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September 2, 2021

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
400 North Street
Harrisburg, PA 17120

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' Exceptions 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)
ra-osa@pa.gov

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of PGW's Exceptions 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: September 2, 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 :

**EXCEPTIONS OF PHILADELPHIA GAS WORKS
TO INITIAL DECISION**

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September 2, 2021

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I. INTRODUCTION

Pursuant to 52 Pa. Code § 5.533 of the regulations of the Pennsylvania Public Utility Commission (“Commission”) and the Secretarial Letter dated August 13, 2021 issued in the above-captioned proceeding, Philadelphia Gas Works (“PGW”) submits these Exceptions to the Initial Decision (“ID”) of Administrative Law Judge Darlene D. Heep. Absent any evidence of harm or a proven exposure of harm to customers, employees or the public, the ID erroneously sustains, in part, the Formal Complaint (“Complaint”) filed by Dwayne Ackie, Miguel J. Chavarria, Jr., Maurice A. Goodwin and Wayne Rauceo (collectively, “Complainants”) on October 31, 2019. The Complainants work at PGW’s Liquefied Natural Gas (“LNG”) Passyunk Plant (“Plant”).

The findings in the ID relied upon to sustain the Complaint are not supported by the record, and when the ID’s flawed factual premises are corrected, it is obvious that the ID’s legal conclusions that PGW is engaged in unsafe practices, during the LNG vaporization process and by continuing to use PCV-1027 valve at the Plant, in violation of Section 1501 of the Public Utility Code, must be rejected. Specifically, PGW has not been bypassing low temperature sensors during the vaporization process at the Plant for 20 years, and the PCV-1027 valve at the Plant is not “faulty” (nor has it been “faulty” for 10 years), did not malfunction on October 15, 2020, and had nothing to do with the innocuous emission of gas into the atmosphere caused by harmless human error.

In mischaracterizing PGW’s practice during the vaporization process as the bypass of a safety measure, the ID capriciously disregards – without any explanation – the extensive evidence presented by PGW concerning the use of steam to ensure that the internal system works properly by preventing external components from freezing in cold ambient temperatures. This common industry practice followed by PGW enables the process temperatures to be accurately transmitted

to the control system and has no effect on the process temperature inside the pipe or the sensor inside the pipe.

The ID also wholly ignores the vast evidence presented by PGW demonstrating that the emission of a negligible and harmless amount of odorless gas on October 15, 2020 had nothing to do with the PCV-1027 valve. Rather, the release of gas was caused by the human error of an employee who mistakenly left the GLV-114 valve open. Indeed, the ID fails to explain any link between the PCV-1027 valve and the release of gas on October 15, 2020, and in fact, could not have since Complainants failed to present any evidence of such a connection. In finding that the PCV-1027 valve is faulty, the ID points to no evidence in support of that conclusion and relies solely on bald assertions of Complainants. The ID further disregards PGW's testimony that the PC-1027 valve is inspected and tested on a yearly basis and functions exactly as it is designed to.

Moreover, in partially sustaining the Complaint as to the allegations regarding the LNG vaporization process and the PCV-1027 valve, the ID fails to apply the Commission's legal standard governing safety determinations of future utility service under Section 1501 of the Public Utility Code. Despite acknowledging the Commission's standard – whether PGW's practices create a proven exposure to harm to its customers, employees or the public – the ID undertakes no such analysis regarding either conclusion. As a result of failing to perform the requisite evaluation, the ID offers no rationale to support the legal conclusions that PGW is violating Section 1501 by using steam during the LNG vaporization process and by continuing to use the PCV-1027 valve.

Finally, the ID recommends the imposition of civil penalties based on PGW practices that it finds occurred more than three years before the filing of the Complaint, well beyond the statute

of limitations in Section 3314 of the Public Utility Code.¹ To the extent that the Commission sustains any portion of the Complaint, no civil penalties should be assessed for actions that occurred prior to October 31, 2016. Moreover, since no harm has occurred as a result of any of the allegations in the Complaint, no specific safety industry standard has been identified as having been violated by PGW and its ratepayers would have to shoulder the burden of a civil penalty, the Commission should refrain from imposing any fine on PGW.²

II. EXCEPTIONS

A. Exception One: The ID Errs in Sustaining the Allegations of the Complaint Regarding the LNG Vaporization Process³

1. Introduction

In sustaining the allegations of the Complaint regarding PGW's LNG vaporization process, the ID improperly finds that "[s]ince 2000 to the present, Passyunk Plant management has bypassed low temperature sensors (TE1019 indicators) on the LNG vaporizers by wrapping the piping within steam hoses/lances."⁴ The ID concludes that PGW is engaged in unsafe practices in violation of Section 1501 of the Public Utility Code.⁵

Reaching this conclusion, the ID does not follow the standard that the Commission has established to make determinations about Section 1501 safety violations, *i.e.* whether the evidence shows that the utility's facility or practice creates a proven exposure to harm. Moreover, the discussion in the ID mischaracterizes PGW's practice as a "bypass" of a low

¹ 66 Pa. C.S. § 3314.

² The ID's Findings of Fact are referred to throughout the Exceptions as "FF"; the ID's Conclusions of Law are referred to as "CL"; and the ID's Ordering Paragraphs are referred to as "OP".

