And even more so in this matter before the Commission, since LNG is an inodorous gas.<sup>49</sup> In fact, PGW’s Director, Gas Processing Malkemes states “[d]ue to the critical and extremely safety sensitive nature of Plant operations, PGW operates its Plants 24-hours a day, 7 days per week. Additionally, it is imperative that LNG Plants are adequately staffed at all times. . . . It is necessary that at least the following personnel be scheduled ***and present at all times***: one (1) Supervisor; one (1) Working Foreman; and one (1) Process Operator.”<sup>50</sup> (emphasis added)

With regard to PGW’s discussion of uncorroborated hearsay evidence, however,

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3-REPLY at 3:6-21, 4:11-5:3; and Tr. at 20:6-68:13.

<sup>46</sup> PGW Main Br. at 8 – 11.

<sup>47</sup> Docket No. C-2016-253766, Opinion and Order at (May 9, 2019), appeal docketed, No. 607 CD 2019 (Pa. Commw. May 22, 2019).

<sup>48</sup> PGW Main Br. at 10-11 citing 52 Pa.Code § 59.33. Noting this statutory provision specifically defines hazardous liquid public utility as “crude oil, gasoline, petroleum or petroleum products, by pipeline or conduit, for the public for compensation.”

<sup>49</sup> Tr. at 20:10-22

<sup>50</sup> EE St. No. 1, Ex. II (A) at 1-2; and Tr. at 70:11, 72:20-73:6. *But see* PGW St. No. 2 at 118:3-121:8; and PGW St. No. 3 at 6:10-13.

Complainants find this analysis has gaping holes beyond PGW’s normally slanted review. As previously discussed in their Response in Opposition to PGW’s Motion in Limine filed on October 20, 2020 (“Response to Initial Motion in Limine”), courts have admitted hearsay evidence “not inconsistent with undisputed facts” in cases where circumstantial evidence is used to establish the case.<sup>51</sup> As in their initial October 19, 2020 motion in limine, PGW again acknowledges relaxed evidentiary rules in administrative proceedings and raises the argument of prohibition against crucial findings of facts based “solely on hearsay evidence.”<sup>52</sup> In both instances, PGW cites an initial ALJ decision finding respondent/company’s witness testimony of the contents of a call as uncorroborated hearsay, since the company failed to produce the call and failed to produce business records of notations of the call.<sup>53</sup> These facts are distinguishable from the instant matter.

In the instant matter, for example, Mr. Rauceo testified he viewed the security video showing the movements of Mr. McGuire on the evening of February 23, 2018.<sup>54</sup> In response to a subpoena for documents, electronically stored information or objects, Sovereign Security stated PGW retained those items.<sup>55</sup> PGW has not produced a copy of the security video, incident or investigation reports or the like, despite being given addition time to do so.<sup>56</sup> As such, Employees maintain PGW has unclean hands. PGW had exclusive possession and control of the

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<sup>51</sup> Bleilevens v. State Civil Serv. Comm., 312 A.2d 109, 111 (Pa. Commw. 1973)

<sup>52</sup> Ackie, et al v. PGW, Docket No. C-2019-3013933 at 5 (Mot. in Limine October 19, 2020)(citations omitted) and PGW Main Br. at 13.

<sup>53</sup> Jackson v. PECO Energy Co., Docket No. F-2013-2351046 at 8 (Initial Decision July 12, 2013).

<sup>54</sup> EE St. No. 4 at 7:5-9:6.

<sup>55</sup> Response in Opposition to Motion in Limine, ¶¶ 16, 22, October 20, 2020 (non-proprietary), Exhibit 6 (response to subpoena seeking security logs, incident reports, investigation reports, *inter alia.*)

<sup>56</sup> Tr. at 7:13-9:12. PGW only produced security logs encompassing February 23, 2018. (EE St. No. 4-

security video and related evidence.<sup>57</sup> Complainants assert PGW cannot now argue uncorroborated hearsay evidence based on Jackson or any other ALJ initial decision, when it failed to produce the corroborating evidence that was properly ordered to do so pursuant to a motion to compel and testimony orders.<sup>58</sup>

Finally, PGW fails to acknowledge competent hearsay exceptions relevant to matters in this proceeding. For example, Rule 803(1), (2) and (6) provide for the admission of hearsay evidence, whether or not the declarant is available. Thus, hearsay evidence providing “present sense impressions”, “excited utterance,”<sup>59</sup> and “records of regularly conducted activity” are admissible, and thus corroborated. Employees apply these exceptions to Mr. Ackie’s and Mr. Chavarria’s testimony regarding the October 15-16, 2020 valve incident and Mr. Ackie’s testimony and contemporaneous notes regarding the February 23, 2018 incident, *inter alia*.<sup>60</sup> Due process in these matters identified above and elsewhere is not implicated, since the hearsay statements where the exceptions apply are from employees of Passyunk Plant, who PGW has direct access to, interviewed and/or have control over or verified/certified statements from its own high level Gas Processing management personnel. The latter being admissions.

**B. Complainants Provide Competent Documentary and Testimonial Evidence in Support of Finding Section 1501 Violations**

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SUP at 2:1-3, Ex. V)

<sup>57</sup> EE St. No. 4 at 8:19-23.

<sup>58</sup> *Id.* and March 19, 2020 Order granting in part and denying in part Complainants’ Motion to Compel Answers and Dismiss Objections to First Request for Production of Documents Nos. 3-8.

<sup>59</sup> Rule 803(2) is narrowing applied to an event or condition that is “startling” and not putting a “set time interval” limit on passage of time when the event/condition occurred and the utterance made. Pa.R.E. 803(2) *Comments*. See also Commonwealth v. Gore, 262 Pa.Super. 540, 547, 396 A.2d 1302, 1305 (1978).

