

KARIN M. GUNTER

Attorney at Law
Kgunterlaw2@gmail.com
www.kgunterlaw.com

85 Old Cedarbrook Road
Wyncote, PA 19095

TELEPHONE (215) 548-9992
FACSIMILE (215) 548-7277

April 5, 2021

VIA ELECTRONIC FILING

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

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

Dear Secretary Chiavetta:

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

Thank you.

Yours truly,

/s/ Karin M. Gunter

Enclosures

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

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

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

Karen O. Moury, Esquire
Kristine E. Marsilio, Esquire
Heather R. Olson, Esquire
Eckert Seamans
213 Market Street
Harrisburg, PA 17101
(717) 237-6036
kmoury@wckertseamans.com
kmarsilio@eckertseamans.com
holson@eckertseamans.com

Honorable Darlene Heep
Pennsylvania Public Utility Commission
Office of Administrative Law Judge
801 Market Street, Suite 4063
Philadelphia, PA 19107
dheep@pa.gov

Graciela Christlieb, Esquire
Philadelphia Gas Works
800 W. Montgomery Avenue
Philadelphia, PA 19122
(215) 684-6164
Graciela.Christlieb@pgworks.com

/s/ Karin M. Gunter
Karin M. Gunter, Esquire
Counsel for Complainants
PA Bar No.: 79852
Law Office of Karin M. Gunter
85 Old Cedarbrook Road
Wyncote, PA 19095
Phone: (215) 548-9992
Fax: (215) 548-7277
Email: Kgunterlaw2@gmail.com

Date: April 5, 2021

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Maurice A. Goodwin and Wayne Rauceo	:	
	:	
v.	:	C-2019-3013933
	:	
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**RESPONSE IN OPPOSITION TO
PHILADELPHIA GAS WORKS' MOTION TO STRIKE
PRELIMINARY STATEMENT**

Dwayne Ackie (“Ackie”), Miguel J. Chavarria, Jr. (“Chavarria”), Maurice A. Goodwin (“Goodwin”) and Wayne Rauceo (“Rauceo”)(collectively “Complainants” or “Employees”) respectfully submit this response in opposition to Respondent Philadelphia Gas Works’ (“PGW”) Motion to Strike (“Motion”), pursuant to 52 Pa. Code § 5.103, certain portions of Complainants’ Reply Brief (“Reply Brief”) timely filed on March 5, 2021. PGW specifically seeks the exclusion of: (a) Proposed Ordering Paragraphs which accompanied the Reply Brief; (b) various portions of the Reply Brief as identified for various alleged bases; and (c) Proposed Findings of Fact which accompanied the Reply Brief in toto.¹

At the outset, Complainants reasonably believe much of PGW’s motion to strike is based on the melding of legal terms, concepts and ideologies with little analysis or appreciation of the differences. For example, there is a legal difference between a “claim” and an “issue”. Also, evidence generally relates to proof adduced at trial/hearing that establishes the existence or nonexistence of a fact *that is in dispute*.² Such amalgamation makes responding to this motion

¹ See PGW’s Mot. at 1.

² <https://legal-dictionary.thefreedictionary.com/document+evidence>

difficult.

In support of their Response, Complainants aver as follows:

OBJECTIONS

Complainants object to PGW's Motion on grounds it failed to provide proper notice, pursuant to 52 Pa.Code §§ 5.103(b), (c), i.e., its Notice to Plead did not state Complainants had "20 days from the date of service within which to answer or object to a motion, unless the period of time is otherwise fixed by the presiding officer."

I. BACKGROUND

1. Admission as to PGW.

2. Admitted in part, denied in part. It is admitted Complainants initiated the proceeding by Formal Complaint against PGW on October 31, 2019, the parties exchanged pre-served testimony and an evidentiary hearing convened on October 21, 2020. All other allegations in this paragraph are denied as stated.

By way of further response, Complainants alleged "safety violations and other concerns regarding management" at Passyunk Gas Processing Plant.³ The parties also participated in motion in limine filed by PGW on October 19, 2020.