³ FF, ¶¶ 13, 15, 16; ID at 14-16; CL, ¶ 11; OP, ¶¶ 2, 3.

⁴ FF 13.

⁵ 66 Pa. C.S. § 1501; ID at 17.

temperature sensor and fails to consider the testimony presented by PGW that the use of steam lance is a common practice in the industry, which ensures the transmittal of accurate temperature readings to the system. The ID wholly overlooks the facts that the TE1019 detects internal, not external, temperatures, and that the use of steam has no effect on the process temperature inside the pipe or the sensor inside the pipe.

The ID errs in sustaining the allegations of the Complaint regarding the LNG vaporization process because: 1) it fails to apply the standard established by the Commission to make determinations as to Section 1501 alleged safety violations and offers no rationale for how the use of steam to ensure the transmittal of accurate temperature readings creates a proven exposure to harm; and 2) the factual findings relied upon in reaching the legal conclusion are not supported by substantial evidence, and the ID capriciously disregards, without explanation, extensive evidence presented by PGW pertaining to the use of steam during the LNG vaporization process.

2. The ID Fails to Follow the Commission’s Applicable Legal Standard For Determining Section 1501 Safety Violations

The Commission has held that its authority under Section 1501 includes an ability to hear and adjudicate claims that seek to prevent future harm.⁶ In so ruling, the Commission has

⁶ *Maria Povacz v. PECO Energy Company*, Docket No. C-2015-2475023 (Order entered March 28, 2019) (*Povacz*), at 28. See also *Cynthia Randall and Paul Albrecht v. PECO Energy Company*, Docket No. C-2016-2537666 (Order entered May 9, 2019) (*Randall*); *Laura Sunstein Murphy v. PECO Energy Company*, Docket No. C-2015-2475726 (Order entered May 9, 2019) (*Murphy*). The discussions in *Randall* and *Murphy* regarding these issues significantly quote *Povacz* and the results mirror the outcome in *Povacz*. See also *Letter of Notification of Philadelphia Electric Company Relative to the Reconstructing and Rebuilding of the Existing 138 kV Line to Operate as the Woodbourne-Heaton 230 kV Line in Montgomery and Bucks Counties*, 78 Pa.P.U.C. 486, 1993 WL 383052 (Pa.P.U.C.), 1992 Pa. PUC Lexis 160, Docket No. A-110550F0055 (Remand Order entered March 26, 1993) (it must be demonstrated by a preponderance of the evidence that there is a “conclusive causal connection” between electromagnetic field exposure from an EDC transmission facility and adverse human health effects; when the record evidence demonstrates a body of inconclusive scientific research and studies as to the causal connection, the burden of proof is not satisfied).

emphasized that “[w]hen the prevention of harm is involved, the question becomes whether the preponderance of the evidence demonstrates that a utility’s service or facilities will cause harm.”⁷ What is required to deem a utility’s service or facilities in violation of Section 1501 is “*proven exposure to harm*.”⁸ The Commission’s rationale for rejecting a “potential for harm” or “capable of causing harm” standard under Section 1501 is that “public utility operations are not, as a general matter, hazard free.”⁹ The Commonwealth Court has likewise rejected a “potential for harm” or “capable of causing harm” standard in determining whether a hazard exists in utility service to be sufficient to prevail under Section 1501.¹⁰

It is not necessary for a utility to remove all hazards from utility services or facilities in order to be safe.¹¹ Rather, a utility’s duty under Section 1501 is to “use reasonable efforts to properly warn and protect the public from danger and to exercise reasonable care to reduce the hazards to which customers may be subjected by reason” of the provision of utility service.¹²

Although the ID correctly recognizes the Commission’s rejection of a “potential for harm” or “capable of causing harm” standard in determining whether a hazard exists in utility service to be sufficient to prevail under Section 1501, the ID fails to apply the standard that the

⁷ *Povacz* at 29 (emphasis supplied).

⁸ *Id.*

⁹ *Povacz* at 30.

¹⁰ *Povacz et al. v. Pa. P.U.C.*, 2020 Pa. Commw. LEXIS 714, 241 A.3d 481, 493-494 (2020) (that a certain practice or facility may pose a safety risk is insufficient to support a Section 1501 violation, which must be supported by evidence that is more than speculative). Although separate Petitions for Review were filed of the Commission’s *Randall* and *Murphy* Orders, the Commonwealth Court consolidated them on June 3, 2019. The Court affirmed, reversed, remanded and vacated other portions of the Commission’s Orders. The Supreme Court of Pennsylvania issued an Order on May 12, 2021 granting allocatur on issues relating to a complainant’s burden of proof under Section 1501 of the Public Utility Code. 37 MAP 2021.

¹¹ *Povacz* at 30.

¹² *Povacz* at 30-31.

Commission has articulated of the utility’s facility or service creating a proven exposure to harm. Rather than undertaking an analysis of this applicable standard, the ID summarily determines that “the concerns raised here are beyond a ‘mere showing’ that the Passyunk Plant is ‘inherently dangerous.’”¹³ Notably, unsubstantiated “concerns” do not constitute evidence.