<sup>60</sup> Tr. at 20-68, 81-108; and EE St. No. 1-REPLY at 1:7-3:7, 3:19-4:9. See also EE St. No. 1 at 10:22-16:5 & Exhibits II(E), IV, V

The Code gives the Commission broad responsibilities and powers under section 1501 to “ensur[e] the adequacy, efficiency, safety and reasonableness” of a public utility’s services and facilities.<sup>61</sup> A finding that Passyunk Plant is inadequate, inefficient, unsafe or unreasonable based on the events/conditions complained of by Employees is at issue. Also of significance throughout this proceeding is the admission by PGW that the Passyunk Plant is located in South Philadelphia.<sup>62</sup> LNG is an inodorous gas whose vapors are flammable and dangerous as well as “[d]ue to the critical and extremely safety sensitive nature of Plant operations, PGW operates its Plants 24-hours a day, 7 days per week. Additionally, it is imperative that LNG Plants are adequately staffed at all times. . . . It is necessary that at least the following personnel be scheduled **and present at all times**: one (1) Supervisor; one (1) Working Foreman; and one (1) Process Operator.”<sup>63</sup>

1. Manipulation of Temperature Indicator (TE1019)

Employees start with PGW’s last comments in this section first, i.e., no reporting of “anything unsafe” and there being no records of the same.<sup>64</sup> Documentary and testimonial evidence presented in this matter show a pattern and practice of violations of security and timekeeping policies raising safety and operations concerns at the Plant.<sup>65</sup> For instance, Complainant Goodwin stated he participated in an initial investigation “the incident with

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<sup>61</sup> Vertis Group v. Pa. PUC, 840 A.2d 390, 395 n.12 (Pa. Commw, 2003)(citing Elkin v. Bell Telephone Co., 491 Pa. 123, 129, 420 A.2d 371, 375 (1980))

<sup>62</sup> See n.50, *supra*.

<sup>63</sup> *Id.*

<sup>64</sup> PGW Main Br. at 19.

<sup>65</sup> EE St. No. 4-SUP, Ex. VI (proprietary version)

Tomczak.”<sup>66</sup> He also stated he was retaliated against for doing so. Did Plant management personnel self-report any of these incidents to the Safety Committee? Did Mr. Martinez or Mr. McGuire report the removal 2 of 3 essential personnel from the Plant for nearly an hour for personal use and not PGW business, or the clocking in of an essential worker by management more than 2 hours *before* he arrived? The answers to all of these questions are “No”. So, Mr. Snyder’s testimony that there were no reports of safety violations is a bit self-serving in light of the bad behavior and questionable qualifications of Plant management. Moreover, though Mr. Rauceo specifically acknowledges Mr. Snyder’s comment on his duty to report, he further states that the white “in” group prioritizing protecting themselves over “the safety of front line plant workers and the City of Philadelphia.”<sup>67</sup> Further, when Complainants did make reports of safety and operations concerns, they were and are met with what they have experienced in this proceeding, that is, belittling, besmirching, denial that the matters are safety and/or operations related and dismissal of their averments as “inconsequential and frivolous.”

Moving to the substance of the averments and responses, Employees state during past winter vaporization seasons, which happens between November through March, “plant personnel have manipulated that readings of a temperature indicator (TE1019) to reduce the frequency of alarms and avoid the labor of insuring that the vaporization operation is safe.”<sup>68</sup> They describe in detail the vaporization process of converting LNG, which enters the system at -260 °F and is vaporized at a temperature between 40 °F and 80 °F, into vapor natural gas (VNG), which after

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<sup>66</sup> EE St. No. 2 at 3:6-10 (incident with Tomczak refers to the December 25, 2017 incident discussed in detail below).

<sup>67</sup> EE St. No. 4-SR at 2:12-19.

<sup>68</sup> Formal Complaint, ¶ 7.

reducing pressure that gas is sent to the end user, i.e., the consumer.<sup>69</sup> TE1019 is located “downstream” from the VNG common header to “insure . . . the line is free of unwanted elements.”<sup>70</sup> Further, during winter operations TE1019 “may give a low temperature alarm due to external coldness.” Plant personnel are required to check the area where the TE1019 is to insure “the alert is due to external temperatures and not the presence of volatile LNG.”<sup>71</sup>

Messrs. Chavarria and Rauceo give extensive testimony on how Passyunk plant practices include wrapping or “jerry-rigging” a steam lance around TE1019, since 2000 and continuing to this day and are unsafe.<sup>72</sup> Specifically, they each refute Mr. Snyder’s testimony, the latter of which focuses more on Mr. Rauceo’s statements and not Mr. Chavarria’s. For his part, Mr. Chavarria testified the current practice of jerry rigging a steam lance/hose around the LNG vaporizer piping masks the “line temperature . . . to be the same as the steam hoses’ temperature.” This in turn disables the “low temperature safety shutdowns for the vaporization system. By doing so, in 2000, this allowed LNG to get into the VNG piping, “which is not engineered to handle LNG’s cryogenic temperatures, setting off an explosion. The same operations condition is still being used today at PGY Passyunk Plant.”<sup>73</sup> Mr. Chavarria as a Working Foreman operates the “vaporizers and auxiliary equipment associated with the LNG vaporization at Passyunk Plant” and as such has firsthand knowledge of the “design of Passyunk Plant’s Vaporization System,” which he describes as “dangerous and critically flawed and should

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> EE St. No. 3 at 3:9-20 and EE St. No. 3-SR at 1:10-2:2. *See also* EE St. No. 4 at 10:1-12:13 and EE St. No. 4-SR at 1:9-2:9.

<sup>73</sup> EE St. No. 3 at 3:12-20.

be decommissioned and replaced with a modern direct fire or [propylene] glycol system that can operate as engineered safely and efficiently.”<sup>74</sup> Mr. Rauceo’s testimony supports and affirms that of Mr. Chavarria’s.

