RENATO DE SOUSA, **Plaintiff,** **v.** **PSE&G; PUBLIC SERVICE ELECTRIC AND GAS COMPANY; PUBLIC SERVICE ENTERPRISE GROUP; PSEG POWER; PSEG SERVICES CORPORATION; CHRIS DOE; TOWNSHIP OF EDISON; STATE OF NEW JERSEY; NEW JERSEY DEPARTMENT OF PUBLIC UTILITIES AND AFFAIRS; COUNTY OF MIDDLESEX; TOWER MAINTENANCE CORPORATION; ELIZABETH VLAHOPOULOS; PETER VLAHOPOULOS; NICHOLAOS PSAREAS; JOHN DOES 1-20; ABC CORPORATIONS 1-20,** **Defendants.** _____ **MARC J. COMER, as administrator ad prosequendum of the ESTATE OF VALDINEI NASCIMENTO DESOUZA a/k/a JOSE SOUZA NASCIMENTO,** **Plaintiffs,** **PSE&G; PUBLIC SERVICE ELECTRIC AND GAS COMPANY; PUBLIC SERVICE ENTERPRISE GROUP; PSEG POWER; PSEG SERVICES CORPORATION; CHRIS BROZOWSKI; ALLRIC DESHONG; TOWER MAINTENANCE CORPORATION; ELIZABETH VLAHOPOULOS; PETER VLAHOPOULOS; NICHOLAOS PSAREAS; JOHN DOES 1-20; ABC CORPORATIONS 1-20,** **Defendants.**	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION:** **MIDDLESEX COUNTY** **DOCKET NO.: MID-L-3051-14** **Civil Action**

BRIEF ON BEHALF OF PLAINTIFFS' IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUES OF BREACH OF COMMON LAW DUTY AND PRODUCT DEFECT (CORRECTED)

Clark Law Firm, PC
811 Sixteenth Avenue
Belmar, New Jersey 07719
(732) 433-0333
(732) 894-9647
Attorneys for Plaintiffs

Of Counsel and on the Brief
Gerald H. Clark, Esq. - #048281997
Mark Morris- #118292015

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STATEMENT OF MATERIAL FACTS IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUES OF BREACH OF COMMON LAW DUTY AND PRODUCT DEFECT

I. PSE&G Re-Hires an "Unacceptable" Contractor to Paint its Transmission Towers

1. In May, 2012, PSE&G ("PSEG") solicited bids from contractors via a Request for Proposals ("RFP") to paint 344 of its transmission towers. The work included scraping off the old lead paint, applying a layer of red primer, and then applying a coat of green paint. (*Exhibit 1, 5/17/12 PSEG RFP*)

2. Under the RFP, PSEG was going to handle some portions of the work itself. For example, PSEG was going to handle the disposal of the lead paint chips and provide drums for that purpose. (*Exhibit 1, 5/17/12 PSEG RFP at 2*) (*Ex. 22, Deposition of Chris Brozowski at 196*)

3. PSEG also selected the paint to be used; Keeler & Long Anodic Self priming paint #440. (*Exhibit 1, 5/17/12 PSEG RFP at 3*)

4. This paint contains zinc and is highly conductive of electricity. (*Exhibit 2, Paint Data Sheet*) (*Exhibit 6, Report of David Wallis at 10-11*) (*Exhibit 3, Report of Michael Caggiano at 3, 6-7*) (*Exhibit 40, Decision of DOL Judge Baumerich at16*)

5. The RFP also states that with respect to the work PSEG will strictly enforce "All OSHA, Federal, State, Municipal and PSE&G safety regulations..." and "PSE&G takes the safety of everyone very seriously...Short cuts on safety will not be tolerated." (*Exhibit 1, 5/17/12 PSEG RFP at 3, 5*)

6. The RFP also states, "Safety Watchers, if required, will be supplied with the cost borne by PSE&G." (*Exhibit 1, 5/17/12 PSEG RFP at 3*)

7. The RFP also states that safety meetings will be conducted every day and that a copy of the meeting minutes, "shall be furnished to PSE&G." (*Exhibit 1, 5/17/12 PSEG RFP at 3*)

8. The RFP also states, "Contractor is to refer to the PSE&G 'Tower Painting' Section of the Overhead Construction Manual. All clarifications of this document are to be requested prior to the start of all work." (*Exhibit 1, 5/17/12 PSEG RFP at 3*)

9. On or about June 13, 2012, Tower Maintenance Corporation ("TM") submitted a bid package to do the job for about $1.6 million. (*Exhibit 4, TM Bid Materials*)

10. TM's bid package showed a significant worker injury history, including the 2010 death of a painter who fell from a transmission tower in Pennsylvania. (*Exhibit 4, TM Bid Materials*)

11. A record of TM's prior tower painting death incident is readily available on OSHA's website. The OSHA file on the matter shows that two years earlier, on October 10, 2010, another TM worker who was painting a communication tower fell 90 feet to his death. (*Exhibit 5, TM 2010 OSHA Death Record*) (*Exhibit 40, Decision of DOL Judge Baumerich at11-13*)

12. OSHA noted TM did not follow basic safety rules about training, inspections and fall protection. (*Exhibit 5, TM 2010 OSHA Death Record*) (*Exhibit 40, Decision of DOL Judge Baumerich at11-13*)

13. Peter Vlahopoulos is the husband of the owner of Tower Maintenance, Elizabeth Vlahopoulos. He is listed as Tower Maintenance's "project director." Peter Vlahopoulos was the owner of record of a Tower Maintenance predecessor industrial painting company (Tower Painting Co., Inc.) that accumulated numerous OSHA citations related to inadequate fall protection. (Exhibit 47, OSHA Press Release) (Exhibit 40, DOL Decision at 13)

14. PSEG has a contractor safety program that sets forth basic safety rules PSEG has to follow in hiring contractors like TM. (*Exhibit 7, Deposition of Lee Wallace at 74-75*) (*Exhibit 8, Deposition of Allric DeShong at 149-150, 152*) (*Exhibit 9, Deposition of Greg Player at 26-28, 33-49*) (*Exhibit 10, Contractor Safety Program*)

15. Greg Player was produced as the PSEG corporate representative most knowledgeable in the PSEG Contractor Safety Program. (*Exhibit 9, Deposition of Greg Player at 26*)

16. The purpose of the contractor safety program is to ensure PSEG hires only "safe contractors that will not needlessly endanger PSE&G personnel, the contractor's own workers or the general public." (*Exhibit 9, Deposition of Greg Player at 33-34*)

17. The way the hiring rules work is that before being awarded a bid, PSEG contractors must fill out a Contractor Safety Qualification Questionnaire. Based upon the information provided, the contractor is assigned one of 3 rankings: acceptable, control or unacceptable. (*Exhibit 10, Contractor Safety Program at 1-5*) (*Exhibit 9, Deposition of Greg Player at 33-36*)

18. Tower Maintenance submitted its Contractor Safety Qualification Questionnaire with its May, 2012 bid package. Their prior injury history, including the prior painter who died, was readily apparent from their bid materials. (*Exhibit 4, TM Bid Documents*)

19. In connection with the instant matter, Tower Maintenance was charged by OSHA and found guilty by a Department of Labor Administrative Law Judge to be a serious, willful and repeat offender. In addition to that of Tower Maintenance, the Judge also took into account the predecessor firm's extensive OSHA violations record. (*Exhibit 40, Decision of DOL Judge Baumerich at 13, 50-77*)

20. <u>TM's prior worker death history placed them squarely in the "unacceptable" category</u>.

(*Exhibit 10, Contractor Safety Program at 1-5*) (*Exhibit 9, Deposition of Greg Player at 35-36*) (*Exhibit 11, Russell Dep at 8-10*)

21. Greg Player testified:

Q. Well, you note on the contractor safety qualification questionnaire that they had a prior fatality. You see that?
A. I see that, yes.

Q. Okay. And that would have put them into what category?
A. In Table 1, <u>that would have put them in unacceptable</u>....They would be marked as unacceptable based on 260-40, Table 1. Having a fatality would be unacceptable.

(*Exhibit 9, Deposition of Greg Player at 36, 45*) (*See also Exhibit 11, Russell Dep at 8-10*)

22. The Contractor Safety Program states:

> **Ranking**: Unacceptable
>
> Contractors who have been evaluated and fall into this category have not demonstrated the ability to perform to company's expectations and should be hired only when Company business needs dictate. In addition to the controls stated above, the Contractor shall appear before the Company Contractor Review Board and, at their discretion, be placed on a Contractor Probation Plan.

(*Exhibit 10, Contractor Safety Program at 4, 5*)[1]

23. There were no pressing company needs that dictated Tower Maintenance had to be hired on this job and there were other contractors available to do the work. (*Exhibit 9, Deposition of Greg Player at 48-49*) (*Exhibit 21, Pre-Construction Meeting Notes at 1*)

24. The additional controls by PSE&G include "additional safety meetings over and

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[1]The Court should be reminded that this was among several critical documents PSE&G hid during the discovery process, swore and represented to the Court did not exist. We were only able to find out about them after persistent questioning of PSEG employees. But even then PSEG told the Court and counsel the records were "over broad, irrelevant, harassing, etc." It took numerous rounds of motions and court orders to get these kinds of documents produced. (*See, e.g., prior court record and Ex. 22, Brozowski dep. at 96, 158-163; Ex. 9, Player dep. at 26-31, 38-39; Ex. 7, Wallace dep. at 75-81; Ex. 38, Obarrio dep at 54*) This is <u>not</u> how the discovery process is supposed to work.

above required site safety meetings," "additional craft training and supervision" and "More frequent safety assessments [by PSE&G]." (*Exhibit 10, Contractor Safety Program at 4*)

25. Despite its death history, none of these additional controls were put in place with regard to Tower maintenance. (*Exhibit 9, Deposition of Greg Player at 34-40, 48-49*)

26. Furthermore, Tower maintenance was never brought before the Contractor Review Board, nor were they placed on any contractor probation plan. (*Exhibit 9, Deposition of Greg Player at 34-40*)

27. At the time Allric DeShong awarded TM the bid, he knew about this prior fatality. He testified:

> Q. Did you know that Tower Maintenance had a prior fatality incident in connection with painting towers?
> A. When I looked through the documents in the OSHA log I -- I did notice an incident.

(*Exhibit 8, Dep of Allric DeShong at 207-209*)

28. But this is what he swore under oath to the United States Department of Labor:

> Q. Were you aware that Tower Maintenance had had a worker fatality in the past?
> A. No.

(*Exhibit 12, DeShong DOL Testimony at 26*)

29. Allric DeShong further admitted his hiring of TM violated basic safety rules and that he should have been "reluctant to hire them." (*Exhibit 8, Dep of Allric DeShong at 207-209*) (*See also Ex. 7, Dep. of Lee Wallace at 53-54*)

30. But then he later testified:

> Q. Do you think it was an error on your part to hire Tower Maintenance on the job?
> A. No.

(*Ex. 8, DeShong dep at 212-213*)

31. Of the 344 towers to be painted, in July, 2012, PSEG awarded TM a contract to paint about 100 of them. (*Exhibit 13, Dep of Josimar Mackevicz at 89-90*) (*Exhibit 14, Purchase Order*)

32. This is not the first time PSEG hired TM to paint its towers; it had utilized them on several other tower painting projects in 2008 and 2009.

II. PSE&G is Required to Provide a Safe Work Environment and Manage Safety on the Transmission Tower Painting Project, Including it is Supposed to Enforce Safety Rules under the New Jersey High Voltage Proximity Act, OSHA, Industry Standards, and its Own Safety Rules

1. PSEG's high voltage transmission towers are extremely hazardous. (*Exhibit 8, Dep of Allric DeShong at 17-18, 20, 251-252*) (*Ex. 7, Dep. of Lee Wallace at 17, 21*)

2. As such, PSEG is duty bound under several laws and industry standards to manage safety on its transmission tower painting project. (*Exhibit 8, Dep of Allric DeShong at 18-19*)

3. PSEG has a responsibility of providing a safe work environment to everyone on its property. (*Exhibit 8, Dep of Allric DeShong at 32, 102-106, 134*).