3. Admitted in part, denied in part. It is admitted in their October 20, 2020 written response in opposition to PGW's October 19, 2020 motion in limine, Complainants averred PGW failed to provide "responses/documents no later than April 9, 2020" regarding "plant safety and operations matters" for the February 2018 event pursuant to ALJ Heep's March 19, 2020 order. Complainants further admit during the October 21, 2020 hearing, ALJ Heep addressed those averments by directing PGW to provide remaining documents within two weeks, and

³ Formal Complaint at 2 "Reason for Complaint" section.

noting Complainants would be given an opportunity to review and supplement their testimony and exhibits to address the remaining documents provided by PGW. It is also admitted on November 24, 2020, ALJ Heep entered an order setting December 18, 2020 as the due date for supplemental direct testimony for the late-filed/additional answers; affording PGW an opportunity to respond thereto; giving Complainants time to reply thereupon; and setting the briefing schedule for main and reply briefs. All other allegations in this paragraph are denied as stated.

4. Admitted in part, denied in part. It is admitted Complainants in their direct and surrebuttal testimony reserved the right to supplement and/or amend their up to and including time of trial. Complainants further admit during the evidentiary hearing, based on their reserved rights, Complainants proffered testimony averring a safety violations incident that occurred on October 15 and 16, 2020. It is also admitted PGW objected to the supplemental oral testimony, and upon request by PGW; ALJ Heep afforded PGW two weeks after receipt of the hearing transcript to respond; and by order dated November 30, 2020, ALJ Heep established deadlines for responsive testimony from both parties. All other allegations in this paragraph are denied as stated.

5. Admitted.

6. Admission as to PGW. It is admitted Complainants submitted 12 pre-served testimonies amongst them, and the transcript of the evidentiary hearing is 168 including cover pages, indices and proceedings.

7. Admitted.

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

9. Admitted in part, denied in part. It is admitted Exhibit A is attached and contains certain portions of Complainants' Reply Brief, which are highlighted. All other allegations in this paragraph are denied as stated.

II. LEGAL STANDARD

A. To the Extent Possible, Issues Shall be Completely Addressed in Main Brief

10. Admitted in part, denied in part. It is admitted Complainants have the burden of proof in this proceeding under 66 Pa.C.S. §§ 332(a) and 1501. All other allegations in this paragraph are denied as stated.

11. Admitted in part, denied in part. It admitted 52 Pa. Code § 5.501(a)(3) states in part “[t]he party with the burden of proof shall, in its main or initial brief, completely address, *to the extent possible*, every issue raised by the relief sought and the evidence adduced at hearing.”⁴ (emphasis added) All other allegations in this paragraph are denied as stated.

By way of further response, in support of its averments in this paragraph, PGW cites Park v. Chronister⁵ for the conclusion “[a] reply brief may not be used by a party as an opportunity to raise new issues which should have been included in the party’s main brief.”⁶ Unfortunately, Complainants do not see that precise quotation made by the Park court. Instead, Employees see the following “[a] reply brief may not be used as an opportunity to raise *additional* issues on appeal.”⁷ This holding relates to reply briefs in the context of Pennsylvania Rules of Appellate Procedure 2113(a), which also requires all reply briefs to include certificates of compliance,

⁴ 52 Pa. Code § 5.501(a)(3).

⁵ 617 A.2d 863 (Pa.Comm.w. 1992).

⁶ PGW’s Mot. at 4 n.3.

⁷ Park, 617 A.2d at 871 (emphasis added).

which in this proceeding neither party provided.⁸ Moreover, in the instant proceeding, the rules of appellate procedures are not applicable as the parties are still at the administrative law judge initial, recommended and/or tentative decision level. At the appellate level, an appellant is limited in his/her reply brief to issues raised in the appellee's brief but not addressed in the appellant's brief in the first instance.⁹

Based on the Commission's rules and regulations for this non-rate proceeding, the briefs are more accurately titled initial and response briefs,¹⁰ though they are functionally serve the same purposes as main and reply briefs in rate proceedings.¹¹ However, no matter what the briefs in this proceeding before ALJ Heep are called, Complainants argue they are not governed by rules of appellate procedures in that they do not represent briefing on exceptions, which is the equivalent to an appeal at the administrative agency level, as contemplated by the Park court.¹²

12. Admitted in part, denied in part. It is admitted in the matter of Pa. PUC v. Columbia Gas of Pa, the ALJ made a recommendation based on the record, and the Commission adopted the ALJ's recommendation based on the fact that neither party filed exceptions to that recommendation.¹³ All other allegations in this paragraph denied as stated.

