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March 5, 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' Reply 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 Reply 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: March 5, 2021

*/s/ Karen O. Moury*  
Karen O. Moury, Esq.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**REPLY BRIEF OF PHILADELPHIA GAS WORKS**

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Date: March 5, 2021

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

In their Main Brief (“MB”), Complainants make unsubstantiated and sweeping claims about alleged unsafe practices of Philadelphia Gas Works (“PGW” or “Company”) at the liquefied natural gas (“LNG”) Passyunk Plant (“Passyunk Plant” or “Plant”). Throughout this proceeding, Complainants have failed to identify any harm resulting from the incidents alleged in the Complaint. Indeed, Complainants have not identified any consequences at all as a result of these allegations. The reason for that is simple: nothing happened arising from any of Complainants’ claims. Further, they have failed to point to any safety standard in the Public Utility Code or state and federal gas safety regulations that PGW allegedly violated.

Complainants acknowledge in their Main Brief that in order to prevail, they have the burden of proving by a preponderance of substantial evidence that PGW is not maintaining safe operations at the Passyunk Plant. They also concede that to establish a safety violation under Section 1501 of the Public Utility Code, it is necessary for them to demonstrate that PGW’s facility or service caused or will cause harm. Yet, they did not refer to evidence in the record – of which there was none – that any PGW practices have caused harm, will cause harm or have created a proven exposure to harm. Instead, Complainants seek to rely merely on the personal “opinions” of four disgruntled employees who filed the Complaint, along with several uncorroborated hearsay statements that are nothing more than rumors. Simply, Complainants have not established a conclusive causal connection between PGW’s conduct and exposing its customers, employees or the public to harm.

Having collectively worked at PGW for nearly 60 years does not make Complainants’ witnesses experts on gas safety practices and protocols, especially since their positions have not included the development of safety procedures or overall responsibility for ensuring the safe operation of the Plant. Given Complainants’ lack of the requisite qualifications to make such

determinations, their speculation about harm that could possibly result from the PGW practices alleged in the Complaint is not sufficient to demonstrate that PGW's facility will cause harm. It is noteworthy that despite their efforts to portray a careless approach to safety on the part of PGW management, Complainants were unable to produce a single shred of evidence showing that harmful consequences, or any consequences, have occurred at the LNG Plant. If Complainants were accurately depicting the Plant's operations, they would have been able to point to numerous instances where incidents actually happened, obviating the need to rely on their laundry list of petty claims.

Moreover, although Complainants' testimony did not even establish legal sufficiency of the claims, or a *prima facie* case, PGW's witnesses thoroughly refuted each of Complainants' averments of unsafe practices. These witnesses, with engineering backgrounds and lengthy PGW careers, are the ones who have been or currently are responsible for establishing the safety protocols and bear the ultimate responsibility for ensuring the safe operation of the Plant. Further, PGW presented evidence demonstrating that, at all times pertinent to this case, it followed its established safety protocols and used reasonable efforts and care to keep its employees, customers and the public safe. PGW's witnesses also presented numerous examples of safety devices and measures that the Company takes to both prevent and timely respond to human error and equipment malfunction. As a result, the Passyunk Plant operates safely at all times.

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. As confirmed by a review

of Complainants' Main Brief, the record is devoid of evidence to support a finding that PGW failed to comply with any established regulatory requirement.

As PGW anticipated most of Complainants' arguments in its Main Brief, this Reply Brief focuses on Complainants' flawed arguments and inaccurate portrayals of facts and the law. It also addresses contentions raised by Complainants' Main Brief that may not have been covered in PGW's Main Brief.

## **II. PROCEDURAL HISTORY**

PGW incorporates the Procedural History from its Main Brief in this Reply Brief.<sup>1</sup> Also, PGW notes its agreement with the statement in Complainants' Main Brief regarding the parties' stipulation as to the admission of testimony that was served after the evidentiary hearing, and Administrative Law Judge ("ALJ") Heep's plan to address this matter in the Initial Decision.<sup>2</sup>

Additionally, PGW corrects two statements made by Complainants. While these statements are not material to the adjudication of the allegations raised by Complainants, it is important for PGW to ensure that these items are accurately portrayed. Otherwise, it could appear to the Commission that PGW was being less than forthcoming in its discovery responses and was seeking approval for modifications to established deadlines, when neither was the case.

The references to "late-filed" discovery responses by PGW is not accurate.<sup>3</sup> Rather, PGW initially responded on April 9, 2020 to the discovery request in question, saying that it had no responsive documents within the scope of ALJ Heep's March 19, 2020 Order ruling on Complainants' Motion to Compel. When Complainants claimed at the hearing on October 21, 2020 that additional documents should have been provided, ALJ Heep gave PGW two weeks to

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<sup>1</sup> PGW MB at 2-6.

<sup>2</sup> Complainants' MB at 8.

<sup>3</sup> Complainants' MB at 7-8.

produce documents, if any, which are responsive to Complainants' discovery request.<sup>4</sup> On November 4, 2020, PGW indicated again that it did not have any responsive documents, but that in the spirit of cooperation, it was providing security logs covering the applicable timeframe.<sup>5</sup> They were not "late-filed" answers. Moreover, Complainants had a full opportunity pursuant to ALJ Heep's November 24, 2020 Interim Order to address these documents, and in fact, did so in the Supplemental Direct Testimony of Wayne Rauceo.<sup>6</sup>

Complainants also refer to ALJ Heep's November 30, 2020 Interim Order as responding to a PGW request for an extension of the deadline to address the new allegations raised at the hearing relating to a "valve incident" that occurred on October 15, 2020.<sup>7</sup> Again, that is not an accurate account. No deadline for PGW's responsive testimony had yet been established. To the contrary, ALJ Heep stated at the hearing that she would issue an order giving PGW at least two weeks after receipt of the transcript to serve testimony addressing the valve incident.<sup>8</sup> Following receipt of the transcript, by Interim Order dated November 30, 2020, ALJ Heep designated December 18, 2020 as the deadline. That is the same date established by the November 24, 2020 Interim Order for Complainants to address the security logs supplied as a supplemental discovery response on November 4, 2020. PGW did not request an extension and timely complied with that deadline.