4. As set forth above, the PSEG Request for Proposals ("RFP") states that PSEG will strictly enforce all these safety rules, including its own internal safety rules. (*Exhibit 1, 5/17/12 PSEG RFP at 3, 5*)

5. The purchase order contract with Tower Maintenance ("TM") states that TM is required to "comply with...all applicable laws, regulations <u>and [PSEG] Company policies and procedures</u> that pertain to all Work" to be done. (*Exhibit 14, Purchase Order at para. 5*) (underline added)

6. PSEG had TM sign an "OSHA Affidavit" which also required TM to "comply with PSE&G Company safety standards." (*Exhibit 4, OSHA Affidavit*)

7. PSEG's corporate industry safety rules are found in several PSE&G documents[2] including the following:

Exhibit 10- PSE&G Contractor Safety Program
Exhibit 15- PSE&G Overhead Transmission Construction Manual
Exhibit 16- PSE&G Environmental, Health and Safety Program Guide
Exhibit 17- PSE&G Environmental, Health & Safety Policy

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[2]PSEG hid these critical documents from discovery, initially denied their existence, and then multiple times told the Court they were "irrelevant," "over burdensome," "harassing," etc. PSEG flouted the discovery rules and engaged in abusive discovery obstruction. They only came to light after persistent questioning of PSEG employees, many hours of motion practice, and court orders. (*See, e.g., prior court record and Ex. 22, Brozowski dep. at 96, 158-163; Ex. 9, Player dep. at 26-31, 38-39; Ex. 7, Wallace dep. at 75-81; Ex. 38, Obarrio dep at 54*)

Exhibit 18- PSE&G Standards of Integrity
Exhibit 19- PSE&G Safety Standards and Procedures Manual
Exhibit 20- PSE&G Substation Awareness

8. These rules are in place to prevent needless injury to all workers- including contractors like TM workers- as well as the general public. (*Ex. 22, Dep of Chris Brozowski at 98-100, 102, 170-173, 175-180*) (*Ex. 26, Dep of Hill at 57*) (*Ex. 8, Dep of DeShong at 25-26, 28, 31, 95-99, 102-107, 113-115*) (*Ex. 7, Dep of Wallace at 18-20*) (*Exhibit 14, Purchase Order at para. 5*) (*Exhibit 18, PSEG Standards of Integrity at 2, 16*) (*Ex. 16, PSE&G Environmental, Health and Safety Program Guide at Element 11 and 2-6, 14, 17, 21, 23*) (*Ex. 10, Health & Safety System, Contractor Health & Safety at 3, 4, 5*) *(Exhibit 19, PSE&G Safety Standards and Procedures Manual at Part 1, 1-1, 1-2, 1-3, 2-3, 2-5*)

9. The purchase order contract also requires TM to follow PSEG's "Standards of Integrity" policy. (*Exhibit 14, Purchase Order at para. 5*)

10. The RFP also states, "Contractor is to refer to the PSE&G 'Tower Painting' Section of the Overhead Transmission Construction Manual. All clarifications of this document are to be requested prior to the start of all work." (*Exhibit 1, 5/17/12 PSEG RFP at 3*)

11. But other than the Tower Painting Section of the Overhead Transmission Construction Manual, PSEG did not provide TM with any of these safety documents PSEG was supposed to make sure they were following for the protection of the workers. (*Exhibit 8, Dep of Allric DeShong at 236-238, 240*)

III. PSE&G Had the Power, Authority, Responsibility and Opportunity to Recognize and Correct Unsafe Job Hazards Including about Fall Protection and Proximity to the Live Wires

A. Chris Brozowski Was the Designated PSE&G Safety Watcher for the Project

1. The RFP also states, "Safety Watchers, if required, will be supplied with the cost borne by PSE&G." (*Exhibit 1, 5/17/12 PSEG RFP at 3*)

2. Similarly, the purchase order contract also states that "Prior to initiating any Work, [TM] should contact the [PSEG] designated Safety Coordinator for the specific work location." (*Exhibit 14, Purchase Order at para. 5*)

3. The Pre-Construction Meeting Notes also state, "Daily job briefs are to include the PSE&G designated Safety Watcher." (*Exhibit 21, Pre-Construction Meeting Notes at 2*)

4. The PSE&G Safety Standards and Procedures Manual tells what a safety watcher is:

7.8 Watchers

A watcher is a person appointed to guard the boundary between an unsafe area and a safe work area in the absence of or in addition to other safety barriers.

The qualifications of watchers include the following:

- Must be alert, physically able, conscientious, able to follow instructions and be familiar with station construction and hazards.
- A watcher is used when normal physical methods of barring workers from adjacent mechanical or electrical hazards need to be supplemented.
- The watcher shall wear a vest or arm band with the word "watcher" on it and use a whistle to alert workers of any dangerous conditions that arise during a work assignment.
- Workers are responsible to know the hazards against which the watcher has been appointed to guard.

(Exhibit 19, PSE&G Safety Standards and Procedures Manual at Part 3, 9-36)

5. Chris Brozowski was the PSEG Chief Live Line Coordinator at the time of the incident. (*Ex. 22, Brozowski dep. at 11, 108*)

6. His job description included, among other things, interpreting transmission tower sketches and drawings, exercising good judgment in coordinating the work, recognizing hazardous conditions, and taking appropriate action to safeguard workers and the public. (*Exhibit 23, Chief Live Line Coordinator Job Description*)

7. Yet Chris Brozowski testified, "I don't know anything about OSHA, really." (*Ex. 22 at 171*)

8. As the PSEG Designated Safety Watcher, Chris Brozowski was on site on a daily basis watching the TM workers paint the towers, monitoring their safety practices and answering any job questions, including about safety. (*Ex. 22, Brozowski dep. at 108, 226-227*) (*Ex. 26, Dep. of Ryan Hill at 12*) (*Ex. 27, Brozowski DOL Testimony at 423*)

9. PSE&G has power and authority over TM to set the rules under which they will work. Lee Wallace testified:

Q. So PSE&G did have certain rules that they required their contractors to follow on this job with regard to safety, correct?
A. Correct.

Q. And PSE&G as the utility hiring a contractor to do work on its property, PSE&G has certain power and authority over that contractor to set the

conditions under which they will work, right?

A. Yes. If there's something that we require, yes, we would state that.

(Ex. 7, Wallace Dep. at 21-22).

10. Allric DeShong of PSEG conducted its own job hazard analysis and reviewed that of TM. PSEG's job hazard analysis included making sure TM followed fall protection and "look[ed] to recognize any specific hazard on that structure or any part of the worksite...[and take] any precautions for any possible dangers that may ally." (*Ex. 12, DeShong DOL dep at 74-75*) PSE&G safety personnel further reviewed the TM job hazard analysis, "to offer any opinions or changes." (*Ex. 12, DeShong DOL dep at 79*)

11. If Chris Brozowski saw something unsafe, he had the authority and responsibility to do something about it. He testified:

Q. [I]f you saw something going on that was unsafe or against PSE&G's safety rules was it part of your job to do something about that?

A. I suppose it was.

...

Q. You had the power and authority to stop work if you saw an unsafe thing going on on the towers, right?

A. Yes. Everyone [at PSEG] does.

...

Q. Weren't you there overseeing the activities of Tower Maintenance?

...

A. I was watching their work and their progress, yes.

Q. <u>If you noticed that the workers were not following the appropriate health and safety rules or regulations you would have the ability to stop the job and take corrective action, correct?</u>

A. <u>Yes, I would</u>.

(*Ex. 22, Brozowski dep. at 108, 155, 226-227*)

12. Chris Brozowski was assigned to oversee the work activities of TM and enforce all safety rules, including PSEG safety rules. Allric DeShong testified:

Q. In the scope of work, the RFP which is marked as P-35 it indicates that all OSHA, Federal, State, municipal safety regulations will be strictly enforced, and it also says that PSE&G safety regulations will be strictly enforced. Who was going to enforce that on the job?

...

A. Well, certainly if Chris had recognized any concerns he had the ability to stop

the job. Additionally, we have folks -- safety -- internal safety folks that would go around and conduct audits unannounced so they could be enforced ...through that manner also.

(*Exhibit 8, Dep of Allric DeShong at 234*)

A. There was one PSE&G representative assigned to oversee the activities of Tower Maintenance. If they were running multiple crews, we did not have a second PSE&G person, it was just one for Tower Maintenance.

...

Q. Okay. And if the PSE&G on-site representative noticed that workers were not following their health and safety plan or safety regulations, what would the on-site representative or what could the on-site representative do in that situation?

A. He's able to stop the job and then talk with the Tower Maintenance supervisor or safety watcher that was on site and require some sort of corrective action, and also notify myself.

Q. And what kind of corrective action could he require?

A. That depends on what was taking place. ...if he sees someone that's not wearing a harness, then he would go and stop the job, make sure this individual is wearing the proper fall protection, and then he would notify me, and I would follow up with Tower Maintenance management to make sure that that's reinforced and it doesn't occur in the future.

(*Ex. 12, DeShong DOL Testimony at 41, 42-43*)

13. PSEG Safety Official, Lee Wallace similarly testified:

Q. Did Chris Brazowski who's sitting in the truck watching them at 40 bucks an hour or so, you know, watching them, did he have any responsibility that if he saw something that was unsafe or against established safety rules, did he have any responsibility or authority to say anything about that to prevent needless injury and death to workers?

...

A. Yes. He would -- yes.

Q. Because all the workers and the witnesses were testifying that those pelican clips on their fall protection couldn't fit around the structure, that they had to wrap it around and then clip it to itself. Shouldn't Chris have noticed that and done something if that's true?

A. If he noticed it. I don't know what he saw.

(*Ex. 7, Wallace dep. at 72-73*)

14. TM Supervisor Nick Psareas testified:

> "[Chris] was there to make sure we did obey all OSHA, all rules and all painting, proper practices, to make sure that everything was painted properly that we did it carefully and we did it safely."

(*Exhibit 24, Psareas deposition at 18, See also pgs. 209, 212, 219, 247-248*)

15. Peter Vlahopoulous testified:

Q. What was the purpose of the pre construction meeting with PSE&G?
A. That they were going to have a safety coordinator with us at all times.

(*Ex. 25, dep of Peter Vlahopoulous at 187*)

16. The PSEG payroll records for Brozowski and Hill for this work was categorized as "SAFETY COMPLIANCE WORK 2012." (*Ex. 39, Ex. 22 at 224*)

17. Consistent with this, Ex. 16, PSE&G Environmental, Health and Safety Program Guide states at Element 11, "The performance of Contractors working on [PSEG] operated sites with respect to Compliance with applicable EHS[3] requirements shall be monitored by [PSEG]."

18. In this same vein, Ex. 10, Health & Safety System, Contractor Health & Safety at 3, 4, 5 states, "[PSEG must] Monitor, evaluate, and document performance of the contractor during the job regarding H&S [and] The PSEG associate provides daily observation of the Contractor to identify potential risk exposure to PSEG."

19. Consistent with all this, Chris Brozowski also ordered the men down from the towers if storms were in the area. (*Exhibit 24, Psareas deposition at 124*) (*Ex. 22, Brozowski dep. at 143-144*)

20. Chris Brozowski gave safety instructions to the TM workers, including about the high voltage line hazards. (*Ex. 22, Brozowski dep. at 118-119, 142-144*)

21. Similarly, TM Project Manager Peter Vlahopoulos testified that Chris Brozowski is the safety guy who is supposed to observe and attend all daily job briefs. He "was the onsite safety person for PSE&G." The TM workers were not allowed to climb up any tower without him giving the specific ok. (*Exhibit 25, Deposition of Peter Vlahopoulos at 198-199, 282, 323*)

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[3]EHS- "Environmental, Health and Safety"

22. PSEG did an inspection of the towers for safety before they would be allowed to go up. (*Ex.13, Dep of Josimar Mackevicz at 127*)

23. If Chris Brozowski knew a worker did not have 100% fall protection, or if the worker was too close to the high voltage lines, he was required to stop the job. (*Ex. 27, Brozowski DOL Testimony at 467, 444-445, 448, 462-463*)(*Ex. 12, DeShong DOL Testimony at 151*) (*See also Ex. 19, The PSE&G Safety Standards and Procedures Manual at Chapter 1, "Each associate has the absolute right and obligation to question, stop and correct any unsafe act or condition."*)

24. PSEG's Allric DeShong testified:

Q. Generally-speaking do you feel that painting towers while the lines are energized is a hazardous activity?
A. Absolutely. I think working in and around facilities is -- is hazardous. That's why we do hazard mitigation and we deploy the right protective measures.

(*Ex. 8, DeShong dep at 251*)

B. PSE&G Standards of Integrity

25. The PSE&G "Standards of Integrity" document states in pertinent part:

In this edition, you may notice an increased emphasis on the responsibility we each have to know and understand the rules and regulations under which we operate...

The Standards of Integrity apply to everyone - employees, our board of directors, contractors and suppliers. ...We are all accountable. And, while knowing the rules and following them is important, the Standards of Integrity require that we keep to the spirit as well as the letter of the law.
...
One of our greatest values is our unwavering commitment to safety. This includes anticipating and preventing incidents before they occur, operating in compliance with the law, and speaking up about unsafe conditions.

Health and Safety PSEG's commitment to integrity means that all of us should leave work in the same condition as when we arrived. We strive for this goal through 100 percent compliance with health and safety laws, rules, and procedures wherever we work. The requirement to comply with these health and safety standards applies to all employees, contractors and anyone on any PSEG property or worksite.
...
- Exercise common sense and caution to prevent accidents involving yourself and others, including co-workers, other employees, contractors, customers

and the general public.