By way of further response, PGW cites the Columbia Gas ALJ's proposition that "when parties have been directed to file briefs and fail to include an issue in their briefs, the unbrieffed issue *may* properly be viewed as being waived."¹⁴ Of course, "may" is separate and distinct

⁸ Pa.R.A.P. 2113(a)

⁹ Park, 617 A.2d at 871

¹⁰ 52 Pa. Code § 5.502(c)

¹¹ 52 Pa. Code § 5.502(d)

¹² 52 Pa. Code §§ 5.533, 5.539

¹³ 2005 Pa. PUC LEXIS 14 at *166 (Order entered Nov. 4, 2005)

¹⁴ *Id.* at *165-*166 (emphasis added).

from “shall,” thereby implying a level of choice but not certitude. Citation for this proposition is found in the Superior Court decision of Jackson v. Kassab.¹⁵ In fact, all of the cases cited by PGW on this issue refer to either appeals to a court or post-trial motions and not initial briefs at the administrative agency level.¹⁶ As such, Complainants argue these cases are distinguishable.

The facts in Jackson involved post-trial motions pursuant to Pa.R.C.P. 227.1, and the appellant’s failure to brief the issues complained at all.¹⁷ The Commonwealth court in Browne v. Dept of Transp., affirmed the Jackson court holding pursuant the post-trial motions standard of Pa.R.C.P.227.1, “[a]t the appellate level, a party’s failure to include analysis and relevant authority results in waiver.”¹⁸ Finally, in Glendon v. Dept. of Env’tl Res., the Commonwealth court addressed an administrative agency appeal pursuant to Pa.R.A.P. 2113(a), and the standards for appellant’s reply brief as outlined in ¶ 11, *supra*.

In the proceeding *sub judice*, 52 Pa. Code §§ 5.501 and 5.501 govern as noted in the November 24, 2020 order, ¶ 7. To that end, Complainants must “to the extent possible” completely address every *issue* “raised by the relief sought and evidence adduced at hearing.”¹⁹

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

By way of further response, the ALJ finding in the recommended decision cited by PGW found the Commission’s Office of Trial Staff’s (OTS) claim of misconduct raised for the first

¹⁵ 812 A.2d 1233 (Pa.Super. 2002).

¹⁶ PGW’s Mot. at 4 n. 4.

¹⁷ 812 A.2d at 1234, 1235.

¹⁸ 843 A.2d 429, 435 (citing Pennsylvania Appellant Procedure § 2119.4).

¹⁹ 52 Pa. Code § 5.501(a)(3)(emphasis added).

time in its reply brief to be “unsupported by fact or law,” *inter alia*.²⁰ However, once again, the facts in the proceeding before this ALJ are distinguishable from that cited proceeding.

For instance, in their main brief, Employees specifically discussed and made citations to PGW’s Answer and Preliminary Objections filed on November 20, 2019, and the findings that Employees have standing as “person(s) . . . having an interest in the subject matter” and the legal sufficiency of their remaining claims based on “safety of [a public utility’s] patrons, employees, and the public,” *inter alia*.²¹ PGW now seeks to strike Complainants’ reply brief statement “[t]his 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.”²² Perhaps PGW finds the word “tactic” or “erroneously” to be “inflammatory” and “inappropriate.” However, Complainants did not make this statement for the first time in their reply brief, and the preliminary objections contain the quoted text attributable to PGW as cited. Complainants presented the appropriate facts and cited the law to support the statement in their main brief. Unlike the interpreted claim of misconduct in the application proceeding cited by PGW, the footnoted reply brief text in the instance proceeding is not a “claim” for which relief is sought in the formal complaint. It is simply part of the Procedural History recitation.

The ALJ in the proceeding cited by PGW in this paragraph found a motion to strike to be the appropriate mechanism to address: (a) claims that are unsupported by evidence of record, and (b) claims that are unsupported by law and/or fact, which are raised for the first time in the reply

²⁰ See PGW’s Mot. ¶ 13 & n.5

²¹ EE’s Main Br. at 4

²² EE Reply Brief at 8 n. 25

brief.²³ Neither basis applies in the instant proceeding.

B. Procedural Due Process is Afforded upon Notice and Opportunity to be Heard

14. Admitted in part, denied in part. It is admitted each party is afforded procedural due process when notice and an opportunity to be heard are given. All other allegation in this paragraph as denied as stated.