Mr. McGuire states PGW redesigned the vaporization process control system and safety shutdowns in 2000-2001 without providing any corroborative evidence including testimony of what the systems and shutdowns were and how they were redesigned.<sup>75</sup> He further states PGW “updated its procedures in October 2017 and June 2019 to improve process reliability,” but once again provides no documentary evidence of the alleged updates and says nothing regarding the actual equipment that is at issue.<sup>76</sup> He doesn’t state what the processes were before these time periods, and what they are now or how they are improved.

Mr. Snyder testified that “[a]pplication of heat to external instruments in cold ambient temperatures is a common practice in process plants.”<sup>77</sup> However, PGW does not identify or qualify Mr. Snyder as an expert witness with regards to vaporization process in general and TE1019 temperature indicator, in particular. He makes these statements without qualifying or quantifying them. Neither he nor PGW provides any studies or trade data to support Mr. Snyder’s testimony. Thus, any weight given to his testimony should be considered as lay opinion. PGW failed to provide any educational background for Mr. Snyder or Mr. Cassidy, for that matter. And failed to provide instances where Mr. Snyder gave testimony or published any works related to the LNG vaporization process.

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<sup>74</sup> EE St. No. at 3-SR at 1:10-18.

<sup>75</sup> PGW St. No. 3-SR at 4:4-7.

<sup>76</sup> PGW St. No. 3-SR at 4:7-9.

<sup>77</sup> PGW St. No. 1 at 5:11-12.

Based on the above, Complainants have met their burdens of proof and persuasion to support a finding of section 1501 violations related to the TE1019 indicator.

2. Structural Cracks in LNG Tanks

As stated in their main brief, Complainants withdraw this complaint.<sup>78</sup>

3. Operations Supervisor Ryan O'Donnell Leaving Plant Unsupervised and Without Telling Other Essential Operations Personnel

Employees aver two incidents where Operations Supervisor Ryan O'Donnell ("O'Donnell") left the Plant without notifying any of the other essential workers of his absence.<sup>79</sup>

What is interesting about most of PGW's responses in this proceeding is that the very people who are being accused of the safety and operations violations, *inter alia*, are also the persons making the statements, often covering up for each other.

On September 11, 2018, Complainant Ackie was the senior process operator on the middle shift (2:00 p.m. to 10:00 p.m.) with O'Donnell.<sup>80</sup> O'Donnell's shift that day was 6:00 a.m. to 6:00 p.m.<sup>81</sup> Mr. Ackie states he last saw O'Donnell at 2:15 p.m. in the Central Control Room, and did not see him again the remainder of his shift, which would have been 6:00 p.m.<sup>82</sup> While making his roving rounds at 4:00 p.m., Mr. Ackie noticed the supervisor pick-up truck, a Chevy Colorado, was nowhere on the plant facility. Once he returned to Central Control after 5:00 p.m., Mr. Ackie noticed O'Donnell had not taken any DETEX readings, so he took the 5:00

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<sup>78</sup> EEs' Main Br. at 9, n.31.

<sup>79</sup> Formal Complaint, ¶¶ 9, 10.

<sup>80</sup> EE St. No. 1 at 2:18, 17:20-21.

<sup>81</sup> *Id.* at 18.

<sup>82</sup> *Id.*

p.m. reading.<sup>83</sup>

At 5:50 p.m., John Walker, Operations Supervisor relieving O'Donnell from his shift, contacted Ackie on his cellphone to determine the location of the plant vehicle. Walker worked B shift, 6:00 p.m. to 6:00 a.m.<sup>84</sup> When Walker arrived in the Central Control, he informed Ackie of O'Donnell's accident and asked Ackie when O'Donnell left the plant. Ackie did not know. Working Foreman Gary Nelson ("Nelson") also did not know when O'Donnell left the plant.

Although PGW denies O'Donnell left the plant "without proper notification to plant personnel," they provide no other information regarding this incident.<sup>85</sup> Mr. McGuire states "employees are permitted to leave the . . . 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, . . ." and further states the 7-Eleven is two blocks away from the plant.<sup>86</sup> Once again, PGW presents hypotheticals but no facts. Mr. McGuire was not present. Mr. O'Donnell provided no testimony. In fact, Mr. McGuire states O'Donnell told Working Foreman Nelson of his whereabouts.<sup>87</sup> However, PGW fails to provide testimony from Mr. Nelson or Mr. Walker concerning any of these events averred in this proceeding. Messrs. McGuire and Martinez do not work shifts. Their hours are generally 6:00 a.m. to 3:30 p.m., Mondays through Fridays.<sup>88</sup> And even if McGuire's testimony were relevant and truthful, the report Mr. Martinez is alleged to

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 18:25

<sup>85</sup> EE St. No. 1, Ex. VI-A & PGW St. No. 3 at 3:11-12.

<sup>86</sup> PGW St. No. 3 at 3:12-16.

<sup>87</sup> *Id.*

<sup>88</sup> Tr. at 25:24-26:2, 27:3-5.

have completed shows the date and time of the accident to be September 11, 2018 at 4:45 p.m.<sup>89</sup>

The ALJ can take judicial notice that September 11, 2018 was a Tuesday, which means Mr. Martinez was not at the Plant at 4:45 p.m., since his day ended at 3:30 p.m. So how did Martinez know O'Donnell was involved in an accident with the plant vehicle?