...

- Assist and cooperate in the investigation of any workplace incident or near miss, and otherwise act with integrity in every manner related to any workplace incident or near miss.

(*Exhibit 18, PSEG Standards of Integrity at 2, 16*) (underline added)

C. PSEG's Environmental, Health & Safety Policy

26. PSEG's Environmental, Health & Safety Policy states in pertinent part:

> Public Service Enterprise Group and its subsidiaries (PSEG) will responsibly conduct its worldwide businesses in a manner that protects the environment, and the health and safety of employees, contractors, customers, and the public.
>
> ...
>
> At PSEG, we believe that safety is a way of life both on and off the job. If there is one message we would like our visitors to remember, it is that PSEG is fully committed to protecting the health and safety of our employees, contractors, and the communities we serve. We believe that operational excellence - with safety first- is the key to long-term success.

(*Ex. 17, PSE&G Environmental, Health & Safety Policy at 1-2*) (underline added)

D. PSE&G Environmental, Health and Safety Program Guide and PSE&G Contractor Safety Program

27. The Contractor Safety Program sets forth PSEG's responsibility and process for preventing needless injury to contractor employees working on PSEG facilities, including Tower Maintenance. (*Ex. 10, Contractor Safety Program*)

28. Under the law, industry standards, as well as its own rules, PSEG had a responsibility to select only properly trained and safety competent contractors. (*Ex. 22, dep of Chris Brozowski at 120-121*) (*Exhibit 8, Dep of Allric DeShong at 18-19*)

29. The PSE&G Environmental, Health and Safety Program Guide sets forth basic rules PSEG has to follow to prevent needless injury to anyone that comes near PSEG facilities, including contractors like TM. (*Ex. 16, PSE&G Environmental, Health and Safety Program Guide*)

30. The PSE&G Environmental, Health and Safety Program Guide states in pertinent part as follows:

Overview of the Required EHS Management Systems
Line Management is responsible for establishing and maintaining management systems to implement the PSEG EHS Policy to ensure Compliance with EHS laws and regulations and relevant PSEG Policies and Practices... Collectively, these standards provide a framework for an effective EHS management system that enables the organization to manage environment, health and safety by:

- setting environment, health and safety policy;

...
The 14 Core Elements of the required management systems are summarized below:

Element 1: Management Commitment- Business are accountable for EHS results. Businesses shall visibly demonstrate support of the PSEG EHS Policy and supporting management systems, programs and initiatives to their staff, the employee population at large and the public. Businesses shall allocate the resources necessary to implement the PSEG EHS Policy and EHS Program Guide.
...
Element 11: Manage Contractor, Supplier and Business Partner Relationships- Systems shall be in place to provide a reasonable level of assurance that Contractors, Suppliers and Business Partners comply with applicable EHS requirements and do not present undue risks to the Business.
...
Element 14: Implement Corrective and Preventive Action to Continuously Improve Performance- Corrective and preventative actions shall be taken to address the underlying causes of accidents and incidents, findings from Inspections, Self-Assessments, independent audits, failure to meet performance objectives and targets, and external complaints, in order to continuously improve EHS management systems and performance.
...
Applicability of this Guide and Other Relevant PSEG Policies and Practices to PSEG Operations and Activities

EHS Program Guide
Like the PSEG EHS Policy, this Guide applies to all PSEG operations and activities where the Business has a controlling interest (i.e., where the Business is in a position to dictate Compliance with the Program).

Health & Safety Commitment
Our Commitment to Health & Safety applies to all PSEG Business.
Health &Safety System
The Health & Safety System is to be used by all Businesses.
...
The Health & Safety System is made up of the following 12 components:

- Administration and Measurement

- Commitment, Participation, and Assurance
- Communication
- Contractor Health and Safety
- Data Analysis
- Hazard Assessment and Control
- Incident Analysis
- Issue Resolution
- Job Safety Observations
- Knowledge

...

Element 8- Integrate EHS in Business Plans and Decisions

EHS considerations should be factored into business development activities where appropriate, relative to citing of facilities; facility design, permitting, construction, staffing, start-up and operating procedures; and retaining Contractors and other entities involved in the business activity.

...

The Hazard Assessment and Control Component as well as the Contractor Health and Safety Component of the Health and Safety System provide further Guidance.

Element 11- Manage Contractor, Supplier and Business Partner Relationships

Basic Requirement

Systems shall be in place to reasonably provide assurance that Contractors, Suppliers and Business Partners comply with applicable environment, health and safety (EHS) requirements and do not present undue risks to the Business.

Specific Requirement

Evaluation and Selection of Contractors, Suppliers and Business Partners: The Business's Selection process for Contractors, Suppliers, and Business Partners shall include consideration of their ability to satisfy applicable environmental, health and safety requirements where a failure to satisfy these requirements could impose risks or liabilities to the Business.

Contractual EHS Regulations: The Business shall inform Contractors and Suppliers of the pertinent PSEG or Business EHS Policies, Practices, and Procedures that could reasonably be expected to affect their work, including those for emergency response. Contractors and Suppliers must agree in writing (e.g. through contracts and purchase orders) to comply with applicable EHS requirements.

Monitoring Performance: Contractors' EHS performance shall be monitored by the responsible Business to verify that management systems are in place to ensure Compliance with applicable environmental, health and safety requirements associated

with work conducted for the Business. The performance of Contractors working on Business- operated sites with respect to Compliance with applicable EHS requirements shall be monitored by the Business. Contractors working for the Business at places other than Business-operated sites (e.g., customer sites) shall be subject to periodic reviews of their EHS performance. A Contractor's or Supplier's EHS performance shall be considered by the Business when evaluating them for a future work.

...

Element 13- Monitor, Measure and Verify Performance

Basic Requirement

Processes shall be in place to monitor key operational parameters to anticipate and reduce the likelihood of environment, health and safety (EHS) incidents, to track and report on progress against objectives and targets, and to assess and verify conformance to legal and other requirements, including the PSEG EHS Policy and Practices. Systems are in place in accord with the provisions of PSEG Practice 570-1, Environmental Health and Safety Auditing.

...

Element 14 - Implement Corrective and Preventive Action to Continuously Improve Performance

Basic Requirement

Corrective and preventative actions shall be taken to address the underlying causes of accidents and incidents, findings from inspections, Self-Assessments, independent audits, failure to meet performance objectives and targets, and external complaints, in order to continuously improve environment, health and safety (EHS) management systems and performance.

(*Ex. 16, PSE&G Environmental, Health and Safety Program Guide at 2-6, 14, 17, 21, 23*) (underline added)

31. As set forth above, under the Contractor Safety Program, TM was an "unacceptable" contractor and should not have been permitted to paint these towers. *(Exhibit 9, Deposition of Greg Player at 33-40, 45, 48-49*) (*Exhibit 11, Russell Dep at 8-10*) *(Exhibit 21, Pre-Construction Meeting Notes at 1*) (*Exhibit 8, Dep of Allric DeShong at 207-209*) (*Ex. 7, Dep. of Lee Wallace at 53-54*)

32. As part of the Contractor Safety Program, PSEG also incorporated a "Supply Chain Management, General Terms and Specifications" agreement applicable to the work of TM. (*Ex. 10, Contractor Safety Program*) (*Ex. 28, PSEG Supply Chain Management, General Terms and Conditions*)

33. The Supply Chain Management document states in pertinent part as follows:

15. SAFETY MEASURES

...

2. The Company shall have the right to stop Work whenever, in the Company's judgement, safety violations could result in personal injury, death, occupational disease or damage to property. ...Safety violations shall entitle the Company to have those responsible for the safety violations removed from the job site. Contractor's failure or refusal to correct safety violations shall entitle the Company to terminate the Contract for cause.

(*Ex. 28, PSEG Supply Chain Management at 15*)

34. Chris Brozowski confirmed this is how things actually worked at PSEG which had the authority to stop contractor work at any time when safety would call for it or otherwise if the contractor was not doing what it is supposed to. (*Ex. 22, Brozowski dep. at 205-206*).

35. The Supply Chain Management document further references the "superintendence, inspection, review, coordination, monitoring, and oversight by [PSEG]" over TM and that "[PSEG's] right to determine the proper method of coordinating the Work...shall be final, binding, and conclusive." (*Ex. 28, PSEG Supply Chain Management at 18, 20*)

36. PSEG can also withhold payment or terminate TM if TM, "Fail[s] to carry out the Company's instructions" or if TM, "Fails to comply with applicable laws...regulations, or the instructions of the Company." (*Ex. 28, PSEG Supply Chain Management at 28, 35*) (*See also Ex. 22 at 205*)

37. The PSEG Contractor Safety Program also includes a document entitled, "Health & Safety System, Contractor Health & Safety." Its purpose is, "To provide clear guidelines for a consistent approach to Contractor [Health & Safety] management." (*Ex. 10, Health & Safety System, Contractor Health & Safety at 1*).

38. The PSEG "Health & Safety System, Contractor Health & Safety" policy further states:

Guiding Concepts

1. All contractors, including 3rd Party Contractors, shall perform their operations in a manner that prevents them from:
   - endangering themselves, our employees, or the public
   - exposing PSEG to potential liabilities from violation of safety rules/regulations or from uncontrolled health and safety hazards
2. PSEG guidance includes the following recommendations:
   - Provide H&S performance expectations to contract bidders before a

contract is awarded and use previous safety performance as one of the criteria for awarding contracts

...

- Contractors' Health and Safety Practices & Performance should be comparable to that expected of PSEG employees, **especially when working with or near PSEG employees**

...

Health & Safety System
Contractor Health & Safety

3. PSEG Associates are authorized to direct any Contractor to immediately stop all applicable work upon the observation of an unsafe action or condition.

Process

Contractors Working for PSEG

Each Line of Business should have a contractor H&S program that meets the general concepts above and meets or exceeds the following objectives:

...

- Monitor, evaluate, and document performance of the contractor during the job regarding H&S

...

- Provides H&S Performance metrics for contractors

PSEG Employees Stopping Contractor Work for H&S reasons

PSEG Associates are *authorized to direct any Contractor* to immediately stop all applicable work upon the observation of an unsafe action or condition.

...

3rd Party Contractors Working on PSEG Property

...

Step 3. The PSEG associate provides daily observation of the Contractor to identify potential risk exposure to PSEG.

(*Ex. 10, Health & Safety System, Contractor Health & Safety at 3, 4, 5*) (underline and italics added).

E. PSE&G Safety Standards and Procedures Manual

39. The PSE&G Safety Standards and Procedures Manual states in pertinent part:

Chapter 1- Responsibility for Safety

1. General

Each associate has the absolute right and *obligation* to question, stop and correct any unsafe act or condition

...

1.3 Responsibility of Person Directing the Work

The person directing the work at the job location, whether it be a worker, a group leader or a supervisor, is responsible for the safety of each person on the job and shall make sure that all safety aids are properly and adequately used and that all persons follow safety practices and procedures. In addition to ensuring that the job is performed properly and efficiently, the person directing the work is responsible for the overall safety of the job.

When the workers are employees of other companies doing work for the Company, the person directing the work shall see that they are properly instructed in and obey the Company safety rules and work procedures applying to their work.

1.4 Responsibility of Supervisors

Supervisors have the responsibility of seeing that all workers, whether they be Electric Distribution Department employees or others, follow the established safety rules, practices and procedures. Supervisors should assume themselves that this being done by frequent field observation of work and by discussion with the workers.

...

1.7 Tailboard Safety Meeting

At the start of work at every location, when conditions change, after each meal period and after any prolonged interruption to the work a Tailboard safety meeting shall be held. The work to be performed shall be discussed and assigned, and the safety aspects of the job shall be reviewed.

...

2.2.3 I=IDENTIFY known hazards

Never assume the workers are aware of hazards, even if they are experienced people.

...

2.2.10 S=STOP the job to correct unsafe acts and conditions

Health & Safety must NEVER be compromised

Everyone has the absolute right and obligation to question, stop, and correct any unsafe act or condition.