By way of further response, the state Supreme Court found procedural due process as the Commission deems it to be is required notice and the opportunity to be heard.²⁴ Moreover, the Chester Water court found procedural due process to be a “flexible concept . . . implicat[ing] procedural protections as each particular situation demands.”²⁵

15. Denied as stated. By way of further response, the Commonwealth court finds procedural due process turns on the axiom “what process is due.”²⁶ Its answer is a “meaning opportunity to be heard.” A “meaningful opportunity to be heard” may occur post-deprivation of the property interest, i.e., after the monetary assessment, as long as the party is afforded: (1) “a fair opportunity to challenge the accuracy and legal validity of the [deprivation] and (2) a clear and certain remedy . . . for a successful challenge.”²⁷

As noted in Complainants’ formal complaint and main brief, their requested relief included, but not limited to, “fines” and “civil penalties” against PGW.²⁸ Thus, PGW had notice

²³ PGW’s Mot. at 4 n.6

²⁴ Chester Water Auth. v. Pa. PUC, 868 A.2d 384, 389 (Pa. 2005)

²⁵ *Id.*

²⁶ Snyder Bros. v. Pa. PUC, No. 1043 C.D. 2015, 2020 Pa. Commw. LEXIS 91 at *12 (Pa. Commw. Feb. 6, 2020)(finding money assessment as a deprivation of property interest implicating procedural due process rights)(citing McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 39 (1990)).

²⁷ *Id.*

²⁸ Formal Complaint at 4 “Requested Relief” section; EE Main Br. at 17 “Conclusion with Relief Requested” section.

of Complainants' request for a monetary assessment. Should the Commission impose civil penalties and/or fines against PGW in this proceeding, procedural due process only requires it to afford PGW a meaningful opportunity to be heard as noted herein by the Commonwealth Court.

C. Content of Briefs Governed by Commission Regulations and Presiding Officer's Directive

16. Admitted in part, denied in part. It is admitted 52 Pa.Code § 5.501 provides generally briefs must contain "reference to the pages of the record or exhibits where the *evidence* relied upon by the filing party appears."²⁹ Complainants further admit ALJ Heep ordered (a) the briefs must substantially comply with the Commission's regulations at 52 Pa. Code § 5.501, . . . [(b)] contain an argument with sufficient citations to record evidence, [and (c)] not to include any extra-record *evidence*," *inter alia*.³⁰ All other allegations in this paragraph are denied as stated.

17. Conclusions of law for which a response is not required. To the extent a response is required, denied as stated and duplicative.³¹ By way of further response, the document speaks for itself.

III. ARGUMENT

A. PGW's Motion to Strike Should be Denied Based on Inconsistent Argument with Respect to Requests for Relief in Complainants' Proposed Ordering Paragraphs

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

By way of further response, the Commission's regulations cited by PGW required it to make certain determinations based on factors and standards that are matters of law and facts

²⁹ 52 Pa. Code § 5.501(a)(2)(emphasis added)

³⁰ Ackie, et al v. Philadelphia Gas Works, Docket No. C-2019-3013933, ¶¶ 7-8, 11 (Order dated November 24, 2020)(emphasis added)

³¹ See ¶ 12, *supra*

including, but not limited to, questions of the nature of the complained of conduct, i.e., serious and/or intentional, consequences of conduct, *inter alia*.³² Complainants provided documentary and oral testimony to support the existence of facts in support of their claims, which can be used by the ALJ in support of her evaluation of this proceeding.

19. Conclusions of law and/or fact for which a response is not required. To the extent a response is required, denied.

By way of further response, Complainants throughout their documentary and oral testimony provided support for the relief requested. For example, Mr. Chavarria proffered testimony regarding the decommissioning of the Passyunk Plant vaporization system and replacement with a “modern direct fire or [propylene] glycol system,” and “it should absolutely be repaired.”³³

20. Conclusions of law and/or fact for which a response is not required. To the extent a response is required, denied.

By way of further response, Complainants provided specific requests and general relief in their complaint, in their testimony as well as in their main brief.

21. Conclusions of law and/or fact for which a response is not required. To the extent a response is required, denied.

By way of further response, Complainants re-aver and incorporate by reference their responses to ¶ 13 & 20, *supra* and ¶¶ 26-28, 35 & 41, *infra*.