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<sup>4</sup> Tr. 7-9. Complainants had not previously raised this argument or filed a motion under the Commission's discovery regulations. 52 Pa. Code §§ 5.342, 5.371.

<sup>5</sup> EE Statement No. 4-SUP (Supp. Direct), Exhibit V (non-proprietary version).

<sup>6</sup> EE Statement No. 4-SUP (Supp. Direct).

<sup>7</sup> Complainants' MB at 8.

<sup>8</sup> Tr. at 69.

### III. ARGUMENT

#### A. Applicable Legal Standards

PGW incorporates by reference in this Reply Brief its discussion of applicable legal standards in its Main Brief.<sup>9</sup> By way of summary, it is incumbent upon Complainants to prove that PGW violated the Public Utility Code, a Commission regulation or a Commission order. To carry that burden, Complainants were required to produce a preponderance of evidence in support of their factual averments. Further, the Commission’s adjudications must be supported by substantial evidence, which needs to be more than a suspicion or mere speculation and cannot rely on uncorroborated hearsay statements. In addition, in this proceeding where issues of safety are raised, it was necessary for Complainants to point to a specific industry standard established by either the statute or Commission regulations with which PGW failed to comply and to show that PGW’s practices caused harm, will cause harm or created a proven exposure to harm.

In their Main Brief, Complainants acknowledge their burden of proof in this proceeding and recognize that this means showing by a preponderance of substantial evidence that PGW’s Passyunk Plant is unsafe or otherwise in violation of the Commission’s regulations.<sup>10</sup> Citing *Maria Povacz v. PECO Energy Company*,<sup>11</sup> the same decision relied upon by PGW, Complainants refer to the Commission’s determination as to “the proper focus of any 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>12</sup>

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<sup>9</sup> PGW MB at 8-13.

<sup>10</sup> Complainants’ MB at 9-10.

<sup>11</sup> *Maria Povacz v. PECO Energy Company*, Docket No. C-2015-2475023 (Order entered March 28, 2019) (*Povacz*). Various parts of *Povacz* were affirmed, reversed, remanded or vacated by the Commonwealth Court in *Povacz et al. v. Pa. P.U.C.*, 2020 Pa. Commw. LEXIS 714, 241 A.3d 481 (2020). The standard for making a Section 1501 safety determination relied upon by the Commission in *Povacz* was affirmed by the Commonwealth Court.

<sup>12</sup> *Povacz* at 31 (emphasis added); Complainants’ MB at 11.

Since no actual harm from any PGW practice has been identified by Complainants, adjudication of the Complaint, which is focused on prevention of harm, turns on whether Complainants proved that a specific aspect of PGW’s service or facilities will cause harm.<sup>13</sup> As the Commission explained in *Povacz*, if a complainant only had to show that a utility’s facility has a “potential for harm” or is “capable of causing harm,” it would not matter how the utility designs, installs, operates, uses or maintains the facility.<sup>14</sup> The Commission further observed that this standard “would have dire consequences to the daily functioning and operation of public utilities and the provision of utility services within the Commonwealth.”<sup>15</sup> While Complainants rely on *Povacz*, they also suggest that it is distinguishable because LNG presents a different risk than exposure to radio frequency fields from smart meters. However, Complainants cite no authority for using a different standard to adjudicate a 1501 complaint. Nor do they articulate what standard should be used in its place. Notably, the Commission in *Povacz* relied on the same standard that it has for nearly three decades when it decided issues regarding the potential harm caused by transmission lines.<sup>16</sup> In the *Woodbourne-Heaton Order*, the Commission rejected scientific research and studies supporting the protestants’ claims of potential harm, due to the lack of a conclusive causal connection between the utility’s facility and a proven harm.<sup>17</sup>

Accordingly, in order for the Complaint to be sustained, Complainants 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 possibly

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<sup>13</sup> *Povacz* at 29.

<sup>14</sup> *Povacz* at 29.

<sup>15</sup> *Povacz* at 30-31.

<sup>16</sup> *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*, 1993 WL 855896 (Pa. P.U.C. 1993), Docket No. 110550F0055 (Final Order entered November 12, 1993) (“*Woodbourne-Heaton Order*”).

<sup>17</sup> *Woodbourne-Heaton Order* at 11.

causing harm, particularly since the mere operation of a public utility inherently has that potential.<sup>18</sup>

**B. Complainants Failed to Prove That Any PGW Incident or Practice Caused or Will Cause Harm to the Public**

1. Rather than pointing to evidence in the record to support their general allegations as to unsafe practices, Complainants rely on nothing other than the personal opinions of four employees who are unqualified to make determinations regarding safety

As they did in testimony, Complainants' Main Brief makes bald assertions that the alleged incidents or PGW practices they described constitute "safety violations." Despite acknowledging their burden of proof and the Section 1501 standard established by the Commission in *Povacz*, Complainants referred to no evidence demonstrating that any of the alleged incidents, even if true, created a proven exposure to harm. They also did not establish any conclusive causal connection between PGW's conduct and alleged harm. Moreover, they failed to point to any evidence that the conduct engaged in by PGW caused actual harm to its customers, employees or the public. Indeed, they identified no consequences resulting from any of their allegations.