(*Exhibit 19, PSE&G Safety Standards and Procedures Manual at Part 1, 1-1, 1-2, 1-3, 2-3, 2-5*) (underline and italics added)

40. These company safety rules are also meant to apply to the work of, and prevent injuries to, contractor employees. (*Ex. 22, Dep of Chris Brozowski at 98-100, 102, 170-173, 175-180) (Ex. 26, Dep of Hill at 57) (Ex. 8, Dep of DeShong at 25-26, 28, 31, 95-99, 102-107, 113-115) (Ex. 7, Dep of Wallace at 18-20) (Exhibit 14, Purchase Order at para. 5) (Exhibit 18, PSEG Standards of Integrity at 2, 16) (Ex. 16, PSE&G Environmental, Health and Safety Program Guide at Element 11 and 2-6, 14, 17, 21, 23) (Ex. 10, Health & Safety System, Contractor Health & Safety at 3, 4, 5) (Exhibit 19, PSE&G Safety Standards and Procedures Manual at Part 1, 1-1, 1-2, 1-3, 2-3, 2-5*)

41. This includes that the 100% fall protection attachment rules are supposed to be enforced by PSEG and followed by all its contractors, including TM. (*Exhibit 8, Dep of Allric DeShong at 107) (Ex. 7, Wallace dep. at 57-58*)

F. PSE&G Overhead Transmission Construction Manual

42. The PSE&G Overhead Transmission Construction Manual ("OTCM") states in pertinent part as follows:

> **Safety**
>
> Each Chapter of this manual incorporates worker safety in all operational procedures. All personnel working on PSE&G Overhead Transmission Facilities are expected to be fully informed of all safety rules and procedures and strict adherence is mandatory.
>
> ...
>
> **2. Work on Tower Lines and Structures**
>
> **2.1 General**
>
> 1. Prior to starting any job, a tailboard should be conducted by the Supervisor and/or Chief, who shall review the operation with the workers to make sure that each member understands the details and safety precautions of his or her part of the job.
>
> 2. All workers engaged in jobs on towers or structures shall wear the proper personal protective equipment.
>
> ...
>
> 5. Full body harness with safety straps and/or lanyards shall be used aloft in all operations.

6. For the complete safety of personnel and property, materials, tools and equipment shall be raised and lowered by means of handlines, bull lines and/or winch lines. If necessary, suitable containers shall be used to lower such items.

...

21. Lines must maintain minimum approach distances.

...

32. When climbing or working on or around conductors, towers, A-frames, terminal frames, and so forth, no part of a worker's body, including outstretched arms and legs, and no material or equipment handled by the worker shall come within the following distances of an energized conductor or the conductor end of an insulator assembly.

33. ...**No work may be performed in these areas until the energized circuits are cleared, tagged, short-circuited, and grounded.**

2.2 Work on Static Conductors over Energized Lines

1. Work on static conductors and their hardware over energized facilities shall be performed **when and only when** the proper clearance between the worker and the energized facilities is provided and maintained. If the specified clearances can **not** be maintained, then **no work** shall be performed in this area.

2.6 The Electrical Safety Clearances and Minimum Approach Distances

2.6.1 Minimum Approach Distances for Qualified Personnel and Insulated Aerial Left Vehicles

1. Table 2-5 lists the Minimum Approach Distances to exposed energized conductors or equipment for qualified personnel as that term is defined in the OSHA Standard at 29 CFR 1910.269(a)(2).

2. In the events that a person's arm line is less than 2 ft., the Inadvertent Movement Distance "adder" shall be no less than 2 ft. plus the length of any conductive object. The placement of barricades and safety flags shall incorporate both the Minimum Approach Distance and the Inadvertent Movement Distance listed in Table 2-5.

Table 2-5: Minimum Approach Distances for Qualified Personnel and Insulated Aerial Lift Vehicles

Voltage (kV) Phase-to-Ground	Minimum Approach Distance
13	3 ft.
26	4 ft.
69	4-1/2 ft.
138	5 ft.
230	8 ft.
500	12 ft.

2.6.2 **Minimum Approach Distances for Unqualified Personnel, Cranes, Uninsulated Area Lift Vehicles, and Lifted Loads.**

1. Any unqualified person (one who has not been trained and qualified within the meaning of 29 CFR 1910.269 (a)(2)) must maintain a Minimum Approach Distance of 10 feet from any energized conductor and equipment at voltages to ground of 50 KV or below where the potential for potential for contact exists. This distance must be increases as the voltage increases above 50KV as shown in Table 2-6.

...

Table 2-6: Minimum Approach Distances for Unqualified Personnel, Cranes, Uninsulated Aerial Lift Vehicles, and Lifted Loads*

Phase-to-Ground Voltage (kV)	Minimum Approach Distance
4-13	10 ft. 0 in.
026	10 ft. 0 in.
069	10 ft. 8 in.
138	13 ft. 0 in.
230	16 ft. 0 in.
345	19 ft. 10 in.
500	25 ft. 0 in.

*Note: As extracted from OSHA Federal Regulations.

...

3. Fall Protection and Safe Climbing Clearances

3.3 Fall Protection Job Hazard Analysis

1. To control and ensure the proper selection and the use of employee for protection and the workplace, a Job Hazard Analysis shall be

performed to include fall arrest systems, guard rails, handrails, and other fall protection equipment.

2. The Fall Protection Job Hazard Analysis shall address the requirements of the equipment policies and regulations:

   a. Fall Protection and Safe Climbing Clearances, section 3. of this chapter.

   b. OSHA 29 CFR 1926 Subpart M. 500 through 1926.503, "Safety Standards for Fall Protection for Our Inside Plant at Work and the Construction Industry."

   c. OSHA 29 CFR 1910. 269 and IEEE 1307, "Fall Protection Guide for the Outside Plant Work."

3. All employees engaged in climbing shall use the applicale Job Hazard Analysis Worksheet in preparing for climbing task. Figure 2.5 provides a sample Job Hazard Analysis Worksheet that incorporates these requirements for climbing a tower or structure safely.

...

3.4 Fall Protection Responsibilities

1. Management shall be responsible for having Job Hazard Analyses developed and selecting proper equipment and establishing worker procedures for fall protection.
2. Management is required to provide employees proper fall protection training.

...

5. The Person in Charge of the work (PIC) shall ensure compliance with the standards by using the corporate fall protection policy as a reference.

...

3.5.3. Fall Protection Equipment

1. All tower workers shall use a full body harness with a positioning safety strap for working site positioning.

2. All tower workers shall use and energy absorbing lanyard attached to the D ring in the middle of the back on the full body harness. The other end of the lanyard shall be attached to a proper anchor as follows:
   a. Use a two bolt tower member or larger as an anchor. <u>Do not use any single bolt steel or aluminum member for an anchor</u>.

...

Snaphook-A connector comprised of a hook-shaped member with a normally closed keeper or similar arrangement that may be open to permit the hook to receive an object and, when released, automatically closes two retain the object. Snaphooks are generally one of two types:

1. The locking type with a self-closing, self- locking keeper that remains closed and locked until unlocked and pressed open for connection or disconnection.

2. The non -locking type with a self - closing keeper that remains closed except when it is pressed open for connection or disconnection.

Note- PSE&G prohibits the use of a non - locking snaphook as a part of personal fall arrest systems. The Electric Distribution Department has already implemented this restriction and non - locking snaphook as are no longer acceptable for use and personal fall arrest systems and positioning devices systems.

...

29. <u>When painting within structure danger zones, grounds shall be installed on both ends of a work area</u> at the structures immediately adjacent to the last structures included in the work area. The distance between such grounds shall not exceed 1 mile in length.

(*Exhibit 15- PSE&G Overhead Transmission Construction Manual at 1-2, 2-9 through 2-17, 2-21, 2-99*) (underline added, bold in original)

43. As discussed previously, although PSEG safety standards required the safety rules contained in this Overhead Transmission Construction Manual to be applied to the work of TM, PSEG failed to even provide them a copy, except for the Tower Painting Section. (*Exhibit 8, Dep of Allric DeShong at 236-238, 240*)

44. In fact, this Tower Painting Section of the Manual made specific reference to safety sections that were not provided. (*Exhibit 15- PSE&G Overhead Transmission Construction Manual at 4-56*)

45. Chris Brozowski testified the Overhead Transmission Construction Manual is PSEG's "Bible." (*Ex. 22 at 155*)

46. Chris Brozowski testified the rules in it apply to both in house PSEG employees as well as contractors like TM:

Q. ...My question is the safety rules that are contained in the Overhead Transmission Construction Manual is it your testimony here today under oath that these rules only apply to PSE&G workers or are these rules also

supposed to be followed by contractors that work on PSE&G transmission towers?

A. They should be -- they're supposed to be followed by contractors also.

(*Ex. 22 at 170-171)* And further:

Q. It's a PSE&G manual but PSE&G controls who goes on their towers or not, right?

A. That's true, yeah.

Q. And also remember we talked about this earlier today that PSE&G is "fully committed to protecting the health and safety of our employees and contractors." Do you remember that?

A. Mm'mm. Yes.

Q. All right. So it would make sense that, you know, what's good for the goose is good for the gander. What's good for their employees should also be good for any other employees that are going to be exposed to these hazards, right?

A. Yes.

(*Ex. 22 at 175-176*)

IV. Minimum Approach Distance- the *Minimum* Distance People Must be Kept Away from High Voltage Lines

1. The PSE&G Safety Standards and Procedures Manual states in pertinent part:

7.7 Painting

Painting...involves hazards where good judgment and proper procedures are necessary. Workers are often located above the ground...They may use special tools to apply and remove surface coverings. Workers should be aware of the contents of all paints and thinners by reading the labels on the containers.

Sufficient clearance from electrical and mechanical hazards is required.

Proper safeguards must be employed in order that those painting are not endangered by the equipment, and secondly, that the painting and its products do not damage the equipment.

(*Exhibit 19, PSE&G Safety Standards and Procedures Manual at Part 3, 2-4, 9-35*) (underline

added)

2. PSEG's Substation Awareness materials state:

Minimum Approach Distances

OSHA 1910.269 (a)(2)(ii)(C) The minimum approach distances corresponding to the voltage to which the qualified employee will be exposed.

Qualified Person – One familiar with the construction and operation of the equipment and the hazards involved.
Whether an individual is considered to be a "qualified person" will depend upon various circumstances in the workplace.
...

Minimum Approach Distances

Electrical Safety Clearances

Minimum Approach Distances for Qualified Personnel

OSHA Standard 29 CFR 1910.269, Appendix B(III)(C) States:

The minimum approach distances (working distances) must include an "adder" to compensate for the inadvertent movement of the worker relative to an energized part or the movement of the part relative to the worker. A certain allowance must be made to account for this possible inadvertent movement and to provide the worker with a comfortable and safe zone in which to work.
...

Minimum Approach Distances

Table 1

Minumum Approach Table, for Qualified Personnel phase to Ground Exposer

System Voltage (kv)	Distance (ft)	Inadvertent Movement Distance
.050 – 1.0	Avoid contact	Plus Inadvertent Movement Distance
4.0 - 13	2ft 2in	Plus Inadvertent Movement Distance
26	2ft 7in	Plus Inadvertent Movement Distance
69	3ft 3in	Plus Inadvertent Movement Distance
138	3ft 7in	Plus Inadvertent Movement Distance
230	5ft 3in	Plus Inadvertent Movement Distance
345	8ft 6in	Plus Inadvertent Movement Distance
500	11ft 3in	Plus Inadvertent Movement Distance

(Ex. 20, PSEG Substation Awareness at 74, 77-78)

3. Allric DeShong testified:

Q. Let's pull out one of the charts, let's look at a chart, okay? Maybe it will be more simple to do it that way. A non qualified employee has to stay at least 10 feet away from a 26,000 kilo volt line, correct?
A. Correct.

Q. And a qualified employee has to stay at least four feet away from a 26,000 kilo volt circuit, correct?
A. Okay, correct.
...
Q. ...2.2, Subsection 1, what's the purpose of that rule?
...
A. To maintain proper clearance.

Q. Okay. And when that clearance cannot be maintained, then no work shall be performed in the area, right?
A. Correct.

(*Exhibit 8, DeShong dep. at 65, 121-122*)

4. The TM workers, including Valdinei DeSouza and Renato DeSousa, were not qualified linemen as defined under OSHA standard 29 C.F.R. 1920.269(a)(2). *(Exhibit 40, Decision of DOL Judge Baumerich at 8- "Here, I find that, as discussed below, none of [Tower Maintenance's] employees are 'qualified.'", see also pgs. 20-22, 25-31) (Exhibit 34, Gallagher Report at 24-39*)

5. Since they were not qualified, the 10 and 25 foot minimum approach distances ("MAD") applied to the 25kv and 500kv lines on the towers, respectively. These workers should not have been anywhere near these towers while the lines were hot. (*Ex. 20, PSEG Substation Awareness at 74, 77-78) (Exhibit 19, PSE&G Safety Standards and Procedures Manual at Part 3, 2-4, 9-35*)

6. Regardless, as discussed herein, even if the painters were "qualified" linemen, the MADs still could not be maintained on these towers while the lines were hot.

7. Indeed, it takes years of training before even PSEG IBEW members are permitted to do live line work like these unskilled painters were directed to do. (*Ex. 22, Chris Brozowski dep at 72-74, 138) (Ex. 8, DeShong dep at 51-55, 57-58, 62, 142-143*)

8. Allric DeShong testified:

Q. Why don't you tell us...your understanding of typically how long it takes before someone will be permitted to come within those minimum approach distances, say a new employee?
A. I would say after two years and then they're provided the necessary training, thereafter they would be allowed to go in those minimum approach distances.