22. Conclusions of law and/or fact for which a response is not required. To the extent a response is required, denied.

³² 52 Pa. Code § 69.1201.

³³ EE St. No.3-SR at 1:10-18, and Tr. at 101:22 – 105:4.

By way of further response, Complainants re-aver and incorporate by reference their responses to ¶¶ 14 & 15, *supra* and ¶ 41, *infra*.

23. Conclusion of law and/or fact for which a response is not required. To the extent a response is required, denied.

By way of further response, Complainants object to the allegations in this paragraph. Further, to the extent the case cited by PGW pre-dates and is overruled by the Commonwealth Court's determination of procedural due process in Snyder Bros v. Pa. PUC, the Commission's ruling is not dispositive.³⁴

24. Conclusions of law and/or fact for which a response is not required. To the extent a response is required, denied.

By way of further response, Complainants put PGW on notice of their requested relief as well as their claims and issues throughout this proceeding through pre-served testimony, oral testimony subject to cross examination and discovery, *inter alia*. To that end, in addition to the evidence of record, Complainants re-aver and incorporate by reference their responses to ¶ 21, *supra*.

25. Conclusions of law and/or fact for which a response is not required. To the extent a response is required, denied. Strict proof demanded.

B. Respondent's Motion to Strike Should be Denied Based on Competent Evidence of Record Including, But Not Limited to, Statements of Law and Facts.

1. Complainants' argument is to be supported by sufficient citations to record evidence.

26. Conclusion of law and/or fact for which a response is not required. To the extent a response is required, denied as stated. Strict proof demanded.

³⁴ See ¶ 15 & n. 25, 26, *supra*.

By way of further response, Complainants re-aver and incorporate by reference their Preliminary Statement and response to ¶ 13, *supra*.

27. Conclusions of law and/or fact for which a response is not required. To the extent a response is required, denied as stated. Strict proof demanded.

By way of response, Complainants object to PGW's alternative blanket request for ALJ Heep give no weight to unidentified "statements" by Complainants for an alleged failure "to cite and/or rely on record evidence in any other portion of their Main or Reply Brief." First, the pleading before the ALJ deals exclusively with alleged errors in Complainants' reply brief. Second, the generalized notion of "statements" is not the legal standard contemplated by 52 Pa. Code § 5.501(a)(3) or the November 24, 2020 order. Rather, evidence, existence or nonexistence of facts that are in dispute, issues, and formal complaint claims are the legal standards contemplated by 52 Pa. Code § 5.501(a)(3) and the November 24, 2020 order

28. Conclusions of law and/or fact for which a response is not required. To the extent a response is required, denied. Strict proof demanded.

By way of further response, Complainants re-aver and incorporate by reference their response in ¶¶ 13 & 27, *supra*.

29. Conclusions of law and/or facts for which a response is not required. To the extent a response is required, denied.

By way of further response, PGW witness Raymond M. Snyder's direct testimony dated August 17, 2020 in which the witness testified he provided previous testimony "for PGW's proceeding to establish the availability, rates, and terms of service for eligible customers under a proposed Negotiated Liquefied Natural Gas Service – Rate LNG-N, at Docket No. R-2019-

3009016” is of record.³⁵ To the extent PGW introduced the fact that Mr. Snyder provided prior testimony before the Commission in general and with respect to Docket No. R-2019-3009016 in particular, these items are supported by facts of record. Or, more accurately, they are admissions. To the extent that PGW cites the proposition that a motion to strike is appropriate where “a party advances a proposal for the first time in its reply brief,” the footnoted reply brief text advances neither a proposal nor an issue nor evidence nor a claim for which relief is sought in the instant proceeding.³⁶ Thus, PGW provides no basis to strike this opinion Introduction section footnoted text.

30. Admitted in part, denied in part. It is admitted the recitation of Complainants’ reply brief text is indeed their reply brief text. All other allegations in this paragraph are denied.

By way of further response, evidence of record is the hearing order and surrounding discussions regarding “those remaining documents” requested in discovery in the instant proceeding.³⁷ The facts and content of that hearing order, the discussion forming the basis of the hearing order and all references thereto are in the evidentiary record, and as such, may properly be considered, referenced and relied upon by the Commission.