In failing to apply the Commission’s standard, the ID contains no discussion to explain how PGW’s use of steam lance in the LNG vaporization process creates a proven exposure to harm. Indeed, despite finding that PGW has used steam for 20 years during the LNG vaporization process, the ID points to no evidence in the record – since none was presented – of any harm occurring as a result of this practice. Additionally, the Commission’s Bureau of Investigation and Enforcement (“I&E”), which has the primary responsibility for overseeing PGW’s practices from a safety standpoint, has not identified PGW’s use of steam lance during the LNG vaporization process as creating any concerns about the safe operation of the Plant.¹⁴

Moreover, the factual premise of this legal conclusion is flawed because it is based on the finding that “PGW intentionally employs a process that bypasses a safety measure.”¹⁵ As further explained below, PGW is not bypassing a safety measure but rather is using steam lance around

¹³ ID at 17.

¹⁴ Notably, the Commission created I&E in 2011 for the very purpose of handling prosecutory functions and overseeing gas safety. *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*”). By the *Reorganization Order*, the Commission delegated authority to I&E to enforce “compliance with the state and federal...gas safety laws and regulations.” *Reorganization Order* at 5-6. Indeed, I&E performs these responsibilities, such as by routinely inspecting gas utility facilities. When I&E makes allegations about a utility failing to operate in accordance with established safety standards, it initiates a Formal Complaint proceeding against the utility. *See, e.g., Pa. PUC v. UGI Utilities, Inc.*, Docket No. C-2018-3005151 (Formal Complaint filed October 4, 2018).

The Utility Authority Search, available on the Commission’s website, allows the public to access docketed cases and complaints associated with an individual utility company. A search of “Philadelphia Gas Works” demonstrates that I&E has not filed any formal complaints related to this issue to date. <https://www.puc.pa.gov/utility/125042>.

¹⁵ ID at 17.

the TE1019 to allow the temperature readings to be accurately transmitted to the control system. The use of steam lance prevents the external instrument from freezing or by warming up an instrument that may have frozen. The ID's flawed factual finding characterizing PGW's practice as a bypass of a safety measure cannot support a legal conclusion that PGW's use of steam lance violates Section 1501 of the Public Utility Code. In addition, the ID points to no provision of the Public Utility Code, a Commission regulation or a Commission order that establishes a specific industry standard or requirement with which PGW failed to comply.

3. The Evidence Does Not Prove That PGW Engages in Any Unsafe Practices During the LNG Vaporization Process

Adjudications by the Commission must be supported by substantial evidence in the record.¹⁶ Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.¹⁷ More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.¹⁸

Capricious disregard occurs when the fact-finder deliberately ignores relevant, competent evidence.¹⁹ A capricious disregard of the evidence occurs "when there is a willful and deliberate disregard of competent testimony and relevant evidence which one of ordinary intelligence could not possibly have avoided in reaching a result."²⁰ Where there is strong critical evidence that

¹⁶ 2 Pa. C.S. § 704; *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 692 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). ("Lansberry").

¹⁷ *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 217 ("Consolidated Edison").

¹⁸ *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (1980) ("Norfolk"); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961) ("Erie Resistor"); *Murphy v. Comm. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 184) ("Murphy").

¹⁹ *Capasso v. Workers' Comp. Appeal Bd. (RACS Assocs.)*, 851 A.2d 997, 1002 (Pa. Cmwlth. 2004) ("Capasso").

²⁰ *Bentley v. Bureau of Professional and Occupational Affairs*, 179 A.3d 1196, 1200 (Pa. Cmwlth. 2018), quoting *Station Square Gaming L.P. v. Pennsylvania Gaming Control Board*, 927 A.2d 232, 237 (Pa. 2007)

contradicts contrary evidence, the adjudicator must provide an explanation as to how it made its determination.²¹ Stated otherwise, the critical inquiry is whether an adjudicator has failed to give a proper explanation of overwhelming critical evidence.²²

a. The ID Fails to Cite to Substantial Evidence Supporting the Finding that the Use of Steam is a Bypass of a Safety Measure

The record does not contain substantial evidence to support the findings that the use of steam lance results in a bypass of a safety measure or amounts to an unsafe practice. In reaching this conclusion, the ID relies on claims of Complainant witness Rauceo that the use of a steam lance means that the electrical element in the TE1019 will never get down to 0 degrees and sound the alarm in the LNG control room. According to Mr. Rauceo, a steam lance negates the proper functioning of the TE1019 device because of the constant flow of steam around the indicator.²³ Additionally, Complainant witness Chavarria testified that disabling low temperature safety shutdowns can lead to an explosion.²⁴ None of this testimony shows that the use of steam in the vaporization process creates a proven exposure to harm. Indeed, it is nothing more than speculation by employees who lack the qualifications to offer these views.²⁵

(“*Bentley*”); *Metro. Edison Co. v. Pa. PUC*, 22 A.3d 353, 359 (Pa. Cmwlth. 2011); *Cerasaro v. Workers’ Compensation Appeal Board (Pocono Mountain Medical, Ltd.)*, 717 A.2d 1111, 1113 (Pa. Cmwlth. 1998) (“*Cerasaro*”).