Q. As either a towerman special or a chief live line coordinator?
A. Yes.

Q. Okay. And then PSE&G would consider them a qualified employee under the OSHA standard to come within those minimum approach distances?
A. Under the live line minimum approach distances, correct.
...
A. Well, certainly what takes place over the course of years is getting -- observing our live line man approach distances. These distances here...to consider a[n] employee qualified, you know, initially when they start in...the department they start getting all this training in terms of the...personal protective equipment that they would need to use...to observe these distances. On the job field...training...with others that...are familiar...with the work and the distances we need to stay away from certain voltages until the necessary training is provided. Supervision would be providing them guidance on our work methods and rules around these...minimum approach distances. <u>I would say probably within a year, two years...we'd probably get them to a point where they can at least recognize the voltages</u>. And beyond that they would then begin [to] start observing the minimum approach distances for...these voltages.

Q. So we're talking relatively speaking that it's a long process, it takes place over the course of years before they are...considered qualified employees and permitted to recognize these minimum approach distances, correct?
A. Correct.
...
Q. All right. So all these distances that we're talking about whether it's 2.7 feet or three feet or four feet, that all assumes the workers are qualified in accordance with 1910.269, right?
A. Correct.

Q. Okay. And in this case you don't even know that the workers were qualified in accordance with 1910.269, correct?
A. I don't know how Tower Maintenance trained their personnel.
...

Q. In order for PSE&G to consider one of their personnel qualified in accordance with 1910.269, they have to undergo two years of on-the-job training and classroom and hands-on training and be tested and all that, right?

...

A. Correct.

(*Ex. 8, DeShong dep at 57-58, 66-68, 142-143*) But these Tower Maintenance workers were exposed to these hazards with virtually no electrical safety nor fall protection training.

V. The Inevitable Result

1. Tower Maintenance started the tower painting work in about late July, 2012. The work was expected to last 2-3 months. (*Ex. 21 at 1) (Ex 12 at 40*)

2. On October 25, 2012, TM had about 12 towers left to paint. (*Ex. 13, Deposition of Josimar Mackevicz at 90*)

3. The process by which the workers were directed to paint the towers was to clip two large, open buckets of paint to their belts and climb the tower. They would then dip large hand mits into the buckets and slap the paint onto the tower. A scene photo of one of those buckets, and three photos showing how the workers and their equipment were typically covered in paint, are attached hereto as Exhibit 33. (*Ex. 22, Brozowski dep. at 88-89, Ex. 27 at 428) (Exhibit 40, Decision of DOL Judge Baumerich at17*)

4. Shortly before 12 noon, six Tower Maintenance painters had just finished one tower and were moving onto the incident tower. (*Exhibit 32, Deposition of Alan Alves at 92-99*)

5. The architectural drawing of the 100 foot+ high incident tower is attached hereto as Exhibit 29 (*deposition exhibit P27*). The incident high voltage line, which is not insulated and carries a 26,000 kilovolt charge, is noted on the drawing. (*Ex. 22, Brozowski dep. at 49) (Ex. 7, Wallace dep. at 20) (Ex. 27, DeShong DOL testimony at 489-490*)

6. These towers were common on the project; there were about 100 of them. (*Ex. 26, dep. of Ryan Hill at 23*)

7. Three photos of the incident tower are attached as Exhibit 30 (*deposition exhibits P49, P1, P2*). Again, the incident 26,000 kilovolt line is noted on the photos.

8. Four close up photos of the area where Valdinei Nascimento DeSouza was working when he was electrocuted are attached as Exhibit 31 (*deposition exhibits P4, P6, P12, P11*)

9. Valdinei was one of the first to climb the tower and get into position. The portion of the tower with the green paint shows where he began. (*P4 and P6 of Exhibit 31*).

10. As previously stated, it was quite common for the paint to spill and splash all around. Indeed, as Chris Brozowski testified:

> Q. What would you do while the guys were painting the towers?
> A. I would pull away from the tower, so as not to get splashed with paint and I would watch. I would watch that crew and I'd try to get in place where I could actually see both crews...

(*Ex. 27, Brozowski DOL Testimony at 427-428) (See also Exhibit 40, Decision of DOL Judge Baumerich at17*)

11. The subject 26,000 kilovolt death wire was only about 2 feet away from the edge of the tower the workers had to paint. *(Ex. 31) (Ex. 22, Chris Brozowski dep at 74–77-78, 146, 147, 247) (Ex. 26, Hill dep. at 21, 59) (Ex. 8, DeShong dep at 196) (Ex. 11, Russell Dep. at 12-13) (Ex. 7, Wallace dep at 32-33) (Ex. 24, dep of Nick Psareas at 255-256) (Ex. 25, dep of Peter Vlahopoulous at 271-272) (Ex. 32, dep of Alan Alves at 84-86) (Ex. 37, dep of Marcel DaSilva at 52, 76-78)*

12. A stream of paint from Valdinei's mit hit the 26,000 kilovolt line and there was a loud, terrifying explosion. Given it contained zinc and was conductive, the charge ran up the paint stream, entered his body through his hand, causing him to move. *(Ex. 6, Report of David Wallis at 3-4, 10-11) (Exhibit 3, Report of Michael Caggiano at 3, 7-8) (Ex. 32, dep of Alan Alves at 97-98) (Exhibit 35, PSEG Incident Report) (Exhibit 40, Decision of DOL Judge Baumerich at16)*

13. Since the harness clips of the painters were frozen in the open position from the sticky and dried paint, after he was struck he fell from the tower. *(Ex. 34, Report of Vincent Gallagher at 1-7)*

14. Scene photos show the harnesses covered in paint and the clips frozen in the open position. The actual harnesses are in the possession of the Edison Police Department and will be brought to trial. *(Ex. 36) (Ex. 35)*

15. On his way down he struck plaintiff Renato DeSousa who was lower on the tower and whose harness clips were also frozen open. *(Ex. 34, Report of Vincent Gallagher at 1-7) (Exhibit 35, Police Report and PSEG Incident Report)*

16. Valdinei fell 70 feet from the tower and eventually died from his injuries.

17. Renato DeSousa fell about 40 feet and sustained catastrophic injuries. He has undergone 7 surgeries and counting. *(Exhibit 46, Medical Reports) (Ex. 35, police report at 2)*

18. P4 and P6 of Exhibit 31 show the green paint on the section of the tower Valdinei was painting when he was zapped. P11 and P12 show the char marks on the wire. (*Exhibit 31) (Ex. 22, Chris Brozowski dep at 49-51, 57-60, 68-69) (Ex. 8, DeShong dep at 84-90) (Ex. 7, Wallace dep at 33, 35)*

19. PSEG suspended all painting activities pending the outcome of this litigation. *(Ex. 8, DeShong dep at 42)*

VI. PSE&G Made a Conscious Decision to Have its Towers Painted in Violation of State and Federal Safety Regulations, Industry Safety Standards, and it Own Safety Rules

1. As demonstrated herein, this incident happened for two main reasons. First, simple math shows it was not possible to paint these towers with the power on and maintain the minimum approach distance requirements, *regardless* of whether or not the workers were "qualified" under 29 C.F.R. 1910.269 (a)(2). The architectural plans show the 26kv line a mere 2.66 feet from the edge of the tower, which had to be painted. The minimum approach distance for qualified workers to this line is four feet. It is ten feet for unqualified workers, such as these painters. PSEG was well aware of all this.

2. Second, PSEG knew it was impossible for the workers to maintain 100% fall protection utilizing harnesses to paint these towers. Many areas of the towers do not have suitable attachment points, thus requiring the workers to "free climb." Furthermore, PSEG knew the clips would freeze in the open position. So even when they were attached, they were still not protected.

3. PSEG having the work done while the deadly current was flowing through the lines within inches of these workers caused the inevitable contact and electrocution. Having it also done in violation of the 100% fall protection rules made it worse and resulted in Valdinei and Renato falling from the towers.

A. Minimum Approach Distance Violations

4. Although initially denying it, PSEG representatives ultimately had to admit the minimum approach distances were not maintained. Chris Brozowski testified:

> Q. So if you could please read rule number 33 into the record and you'll see it's going to make reference to that table which I'll put there for your convenience as well.
>
> A. "Areas within distances to energized conductors that are less than the distances specified in Table 2-5[page 2-11] shall be considered nonworking danger zones. No work may be performed in these areas until the energized circuits are cleared, tagged, short circuited and grounded."

Q. So based upon that those workers should not have been up there, correct?
A. I didn't feel that at the time.

Q. But this was the manual that was in effect at the time?
A. Okay. I believe you.

Q. Okay. I know you didn't feel it at the time but as you sit here today.
...
A. Yeah. I guess they shouldn't have been up there...

(Ex. 22, Chris Brozowski dep at 184-186)

5. PSEG Manager of Project Engineering, Jose Obarrio, testified:

Q. Well, in connection with this job and what you've looked at, it is clear that the minimum approach distances in Table 2-5 were not maintained. Correct?
A. According to our construction handbook, that's correct.

Q. All right. Now, there's a section in the manual, Section 4, called Tower Painting. Do you see that?
A. Yes.

Q. As far as you understand it, this sets forth some safety rules that have to be followed when these towers are painted. Correct?
A. Correct.

Q. All right. So taking a look at Section 4.3, the safety procedures, it says certain sections of the upper portion of the structures are designated as danger zones. The danger zones for various types of structures are shown in Section 4.10. Do you see that?
A. Yes.

Q. And then it says basically - Paragraph 4 of Section 4.3 basically says that if it's necessary for someone to enter that danger zone, then the power has to be shut off basically. Right?
A. Correct.

Q. And basically it also says that it has to be grounded. Right?
...
A. Correct.

Q. And basically what that means is that if they're painting one tower, then the two adjacent towers' lines have to have an electrical line running into the

ground...so that if there's a lightning strike or if someone flips the switch back at the substation that the workers on that tower will be protected?

A. Correct.

(Exhibit 38, Jose Obarrio dep. at 26-27)

6. PESG's Allric DeShong testified:

Q. All right. Just referring to on P-2 the area of the tower to the left of the incident line of that tower. So that tower cannot be painted the way it was intended to be painted here and comply with PSE&G's minimum approach distance rules, correct?

A. Correct.

...

Q. Under PSE&G safety rules, you can't paint this tower and be in compliance with that four feet, that's pretty evident from the plans and the photos, right?

A. Correct.

(Exhibit 8, DeShong dep. at 95, 114)

7. DeShong further testified:

Q. Now, Rule No. 33 from Section 2.1 says that the area that's less than the minimum approach distance in Table 2.5 are considered non working danger zones. Were you aware of that?

...

A. Yeah.

Q. Okay. So in this case, the work was taking place within the "non working danger zones," right, because it was less than the four feet distance on Table 2.5?

A. My understanding of that is we provided the danger zone charts of the structures and I believe the arms, all the arms showed up in the danger zone.

...So it's three feet, that contradicts the -- the danger zone diagrams that we provided because the danger zone diagrams only show the arms.

Q. ...Assuming the distance from the line, the incident line shown on P-27 to the edge of the tower which was being painted as three feet, then since they were in that area and painting in that area, work was taking place in a non working danger zone, correct, because three feet is less than four feet on Table 2.5, right?

A. According to that rule that's what that would indicate.

Q. All right. So since counsel objected I have to ask the question again and break it up a little bit. Assuming the distance from the incident line to the edge of the tower is three feet and based on everything you've reviewed here, work was, in fact, taking place on that tower in a non working danger zone, correct?

A. Less than, that's what that rule would indicate, yes.

(Exhibit 8, DeShong dep. at 123-126, 133-134)

8. Furthermore, (as DeShong alluded to above) PSEG gave TM certain "non-working danger zones" diagrams from the Tower Painting Section of the Overhead Construction Manual. TM was told by PSEG that if they stayed within the dotted lines, they would be safe. But Allric DeShong admitted PSEG gave TM incorrect and dangerous information in this regard because areas within the dotted lines actually *breached* the minimum approach distances. *(Exhibit 8, DeShong dep. at 157-175) (Ex. 25, Vlahopoulos dep. at 332-333)*

9. Allric DeShong testified:

Q. The nonworking danger zones which are discussed on Page 2-11 of the manual and which reference back to the minimum approach distances in Table 2.5 or 2-5, they're the same nonworking danger zones that are talked about in Section 4.3 on Page 4-56. That's talking about essentially the same things, correct?

A. I believe so.

Q. And basically they're calling it nonworking danger zones because they are too close with regard to the minimum approach distance, right?

A. Correct.

Q. All right. And I believe we established ...that the incident line as shown on the diagram of P-27...would not be within the minimum approach distance, meaning it would be closer than the 4 feet referenced in Table 2-5, correct?

A. In comparison to the table on 2-5, that would be correct.

...

Q. So basically your testimony is that since the power was going to be kept on during the project the arms were not to be painted, correct?

A. Correct.

Q. Because in order to paint the arms they'd have to go closer than the minimum approach distances on Table 2-5, correct?