31. Conclusions of law and/or facts for which a response is not required. To the extent a response is required, denied.

By way of further response, Complainants took advantage of appropriate Chapter 5 mechanisms during discovery in this matter by filing two motions to compel in this proceedings. ALJ Heep twice ordered PGW to comply with certain discovery responses including, but not

³⁵ PGW St. No. 1 at 1:20-22.

³⁶ PGW Mot. ¶ 13.

³⁷ Tr. at 7:13 – 9:18.

limited to, production of documents involving the “those remaining documents” in one such discovery order.³⁸ By employing Chapter 5 mechanisms, Complainants afforded PGW the opportunity to respond to both the initial discovery document production requests and Complainants’ commensurate motion to compel. Further, ALJ Heep and PGW had a complete description of the information sought in the discovery motions and the motion in limine in the instant proceeding. PGW’s persistence in “believ[ing] that it is fully compliant and responsive to Complainants’ discovery requests including Set III-4” in no way should trump Complainants’ believe that PGW is not fully compliant. Either way, the allegations in this paragraph do not form the basis for striking Complainants’ reply brief text.

32. Conclusions of law and/or fact for which a response is not required. To the extent a response is required, denied.

By way of further response, the cited paragraph in Complainants’ reply brief refers to the vaporization process, the location of the TE1019 indicator and the personnel responsibilities regarding the indicator.³⁹ Complainants do not “rely exclusively” on this paragraph in support of their claims against PGW for manipulation of TE1019 readings.⁴⁰ Rather this paragraph is informal only to explain the winter vaporization process. The facts of record in the paragraphs that following form the substantive basis of the claim against PGW plant personnel’s manipulation of the TE1019 temperature indicator.

33. Conclusion of law and/or fact for which a response is not required. To the extent a response is required, denied.

³⁸ See Response ¶¶ 3 & 30, *supra*.

³⁹ EE Reply Br. at 16-17.

⁴⁰ PGW Mot. ¶ 32.

By way of further response, the issue in this argument section is whether on September 11, 2018 PGW Passyunk Plant Operations Supervisor Ryan O'Donnell violated safety and operations policies when he left the plant unsupervised and without telling other essential operations personnel.⁴¹ The testimony evidence is Complainant Ackie last saw Supervisor 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., which is more than 2 hours.⁴² Thus, the *argument* and *evidence* supporting for the underlying claim as well as the issue has been sufficiently cited throughout this section.

34. Conclusions of law and/or fact for which a response is not required. To the extent a response is required, denied.

By way of further response, ALJ Heep entered an order on PGW's third motion in limine denying the exclusion of Mr. Walker's statements as proffered in the transcript at 22:17-22, *inter alia*.⁴³

2. Legal Precedent and Facts

35. Conclusions of law and/or facts for which a response is not required. To the extent a response is required, denied.

By way of further response, Complainants re-aver and incorporate by reference their responses to ¶¶ 13 & 27, *supra*.

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

⁴¹ EE Reply Br. at 19-22.

⁴² *Id.* at 19 & n.82.

⁴³ Ackie, et al v. Philadelphia Gas Works, Docket No. C-2019-3013933 (Order dated February 9, 2021)(emphasis added)

By way of further response. Questions of law are for the Commission to decide. As such, Complainants object to PGW's motion to strike specifically with respect to this point as it seeks to require the Commission to follow PGW's interpretation of the law. It is Complainants' understanding "misrepresentations," though the term is not used in the cited recommended decision, refers to misrepresentation of facts and not law, as used here by PGW.⁴⁴ Further, the burden of proof for "proven exposure to harm" is a preponderance of evidence, which standardly means more likely than not.⁴⁵ Such a burden is distinct from "certain" or "probable".

37. Conclusion of law and/or fact for which a response is not required. To the extent a response is required, denied.

By way of further response, the basis of the cited statement in this Summary of Argument section refers to PGW's statement in the same section of its main brief of "human errors."⁴⁶ Thus, Complainants' intent in the cited argument summary statement is to affirm their agreement with PGW of human error in some instances. Complainants argument is those instances of human error occur with respect to David Martinez and Ryan O'Donnell, which are supported by facts of record in this processing.

38. Conclusions of law and/or facts for which a response is not required. To the extent a response is required, denied.

By way of further response, Complainants object to PGW's attempts to strike every statement of record that it alone deems as "misleading," "misrepresentation" and the like. It is very clear from Mr. Rauceo's testimony his participation in this processing related to two events:

⁴⁴ PGW Mot. ¶ 35.