Mr. Ackie testified credibly that Martinez called Walker and informed Walker of O'Donnell's accident, and needed Walker to go to the accident site to pick up the plant vehicle.<sup>90</sup> How did Martinez know the accident occurred at 4:45 p.m.? Over an hour later, Walker informs Ackie of O'Donnell's accident, once Walker arrives at the Plant. Why weren't Nelson and Ackie informed by Martinez that no Operations Supervisor was at the Plant? Mr. Ackie further credibly testified Martinez came back to the Plant after and came back to the Plant after O'Donnell's accident. Moreover, he competently testified PGW policy concerning accidents in PGW vehicles forbids an employee from moving the vehicle. "Risk management sends someone to pick the vehicle up, and you have to take a drug test."<sup>91</sup> So, why did Martinez instruct Walker to go to the 7-Eleven and pick up the company vehicle? And all this while PGW constantly raises complaints of uncorroborated hearsay evidence should not be considered due to due process concerns. Complainants are the ones who are being detrimentally denied due process in these incidents where Mr. McGuire was not present and presents only hypothetical explanations as well as double hearsay statements, as he has no personal knowledge of the facts. There is no evidence of any hearsay exceptions that apply. What the competent evidence does support is a finding that Mr. McGuire consistently supports management personnel's failure to follow PGW

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<sup>89</sup> EE St. No. 1, Ex. I-B.

<sup>90</sup> EE St. No. 1 at 18:15-19.

<sup>91</sup> *Id.* at 19:1-3.

corporate policies, protocols and procedures.<sup>92</sup>

The most important fact of all, however, is the fact that the Plant remained unsupervised without notification of the other essential plant personnel.<sup>93</sup> Neither the Working Foreman nor Senior Process Operator have the ability to make management decisions, since as Mr. McGuire states the “Operation Supervisor is the acting boss out of hours of plant operations and safety”.<sup>94</sup> Mr. Snyder also testified “[i]t is the Operations Supervisor’s responsibility to ensure that the operators remain in their area or at the Plant.”<sup>95</sup> Similar to the discussions later in this Brief, the proven exposure to harm exists when even 1 of the 3 essential personnel is not at the Plant, and even more so in this matter since O’Donnell is the Operations Supervisor tasked with managing operations and had been gone from the plant leaving it unsupervised for at least 2 hours until Walker arrived.

A similar situation exists again, when O’Donnell left the Plant on September 11, 2019. Once again, O’Donnell was the Operations Supervisor on shift. From prior credible testimony, Messrs. McGuire and Martinez do not work shifts. For judicial notice sake, September 11, 2019 was a Wednesday. He left the Plant without notifying the Working Foreman, Complainant Chavarria and the senior process operator Kyre Chapman.<sup>96</sup> Mr. Chavarria testified without plant management supervision, there are certain emergency procedures that cannot be implemented including, but not limited to, safety systems, first

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<sup>92</sup> See EE St. No. 4-SUP, Ex. VI (proprietary version)

<sup>93</sup> *Id.* at 19:22-25.

<sup>94</sup> Tr. at 146:17-20.

<sup>95</sup> PGW St. No. 1 at 4:7-8. Which begs the question, whose responsibility is it to ensure the Operations Supervisor, in this case, Mr. O’Donnell remains in his area and at the Plant out of hours?

<sup>96</sup> EE St. No. 3 at 5:20 – 6:22

responders, turning on safety equipment, presence and directions, i.e., management of the emergency.

Mr. McGuire's testimony in this matter is becoming all too familiar. He provides double hearsay testimony without alleging any firsthand knowledge and provides "facts" not in evidence, which deprive Complainants of due process cross examination of the declarant.<sup>97</sup> There is not credible testimony that O'Donnell retrieved the radio within 10 minutes of leaving it. There is no competent evidence how long O'Donnell was gone from the plant before Mr. Chavarria learned the radio was left at Rite Aid. Further, this time, McGuire does not and cannot aver O'Donnell notified the working foreman of his absence, so there is no competent evidence O'Donnell was gone for a brief period of time.

Once again, PGW through its Passyunk Plant management leaves a LNG storage plant unsupervised when its Director, Gas Processing states the Plant must have at least the essential 3 personnel present at all time due in large part to the very flammable and danger nature of LNG. Complainants maintain they have presented ample evidence of 1501 violations occurred in this matter.

4. February 23, 2018 After Hours, Unannounced Return of Plant Manager Brian McGuire

PGW states it "demonstrated" Mr. McGuire as plant manager is "permitted to enter the Plant at any time, and he has all the credentials to do so."<sup>98</sup> PGW then supports its bald assertion with equally uncorroborated testimony of Mr. Cassidy, which includes "Mr. McGuire is known by everyone working at the Plant, including the security guards, and there is no one who

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<sup>97</sup> PGW St. No. 3-SR at 7:1-6

<sup>98</sup> PGW Main Br. at 30.

works at the Plant from whom he would need to obtain permission before entering the Plant.”<sup>99</sup> PGW presents Mr. Cassidy’s “opinion” as to whether McGuire’s entry onto the Plant with or without his PGW ID badge is a safety or security risk.<sup>100</sup> As shown in the Povacz case, “risks” are not at issue in a section 1501 matter. The issue is caused or will cause harm, or as PGW likes to state presents a “proven exposure to harm.”

Mr. Cassidy’s assessments via his pre-served testimony and cross examination testimony at the October 21, 2020 hearing typically run afoul of PGW standards articulated by Director, Gas Processing Malkemes as presented in this proceeding. This time is no exception. Complainants have competently testified and provided contemporaneous documentary evidence of the events of February 23, 2018.<sup>101</sup> Mr. McGuire appeared afterhours at the Plant at approximately 11:35 p.m.; he did not have his PGW ID badge; the security guard did not know who McGuire was; he did not want to be announced to the shift Operations Supervisor as is required for “out of hours” or after hours entry into the plant; the announcement policy applies to everyone seeking to enter the plant after hours; McGuire drove a company vehicle in the Plant without highlights; Ackie was startled by McGuire’s presence; McGuire smelled of alcohol and cursed at Ackie; LNG truck unloading was taking place at the time McGuire appeared at the plant in street clothes and without Fire Retardant (FR) clothing; and Sovereign Security does not have any documents, electronically store information, etc. regarding the February 23, 2018 incident but states PGW retained all information.<sup>102</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 31

<sup>101</sup> EE St. No. 1 at 10:20-17:11 & Exhibits II, IV, IV-A, IV-B and V; EE St. No. 1-SR at 4:3 – 20 (“Plant policy . . .”); EE St. No. 4 at 6:24-9:21 & Exhibit II; and EE St. No. 4-SR at 3:22-4:16

<sup>102</sup> *See* n.55, *supra*

The exposure to harm in driving a motor vehicle without headlights at night is a danger with or without LNG truck unloading simultaneously occurring. To be intoxicated or have alcohol on the breath just adds more exposure to harm. Then to request that your presence at the Plant not be announced to the shift Operations Supervisor is just another safety and security violation for the same reasons as stated herein. Fire retardant attire is required especially in that portion of the Plant where LNG truck unloading occurs for obvious reasons. Complainants maintain they have presented ample evidence of 1501 violations occurred in this matter.