A. They have to breach the danger zone outlined as represented in the diagrams.

Q. And the danger zone represented in the diagram is represented by Table 2-5, correct?
A. I believe so, yes.

Q. And PSE&G would not permit that and therefore it stated that the arms were not to be painted, correct?
A. I stated that the arms would not be painted in the...project scope.

Q. Because it wouldn't permit the workers to get within that nonworking danger zone area, correct?
...
A. Correct. They...would not be allowed within the danger zone area.

Q. Okay. So of the diagrams contained in Section 4-10 its your testimony that the diagram on Page 4-66 in the second row closest to the left side of the page which I indicated with a bracket in pencil, that that's the diagram that most closely resembles the actual tower in question, correct?
A. In my opinion, correct.
...
Q. <u>But assuming the incident line on P-27 is 3 feet from the edge of the tower, then this diagram [on Page 4-66] does not accurately depict the [non-working] danger zone area [of the incident tower], correct?...right?</u>
...
A. <u>Right.</u>
...
It seems to me that -- and I think you already testified to this -- that the dotted line in the diagram on Page 4-66, that dotted line is showing the nonworking danger zone, right?
A. Correct.

Q. And it is created to keep the workers at least 4 feet away from the 26,000 kilovolt line...because that is the distance in Table 2-5, right?
A. That is the distance on 2-5, correct.
...
Q. So basically to sum up, the reason you directed or specified that the arms not be painted is because the arms could not be painted while maintaining the minimum approach distances in Table 2-5, correct? That's the bottom line?
A. The arms were not to be painted because the lines would remain energized and you would have to breach the minimum approach distance of working within the danger zones to paint the arms.

Q. And the minimum approach distances as set forth in Table 2-5, correct?
A. That's what's identified on 2-5, correct.

...

Q. ...Assuming the incident line is 3 feet to the leg of the tower as depicted in P-27, then the leg of the tower is within the 4-foot minimum approach distance of a 26,000 kilovolt line as depicted on Table 2-5, correct?

A. Correct. That's what the documents would indicate.

Q. All right. And PSE&G specified that that section on the tower would be painted. That section being the leg of the tower adjacent to the 26,000 kilovolt incident line, correct?

A. Correct.

Q. And, in fact, if we look at the photos from the site of the incident that were taken on the day of the incident, those photos show that that area was, in fact, painted? Correct? And I'm now showing you, for example, photos P-7, P-6 and P-8.

...

A. Yes. The legs are primed.

Q. Primed with red?

A. Correct.

Q. And there's also some painting in the area in green as well, right?[4]

A. Yes.

Q. Okay. So the question is if they wouldn't let them paint the arms because doing so would breach the minimum approach distances in Table 2-5 why did they let them paint the side of the tower when that also would breach the minimum approach distance in Table 2-5?

...

A. From what I understand the legs appear outside of the minimum approach distance so -- outside of the danger zone and if you stay on the body of the tower, I -- I think it's safe to paint.

Q. Yeah, but we just established that the leg of the tower's 3 feet from the line and they're supposed to be 4 feet from the 26,000 kilovolt line?

A. We established or we assumed?

...

Q. Mr. Deshong, PSE&G would not permit them to paint the arms of the towers because by painting the arms of the towers that would breach the minimum approach distances in Table 2-5, correct?

---

[4]This is referring to the areas also on P4 and P6 of Exhibit 31 which show the green paint on the section of the tower Valdinei was painting when he was zapped.

A. Painting the arms of the towers would require that you breach the danger zone barrier.

...

Q. But I can tell you very clearly that you testified that the nonworking danger zones discussed on Table -- on Page 2-11 which reference the Table on 2-5 are the same nonworking danger zones that are discussed on Page 4-58 and referenced in the diagrams on Section 4.10 of this manual. Isn't that what you testified to already?

A. I testified by looking -- reading the doc -- the pages that you pointed out and the danger zones pointing and referencing the minimum approach distance table, that that was correct.

Q. Okay. And painting the arms would breach the minimum approach distances on Table 2-5, correct?

A. It would breach...the danger zone barrier and if the danger zone barrier were created based on the minimum approach distances that would be correct.

Q. All right. You already testified under oath that they are based on that; that that's -they're talking about the same thing. You testified to that about four times today already?

A. I understand that...

Q. Okay. So assuming the leg of the tower, assuming a person who -- whose body is - whose hand is on the leg of the tower adjacent to the 26,000 kilovolt line, assuming that distance is less than 3 feet or 3 feet, that also breaches the minimum approach distance of Table 2-5, correct?

A. Under that assumption that would be correct.

Q. **Okay. So why did PSE&G permit painting to be done in that area if it breaches that distance? Do you know -- do you have an answer to that question or no?**

A. **No.**

(Exhibit 8, DeShong dep. at 165-183) (See also Ex. 22, Chris Brozowski dep at 181-182; Ex. 26, Dep. of Ryan Hill at 31-32)

10. Senior Project Manager for the PSEG Construction Safety Department testified:

Q. Are you aware that under PSE&G's safety rules unqualified workers are supposed to stay 10 feet away from a 26,000 kilovolt line?

A. 2.6.2.1, yes. They're citing the OSHA standard.

Q. Okay. And are you aware that under PSE&G's rules trained and qualified

workers have to stay at least 4 feet away from the 26,000 kilovolt circuit?

A. Per the OSHA rules, yes.

(Ex. 11, Dep of Courtney Russell at 13-14)

11. Under the safety rules the power had to be shut off in order to paint the towers:

Q. So in order to paint the arms you would have to do an outage. Is that what you're saying?

A. Correct....According to our rules if you're going to be out on the arms you have to have an outage. ...I'm talking about within the transmission construction manual, the Painting section. I believe it's in there.

Q. So you're talking about the Overhead Transmission Construction Manual rules?

A. In the Painting section.

Q. Can you go through the manual and just tell us what you're talking about?

A. Again, it's stated right there, 4.3. You're entering the danger zone of the transmission circuit. In 4.3, number 4.

Q. Would you mind just reading that into the record? [Page 4-56, Section 4.3 of the Overhead Transmission Construction Manual, entitled "Safety Procedures"]

A. "When it is necessary for personnel to enter or place painting tools or equipment within a danger zone for the purpose of painting an otherwise inaccessible portion of the structure, the transmission circuit shall be taken out of service and grounded."

Q. And because that rule cannot be complied with by painting the arms when the wires are live therefore the lines have to be taken out of service. Is that correct?

A. Correct.

(Exhibit 8, DeShong dep. at 158-160) (See also Ex. 38, Obarrio dep at 28-29)

12. PSEG's Jose Obarrio also testifed:

Q. ...You would agree with me then that a qualified worker could not paint the edge of the tower and maintain the 4 foot minimum approach distance to the 26,000 kilovolt incident line if the line is energized. You would agree with that?

...

A. According to our manual, I would agree with that.

(Ex. 38, Obarrio dep at 23)

13. PSEG Construction Safety Department official Courtney Russell further testified:

Q. All right. So now I want to ask you, from a safety perspective, given that the 26,000 kilovolt circuit was 2.66 feet or less than 3 feet away from the edge of the tower, do you see a safety issue with having these workers paint these towers while the lines were hot?

A. Having not seen them perform their work, just based off the pictures, yeah, there would be qualified and unqualified distances that would need to be maintained.

Q. <u>But even if they were qualified workers, they still couldn't maintain the 4 foot distance and paint the legs of the towers while the lines are hot. Right?</u>

A. <u>They would have to stop about four, four-and-a-half feet from whatever their adder is</u>.[5]

...

Q. All right. And given that the 26[kv] line is less than 4 feet from the edge of the tower, these towers cannot be painted and maintain the minimum approach distance while the lines are hot. Correct?

A. <u>To err on the side of safety, they would have to stop at least 10 feet away from any of the lines</u>.

(Ex. 11, Dep of Courtney Russell at 16-17)

14. Tower Maintenance worker Marcel DaSilva similarly testified:

Q. <u>How could one paint that part of the tower, without coming close to the wires?</u>

A. <u>There is no way to do it without coming close</u>.

(Ex. 37, DaSilva dep. at 82)

---

[5]"Adder" is a distance amount <u>added</u> to the minimum approach distances to compensate for the inadvertent movement of the worker relative to an energized part or the movement of the part relative to the worker (such as the electric line blowing in the wind). The adder must be made to account for this possible inadvertent movement and to provide the worker with a comfortable and safe zone in which to work. (See OSHA Standard 29 CFR 1910.269, Appendix B(III)(C)) (Ex. 20, PSEG Substation Awareness at 74, 77-78) <u>This adder must be no less than 2 feet</u>. *(Exhibit 15- PSE&G Overhead Transmission Construction Manual at 2-13*)

15. In fact, the lines were so close to the workers that they would often feel the electric energy and a shiver in their bodies which would make their hair stand up. *(Ex. 32, Alves dep. at 84, 86)*

16. Marcel DaSilva testified that the 26kv lines were "like 2 feet" away from where they had to paint and "Some were very close...Close enough that you would feel the shock." *(Ex. 37, dep. of Marcel DaSilva at 52, 76-77, 78)*

17. Disturbingly however, PSEG actually testified that not only did they know these safety rules were being violated, but it was actually acceptable to them. *(Exhibit 8, DeShong dep. at 117)*

18. Ryan Hill testified:

Q. In 2012 was it your understanding that it was acceptable to PSE&G for workers to come within 3 feet of a 26,000 kilovolt line on the towers like are shown in P-1 and P-2? Was that acceptable to you as far as you knew?
A. Yeah, I guess.

Q. [A]s an experienced PSE&G worker and now management, with all of the training that comes with that and knowledge of the manuals and all, from your view sitting here today, from a safety perspective is that acceptable to you that these painters would come within 3 feet of 26,000 kilovolt lines?
A. No.
...
Q. [A]s you sit here today, based on everything you know and your training and your knowledge of the Overhead Transmission Construction Manual rules and the rules in PSE&G's safety standards and procedures and based on being a professional in this area, as you sit here today is it acceptable to you that workers that are painting towers like shown in P-1 and P-2 would be permitted to come within 3 feet of a live 26,000 kilovolt line...from a safety standpoint?
A. No.

(Ex. 26. Hill dep at 33-34, 36)

19. This testimony from PSEG's Ryan Hill tells it all:

Q. Do you think PSE&G made a mistake to permit these workers to paint these towers and come within 2.66 feet of the 26,000 kilovolt line?
MR. MONDORA: Object to the form. You can answer.
A. No.

Q. You don't think they made a mistake in permitting that?
A. Letting them on the property or let them work?

Q. No. Come on. Come on, Mr. Hill. You know, the rules are so clear. I mean, they're not supposed to get within 4 feet, and that assumes they're qualified. We all know they're not qualified, which means 10 feet. You know, you guys are there, you see it. They knew the distance of the lines before. The IBEW workers don't want to do the work. You said yourself you've never painted the lines. Same with Brozowski. I mean, if these Standards of Integrity are to mean anything and being held accountable, do you think PSE&G made a mistake in permitting these workers to do this work...under these conditions? You're in a tough spot. You're management.
A. Not even that. I don't know how it went about them, you know, being hired.

Q. Well, they submitted -- Allric DeShong put out a request for proposal we marked -- you looked at the document -
A. Right. 4

Q. -- which describes the work we're going to paint 214 lattice towers, it's going to be live work, everyone's got to follow these rules here. Your president writes a letter in the Standards of Integrity that says these rules are important. They know they have to paint the edge of the tower, they know the edge of the tower is within 2.66 feet of the line. You know, they've got to wrap around, put their hand in a mitt to paint the tower. They're clearly coming -- you know, well breaching the minimum approach distance. Do you think PSE&G made a mistake in permitting the work to be done in this way?
A. I don't -- if they were qualified, they're fine. I mean -

Q. Well, if they're qualified, 4 feet's the distance. Right? We talked about that already....<u>The death line is 2.66 feet away</u>.
A. Right.

Q. Do you think they made a mistake in allowing this?
A. By our rules?

Q. Yes.
A. Yeah, 4 foot, right.

Q. But your rules -- when you say our rules, PSE&G rules apply, not only to PSE&G workers, but contractors or anyone else on the property. Right? ...We can go through that again.
A. Yeah. Sounds like it, yes.

Q. Yeah. In fact, they even had the contractor -- you know, they have this paperwork they have to sign before they work, and one of the things they had them sign is that Tower Maintenance shall comply with PSE&G Company Safety Standards. I'll show that to you. It's Plaintiffs Exhibit 47. Do you see that?
A. Okay.