In lieu of producing evidence establishing harm or a proven exposure to harm, Complainants seek to rely on the personal opinions of the four employees who filed the Complaint, and their speculation as to the possibility of harm stemming from PGW's safety practices. Noting that these employees have collectively worked for PGW for nearly 60 years and hold various positions in gas processing, Complainants imply that this experience somehow makes them capable of making determinations about proper safety protocols.<sup>19</sup> However,

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<sup>18</sup> See *Povacz* at 28 ("even a layperson knows that public utility operations are not, as a general matter, hazard-free"); 52 Pa. Code § 59.33(a).

<sup>19</sup> Complainants' MB at 11-12.

Complainants are responsible neither for establishing the safety policies and procedures for the Plant nor for ensuring its overall safe operations. While certainly each Complainant's job entails some element of assisting with the safe operation of the Plant, it is Mr. McGuire and his superiors within PGW management who have those ultimate responsibilities. Complainants' testimony is not entitled to any kind of "expert witness" treatment.<sup>20</sup> Indeed, in many instances, PGW's witnesses noted that Complainants' witnesses were opining about issues of which they know nothing and are beyond the scope of their job duties.<sup>21</sup> Through their testimony, Complainants did not even establish the legal sufficiency of their claims, or establish a *prima facie* case, let alone carry their burden of proof.

By contrast, despite the shortcomings of Complainants' efforts to meet their burden, PGW's Main Brief referred to evidence it presented to show that it has established policies and procedures that are designed to ensure the safe operation of the LNG Plant. As Plant Manager, Mr. McGuire is responsible for ensuring that the Plant operates in a safe and productive manner, which entails writing the protocols for doing so.<sup>22</sup> At all times, the Plant operates safely in accordance with those safety procedures and protocols.<sup>23</sup> Raymond Snyder, who is a Professional Engineer and was the Senior Vice-President of Gas Management before his

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<sup>20</sup> In *Povacz*, the Commission rejected complainants' claims even though they were supported by scientific studies and the expert opinion of a doctor regarding adverse health effects. *Povacz* at 74. The Commission noted that expert witnesses offer opinions based on "the scientific, technical, or other specialized knowledge." *Povacz* at 67. That kind of foundation was certainly not established by Complainants in this case.

<sup>21</sup> See, e.g., PGW Statement No. 3-SUR (Surrebuttal) at 3 (Mr. Ackie's testimony...is inaccurate and, at times, demonstrates a complete lack of knowledge regarding Plant operations); PGW Statement No. 3-SUR (Surrebuttal) at 4 (Mr. Ackie shut the wrong two valves, which was useless because they have "absolutely nothing to do with the issue of gas in the truck unloading hose); PGW Statement No. 3-SUR (Surrebuttal) at 5 ("Mr. Chavarria makes several inaccurate statements," confusing LNG and cold gas, and by blaming a valve that was irrelevant to the incident); PGW Statement No. 3-SUR (Surrebuttal) at 6 (Mr. Chavarria's claim omits material facts regarding the tool he was using); PGW Statement No. 3-SR (Supp. Rebuttal) at 5 (Mr. Chavarria's account of what he believes happened should be disregarded since his responsibilities do not place him in a position of knowing what happened).

<sup>22</sup> PGW Statement No. 3 (Rebuttal) at 1.

<sup>23</sup> PGW Statement No. 3-SR (Supp. Rebuttal) at 3.

retirement in 2019, echoed these sentiments.<sup>24</sup> 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.<sup>25</sup>

Moreover, PGW's witnesses thoroughly refuted each of Complainants' claims of unsafe practices. These witnesses, with engineering backgrounds and lengthy PGW careers, are the ones who have been or are currently responsible for establishing the safety protocols and bear the ultimate responsibility for ensuring the safe operation of the Plant. Further, PGW presented evidence demonstrating that, at all times pertinent to this case, it followed its safety protocols and used reasonable efforts and care to keep its employees, customers and the public safe. PGW's witnesses also presented numerous examples of measures that the Company takes to both prevent and timely respond to human error and equipment malfunction, including updates to its safety procedures, and the use of safety devices, back-up systems and gas sensors. As a result, the Passyunk Plant operates safely at all times.<sup>26</sup>

In an apparent attempt to bolster their argument, Complainants refer to prior statements of PGW's Director of Gas Processing, Curt Malkemes, noting that the handling and processing of LNG requires great care in order to ensure public safety.<sup>27</sup> PGW does not dispute this premise and, in fact, PGW's approach to the safe operation of the Plant is consistent with Mr. Malkemes' observation, as well as the Public Utility Code and Commission regulations.

Simply stated, absent substantial evidence of actual safety violations, the Complaint cannot be sustained under Section 1501 of the Public Utility Code. Besides failing to refer to a

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<sup>24</sup> PGW Statement No. 1 (Rebuttal) at 2.

<sup>25</sup> PGW Statement No. 2-SR (Supp. Rebuttal) at 3-4.

<sup>26</sup> PGW Statement No. 1-R (Rebuttal) at 3; PGW Statement No. 3-SR (Supp. Rebuttal) at 4-6; PGW Statement No. 3-SUR (Surrebuttal) at 4.