²¹ *Bentley*, 179 A.3d at 1200.

²² *Id.*

²³ ID at 14-15; FF 13-16; EE Statement No. 4 (Direct) at 10-12.

²⁴ ID at 15; EE Statement No. 3 (Amended Direct) at 3.

²⁵ ID at 10-11 (Complainants are not engineers and are not responsible for determining the most effective methods to use during the vaporization process to ensure the transmittal of accurate temperature readings into the system). Complainant often testified inaccurately because of not having responsibility for certain aspects of the Plant’s operation. *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

b. The ID Capriciously Disregards PGW’s Testimony on the Use of Steam During the LNG Vaporization Process

The ID capriciously disregards the vast majority of PGW’s rebuttal testimony regarding these allegations and offers no explanation for doing so. In response to Complainants’ testimony, PGW presented the testimony of Raymond Snyder, a Professional Engineer and the former Senior Vice President of Gas Management for PGW prior to his retirement in 2019. Mr. Snyder confirmed that PGW’s Plant operates at all times in accordance with established procedures and protocols. Describing the T1019 as a sensor inside the pipe that measures the process temperature of the gas inside the pipe, Mr. Snyder explained that the “temperature is measured by a sensing element that extends into the center of the pipe and is received by an external transmitting instrument that transmits the temperature to the plant control system.”²⁶ He testified that a steam lance, which is a connection to a steam source that allows steam to be directed and sprayed to a desired location similar to a water hose, has never been used to prevent an alarm from occurring in the LNG control room.²⁷ Rather, the use of “steam lance, or any kind of external heat applied to the external instrument, will prevent it from freezing in cold ambient temperatures, or warm up instruments that may have frozen, so process temperatures can be accurately transmitted to the control system.”²⁸ Mr. Snyder further explained that the TE1019 detects *internal*, not *external* temperatures, and the steam has no effect on the process temperature inside the pipe or the sensor inside the pipe. It is the sensor *inside* the pipe that has

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.)

²⁶ PGW Statement No. 1 (Rebuttal) at 5.

²⁷ PGW Statement No. 1 (Rebuttal) at 3.

²⁸ PGW Statement No. 1 (Rebuttal) at 5 (emphasis supplied).

the potential to trigger an alarm, and this sensor is not impacted by the external application of the steam lance.

Per Mr. Snyder, application of heat to external instruments in cold ambient temperatures is a common practice in process plants.²⁹ Mr. Snyder noted that there are various ways to apply heat to external instruments in cold ambient temperatures. In addition to using steam, Mr. Snyder testified that electric heat tracing is common, and enclosures with heaters are also common and are typically used where there are multiple instruments at one location that can be inside one heated enclosure. The Passyunk Plant vaporization system, however, has a number of standalone external instruments, and therefore steam is the heating medium used in the vaporization process, so it is available in close proximity to instruments such as TE1019 at minimal incremental cost.³⁰

The ID does not acknowledge or discuss this extensive testimony of Mr. Snyder about the reason for using steam. Rather, the ID considers only the rebuttal testimony of Mr. Snyder concerning the redundant safety shutdown systems of the two vaporizers at the Plant, which actually highlighted the meritless nature of the Complainant's claim.³¹ As Mr. Snyder explained, the TE1013 and TE1015 are upstream and would be the initial shutdowns, while the TE1019 is a *third* safety device downstream of both vaporizers that can sense low process temperature; it is not the primary safety device that would initiate a shutdown in the event of low process temperature.³² Therefore, even if the externally applied steam lance were able to manipulate an

²⁹ PGW Statement No. 1 (Rebuttal) at 3-6.

³⁰ PGW Statement No. 1 (Rebuttal) at 5-6.

³¹ ID at 16.

³² PGW Statement No. 1 (Rebuttal) at 3-4.

internal temperature (which it cannot), PGW would *still* have upstream safety mechanisms eliminating the risk of any harm. With respect to this testimony, the ID summarily finds that it is an unsafe practice to render a redundant safety measure useless given the volatility of the product handled at the Plant.³³ Importantly, however, PGW is not rendering the TE1019 useless but rather is ensuring that through the use of steam, the system works properly and that external components of instruments exposed to cold ambient temperatures do not freeze.³⁴

The ID also errs by concluding that PGW has used the same practices during the vaporization process since 2000.³⁵ Brian McGuire, Manager of PGW's Passyunk Plant, testified that although what may or may not have been happening in 2000 is irrelevant to this proceeding, the vaporization process control system and safety shutdowns were completely redesigned (from 2000-2001); thus, there is no basis for comparison between current operating conditions and those in 2000. Mr. McGuire went on to say that PGW also updated its procedures in October 2017 and June 2019 as part of its continuous effort to improve the LNG vaporization process. Mr. McGuire further confirmed that he is not aware of any time during which Plant personnel manipulated readings on the temperature indicators.³⁶ Again, the ID largely disregards this testimony in concluding that PGW is engaged in unsafe practices.³⁷

It is imperative that the PGW testimony refuting the claims of Complainants regarding the TE1019 temperature indicator be taken into account by the Commission in its review of the ID. When this evidence is considered, it is clear that PGW has not been bypassing a low

³³ ID at 17.