Q. You see that?
A. Yes.

Q. All right. **So it seems they specified the work, gave the work, knowing the work would not comply with the safety standards, knowing that they would have to get within feet of the line to paint it. Do you see a safety issue with that?**
A. **Yes.**

Q. You can actually see -- I'll show you this picture. You can actually see where the worker was painting the line when he fell. P-6 is a close-up of it... You can see where the green paint is, which was close to the 26,000 kilovolt line. That's the last thing the guy did in his life was paint that. And then P-10 is a close-up adjacent to the line where you can see the scarring marks or the marks from where the arcing occurred. Also shown in P-13. See all that?
A. Yes.

Q. A lot of guys in the labor movement sacrificed a lot to get rules like this passed like OSHA and that kind of thing. You're familiar with that, right?
A. Yes.

Q. And if those rules had been followed, you know, those kind of basic safety rules, this wouldn't have happened. Right?
A. Yes.

(Ex. 26, Hill dep at 57-62)

20. PSEG argues at page 2 of their brief that painting the towers while the power was on was a mandatory "and indeed central to, the performance of their work." (Db2)

21. The facts set forth herein show this assertion is contradicted by defendants' own documents and sworn testimony to the exact contrary. (*See infra. and supra.*)

22. This assertion by PSEG shows an astonishing disregard for the truth and lives of these workers. (*See infra. and supra.*)

B. 100% Attachment Fall Protection Violations

23. Chris Brozowski testified as follows:

Q. [R]ule number 5 in Section 2 is that "full-body harness with safety straps and/or lanyards shall be used aloft in all operations." Do you agree with that rule?
A. Yes.

Q. And those full-body harnesses should be worn not only by PSE&G workers on the towers but any contractors that may go on the towers as well, right?
A. Yes.

Q. Now, here's the one that I had questions about. Now, you said that they were carrying the buckets up their -- their belts, right?
A. Yes.

Q. In the picture of the bucket we have here -- it's P-21 -- it shows the hook on the top of the bucket, right?
A. Yes.

Q. All right. So rule number 5 says, "For the complete safety of all personnel and property materials, tools and equipment shall be raised and lowered by means of hand lines, bull lines and/or winch lines. If necessary, suitable containers shall be used to lower such items." What's that rule mean?
...
A. The way PSE&G would work on a tower, we would go up with a rope, tie it to the top of the tower and the material and tools would be raised up to the worker.

Q. That's just a safer way to do it, right?
A. It's not the only way to do it....You could carry stuff up. There's nothing saying that you can't.

Q. Oh.
A. Or -- does that say you can't?
...
Q. Number 6.
A. "Shall be raised and lowered." "And if necessary suitable containers." I don't think that's necessarily a must do thing.

Q. It says "shall," though?
A. Shall. Does that mean must? I don't know.

Q. I think it's stronger than must.
A. Is it?

Q. Well, I think it is.
A. Yeah?
...
Q. But in this case they didn't -- that rule wasn't followed, right, where they would bring the material up with the line. Instead, they have carrying it on their belts, right?
A. That procedure wasn't followed.

(Ex. 22, Brozowski dep at 176-178, 179)

24. TM workers were also exposed to fall hazards while climbing the step bolts. They were exposed to fall hazards when they anchored to step bolts. Anchoring to a step bolt violates PSE&G's safety policy. They were exposed to fall hazards at times when the pelican hook would stick open so that it could dislodge and result in a fall. They were exposed to the risk of falling when they would wrap the lanyard around itself to anchor because the structural member was too wide for the throat of the pelican hook. That is not an acceptable means of fall protection because it violates OSHA standards and it exposes the lanyard to tears and puts stresses on the lanyard for which it was not designed. *(Ex. 22, Gallagher Report at 17-18, 25)*

25. PSE&G approved the TM workers wrapping the lanyard around the tower. *(Ex.24, Nick Psareas dep at Nick- 239-240) (Ex. 13, Josimar Mackevicz dep at 166) (Ex. 32, Alves dep at 75-78, 82)*

26. PSE&G also approved the TM workers clipping onto the step bolts. *(Ex. 26, Hill dep at 51)*.

C. Notice and Knowledge of the Hazardous Conditions; Authority and Opportunity to Prevent the Incident

1. Chris Brozowski, who was the PSEG designated safety watcher on site on a daily basis overseeing the work and watching with binoculars (Sec. III A. above), knew the painters' harness clips were frozen in the open position. *(Ex. 22, Brozowski dep at 88, 250-252, 254) (Ex. 8, DeShong dep. at 211-212) (Ex. 25, dep of Peter Vlahopoulous at 187, 195-198, 213, 322)*

2. Chris Brozowski gave them the ok to go up on the tower and was there watching the work most of the time. *(Ex. 22, Brozowski dep at 142-144, 146, 180-181, 250-252, 254) (Ex. 25, dep of Peter Vlahopoulous at 322-323)*

3. Peter Vlahopoulous testified:

Q. What was the purpose of the pre construction meeting with PSE&G?
A. That they were going to have a safety coordinator with us at all times.
...
Q. Where does it say that the distribution lines were supposed to be turned off.
A. That's why the safety provider is there to sup[ervise], the site safety person for PSE&G. He's here to witness what dangers are ahead of us, so he can report them back to the company, and let us know where we're not to work.

(Ex. 25, dep of Peter Vlahopoulous at 187, 195)

4. The PSEG safety watcher had the power and authority to correct unsafe conditions on the job. Ryan Hill testified:

Q. In the safety manual in Section 5 it says that all personnel working on PSE&G transmission facilities are expected to be fully informed of all safety rules and procedures and strict adherence is mandatory. Do you agree with that?
A. Yes.

Q. So when they would start work in the morning and end at the end of the day, typically that would be like an eight-hour day that they'd be painting?
A. Yeah.

Q. And when you were filling in for Chris Brozowski on the job, you would be there during that time?
A. Yes.

Q. Okay. For eight hours -
A. Yes.
...

Q. And while you were doing that work, if you saw something that was being done unsafely or in violation of PSE&G's safety rules, you feel you had the power to stop the work?
A. Yes.

(Ex. 26., Hill dep. at 46-48)

5. Nick Psareas of TM testified that with regard to any electrical hazards on the towers, "we all followed, you know, what PSE&G had told us and whatever Chris had told us." *(Ex. 24, Nick Psareas dep. at 219)*.

6. Nick Psareas further testified:

Q. What was the process for requesting a line on a transmission tower to be de-energized?

A. ...All I remember is that Chris did give us an okay to go up. If he didn't, we would have been terminated by the contract. So by him allowing us to go up and the fact that we had painted over 200 of these towers, we knew what we're doing. The thing is, because I can't remember exact word-for word conversation, we primed it before, and we went up the same way to do the same thing. So when Chris gave me the okay, you know, these are his towers. He had more, you know, so he had that understanding with his towers.

...

Q. If you knew that the lines were energized, would you have let the employees go up there and paint the tower as they were supposed to paint the tower?

A I mean, if Chris gave us the okay that it was okay for us to go up, we primed it before. I don't remember if they were energized or de-energized before.

...

Q. To make sure that the distribution line that is circled on Exhibit C-14 was de-energized.

A. I don't remember. I just remember Chris telling to go up. So he gave me clearance.

(Ex. 24, Nick Psareas dep. at 209, 212, 247-248)

7. Chris Brozowski saw the workers clip two open buckets of paint on their belts and climb up the tower. And although that was a clear safety violation, he never did anything about it. *(Ex. 22, Brozowski dep at 106-107, 250-252, 254)*

8. He knew the paint would spill all over, he would drive his truck out of the spill zone so he did not get wet, and a stream of spilled paint ultimately was the contact with the line. *(Ex. 27 at 428) (See also Exhibit 33, photos and Exhibit 40, Decision of DOL Judge Baumerich at17)*

9. Nick Psareas testified, "there's no way to not get paint on everything in that process." *(Ex. 24, dep. of Nick Psareas at 126)*

10. When Chris Brozowski saw them up there working in proximity to the lines he, "[W]as watching and [knew] that they could get in trouble." *(Ex. 22, Brozowski dep at120)*

11. So he gave safety instructions to the painters, "that they go inside the tower." *(Ex. 22, Brozowski dep at146) (Ex. 27 at 439)*

12. Chris Brozowski further testified:

Q. The circuit marked as one, two and three, the 26 KV distribution circuit, was

that the circuit energized on the day of the accident?

A. Yes, it was.

Q. Did tower maintenance corporation ever discuss with you the location of that circuit, one, two and three?

A. Yes. I had a discussion with Nick about the location, the close proximity to the tower.

Q. What was the nature of that discussion?

A. I suggested to Nick that the guys, once they climbed and got close to that circuit, that they go inside the body of the tower and do their painting from inside the body, so their backs aren't exposed to that circuit where they could accidentally backed into it.

...

Judge Baumerich: If they touched the wire if they had, for example, a paint brush or paint mitt, could that bridge the gap if the person was standing on the tower?

The Witness: Yes. If they reached out, they would physically bridge the gap. Yes.

Judge Baumerich: How about if something was attached to the person, could that bridge the gap like, for example, if the paint bucket touched the wire?

The witness: Yes.

Judge Baumerich: [B]ut just so that I'm clear, if that wire was de-energized, it wouldn't have burned like this because there would have been in no electricity to search for a ground source.

The Witness: That's correct.

Judge Baumerich: Okay. The other question I have for you is, you did mention that at the beginning of the work day, you would speak to the safety supervisor for Tower Maintenance, Nick?

The Witness: Yes.

Judge Baumerich: The gentleman named Nick. Do you recall what were the topics of those conversations?

The Witness: If there were any hazards that needed to be addressed for that day's work, you know, we would discuss them first thing, so we'd get that out of the way.

Judge Baumerich: Can you give me an example of what would that be, if there were any hazards for the day?

The Witness: Like an example would be, this tower where this accident occurred, I discussed with Nick the need for the guys to be inside the cage of that tower inside the body of the tower when they were working next to these wires.

(E. 27, Brozowski DOL testimony at 439, 458-459) And further:

Q. ...You did say that you suggested to them that they stay kind of in the box so they don't back into the line, right?
A. Yes.

Q. And you testified that you made that suggestion for safety reasons, right?
A. Yes.

Q. Well, did you ever suggest that maybe the power be shut off to the lines?
A. No, I didn't.

Q. Well, in hindsight don't you think that that would have prevented this from happening?
A. If they had asked me to, if they had asked for the line to be deenergized?

Q. Yeah.
A. I would have gone to the -- you know, through the process and, you know -- all it takes is a phone call from me and the process would get started.

Q. So why didn't -- **<u>if you had a concern about them getting less than three feet from this line and you suggested to them a certain method of the way they would do their work so that they don't die why didn't you suggest that the power be shut off?</u>**
A. ...I just assumed that they were going to work safe.

Q. If you assumed they were going to work safe why did you make safety suggestions to them about not backing into the line?
A. It was just a suggestion. Just a reminder.

Q. And was that up to you to make that suggestion?
A. I took it upon myself to do it.

Q. Why didn't you take it upon yourself to suggest that the power be shut off?
...
A. Because they didn't ask for it.

Q. Did they ask you to suggest about not backing into the line?

A. They didn't ask me to suggest that. That's something that Nick and I talked about in the morning on the first structure that was this configuration.

Q. ...So this was not the only structure along that line where the 26,000 kilovolt circuit was in close proximity to the tower itself, right?
A. No. There were more [before this incident].

Q. And this [painting project] work had been ongoing for how many days roughly as of October...
A. Roughly three months.

Q. Okay. So over the course of those three months there were many other towers just like this one with the 26 KV line close to the tower?
A. There were others. ...Yes.

(Ex. 22, Brozowski dep at 151-155)

13. Chris Brozowski also testified:

Q. I was asking, as Mr. Brozowski sits here today, do you believe that the power should have been shut off?
A. I don't know how to answer that question.
...
Q. And you were there on a daily basis unless it was your day off or vacation or something?
A. Yes.

Q. And then Ryan Hill would fill in at some points?
A. Yes, Ryan Hill and another guy. We would alternate weekends.

Q. Okay. And you were aware during that three-month approximate time period that the lines were hot. Right?
A. Yes.

Q. And you were aware that they were carrying open buckets of paint up the towers. Right?
A. Yes.

Q. You were able to see that?
A. Yes.

Q. And you were also able to see the harnesses that they had on?
A. Yes.

Q. Okay. And you were able to see the Pelican clips as well that they had on the harnesses?
A. Yes.

Q. And...by looking at the tower, you were able to see where the lines were in relation to the body of the tower. Right?
A. Yes.
...
Q. [O]ver the course of those 30 years [you worked at PSEG] you became very familiar with those towers that were painted. Right? ...
A. Yes. I've seen them quite a few times.
...
Q. And the process of painting the towers as it was done on this day it had been done in those months before, the same process. Is that right?
A. Yes.