<sup>27</sup> Complainants MB at 13.

preponderance of substantial evidence in support of their allegations of unsafe practices by PGW, Complainants' Main Brief also did not cite any Commission regulations or orders with which PGW did not comply. Notably, they did not refer to any industry standards established by the regulations, produce evidence of non-compliance or point to any regulatory enforcement actions against PGW relating to the incidents alleged in their Complaint. The Commission should dismiss the Complaint in its entirety and deny Complainants' requested relief.<sup>28</sup>

2. Complainants' testimony does not show a pattern or ongoing safety violations that have caused harm or will cause harm to the public

For the first time in this proceeding, Complainants' Main Brief contends that their allegations and testimony "show a pattern and continuous nature of ongoing safety violations, which have caused and will/did cause harm."<sup>29</sup> In making this argument, Complainants seem to suggest that because they cobbled together a laundry list of "incidents" or "practices" that they alone have concluded jeopardize safety, they have shown a pattern or ongoing safety violations.<sup>30</sup> However, a complainant cannot simply string together a series of allegations, without substantiating any of them as "safety violations," and then lump them together as a group (even though many are unrelated) and say they demonstrate a pattern.

At the outset, PGW notes that Complainants have not cited any case law to support the proposition that the Commission may consider any "pattern" of conduct in adjudicating a complaint. Section 701 of the Public Utility Code, which authorizes the Commission to hear complaints, does not empower the Commission to rely on a "pattern" of violations.<sup>31</sup>

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<sup>28</sup> PGW notes that Complainants withdrew Paragraph 8 of the Complaint, which alleged that PGW had structural cracks in a tank and boiler and repaired them by welding. Dismissal of Paragraph 8 is consistent with PGW's Main Brief since Complainants presented no testimony in support of this allegation and therefore failed to make a *prima facie* case. PGW MB at 20-21.

<sup>29</sup> Complainants' MB at 14.

<sup>30</sup> Complainants' MB at 11, 14-16.

<sup>31</sup> 66 Pa.C.S. § 701.

Complainants have not cited to any Commission decisions finding that a utility has engaged in a “pattern” of violating regulatory requirements in the context of adjudicating a complaint. The portion of an adjudication where a utility’s prior compliance history is relevant is after a complaint is sustained or settled and the Commission is determining an appropriate civil penalty, if any.<sup>32</sup> For instance, in considering a settlement and determining whether the negotiated civil penalty was reasonable, the Commission observed that UGI had experienced a “pattern of allegations regarding safety violations,” with most of them resulting in an explosion, accompanied by fatalities, personal injury and/or damage to property.<sup>33</sup> This observation followed a series of incidents occurring over a 10-year period.<sup>34</sup>

In advancing the “pattern or practice” argument before the Commission, Complainants appear to be relying on a theory that has often used in employment discrimination claims. For instance, this concept was originally used in cases filed under Title VII of the Civil Rights Act of 1964.<sup>35</sup> Even in that context, the theory has been looked upon more recently with disfavor unless statistical analysis is done, with the United States Supreme Court rejecting the use of anecdotal evidence.<sup>36</sup> In any event, it is not a theory relied upon by the Commission in adjudicating a complaint.

Moreover, PGW views a “pattern” as being distinguishable from “ongoing” safety violations. A pattern of allegations regarding gas safety violations suggests that a utility is engaged in the same conduct in approaching certain issues. An ongoing violation would be an

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<sup>32</sup> 52 Pa. Code § 69.1201(c)(6) (a factor to be considered is “[t]he compliance history of the regulated entity which committed the violation.”)

<sup>33</sup> *Pa. PUC v. UGI Utilities, Inc. – Gas Division*, Docket No. C-2018-3005151 (Order entered October 29, 2020 at 29).

<sup>34</sup> *Id.* at 26-29.

<sup>35</sup> 42 U.S.C. §§ 2000e to 2000e-17; “Pattern and practice” evidence is sometimes used when a complainant is attempting to prove that a pattern or practice of discrimination exists. *Teamsters v. United States*, 431 U.S. 324 (1977).

<sup>36</sup> *Wal-Mart Stores, Inc. v. Dukes et al.*, 131 S.Ct. 2541 (June 20, 2011).

act of the utility that is in violation of a safety standard, which the utility has perpetuated over a period of time, particularly after being put on notice that the conduct is non-compliant. Yet, most of the “incidents” alleged by Complainants appear to be unrelated “one-off” situations, as opposed to a “pattern.” In addition, Complainants presented no evidence of an “ongoing” violation since they were unable to show any violation.

The only attempt Complainants made to show any kind of “pattern” was claiming that the General Supervisor of the Plant was promoted without adequate qualifications and that PGW management is now somehow “protecting” him.<sup>37</sup> However, the General Supervisor has been in his position for 6 years,<sup>38</sup> and while Complainants nit-picked his performance, they only gave three examples of times when they believe he fell short of safety standards. Notably, two of these examples were asserted over two months after the hearing (although they allegedly occurred prior to the hearing), and PGW was denied the opportunity to respond.

Upon the filing of the Complaint asserting a general allegation about PGW promoting and protecting unqualified individuals, Complainants should have already been equipped with examples to support their claim.<sup>39</sup> Yet, although they filed the Complaint approximately a year before the hearing and had ample time to build a case against PGW - if there were any truth in their claims, which, of course, there is not - regarding the General Supervisor’s performance and qualifications, they failed to do so. Even when they scrambled just before the hearing and two months after the hearing to find instances that in their view fell short of safety expectations, they could point to no harmful consequences or make any link between their allegations and a proven exposure to harm.

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<sup>37</sup> Complainants’ MB at 14-16.

<sup>38</sup> EE Statement No. 1 (Direct), Exhibit II (EEOC Statement of David Martinez at 1).

<sup>39</sup> Complaint ¶ 15.