³⁴ PGW Statement No. 1 (Rebuttal) at 5.

³⁵ FF, ¶ 13; ID at 16.

³⁶ PGW Statement No. 3-SR (Supp. Rebuttal) at 4.

³⁷ ID at 16-17.

temperature sensor or safety measure as the ID concludes. To the contrary, PGW has been using steam to ensure that accurate temperature readings are transmitted to the control system.

B. Exception Two: The ID Errs in Sustaining the Allegations of the Complaint Regarding the PCV-1027 Valve³⁸

1. Introduction

In sustaining the allegations of the Complaint concerning a valve (“1027” or “PCV-1027”) at the Plant, the ID finds – in the absence of any evidentiary support – that the PCV-1027 valve has been broken for years and that the release of odorless gas on October 15, 2020 was related to the “faulty” PCV-1027 valve.³⁹ The ID further finds that the only viable detectors that would sound alarms and warn of the presence of the “dangerous gas” are too far away.⁴⁰

What the ID fails to recognize is that the PCV-1027 valve is not faulty, has not been broken for years, and had nothing to do with the emission of a negligible and harmless amount of gas into the atmosphere on October 15, 2020. The ID correctly holds: “Plants involve moving parts operated by humans. They cannot and are not expected to operate perfectly all the time.”⁴¹ As PGW showed, the ultimately innocuous emission of gas on the day in question was caused by harmless human error when the GLV-114 valve was left open.

In addition, in analyzing this issue, the ID does not follow the standard that the Commission has established to make determinations about Section 1501 safety violations, *i.e.* whether the evidence shows that the utility’s facility or practice creates a proven exposure to harm. Rather, the ID summarily speculates that the “continued disrepair of the valve led to and

³⁸ ID at 22-23; FF, ¶¶ 12, 18, 19, 20; CL, ¶11.

³⁹ FF ¶¶ 17, 18, 19.

⁴⁰ FF ¶ 20.

⁴¹ ID at 23.

can lead to a dangerous situation and create an unsafe condition in violation of Section 1501.”⁴²

The ID erroneously concludes that the Complainants have met their burden of proof as to their claims that PGW violated Section 1501 of the Public Utility Code, 66 Pa.C.S. § 1501, by not repairing or replacing the PCV-1027 valve.⁴³

The ID errs in sustaining the allegations of the Complaint regarding the PCV-1027 valve because: 1) the findings are not supported by substantial evidence, and the ID capriciously disregards evidence presented by PGW pertaining to the PCV-1027 valve; and 2) the findings of fact do not support the legal conclusion that PGW violated Section 1501 by continuing to use the PCV-1027 valve, particularly when it had nothing to do with the emission of a negligible and harmless amount of odorless gas into the atmosphere.

2. The Findings Are Not Supported by Substantial Evidence, and the ID Capriciously Disregards Evidence Presented by PGW Pertaining to the 1027 Valve.

As discussed above, adjudications by the Commission must be supported by substantial evidence in the record.⁴⁴ Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.⁴⁵ More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.⁴⁶

Capricious disregard occurs when the fact-finder deliberately ignores relevant, competent evidence.⁴⁷ A capricious disregard of the evidence occurs “when there is a willful and deliberate

⁴² ID at 23 (emphasis supplied).

⁴³ Conclusions ¶ 11.

⁴⁴ 2 Pa. C.S. § 704; *Lansberry*.

⁴⁵ *Consolidated Edison*.

⁴⁶ *Norfolk; Erie Resistor; Murphy*.

⁴⁷ *Capasso*.

disregard of competent testimony and relevant evidence which one of ordinary intelligence could not possibly have avoided in reaching a result.”⁴⁸ Where there is strong critical evidence that contradicts contrary evidence, the adjudicator must provide an explanation as to how it made its determination.⁴⁹ Stated otherwise, the critical inquiry is whether an adjudicator has failed to give a proper explanation of overwhelming critical evidence.⁵⁰

a. The ID Relies on Complainants’ Speculative Testimony

At the outset, the record does not contain substantial evidence to support the findings that the PCV-1027 valve has been malfunctioning for years and that the release of odorless gas on October 15, 2020 was related to this valve. The ID’s findings are based on the testimony of the Complainants’ witnesses Mr. Ackie and Mr. Chavarria, which is nothing more than conjecture.⁵¹ While Mr. Ackie and Mr. Chavarria made general claims of this nature, neither witness provided any evidence, let alone substantial evidence, to support these assertions.⁵² Certainly, if the PCV-1027 valve was, in fact, faulty and failed to block the flow of gas (as Mr. Ackie alleges), it seems the release of inodorous natural gas would have been a continuous and constant issue. However, despite the claims by Mr. Ackie and Mr. Chavarria that the PCV-1027 valve has been malfunctioning for at least five years⁵³ and ten years,⁵⁴ respectively, (of which the ID accepts the ten year period for purposes of assessing a civil penalty),⁵⁵ the record is completely devoid of

⁴⁸ *Bentley; Metro. Edison; Cerasaro.*

⁴⁹ *Bentley*, 179 A.3d at 1200.

⁵⁰ *Id.*

⁵¹ *See ID* at 22-23.