5. Plant General Supervisor David Martinez Removal of Two of Three Essential Workers from Plant to Accommodate his Vacation Travels (August 2017)

On or about August 28 and 29, 2017, Passyunk Plant General Supervisor Martinez demanded essential plant employees Operation Supervisor Mr. Walker and Complainant Ackie, who was the Senior Process Operator to follow him to Philadelphia International Airport (PHL) and return his empty personal vehicle to PGW employee lot at Passyunk Plant.<sup>103</sup> They were gone from the Plant for about 40 – 45 minutes.<sup>104</sup> Also working at that time was Jose Ortiz (“Ortiz”), the Working Foreman. Mr. Ackie provides Mr. Martinez’s absences detail for 2017<sup>105</sup> as well as Passyunk Plant Schedule for August 19, 2017 through September 15, 2017 in support of his testimony.<sup>106</sup> Mr. Ackie testified he and Mr. Walker are “essential” because they make certain gas feed to City of Philadelphia residents are uninterrupted and safe, and the gas process

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<sup>103</sup> Formal Complaint, ¶ 12. *See also* EE St. No. 1 at 3:7-5:12 & Ex. I-A, I-B. Tr. at 136:23 – 137:5 (personal use of PGW employees during business hours is “frowned up”)

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* Ex. I-A, I-B

and storage have no problems.<sup>107</sup> If there are problems, they are able to rectify them immediately without “catastrophic incident.”<sup>108</sup> Mr. Ackie further testified by removing he and Mr. Walker, Martinez “jeopardize[d] the safety of the plant” which he contends was understaffed for that period of time. As such, the City was in “great danger” of an incident that could be “prevented or control[led] if workers were on site.”<sup>109</sup>

In addition to PGW’s standard response, i.e., “the incident did not create a safety violation,” Mr. McGuire affirmed the practice of employees leaving their personal vehicles parked at Passyunk’s parking lot when traveling to the airport.<sup>110</sup> He then tried to justify Martinez’s action of using Operations Supervisor Walker by noting the job duty of download data from a DETEX unit from “the Penrose M&R Station,” asserting such action on the part of the Operations Supervisor was “common workplace practice.”<sup>111</sup> McGuire went further to state August is during non-vaporization season, and the Working Foreman along with remote monitoring by the City’s Gas Control Department (Gas Control”) at 9<sup>th</sup> and Montgomery Streets was sufficient to for monitoring City gas-pressure, since Passyunk plant personnel are “backup” to Gas Control.<sup>112</sup>

Mr. Malkemes’ verified statement does not support McGuire’s testimony in this proceeding. Specifically, PGW Director, Gas Processing stated “at least” one Operations Supervisor, one Working Foreman and one Senior Process Operator be scheduled and “*present*

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<sup>107</sup> *Id.* at 4:7-9

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 5:4-7

<sup>110</sup> PGW St. No. 3 at 4:16-18

<sup>111</sup> *Id.* at 4:19-22

<sup>112</sup> *Id.* at 4:22 – 5:7.

*at all times.*” Importantly, Mr. Malkemes made no distinction between “non-vaporization” and “vaporization” seasons,<sup>113</sup> unlike PGW witness Mr. Cassidy attempted to do in his cross examination testimony on October 21, 2020 distinguishing times when one qualified staff present at the Plant is sufficient.<sup>114</sup> Further, Mr. Ackie testified the run to DETEX unit by the Operations Supervisor occurs once a week and only if there is another Operations Supervisor or above management personnel present.<sup>115</sup> He gave an example in August 2020 where an Operations Supervisor would not leave to get the DETEX unit data because there was no other Operations Supervisor or higher present at the plant.<sup>116</sup> Mr. Ackie acknowledged Martinez’s valet request occurred during non-vaporization season but states it was “peak season when high pressure boilers were on and left unattended.”<sup>117</sup> Finally, Mr. Ackie testified McGuire’s testimony failed to include that fact that “when Gas Control loses remote connection to the monitors and regulators, Passyunk workers are needed immediately to manually control the flow of gas safely going to the City. Hence, the need for quick and sufficient coverage at the plant at all times.”<sup>118</sup>

Perhaps the clearest picture of why this practice, which is now alleged to no longer occur, will cause harm comes from the testimony of Complainant Goodwin. His testimony provides insight to the individualized job duties of each essential personnel that make all three necessary. The Working Foreman “has control over the valves . . . remotely from a computer.”<sup>119</sup>

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<sup>113</sup> See n.50, *supra*.

<sup>114</sup> Tr. at 118:13-121:8

<sup>115</sup> EE St. No. 3-SR at 2:10-22

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (including harm to Working Foreman left alone at Plant)

<sup>118</sup> *Id.* at 3:3-7.

<sup>119</sup> Tr. at 71:8-73:13. See also EE St. No. 3 at 1:22-2:3 (describing job duties as a Working Foreman); EE St. No. 1 at 2:3-7 and EE St. No. 2 at 2:3-5 (describing job duties as Senior Process Operators; and EE St.