For a complainant to establish either a pattern of or ongoing safety violations, he or she needs to prove that at least some of the incidents or practices at issue violated a safety-related requirement. Yet, at no time in this proceeding have Complainants linked any of their allegations to harmful consequences, or for that matter, any consequences. If PGW were operating the Passyunk Plant in the careless manner in which Complainants seek to depict, Complainants would have had no difficulty pointing to incidents that supported their claims

3. Complainants did not prove that the Plant has faulty valves or that the release of a small amount of inodorous natural gas placed the public in any jeopardy at all

Complainants refer to “faulty valves” and the “release of inodorous natural gas at the Passyunk Plant” and allege that these “safety violations” have caused harm and will cause harm to the public. Complainants seem to blame this release of natural gas on an alleged faulty PCV-1027 valve.<sup>40</sup>

PGW incorporates by reference in this Reply Brief its discussion of these issues in its Main Brief.<sup>41</sup> As PGW explained in its Main Brief, PGW witness Brian McGuire provided substantial evidence refuting these allegations. Mr. McGuire’s testimony demonstrated that the situation did not amount to an emergency and that the incident had nothing to do with the PCV-1027 valve. Mr. McGuire also refuted the claims that the PCV-1027 valve has been malfunctioning for years, noting that the PCV-1027 valve is inspected and tested on an annual basis and operates consistently with its design.<sup>42</sup>

More specifically, Mr. McGuire (the individual responsible for ensuring that the Plant operates in a safe and productive manner)<sup>43</sup> explained:

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<sup>40</sup> Complainants’ MB at 14-15.

<sup>41</sup> PGW MB at 43-49.

<sup>42</sup> PGW Statement No. 3-SUR (Surrebuttal).

<sup>43</sup> PGW St. No. 3 (Rebuttal) at 1.

On [October 15, 2020], valve GLV-114 was open when it should not have been and, as a result, a negligible and harmless amount of gas was emitted into an open, outdoor area. There was no valve malfunction. There was no emergency. The amount of gas that was emitted did not even trigger any of PGW's detectors, which sound an alarm when gas (including inodorous gas) is detected in that location.<sup>44</sup>

Mr. McGuire further described the incident as “a harmless human error” and 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.

Refuting the allegations that this incident could have led to an explosion, Mr. McGuire explained that three 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.” Mr. McGuire testified that the amount of gas escaping from the truck unloading hose was not even sufficient to trigger any of the numerous gas detectors at the Plant, let alone sufficient to “create a vapor cloud” that could cause an explosion. Mr. McGuire also noted that there is a gas detector in the truck unloading building (the door of which was open to the outside), which is approximately 30 feet from the outlet through which gas was escaping. Additionally, Mr. McGuire testified that the area of the Plant where the gas was escaping is an “explosion-proof area where nothing that could cause a spark is permitted (e.g. cell phones, electric power tools, lighters, etc.).”<sup>45</sup>

Mr. McGuire further testified that 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.”<sup>46</sup> For these reasons and the reasons explained in PGW's Main

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<sup>44</sup> PGW Statement No. 3-SUR (Surrebuttal) at 3.

<sup>45</sup> PGW Statement No. 3-SUR (Surrebuttal) at 5-6.

<sup>46</sup> PGW Statement No. 3-SUR (Surrebuttal) at 6.

Brief, Complainants have failed to prove that the Plant has faulty valves or that the release of a small amount of inodorous natural gas placed the public in any jeopardy at all.

4. Complainants' allegations concerning events on October 5, 2020 and October 14, 2020 are unrelated to the alleged "valve incident" and should not be considered since PGW had no opportunity to respond

Citing Reply Testimony of Complainants' witness Ackie served on January 8, 2021, to which PGW was not permitted an opportunity to respond, Complainants describe events that allegedly occurred on October 5, 2020 and October 14, 2020 involving PGW's handling of the fire system and a procedure to pack the LNG pumps header. Although Complainants point to no harm that resulted from these claims, they argue that PGW's handling of these alleged events shows that PGW promotes and protects employees who violate safety protocols and who are not competent for their positions.<sup>47</sup>

PGW incorporates by reference in this Reply Brief its discussion of these issues in its Main Brief.<sup>48</sup> Complainants' Reply Testimony served on January 8, 2021 was limited by ALJ Heep's November 24, 2020 Order to the "valve incident" that occurred on October 15, 2020. It is clear from Complainants' own description of these alleged, isolated claims that they are entirely unrelated to the valve incident. Moreover, despite PGW's request to have this testimony excluded from the record or, in the alternative, being afforded an opportunity to respond to the new allegations, ALJ Heep granted neither request in her February 9, 2021 Order addressing PGW's Motion in Limine. As a result, any consideration of these issues by the Commission would deprive PGW of its fundamental rights of due process.

Unable to establish a link between the valve incident and their new claims of events that allegedly occurred prior to the evidentiary hearing in this matter, Complainants now seek to rely

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<sup>47</sup> Complainants' MB at 14-15.

<sup>48</sup> PGW MB at 41-43, 49-52

on this eleventh hour testimony to prove their allegations in the Complaint that PGW promotes and protects employees who violate safety protocols and are not competent for their positions.<sup>49</sup> As an initial matter, employment claims, such as relating to promotions, are beyond the purview of the Commission, and the allegations raised by Complainants are not supported by evidence of any harm or as interfering with PGW's safe operation of the LNG Plant. To the extent that Complainants wish to have their employment discrimination claims heard, they have a forum for that and are currently utilizing it through their federal lawsuits pending before the United States District Court for the Eastern District of Pennsylvania.<sup>50</sup>

The Complaint was filed on October 31, 2019 and the evidentiary hearing was not held until October 21, 2020. Complainants had ample time and many opportunities to present evidence in support of these claims and simply failed to do so. The promotions that Complainants criticize occurred over five years ago, and as of the date of the hearing, they had pointed to no examples of how the promotions caused harm or created a proven exposure to harm. Their last ditch attempt to raise examples they personally and unreasonably perceive as creating unsafe conditions should be rejected.