⁵² *See e.g.* Tr. at 57 and 93-94.

⁵³ Tr. at 46.

⁵⁴ Tr. at 94

⁵⁵ ID at 27.

any evidence that the PCV-1027 valve caused any issues prior to October 15, 2020 and contains only speculation as to any issues it caused on October 15, 2020.

Additionally, the Commission's Bureau of Investigation and Enforcement, which has the primary responsibility for overseeing PGW's practices from a safety standpoint, has not identified PGW's PCV-1027 valve as posing any concerns about the safe operation of the Plant.⁵⁶ Moreover, as noted by PGW witness Mr. McGuire, despite being asked twice by his own attorney, Mr. Chavarria could not explain why he believed the PCV-1027 valve was relevant to the incident on October 15, 2020.⁵⁷ Despite these major shortcomings, the ID accepts this mere trace of evidence provided by Mr. Ackie and Mr. Chavarria in finding that the PCV-1027 valve was faulty and somehow related to the incident on October 15, 2020. Importantly, the ID contains a misleading reference to Mr. Chavarria's testimony about the valve having a "broken ground safety feature" that presents a dangerous situation.⁵⁸ Mr. Chavarria did not testify that the ground safety feature of the valve is "broken." Rather, this testimony explained that the PCV-1027 valve "is an emergency shut down valve that stays open as long as a positive electrical ground is achieved. If the electric ground is broken, the PCV-1027 valve will shut."⁵⁹

The ID also erroneously relies on the testimony of Mr. Chavarria related to the frosted line and the reading on the gas indicator to support its findings about the PCV-1027 valve.⁶⁰ Even if this testimony is true, it does not provide substantial evidence to support the findings that

⁵⁶ See FN 14, *supra*. A search of "Philadelphia Gas Works" demonstrates that I&E has not filed any formal complaints related to this issue to date. <https://www.puc.pa.gov/utility/125042>.

⁵⁷ PGW Statement No. 3-SUR (Surrebuttal) at 6-7.

⁵⁸ ID at 22.

⁵⁹ EE Statement No. 3-REPLY at 4.

⁶⁰ ID at 23.

the PCV-1027 valve was malfunctioning for years, or that the valve was in any way related to the incident on October 15, 2020. At best, this evidence merely establishes that gas was escaping from the line on October 15, 2020, and these issues were addressed by PGW, as explained in more detail below. For these reasons, the record lacks substantial evidence to support the findings related to the PCV-1027 valve.

b. The ID Capriciously Disregards PGW Testimony

Perhaps more detrimental, in accepting the Complainants' testimony, the ID capriciously disregards the extensive testimony of PGW on this issue – without any explanation. PGW witness Brian McGuire provided substantial evidence refuting the allegations of Mr. Ackie and Mr. Chavarria, which is supported by the lack of evidence, to show that the valve has been malfunctioning for a significant period of time.

i. The PCV-1027 Valve Functions Properly and the Emission of Gas Was the Result of Harmless Human Error

Mr. McGuire flatly refuted the claims that the PCV-1027 valve has been malfunctioning for years. He explained that the PCV-1027 valve is inspected and tested on a yearly basis and that no operational issues have been found. Mr. McGuire testified, “PCV-1027 functions exactly as it is designed to.”⁶¹ The ID ignores this unrefuted testimony regarding yearly inspections. Further, the ID fails to explain, or provide a justification for, its acceptance of the Complainants' testimony over the contradicting evidence presented by Mr. McGuire.⁶² This is particularly

⁶¹ PGW Statement No. 3-SUR (Surrebuttal) at 6-7.

⁶² The ID states that Mr. Chavarria's testimony related to the frosted line and the reading on the gas indicator support its findings. ID at 23. However, as discussed in more detail herein, it should be noted that, even if true, this testimony does not establish that the 1027 valve was malfunctioning for years, or that the alleged faulty valve was in any way related to the incident on October 15, 2020.

concerning given Mr. McGuire's role as Manager of the Plant, with a responsibility to ensure its safe operation.⁶³

Notably, Mr. McGuire explained that the cause of the emission of a negligible and harmless amount of gas on October 15, 2020 was nothing more than human error. An employee had neglected to close the GLV-114 valve. When another employee on the next shift closed the GLV-114 valve, he rectified the issue.⁶⁴ Mr. McGuire further testified that even if the GLV-114 valve had remained open, the cold gas would have bled down to zero and dissipated within a couple of days.⁶⁵ The ID does not even acknowledge this unrefuted testimony or explain why the PCV-1027 valve was to blame rather than the human error of not closing the GLV-114 valve.

ii. The Frosted Line and Reading on the Gas Indicator Are Unrelated to the PCV-1027 Valve

The ID also capriciously disregards Mr. McGuire's testimony related to the frosted line and Mr. Chavarria's reading on the gas indicator. Mr. McGuire's testimony – which is not contradicted by Mr. Chavarria – demonstrates that these facts are wholly unrelated to the PCV-1027 valve, do not establish a valve malfunction, nor do they link the PCV-1027 valve to the October 15, 2020 incident. Specifically, Mr. McGuire explained that on October 15, 2020, PGW tested the LNG pumps. In preparation, cold gas (below 32°) was introduced into the system to ensure that the pipes were at the appropriate temperature to run the test. Valve GLV-114 was open when the cold gas was pumped through the system, which resulted in the cold gas slowly escaping through the truck unloading hose and causing the hose to frost over.⁶⁶ “[T]he only

⁶³ PGW Statement No. 3 (Rebuttal) at 1.