Without the Working Foreman being present, a Senior Process Operator is not permitted to “touch the computer” in case of boil off building, *inter alia*.<sup>120</sup> Further, the October 15-16, 2020 incident dramatizes the need for all essential personnel to be *present at all times*.

In that situation, which PGW minimizes as “a negligible and harmless amount of gas emitted to the open, outdoor area,”<sup>121</sup> the competent testimony shows that it was indeed an emergency involving more than a negligible, harmless amount of LNG escaping in the atmosphere.<sup>122</sup> This argument is developed more fully below. For the purposes of this section only, each essential position was required for that emergency. Specifically, the Operations Supervisor managed the incident and contacted Martinez,<sup>123</sup> the Senior Process Operator responded to the instructions from the Operations Supervisor regarding the valve(s) and the Working Foreman had the responsibility to call matrix personnel for emergency, unscheduled releases during non-sensitive plant operations, *inter alia*.<sup>124</sup>

Thus, the competent testimony in this incident shows there is proven evidence of harm exists when two essential personnel are removed at the same time from the Plant, whether

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No. 4 at 2:3-8 (describing job duties as an Operations Supervisor).

<sup>120</sup> Tr. at 71:25 – 72:19 (situation can result in the release of “odorless gas into the atmosphere”). Though Mr. Goodwin testified he only knew of that incident when the Working Foreman was not present, there are other incidences as testified to in this proceeding when other essential personnel were not present.

<sup>121</sup> PGW St. No. 3-SUR at 3:6-7. Mr. McGuire was not present at the time October 15, 2020 incident occurred. The incident was discovered at approximately 7:20 p.m., and McGuire works 6:00 a.m. to 3:30 p.m. See Tr. at 21:15-18, 27:3-5.

<sup>122</sup> Inodoruous LNG blowing hard into the atmosphere for nearly 4 hours (from at least 7:20 p.m. to 11:30 p.m.). Tr. at 21:15-19; 89:16-20

<sup>123</sup> Tr. at 146:17-20 (McGuire noting Operations Supervisor is the “acting boss out of hours – of plant operations and safety.”)

<sup>124</sup> Tr. at 21:12-25:18, 26:20-24. See also Tr. at 88:23-89:4, 90:4-93:7 (working foreman responsible for initiating matrix notification system; Operations Supervisor and Senior Process Operator opened the valve)

used as valets or otherwise. Complainants maintain they have presented ample evidence of 1501 violations occurred in this matter.

6. Absence of Working Foreman at Plant for Over Two Hours on Christmas Day 2017

Continuing with Mr. Goodwin's specific testimony, even one essential personnel absent for 2 to 2 ½ hours is a safety and operations violation at Passyunk Plant as averred occurred on December 25, 2017.<sup>125</sup> Mr. Goodwin worked on December 25, 2017 beginning at 6:00 p.m.<sup>126</sup> When he was clocked in, Working Foreman Michael Tomczak ("Tomczak") was not present, yet he later learned in February 2018, timekeeping records showed Tomczak as being clocked in a minute after Goodwin on the same time clock. Since his desk is across from the time clock, Goodwin testified he did not see Tomczak until 8:30 p.m. Jose Ortiz ("Ortiz") was the Working Foreman immediately before Tomczak's start time. Instead of waiting until Tomczak arrived, Ortiz left, leaving the Plant without a working foreman on Christmas Day 2017 for more than 2 hours. To Mr. Goodwin's knowledge no disciplinary actions were taken against Tomczak, Ortiz or O'Donnell, who clocked Tomczak in.

For the first time, Mr. McGuire selectively admits he was not present at the Plant and "no personal knowledge of whether a Working Foreman was there during the time in question."<sup>127</sup> However, the veracity of that testimony is contradicted by other documentary and testimonial evidence. How is it the Plant Manager does not know what happened with regards to averments of theft of company time and/or timekeeping violations by O'Donnell and the Working Foreman? But once again, McGuire offers vague, meaningless hypotheticals that do

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<sup>125</sup> Formal Complaint ¶ 13

<sup>126</sup> EE St. No. 2 at 3:12 – 5:24.

<sup>127</sup> PGW St. No. 3 at 5:16-17. *But see* EE St. No. 4-SUP, Ex. VI (proprietary version)

not relate to the relevant facts and fails to address the safety and operations violations at issue.<sup>128</sup>

None of the other PGW witnesses in this proceeding even address the matter at all.

At the October 21, 2020 evidentiary hearing, Mr. Goodwin competently and credibly testified of the inherent dangers of leaving the Plant for more than 2 hours without a Working Foreman.<sup>129</sup> Chief amongst them is the segregation of job duties amongst the Operations Supervisor, Working Foreman and Senior Process Operator. Specifically, the process operator is not trained to perform the functions of a working foreman, that latter of whom is responsible for remote computer control of valves at the Plant. Situations including, but not limited to, boil offs building in the pumps that may require to be reset on the computer if not set on automatic, *inter alia*. If not properly addressed, pressure in the pipe could result in broken pipes or release of inodorous gas into the atmosphere.

Somehow, with this testimony at the hearing and with its witnesses and counsel in attendance, PGW states Messrs. Ackie and Goodwin “made no reference to this allegation as constituting a safety violation; describe no harm that resulted from this alleged incident; offered no explanation for how this allegation created a proven exposure to harm.”<sup>130</sup> Instead they blindly fall back on the vague and hypothetical rants of Plant Manager McGuire and their VP Technical Operations Cassidy, who wasn’t employed by PGW at that time. It is beyond incredulity for PGW to proceed with these arguments when the very nature of its business is natural gas and the flammable, dangerous LNG at the Plant in particular. Job titles do not make for competent, credible testimony. So what incentive does this behavior give to Complainants or

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<sup>128</sup> *Id.* See also EE St. No. 1, Exhibit II-A.