5. Complainants did not prove that PGW's Plant management has bypassed the TE1019 indicator during the LNG vaporization process, dating back to 2000, or that the use of steam lance creates any harm or violation of the Public Utility Code, Commission regulations or Commission orders

In a mere two sentences, Complainants contend that they are entitled to relief because beginning in 2000, Passyunk Plant management has wrapped the low temperature sensor, or the TE1019 indicator, in steam hoses during the LNG vaporization process. They further maintain

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<sup>49</sup> Complaint, ¶¶ 15, 17.

<sup>50</sup> Complaint ¶ 18; EE Statement No. 4-SUP (Supp. Direct) at 1 and Exhibit IV (Non-proprietary version).

that this practice bypasses the TE1019 indicator and obstructs accurate readings, warning/alarms and fail safe systems.<sup>51</sup>

PGW incorporates by reference in this Reply Brief its discussion of this issue in its Main Brief.<sup>52</sup> In short, PGW's testimony has shown that PGW has never "manipulated" any TE1019 readings, but rather engages in the common practice of applying heat to external instruments in cold ambient temperatures by using steam lance to help ensure that the internal system works properly. PGW has always operated the Plant in accordance with the current, established procedures and protocols.<sup>53</sup>

Importantly, PGW's Plant Manager, Brian McGuire, testified that, "the vaporization process control system and safety shutdowns were completely redesigned (from 2000-2001), so there is no basis for comparison between current operating conditions and those in 2000. PGW continually works to improve the LNG vaporization process, and in fact, updated its procedures in October 2017 and June 2019 to improve process reliability."<sup>54</sup> Thus, Complainants' incorporation of irrelevant testimony concerning an event in 2000 that occurred at the Plant is nothing more than a desperate attempt to connect some type of harm or other violation to PGW's use of steam lance around the TE1019 at the Plant today.

In their Surrebuttal testimony, Complainants made no attempt whatsoever to respond to the fact that PGW's vaporization system in 2000 and PGW's system today are not the same. Instead, Complainants continue to insist, without support, that the event that occurred in 2000 is somehow evidence of unsafe conditions at the Plant today, even though the operating conditions and procedures have changed more than once since 2000. Tellingly, Complainant Rauceo was

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<sup>51</sup> Complainants' MB at 16.

<sup>52</sup> PGW MB at 41-43; 49-52.

<sup>53</sup> *Id.*

<sup>54</sup> PGW Statement No. 3-SR (Supp. Rebuttal) at 4 (emphasis added).

not even employed by PGW at the time of the event in 2000; thus, he could not know personally what caused the event, and the statements he made in his Surrebuttal testimony opining on this issue should therefore be disregarded.<sup>55</sup>

Finally, it is worth noting that even Complainants do not agree on what they believe would be “safe” operating conditions in lieu of the use of steam lance. On the one hand, Complainant Chavarria testified that the entire “design of Passyunk Plants Vaporization System is dangerous and critically flawed and should be decommissioned and replaced with a modern [system],” and “jerry rigging” the system should not be permitted.<sup>56</sup> On the other hand, Complainant Rauceo disagrees and testified that the TE1019 could “work efficiently by putting some type of housing over it, instead of a steam lance.”<sup>57</sup> This blatant discrepancy in testimony serves as further evidence of the lack of foundation for Complainants’ allegations, and Complainants’ lack of qualifications to credibly make them.

For the reasons set forth above, and in PGW’s Main Brief, Complainants’ allegation that PGW personnel have manipulated the readings of the TE1019 indicator or otherwise engaged in conduct during the vaporization process that has resulted in harm or any violation should be dismissed.

6. Complainants failed to prove that the Plant Manager’s return to the Plant on February 23, 2018 constituted a safety violation

In their Main Brief, Complainants offer their account of what occurred on February 23, 2018 when the Plant Manager, Brian McGuire, returned to the Plant after his scheduled shift. Complainants note that Mr. McGuire did not have his identification badge and did not announce his arrival to the on-duty Operations Supervisor. They go on to describe the conduct in which

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<sup>55</sup> EE Statement No. 4 (Direct Testimony) at 1; EE Statement No. 4-SR (Surrebuttal) at 2.

<sup>56</sup> EE Statement No. 3-SR (Surrebuttal) at 1-2.

<sup>57</sup> EE Statement No. 4 (Direct Testimony) at 11-12.

Mr. McGuire allegedly engaged with respect to using a Company vehicle and an encounter with Mr. Ackie.<sup>58</sup>

PGW incorporates by reference in this Reply Brief its discussion of this issue in its Main Brief.<sup>59</sup> As discussed at length in PGW's Main Brief, the evidence provided by the Complainants is unreliable and based almost entirely on uncorroborated hearsay of which the Complainants have no first-hand knowledge (including the allegation that Mr. McGuire drove a Company vehicle without headlights).<sup>60</sup> Complainants' 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.

Moreover, Mr. McGuire and Mr. Cassidy (the individuals responsible for the safe operation of the Passyunk Plant)<sup>61</sup> provided substantial evidence demonstrating that Mr. McGuire's actions on the evening of February 23, 2018 were reasonable<sup>62</sup> and did not create a

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<sup>58</sup> Complainants' MB at 16-17. It should also be noted that Complainants appear to assert in their Main Brief that Mr. McGuire was not wearing "fire retardant protective equipment" when he returned to the office the evening of February 23, 2018. Complainants' MB at 17. Complainants, however, never raised this issue before or alleged any safety violation related to same. Perhaps more importantly, this statement is not even consistent with the testimony of Mr. Ackie that Complainants cite in their Main Brief. Mr. Ackie does not allege that Mr. McGuire was not wearing fire retardant protective equipment, but rather asserts that Mr. McGuire had confronted Operations Supervisor Wallace Benson about "not having his FR pants." EE Statement No. 1- SUR (Surrebuttal) at 4. Mr. Ackie appears to offer this statement not to prove an alleged safety violation, but rather in an attempt to demonstrate that Mr. McGuire had an opportunity to confront Mr. Ackie about sleeping on the job (which Mr. Ackie claims he did not do). In any event, PGW submits that Complainants have failed to prove this allegation and have failed to prove that it resulted in a safety violation.