⁶⁴ PGW Statement No. 3-SUR (Surrebuttal) at 4-5.

⁶⁵ PGW Statement No. 3-SUR (Surrebuttal) at 5.

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

reason Mr. Chavarria got a reading of 100% gas on the portable gas indicator was because he took a device meant to detect natural gas *in the atmosphere* and held it to the ‘site of the venting gas’. In other words, Mr. Chavarria got the result one would expect when putting the sensor directly into the stream of gas flowing from the hose.”⁶⁷ As such, this uncontradicted evidence establishes a reason for the frosted line and the reading on the gas indicator, entirely unrelated to the PCV-1027 valve. Nevertheless, the ID completely ignores this testimony, and instead, relies on the frosted line and the gas indicator reading to support its findings related to the PCV-1027 valve.

iii. Gas Alarms Did Not Sound Due to Negligible Amount of Gas

Additionally, the ID capriciously disregards Mr. McGuire’s testimony related to the gas detectors at the Plant. Refuting Mr. Chavarria’s testimony that the alarms are too far away to warn of the presence of gas, Mr. McGuire explained that the alarms did not sound on October 15, 2020, because the amount of gas being emitted was not enough to trigger any of PGW’s detectors.⁶⁸ Mr. McGuire testified that “[t]he gas detectors at the Plant are a safety measure and are programed to detect natural gas in the atmosphere, whether odorized or not.”⁶⁹ He indicated that a detector in the truck unloading building, the door of which was open to the outside, is approximately 30 feet from the outlet of the hose through which gas was escaping.⁷⁰ Mr. McGuire further explained that no emergency existed because of the negligible amount of cold

⁶⁷ PGW Statement No. 3-SUR (Surrebuttal) at 6 (internal citation omitted).

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

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

⁷⁰ PGW Statement No. 3-SUR (Surrebuttal) at 5-6.

gas that escaped through a hose because a valve which should have been shut was left open. In finding that the gas sensors are too far away, the ID wholly disregards this evidence.

c. Summary

Contrary to the unsupported findings in the ID, the record contains substantial evidence demonstrating that the PCV-1027 valve had nothing to do with the events that occurred on October 15, 2020 and that the release of gas on said date involved a different valve, GLV-114, which was not shut due to harmless human error.⁷¹ The record further demonstrates (and the ID does not find otherwise) that this situation was effectively and efficiently addressed by PGW management.⁷² For the reasons explained above, the ID errs in sustaining the allegations of the Complaint regarding the PCV-1027 valve because the findings are not supported by substantial evidence, and the ID capriciously disregards evidence presented by PGW pertaining to the PCV-1027 valve.

3. The Findings of Fact Do Not Support the Legal Conclusion That PGW Violated Section 1501 By Not Repairing or Replacing PCV-1027

Even if the Commission finds that the findings are supported by the evidence in the record, the findings do not support the legal conclusion that PGW violated Section 1501 by not repairing or replacing the PCV-1027 valve. In order for the Complainants to meet their burden, they must demonstrate that PCV-1027 valve caused harm or created a proven exposure to harm.⁷³ The ID, certainly, does not conclude that the PCV-1027 valve caused harm. Similarly, the ID undertakes no analysis of the “proven exposure to harm” allegedly created by PCV-1027

⁷¹ See PGW Statement No. 3-SUR (Surrebuttal) at 3-4 and 6-7.

⁷² See PGW Statement No. 3-SUR (Surrebuttal) at 7-8.

⁷³ See PGW Main Brief at Section IV.A.2 and Section II.A.2., *supra*.

valve, but rather summarily speculates that the “continued disrepair of the valve led to and can lead to a dangerous situation and create an unsafe condition in violation of Section 1501.”⁷⁴ It is noteworthy that nothing in the record supports the factual premise of this conjecture since Complainants made only bald assertions and produced no evidence to establish a “continued disrepair of the valve.”

Importantly, the ID also contains no findings to support this conclusion. The ID does not identify any specific harm or danger associated with the PCV-1027 valve or the incident on October 15, 2020. For example, the ID does not find that said release could have created an explosion, led to asphyxiation, or was not handled properly by PGW management. To the contrary, the ID acknowledges the testimony of PGW witness Brian McGuire, the individual responsible for ensuring that the Plant operates in a safe and productive manner,⁷⁵ who stated that the incident was not an emergency or a dangerous situation and that “a negligible and harmless amount of gas was emitted into an open-air area.”⁷⁶ In fact, the record evidence demonstrates that, even if GLV-114 had remained open that day, the cold gas in the system would have bled down to zero (run out) and dissipated within a couple of days. Mr. McGuire further 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 also indicated the “area of the Plant where the gas was escaping is an explosion-proof area where nothing that could cause a spark is permitted.”⁷⁷

⁷⁴ ID at 23.