<sup>129</sup> Tr. at 70:13 – 73:6

<sup>130</sup> PGW Main Br. at 39

any other employee at PGW Gas Processing plants to report any safety and/or operations violations and/or concerns if management blindly and without one iota of credibility maintain thin logic to justify its actions?

Complainants maintain they have presented ample evidence of 1501 violations occurred in this matter.

#### 7. Promotion and Protection of Unqualified Management Personnel

The majority of the safety and operations violations complained of by Employees center around with 3 management personnel: Plant Manager McGuire, General Supervisor Martinez and Operations Supervisor Ryan O'Donnell as more fully discussed in this proceeding. In its main brief, PGW points out "the Commission does not have jurisdiction to decide matters regarding a utility's promotions."<sup>131</sup> Employees maintain that PGW's promotion and protection of unqualified management personnel continues to expose themselves and the public to harm.<sup>132</sup>

With respect to Martinez and O'Donnell, Complainants provided documentary and testamentary evidence that both did not meet the educational and work experience minimum qualifications of the positions they currently occupy.<sup>133</sup> Not having the required minimum work experience and educational background as General Supervisor and Operations Supervisor creates an environment at Passyunk Plant where others have to cover, fill-in and compensate for their ineptness. For example, one of the times when O'Donnell left the Plant unsupervised and without the knowledge of the 2 other essential workers, Mr. Ackie had to take O'Donnell's 5:00

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<sup>131</sup> *Id.* at 41

<sup>132</sup> Formal Complaint ¶¶ 15, 17

<sup>133</sup> EE St. No. 4 at 4:8-6:23 & Exhibit I;

p.m. DETEX unit reading.<sup>134</sup> As more fully discussed above, Mr. Martinez’s removal of 2 of 3 essential workers for personal use created an exposure to harm for the Plant, the City and the Working Foreman left alone.<sup>135</sup> Further, as more fully developed below, Mr. Martinez continues to show as recently as late 2020 instances where his lack of work experience with plant equipment and reporting of incidents poses present exposure to harm for Complainants, the City and fellow plant employees.

Specifically, Mr. Ackie testified “McGuire continues to downplay safety problems and incidents at Passyunk plant and to hid Dave’s incompetency as General Supervisor, this is a pattern. Dave not only supervised the October 15<sup>th</sup> procedure but supervised two other procedures within a week were he was negligent.”<sup>136</sup> Ackie then describes two other incidents on October 5, 2020 and October 14, 2020 where Martinez left the plant’s fire system offline and left for the day without putting it back online, which left the plant vulnerable, and when he forgot to open HCV110 valve needed to introduce LNG to the header.<sup>137</sup> In the first instance, Complainant Rauceo found the error, contacted Martinez who had to contact Plant protection to return to the plant and put the fire system back online.<sup>138</sup> The second incident McGuire intervened, called Martinez on the radio regarding the HCV110 valve not being open.<sup>139</sup> McGuire later contacted the Working Foreman Steve Edwards, reprimanding him for not having

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<sup>134</sup> See Argument at B(3) & n.81, *supra*

<sup>135</sup> See Argument at B(5) *supra*

<sup>136</sup> EE St. No. 1-REPLY at 3:19-4:9

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

“Dave’s back.”<sup>140</sup>

PGW states ALJ Heep’s preliminary objections order dismisses employment issues. However, a thorough reading the order makes it clear that “race, color, national origin employment discrimination claims” are beyond the Commissions’ jurisdiction.<sup>141</sup> Judge Heep specifically relied on the case of N.A.A.C.P. v. P.U.C., which was a rate case in which the complainants/petitioners specifically requested, *inter alia*, the Commission to conduct an investigation and hearing in to the employment practices of a public utility while withholding the requested rate increase and profits.<sup>142</sup> That case specifically and succinctly stated the powers of the Commission to be limited to “see that in the matter of rates, service and facilities the treatment of the public by the public utility companies is fair.”<sup>143</sup> With regards to section 1501, public include “patrons, employees and the public”.

The definition of “service” found in 66 Pa.C.S. § 102 states:

Used in its broadest and most inclusive sense, includes any and all acts done, rendered or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities, or contract carriers by motor vehicle, in the performance of their duties under this part to their patrons, employees, other public utilities, and the public . . .

Section 1501 guarantees that “[e]very public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alternations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its

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<sup>140</sup> *Id.*

<sup>141</sup> Prelim. Obj. Order at 4-5.

<sup>142</sup> 5 Pa. Commw. 312, 290 A.2d 704, 706-708 (1972)(denying complaint due to PHRC original, sole jurisdiction).

<sup>143</sup> *Id.* at 708 (citation omitted)

patrons, employees, and the public.”<sup>144</sup> The instant matter is distinguishable. Based on these powers and provisions afforded the Commission, Employees maintain in this proceeding PGW is violating section 1501 because of its promotions of unqualified Passyunk Plant Operations management personnel Martinez and O’Donnell, safety and operations at the plant violate the Code. In fact, Mr. Rauceo stated “Now, because of dangerous practices and unqualified personnel in supervisory positions at PGW Passyunk LNG Facility, I have decided to file a formal complaint to resolve these problems before another disaster occurs.”<sup>145</sup>

PGW once again by Mr. McGuire justifies its promotion of Martinez and O’Donnell simply stating that guidelines are irrelevant and instead one’s subjective determination of who is qualified dominates.<sup>146</sup> For the second time in this Reply, Employees state, “What?”<sup>147</sup> Mr. McGuire’s responses sounds a lot like rules apply to everyone but him and who he deems they don’t apply to. Doesn’t the Commission set forth guidelines and rules for public utilities, *inter alia*? Putting aside lack of logic in that response, McGuire is used to state this on behalf of PGW “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.’”<sup>148</sup>

Mr. McGuire testified at the October 21, 2020 hearing “a shift supervisor is a training position to become an operation supervisor.”<sup>149</sup> The job description for a General

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<sup>144</sup> 66 Pa.C.S. § 1501

<sup>145</sup> EE St. No. 4 at 4:3-7.