<sup>59</sup> PGW MB at 30-35.

<sup>60</sup> PGW objected to the introduction of the hearsay testimony in its Motion In Limine dated October 19, 2020.  
<sup>61</sup> PGW St. No. 3 (Rebuttal) at 1; PGW Statement No. 2-SR (Supp. Rebuttal) at 3.

<sup>62</sup> For the first time in their Main Brief, Complainants assert that PGW's actions were "unreasonable." See Complainants' MB at 16. Under 66 Pa.C.S. §§ 1501 and 1505 (the provisions under which Complainants legally justify their claims (*see* Complainants' MB at 9 and 20, Conclusions ¶ 3)), PGW has a duty to, among other things, furnish and maintain "reasonable" service and facilities. Complainants, however, fail to make any connection between Mr. McGuire's alleged actions on February 23, 2018 and unreasonable service and facilities. Further, for the same reasons that Complainants failed to prove that Mr. McGuire's actions constituted a safety violation (as discussed herein and in PGW's Main Brief), Complainants failed to prove that Mr. McGuire's actions resulted in unreasonable service or facilities.

safety violation. The evidence establishes that, as the Passyunk Plant Manager, Mr. McGuire is permitted to enter the Plant at any time and that he has all the necessary credentials to do so. Further, the evidence demonstrates that Mr. McGuire does not need to obtain permission from anyone prior to entering the Plant and that Mr. McGuire did not violate any of PGW's security protocols or safety policies.<sup>63</sup> Further, the evidence demonstrates that Mr. McGuire was not inebriated on the evening in question.<sup>64</sup>

For the reasons explained above and in PGW's Main Brief, Complainants have failed to prove that Mr. McGuire's return to the Plant on February 23, 2018 constituted a safety violation.

7. Complainants failed to prove that occasional departures from the Plant by PGW personnel caused harm or created a proven exposure to harm

Complainants contend that they addressed a host of "other safety and operations violations" in their testimony that placed the public "in danger." These instances are when the Operations Supervisor allegedly left the Plant without "proper notification" on two occasions and when a Working Foreman allegedly arrived 2 hours late for work once.<sup>65</sup> They also refer to one occasion when two employees left the Plant to transport the General Supervisor to the airport.<sup>66</sup>

PGW incorporates by reference in this Reply Brief its discussion of this issue in its Main Brief.<sup>67</sup> As discussed in PGW's Main Brief, these allegations, even if true, do not amount to a safety violation or create a proven exposure to harm. 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

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<sup>63</sup> PGW Statement No. 3 (Rebuttal) at 6-7; PGW Statement No. 2-SR (Supp. Rebuttal) at 3.

<sup>64</sup> PGW Statement No. 3 (Rebuttal) at 6-7.

<sup>65</sup> Complainants' MB at 17-18.

<sup>66</sup> Complainants' MB at 15-16.

<sup>67</sup> PGW MB at 22-30, 35-41.

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.<sup>68</sup>

It is undisputed that these instances did not result in any actual harm. 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 the alleged actions and the alleged harm. Complainants fail to identify any specific alleged harm and, instead, make generalized claims that these actions put others in “danger.” Certainly, Complainants’ speculative claim that there *could have been* an unspecified dangerous situation does not meet the standard required for Complainants to meet their burden.

**C. Complainants Have Not Presented Any Support for Their Request for Relief**

In their request for relief, Complainants have suggested that the Commission conduct a further review and inspection of PGW’s LNG Plant and then impose remedies, including but not limited to civil penalties.<sup>69</sup> PGW incorporates by reference in this Reply Brief its discussion of remedies and penalties in its Main Brief.<sup>70</sup>

Referring to Section 1505(a) of the Public Utility Code,<sup>71</sup> Complainants appear to be suggesting that based on the speculation of potential harm they have offered, the Commission should conduct a “further review and inspection of the facility,” while reserving the right to thereafter impose remedies, including civil penalties.<sup>72</sup> This request seems to be a concession

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<sup>68</sup> Complainants use the term “operations violations.” To be clear, operational concerns are not the same as safety violations. Here, as discussed herein and in PGW’s Main Brief, there needs to be a proven exposure to harm to meet the standard required for a Section 1501 safety violation. Therefore, even if, for example, Complainants had established that PGW failed to comply with an internal policy or procedure, the Commission could not find a violation of Section 1501 unless the Complainants also established that the action resulted in a proven exposure of harm.

<sup>69</sup> Complainants’ MB at 18.

<sup>70</sup> PGW MB at 58-59.

<sup>71</sup> 66 Pa.C.S. § 1505(a).

<sup>72</sup> Complainants’ MB at 18, 20.

on the part of Complainants that they have not met their burden to obtain the relief sought in the Complaint. In addition, Complainants did not raise this proposal for a “further review and inspection of the facility” until their Main Briefs. As such, PGW has had no opportunity to present testimony showing that this request is moot due to the periodic and recent safety inspections of the Plant by the Commission’s enforcement arm, the Bureau of Investigation and Enforcement (“I&E”), as well as the positive results of those inspections. Therefore, granting this relief would deprive PGW of due process, unless the ALJ reopens the record to permit PGW to respond.