⁴⁵ Povacz v. Pa. PUC, 241 A.3d 481, 493 (Pa. Commw. 2020).

⁴⁶ PGW Main Br. at 8.

(a) December 2000 exposition at PGW Passyunk plant, and (b) June 2019 explosion at Philadelphia Energy Solution, which is neighboring to the PGW Passyunk plant.⁴⁷ Those statements have not been excluded from his direct testimony. Further, Mr. Chavarria testified PGW's "0-30 station is located on the property of the old Sunoco refinery, which later became Philadelphia Energy Solutions ("PSE")."⁴⁸ As such, they are not "extremely misleading" or the like. PGW may not like the testimony, but it is properly in the evidentiary record.

39. Conclusions of law and/or fact for which a response is not required. To the extent a response is required, denied.

By way of further response, Complainants once again object to PGW's attempts to strike every statement of record that it alone deems as "misleading," "misrepresentation" and the like. Questions and interpretation of facts are for the Commission to determine. PGW's attempts here to have the Commission adopt PGW's interpretation of the evidence at the exclusion of Complainants' presentation and interpretation. As such, PGW's motion to strike this text is inappropriate.

C. Complainants' Proposed Findings of Fact in their Reply Brief Should Not be Stricken

40. Admitted in part, denied in part. It is admitted Complainants provided a proposed findings of fact associated with their reply brief to PGW's main brief. All other allegations in this paragraph are denied as stated.

By way of further response, as with their entire reply brief, Complainants' proposed findings of facts are in response to PGW's main brief. And here is where Complainants reasonably believe PGW's motion to strike is internally inconsistent. PGW first uses appellate

⁴⁷ EE St. No. 4 at 3:19-4:7.

⁴⁸ EE St. No. 3 at 4:19-20.

rules of procedures and post-trial motions to support its position that Complainants raise issues for the first time in their reply brief.⁴⁹ However, those standards afford Complainants to file a “reply brief to matters raised by appellee's brief not previously raised in appellant's brief.”⁵⁰ Thus, based on PGW’s argument, *supra*, Complainants in their reply brief are permitted to address matters addressed in PGW’s main brief that were not previously addressed in employees’ main brief . Those matters include the commensurate proposed findings of fact Complainants provided herein.

Alternatively, what is the purpose of the reply brief if a party cannot respond to arguments, evidence and facts, *inter alia*, proffered by the other party. Certainly, PGW does not argue Complainants raise matters not proffered in its main brief.

41. Conclusions of law and/or facts for which a response is not required. To the extent a response is required, denied.

By way of further response, Complainants object to this paragraph and re-avers and incorporates by reference it responses to ¶¶ 13, 27 & 35, *supra*. Complainants reasonably believe PGW wants to include the rulings from another ALJ in an unrelated proceeding in the instant matter whenever they can. Even here, where PGW summarily, broadly, and generally makes conclusory statements about all proposed findings of fact and unilaterally determines them to be “inflammatory and inappropriate” based on a ruling that found unsupported “claim of misconduct” raised for the first time in a reply brief to be excludable. There is no comparison. Further, PGW fails to cite any regulation that precludes Complainants from presenting counter proposed findings of fact in their reply brief.

⁴⁹ PGW Mot. at 3-4. *See also* ¶¶ 10-13, *supra*.

⁵⁰ *Park*, 617 A.2d at 871.

42. Conclusions of law and/or facts for which a response is not required. To the extent a response is required, denied.

By way of further response, Complainants re-aver and incorporate by reference their response to ¶ 41, *supra*.

IV. CONCLUSION

For the reasons set forth above, Complainants respectfully request ALJ Heep rule in favor of Complainants and against PGW by DENYING their Motion to Strike. In the alternative, give all disputed portions of Complainants' Main and Reply Briefs in particular and their entireties in general the appropriate weight, and such other relief as her Honor deems proper in this proceeding.

Respectfully submitted:

LAW OFFICE OF KARIN M. GUNTER

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By: /s/ Karin M. Gunter,
Karin M. Gunter, Esquire
Counsel for Complainants
PA Bar No.: 79852
Law Office of Karin M. Gunter
85 Old Cedarbrook Road
Wyncote, PA 19095
Phone: (215) 548-9992
Fax: (215) 548-7277
Email: Kgunterlaw2@gmail.com