<sup>146</sup> PGW Main Br. at 42-43. By way of further response, the job description states “education & experience qualifications”. And further it says “Must have. . . .” and not “If you feel like considering it..”

<sup>147</sup> See n.1, *supra*

<sup>148</sup> PGW Main Br. at 43.

<sup>149</sup> Tr. at 146:23-24.

Supervisor, Gas Processing Operations, education and experience qualifications requires “associates degree in relevant field of study or 3 to 5 years relevant experience working as a Supervisor of Gas Processing, Operations” and “Must have 5-7 years relevant experience working in instrumentation, operations management, gas control or other relevant craft.”<sup>150</sup> Similarly for the position of Supervisor, Gas Processing Operations, the education and experience qualifications require “associates degree in a relevant field of study or 3-5 years experience working as a Shift Supervisor, Gas Processing Operations in PGW Gas Processing Department”<sup>151</sup> Neither Mr. Martinez nor Mr. O’Donnell met the minimum requirement for the position of Operation Supervisor as their resumes showed at the time they were promoted to General Supervisor and Operation Supervisor, respectively.<sup>152</sup>

Complainants provide documentary and testimonial evidence of the behaviors of Messrs. Martinez and O’Donnell that have exposed Complainants, the City and the public to harm, and reasonably believe they have meant their burden in this matter.

#### 8. Pattern and Practice of Uncontrolled Release of LNG

With the entire staff at Passyunk Plant who were present on October 15, 2020 and October 16, 2020 and with its engineer witnesses at its disposal, PGW chooses to use Mr. McGuire, who was not present during the incident, as a witness on this issue. Through judicial notice, October 15 and 16, 2020 were Thursday and Friday. Complainant Ackie learned of LNG releasing from a hose at or about 7:20 p.m. on October 15, when he received a call from

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<sup>150</sup> EE St. No. 4, Exhibit I.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

Operations Supervisor Walker to “secure an outlet valve 1027” and other instructions.<sup>153</sup> At 7:20 p.m., Messrs. McGuire and Martinez have finished their work day, which ends at 3:30 p.m. At that point, Ackie noticed “the truck unloading hose was covered in frost, meaning that LNG had reached all the way from the tank to the – the hose. The hose had a cap on it, but the cap didn’t secure the release of inodorous gas. It kept feeding off into the atmosphere.”<sup>154</sup> Mr. Ackie went on to describe the remainder of events that included Mr. Walker’s “panicking” utterance due to the contemporaneously occurring events “I can’t believe that this 1027 valve that has been giving problems for years has not been replaced. This is ridiculous. That’s why we have [ ] problems here.”<sup>155</sup> Mr. Chavarria also affirms the problems with PCV-1027, i.e., its “broken ground safety feature.”<sup>156</sup> Both Messrs. Ackie and Chavarria go into great detail explaining the actual events of October 15 and 16, 2020 in their October 21, 2020 direct and cross examination testimony as well as their written replies to Mr. McGuire’s surrebuttal testimony.<sup>157</sup> Both Employees cite Mr. McGuire’s pattern and practice of covering and protecting Mr. Martinez’s ineptitude.

Complainants also aver the actions of October 15 and 16, 2020 are consistent with a pattern and practice of gas releases at Passyunk Plant under Mr. McGuire. Specifically, they cite the incident that occurred in March 2016.<sup>158</sup> Mr. Chavarria, who has been an employee of PGW for nearly 30 year entirely in its Gas Processing Department with the majority of that time at Passyunk Plant, testified Plant management lied to the “public, news media and others regarding

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<sup>153</sup> Tr. at 21:15-18.

<sup>154</sup> *Id.* at 21:22-22:7

<sup>155</sup> *Id.* at 22:17-22

<sup>156</sup> EE St. No. 3-REPLY at 4:4-17.

<sup>157</sup> *Id.* at 1:10-5:3; EE St. No. 1-REPLY at 1:7-3:22 and Tr. at 20-68, 81-108.

<sup>158</sup> Mr. McGuire became Plant Manager in May 2015, while Mr. Martinez became General Supervisor as

the conditions at Passyunk Plant, and this continues today.”<sup>159</sup>

Mr. McGuire for his part remains true to form, this time blaming Complainant Ackie, the lowest ranking employee in all of the actions in this event and not Martinez, who is the Plant General Supervisor or the Operations Supervisor Walker who are responsible for “plant operations and safety.”<sup>160</sup> McGuire gives hearsay evidence that have no exceptions, since he wasn’t present and does not provide the source of his alleged “facts.” He makes bald statements and does not provide an incident report that gives any type of written narrative, or acknowledges there is an incident report in this matter.

#### 9. Re-pressurization and New Plant Truck Rule

Complainants did mention these issues in their pre-served testimony. However, neither the repressurization nor the new plant truck rule were fully developed or pursued in this matter. If Complainants believe these matters are something they need to pursue in the future, they reserve the rights to do so.

### **V. CONCLUSION**

Based on the credible and competent documentary and testimonial evidence presented in this proceeding, Complainants have met their burdens of proof and persuasion, and PGW provides no evidence of equal value to refute Complainants. Messrs. Ackie, Chavarria, Goodwin and Rauceo respectfully request this Honorable ALJ to find in their favor and enter any and all relief she finds necessary and proper to make PGW’s Passyunk Gas Processing Plant adequate, efficient, safe and reasonable for the safety of employees, patrons and the public.

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a result of a June 2015 job posting. PGW St. No. 3 at 1:7; EE St. No. 4 at 2:13-19.

<sup>159</sup> EE St. No. 3 at 3:21-5:10.

<sup>160</sup> Tr. at 146:17-20 (McGuire describing role of operations supervisor after hours)

**Respectfully submitted,**

*/s/ Karin M. Gunter* \_\_\_\_\_

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