Notably, the Commission created I&E in 2011 for the very purpose of handling prosecutory functions and overseeing gas safety.<sup>73</sup> By the *Reorganization Order*, the Commission delegated authority to I&E to enforce “compliance with the state and federal...gas safety laws and regulations.”<sup>74</sup> Indeed, I&E performs these responsibilities, such as by routinely inspecting gas utility facilities. Also, when it makes allegations about a utility failing to operate in accordance with established safety standards, it provides specific details about the utility’s practices and includes citations to regulations to which it claims the utility is not adhering. Similarly, it provides examples of harm that has been caused.<sup>75</sup> That did not occur during Complainants’ attempt to take on a self-imposed enforcement role.

Moreover, this request for relief is not consistent with Section 1505(a) of the Public Utility Code or an appropriate outcome of this Complaint proceeding. Section 1505(a) states as follows:<sup>76</sup>

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<sup>73</sup> *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071952 (Order entered August 11, 2011 at 3) (“*Reorganization Order*”).

<sup>74</sup> *Reorganization Order* at 5-6.

<sup>75</sup> *See Pa. PUC v. UGI Utilities, Inc.*, Docket No. C-2018-3005151 (Formal Complaint filed October 4, 2018) (“2018 UGI Complaint”).

<sup>76</sup> 66 Pa.C.S. § 1505(a).

Whenever the commission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the service or facilities of any public utility are unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory, or otherwise in violation of this part, the commission shall determine and prescribe, by regulation or order, the reasonable, safe, adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed, including all such repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accommodation and convenience of the public.

Notably, Section 1505(a) does not provide that the Commission needs to be convinced enough by a complaint raising speculative safety concerns as to warrant conducting its own review and inspection and thereafter imposing remedies. To the contrary, under this provision, the Commission must first find that the service or facilities are unsafe or violate a safety law, and then tell the public utility what it needs to do in response to that determination.<sup>77</sup> Only upon a finding that PGW is engaged in unsafe practices, which caused or cause harm or create a proven exposure to harm, is the Commission able to take remedial action under Section 1505(a). Here, the evidentiary record simply does not support such a finding. Therefore, no Section 1505(a) relief is warranted.

Further, it is beyond dispute that when a complaint is filed under Section 701 of the Public Utility Code,<sup>78</sup> it is incumbent upon the complainant to establish by a preponderance of the evidence that the utility violated the Public Utility Code, a Commission regulation or a Commission order.<sup>79</sup> Complainants concede as much.<sup>80</sup> That is the only way that the Commission can sustain a complaint. This is not a bifurcated process where all the complainant

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<sup>77</sup> See *Povacz* at 29 (if the Commission finds that the facility is unsafe, the remedy is to direct the utility under Section 1505 to remove the unsafe facility and furnish a safe one).

<sup>78</sup> 66 Pa.C.S. § 701.

<sup>79</sup> PGW MB at 8-10.

<sup>80</sup> Complainants' MB at 9.

needs to do is plant the seed in the Commission’s mind that something about the utility’s service or facilities may be amiss. In short, the opportunity to pursue a Section 701 complaint against a utility is not a vehicle through which a person may raise unsubstantiated and speculative concerns about the utility’s practices and ultimately, after further Commission review and inspections, get relief pursuant to Section 1505(a).

In addition, the evidentiary record is completely devoid of any evidence to support the imposition of a civil penalty and no basis exists for finding a certain number of violations or amount of civil penalty. Complainants allege no specific number of violations. Rather, without any evidentiary support, Complainants make general references to an unsubstantiated “pattern,” an unspecified “ongoing safety violation,”<sup>81</sup> an unsupported “host of other safety...violations,”<sup>82</sup> and unproven “multiple violations.”<sup>83</sup> None of these vague and unfounded claims can support the imposition of a civil penalty. It is also noteworthy that no amount of a civil penalty was ever proposed in the Complaint or in testimony (or even in the Main Brief), meaning that PGW has not had any opportunity to be heard on a proposed civil penalty level.<sup>84</sup> By contrast, when I&E pursues enforcement action against a utility, it proposes a civil penalty in the complaint.<sup>85</sup> Further, Complainants here have undertaken no analysis of an appropriate civil penalty under the Commission’s Policy Statement to support any particular amount.<sup>86</sup>

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<sup>81</sup> Complainants’ MB at 14.

<sup>82</sup> Complainants’ MB at 17.

<sup>83</sup> Complainants’ MB at 20.

<sup>84</sup> *See Northview Motors, Inc. v. Commonwealth, Attorney Gen.*, 562 A.2d 977, 980 (Pa. Cmwlth. 1989) (when an action seeks to impose civil penalties, a respondent is entitled to full due process rights, and the respondent must be informed with reasonable certainty of the nature of the relief sought).

<sup>85</sup> *See* 2018 UGI Complaint at ¶ 72.

<sup>86</sup> 52 Pa. Code § 69.1201. For example, Complainants have offered no testimony as to whether any “resulting consequences” of PGW’s conduct or alleged conduct were “serious,” whether PGW has modified certain practices to address the conduct at issue, whether any customers were affected and the duration of any impact, or the amount of civil penalty necessary to defer “future violations.” The last factor is particularly important in PGW’s case since it does not have shareholders and already-strapped ratepayers would have to pick up the cost.

No basis exists for the imposition of a civil penalty in this proceeding. Moreover, it would be unlawful for the Commission to impose a civil penalty on PGW after conducting a “further review and inspection of its facilities” since that would not be evidence in this record and PGW would be denied due process since it would not have the opportunity to respond to the Commission’s determination or imposition of remedies. Any need for remedies arising from Complainants’ allegations, whether they entail changes to PGW’s facilities or a payment of a civil penalty, can be determined solely on the basis of the evidentiary record in this proceeding.

#### IV. 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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