⁷⁵ PGW St. No. 3 (Rebuttal) at 1.

⁷⁶ ID at 22.

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

Additionally, the threat of asphyxiation was non-existent. “An extremely small quantity of gas was escaping through the truck unloading hose into an outdoor space; there was no possibility of the gas collecting in an amount that would have posed a danger of asphyxiation to anyone.”⁷⁸ The evidence in this case clearly demonstrates that the issue that occurred on October 15, 2020 was not an emergency situation, did not create a proven exposure to harm, and was effectively and efficiently addressed by PGW management.

The ID fails to make any findings contrary to this evidence, or findings that would support the legal conclusion that the Complainants met their burden of proving that the 1027 valve or the incident on October 15, 2020 caused harm, created a proven exposure to harm or that PGW otherwise violated the Public Utility Code, Commission regulations or Commission orders.

C. Exception Three: The ID Errs in Recommending the Imposition of a Civil Penalty Based on Findings of PGW’s Practices that Occurred More than Three Years Ago⁷⁹

As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code.⁸⁰ It is well-settled that the Commission must act within, and cannot exceed, its jurisdiction.⁸¹

⁷⁸ PGW Statement No. 3-SUR (Surrebuttal) at 5-6.

⁷⁹ ID at 24-27; CL, ¶¶ 12-13.

⁸⁰ *See City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984) (“We begin our inquiry by recognizing that the authority of the Commission must arise from the express words of the pertinent statutes or by strong and necessary implication therefrom...It is axiomatic that the Commission’s power is statutory; and the legislative grant of power in any particular case must be clear.”); *see also Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 795 (Pa. 1977); *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008).

⁸¹ *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348 (Pa. Super. 1945).

Jurisdiction may not be conferred by the parties where none exists.⁸² Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.⁸³

Section 3314 of the Public Utility Code provides that “[n]o action for the recovery of any penalties or forfeitures incurred under the provisions of this part, and no prosecutions on account of any matter or thing mentioned in this part, shall be maintained unless brought within three years from the date at which the liability therefor arose.”⁸⁴ The statute of limitations in Section 3314 is non-waivable because the time limitation terminates not just the remedy but also the actual right to bring the action.⁸⁵ As the Complaint in this proceeding was filed on October 19, 2019, Section 3314 divests the Commission of jurisdiction to address practices that occurred prior to October 19, 2016.⁸⁶ It logically follows that since the Commission does not have jurisdiction to hear claims that occurred prior to October 19, 2016, it likewise may not impose civil penalties on a public utility for practices that may have been in effect prior to that date. The ID errs in calculating these civil penalties based on periods that exceed the three-year statute of limitations in this case. Even if the Commission determines that PGW has violated Section 1501 of the Public Utility Code, the calculation of the civil penalty must be limited to the three years immediately preceding the initiation of this proceeding.⁸⁷

⁸² *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

⁸³ *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *alloc. denied*, 637 A.2d 293 (Pa. 1993).

⁸⁴ 66 Pa.C.S. § 3314.

⁸⁵ *Reuben v. O’Brien*, 445 A.2d 801 (Pa. Super. 1982).

⁸⁶ *Perry v. Public Power, LLC*, Docket No. 2018-3003086 (Initial Decision served January 30, 2019 and Final Order entered March 29, 2019).

⁸⁷ This conclusion is also consistent with the Commission’s application of Section 1312 of the Public Utility Code, 66 Pa.C.S. § 1312 (related to the Commission’s authority to order refunds for excess rates). *See e.g. Norman DiMatteo v. West Penn Power Company*, 67 Pa. PUC 444, 1988 Pa. PUC LEXIS 467 (June 17, 1988). In *Norman DiMatteo v. West Penn Power Company*, the Commission found that a public utility improperly charged a customer a commercial rate, rather than the appropriate residential rate, over a seven-

Further, in recommending the imposition of a civil penalty, the ID overlooks the fact that PGW is not an investor-owned utility. If PGW is required to pay a civil penalty, the only source of revenues from which to make the payment is its ratepayer base. Finally, it is inappropriate for the Commission to determine as part of a complaint proceeding that PGW should refrain from certain practices that have been in place for many years and then assess a civil penalty. For example, since PGW was not on notice that the Commission views the use of steam during the vaporization process as jeopardizing safe operations, it would be a violation of its fundamental due process rights to be penalized as part of this complaint proceeding.⁸⁸

year period. The Commission held that the customer could only receive a refund for the excessive charges paid during the last four of the seven years before the date of filing of the complaint, in accordance with Section 1312. *See also Arnold Young v. PECO Energy Company*, 2002 WL 1430184 (Apr. 12, 2002) (Even if the Complainant had met his burden of proving that he had been over charged for years as a result of a meter mix-up, he nonetheless would not have been entitled to relief beyond the time period set forth in Section 1312).

⁸⁸ As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. *Schneider v. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984), *citing Fusaro v. PUC*, 382 A.2d 794 (Pa. Cmwlth. 1978). Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Id.*

III. CONCLUSION

Philadelphia Gas Works respectfully requests that the Commission grant its Exceptions and modify the Initial Decision to dismiss the Complaint in its entirety.

Respectfully submitted,

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