(Ex. 22, Brozowski dep at 250-252, 254)

14. Ryan Hill also confirmed:

Q. But you would stay on site while they were up there working?
A. Yes.

Q. [A]nd you knew when you were there watching that the lines were live?
A. Yes.

Q. All right. And you were able to see the harnesses that they had?
A. Yes.

Q. And the Pelican clips on the harnesses, you were able to see that?
A. Yes.

Q. And you were able to see them carrying the open buckets of paint on their belts up?
A. Yes.

(Ex. 26., Hill dep. at 45)

15. The PSEG payroll records for Brozowski and Hill for this work was categorized as "SAFETY COMPLIANCE WORK 2012." *(Ex. 39, Ex. 22 at 224)*

16. The PSEG Senior Transmission Supervisor testified as follows:

Q. Do you think in hindsight and seeing as how the line was 2.66 feet away from the edge of the tower the better decision would have been to shut off the 26 KV line at least?

A. Certainly...in hindsight and knowing all of the other information regarding contractor, training and so forth that's been discovered personally, yes, I probably would have take -- asked for the line to be deenergized.

...

Q. Okay. But with everything you know now and as you sit here today would you have shut off the lines? Yes or no?

A. Yes.

...

...And Chris Brozowski if he saw something unsafe did have the authority to stop the job to address that, right?

A. Absolutely.

Q. That would include, for example, if the workers were not utilizing the proper fall protection in the proper manner, correct?

A. Correct.

Q. And that would also include that the workers were getting too close to the lines, correct?

A. Correct.

(Ex. 8, Allric DeShong dep. at 214-215, 217-219)

17. In fact, Lee Wallace testified part of his job as a safety official at PSE&G is to prevent the very kind of thing that happened here. *(Ex. 7, Deposition of Lee Wallace at 96, 98)*

18. PSEG could have and should have prevented this incident. Instead it chose to risk the lives of the workers. *(Exhibit 34, Gallagher report)*.

19. Prior to the start of work, Peter Vlahopoulos talked to Chris Brozowski about the subject towers. Chris Brozowski stated that when they worked on that tower type, because the lines were so close, PSEG would have to do a power outage. *(Ex. 25, dep of Peter Vlahopoulos at 196-197, 271-272, 280-286)*

20. Peter Vlahopoulos testified:

Q. But where does it say in a contract or document...that the distribution lines are to be turned off?

A. Substation awareness. It doesn't say it. But it does say what the, a PSE&G inspector will be provided with us at all times, a safety inspector. ...

Q. What was the process for getting the distribution lines turned off?
A. I have no idea.

Q. That wasn't your, you weren't in
A. That's not my call.

Q. Did you notify PSE&G, and say, this tower has a distribution line on it. We need it turned off.
A. Well, yes. We spoke about it with Chris, the inspector. He was the main guy on the job. He was the one who takes care of that. As soon as he gets the okay, we go up.

Q. Okay. You told him that -
A. Well, actually, I think he told us.
...
Q. Looking at the insulator that is closest to the tower on set two, what is the distance of that insulator to the center of the tower?
A. I'm not sure. But it's way too close.

Q. Okay. Did you ever -- What do you mean, way too close?
A. It's way too close to the body.

Q. Okay. Did you ever measure distance?
A No. No. That's what the survey is about, for PSE&G. Because their plans are so old they're not sure what's out there. So they send a crew ahead to do their own survey of what's safe for us to go on and what's not.

Q. Okay. Did you ask what the distance from that is?
A. No.

Q. ...Did you ever ask what the distance from that second insulator...to the middle of the tower is?
A. No. I just remember going through this line with Chris and saying, when we get here we need outages for these towers. So I'm sure we had them the day before. And the day after we didn't. He agreed.
...
Q. And it was your understanding that that was supposed to be shut down on the day of the accident, correct?
A. Yes.

Q. Is it your understanding that this is also the distribution line that caused the accident?
A. Yes.

Q. Okay. Who actually requested that the distribution lines on that tower be shut down?
A. The PSE&G safety coordinator.

Q. The PSE&G safety coordinator did?
A. Yes, me and him. Actually, he said, we have to look at these down the road, which are on Route 1. When we get to them we have to coordinate outages.

Q. Did you, or did Tower Maintenance make a request that they be shut down?
A. I can, only to him. I said, of course, you know, yes, we definitely do, both agreed to it. But I can't call the glass tower, as they call it, on my own. He has to sign in and sign out of a hot work permit, and all that stuff.

Q. It's set in the contract, in this page, looking at Exhibit C-1. It's for specific procedures for shutting down lines.
A. Yes.

Q. It says, contractor is to provide seven days notice -
A. This was all done through their onsite safety person.

Q. So you didn't tell Mr. Nash (phonetic) 2:02:55 to do anything?
A. No. We had to notify them, and they took care of everything.

Q. What do you mean, you had to notify them?
A. We just notified their safety coordinator on the ground which towers we needed what on. And they will do the rest.

Q. Okay. Why did you -
A. We can't do switching. We can't switch lines out. We can't ask their clients to remove stuff like signs, barb wire, et cetera, off the towers.

Q. Who from Tower Maintenance requested that -
A. It was either me or Nick.

Q. Do you recall doing that?
A. Yes.

Q. Okay. And who did you make that request to?
A. Chris something.

Q. And Chris is the safety guy from PSE&G?
A. He was the onsite safety person for PSE&G.

Q. Okay. So you made a request, and said, I need the distribution lines shut off on this tower? Is that correct?
A. Yes. Or he would say, we need these shut down, you know.

Q. You did it for each tower individually?
A. Yes.

Q. Every day?
A. Every day. And we'd get the okay on which towers we can go on, and which we cannot. And Nick took care of a lot of the satellite towers.

Q. On the date when the accident happened, who made a request to shut that line down?
A. Chris.

Q. Who from Tower Maintenance made the request?
A. I had made it in advance, a long time ago.

Q. Okay. When was that made?
A. We took a ride through the line months before we started.

Q. Was the request written down?
A. He wrote it on his paperwork.

Q. You didn't, like, submit any documentation?
A. I don't know what to submit.

Q. Okay. You didn't submit any sort of formal request?
A. They never gave me who to submit it to, and a number to submit it to, or anybody. A lot of times I'm given the control room to request for a hot work permit, on and off. I didn't give, I wasn't given that authority here. I didn't sign in and out of the line daily, none of that. That was all done by their onsite person.

Q. So when was the request to shut down the distribution line made, approximately?
A. I have no idea.

Q. A week in advance?
A. No, no, no. Way before.

Q. Months in advance?
A. Yes, yes, months. Maybe a month. Maybe a month and a half, until we got

to that section. We knew what we were going ahead before we got there. Only because a lot of times we weren't able to, we'd have to skip 30 towers because of cell lines. Because their customer couldn't take them out within the month, or two weeks, or three weeks that they gave them.

Q. And what was your understanding of what PSE&G was doing to de-energize the towers?
A. They ground them.

Q. And so the whole distribution line was supposed to be off? Is that your understanding?
A. Well, usually they re-route it someway else.

Q. But there would be no energy flowing through those distribution lines?
A. Yes.

Q. That was your understanding?
A. It's done all the time. It's the normal practice. It's nothing that's unusual.

Q. It would be unusual to shut down the other lines, correct? The 280 lines?
A. No, no.

Q. Why were those kept on?
A. I have no idea. ...With every other utility company...they tell us, you're not allowed on the tower without outages.

(Ex. 25, dep of Peter Vlahopoulos at 196-197, 271-272, 280-286)

21. In fact, PSEG wrote down questions bidders asked at the bid meeting. Question #4 on the bidder questions document states:

4. [Q.] Several towers on the MT-T tower Line have distribution, how will that be handled?
[A.] All required distribution outages will be coordinated with the assigned **PSE&G project owner who will be responsible for securing the necessary outages** with the local distribution divisions.

(Exhibit 45, PSEG Bidder Questions) (emphasis added)

22. As discussed herein, PSEG should have and could have prevented this needless incident.

23. Chris Brozowski testified:

Q. If PSE&G wanted to shut off the power to these lines during the painting of this tower they could have done that, right?
A. Yes. If it was requested they would have done it.
...
Q. Do you think there's anything PSE&G could have done to prevent this incident?
A. I don't know.

Q. Well, they could have not permitted them up on the towers, right? That's one thing they could have done to prevent the incident?
...
A. That would obviously have prevented it.

Q. And they also could have turned off the power and grounded it out. That would have prevented it as well, right?
A. Yes, that's another way.

(Ex. 22, Brozowski dep at 131, 228-229)

24. Ryan Hill testified:

Q. In hindsight do you think there's anything PSE&G could have done to prevent the incident?
A. No.

Q. How about shutting down the power to the lines? That would have prevented the incident, right?
A. If the lines were off, yes.

Q. <u>So that's something PSE&G could have done to prevent the incident, right, they could have shut off the power</u>?
A. <u>Yes</u>.

(Ex. 26, Hill dep at 54, 56)

25. In fact, when PSEG works on the lines, they shut the power off. *(Ex. 22, Brozowski dep at 139-140)*

VII. Exploitation of the Workers

A. Alan Alves

1. Alan Alves testified he does not know what the minimum approach distance ("MAD") is. He just thinks he is supposed to keep 6 feet away. *(Ex. 32, Alves dep at 44-45)*

2. All he needed to get hired by Tower Maintenance was to give them his name; they did not ask about prior training or experience. *(Ex. 32, Alves dep at 48-49)*

3. Tower painting is heavy, difficult work. They take up two buckets of paint on their waist. *(Ex. 32, Alves dep at 50-51)*

4. They are provided no training, instructions nor safety rules prior to going up the towers. *(Ex. 32, Alves dep at 63-64, 82, 83-84)*

5. The clips often did not fit around the tower structure, so they would wrap it around and clip it onto itself. Sometimes there was nowhere to wrap around to so they would hook onto the step bolts or just hold on with their hands. *(Ex. 32, Alves dep at 75-78, 82)*

6. The clips would often freeze in place. *(Ex. 32, Alves dep at 78-80)*

7. Nobody inspected the equipment before climbing. The harnesses did not work properly because of the frozen paint. They asked for new belts and were refused. *(Ex. 32, Alves dep at 79)*

8. The electricity from the lines is so close to where they have to paint that they can feel the energy; their hair on arms would stand up. The lines are very close to the tower. They would feel a shiver in their arms from the energy. *(Ex. 32, Alves dep at 84, 86)*

9. No one ever talked to them about coming too close to the lines. *(Ex. 32, Alves dep at 87)*

10. They were never told the voltage was on. They were just told "to be careful. Nothing else." *(Ex. 32, Alves dep at 102-103)*

B. Marcel DaSilva

11. There were no safety meetings before going up the towers. They would just wait for the ok from the PSEG safety inspector. *(Ex. 37, dep. of Marcel Da Silva at 41-42, 71)*

12. He was not aware of any rule about how far to stay away from the power lines. *(Ex. 37, dep. of Marcel Da Silva at 49)*

13. After a few days of working the harness clips would freeze in the open position. *(Ex. 37, dep. of Marcel Da Silva at 53-54)*

14. Some parts of the towers they could not clip in at all and would have to paint without being clipped in. *(Ex. 37, dep. of Marcel Da Silva at 54, 88-89)*

15. Tower Maintenance knew the clips did not work right because of the dried paint freezing them. TM did nothing about it. *(Ex. 37, dep. of Marcel Da Silva at 56-59)*

16. When they would paint towers like the one the incident happened at, "we would say the cables were too close. They would tell us to paint it just the same." *(Ex. 37, dep. of Marcel Da Silva at 73)*

C. Renato Sousa

17. He tried to keep at least 2 feet away, "but there were times I had no choice because I needed to paint certain things, and I was following orders that I had to fulfill." *(Exhibit 41, dep. of Renato Sousa at 49)*

18. Sometimes when working near them the hair on his body stand up. That is the only way he ever knew if the equipment was live or not. *(Exhibit 41, dep. of Renato Sousa at 98, 232)*

19. He had no training or understanding how far he was supposed to be from the lines. He knows nothing about the minimum approach distances. *(Exhibit 41, dep. of Renato Sousa at 99) (Exhibit 42, DOL Testimony of Renato Sousa at 252, 275)*

20. He did not have to show any training documents or certifications to work for Tower Maintenance. *(Exhibit 42, DOL Testimony of Renato Sousa at 245)*

21. He was not provided any instructions or safety meetings at the beginning of the work day nor otherwise. He was never taught anything about how far he had to stay from the lines. *(Exhibit 42, DOL Testimony of Renato Sousa at 263-264, 275)*

22. The harness clips would freeze open frequently. They were old and difficult to work with. He told his bosses. They did nothing; just said try to clean them better. *(Exhibit 42, DOL Testimony of Renato Sousa at 297-282)*

23. He thought they were supposed to paint out the arm as far as they could reach. *(Exhibit 41, dep. of Renato Sousa at 104)*

24. Chris Brozowski was the PSEG supervisor that told them what to do. He was there M-F and on weekends a younger guy in his 30s would fill in (Ryan Hill). They would give them the

ok to climb. *(Exhibit 41, dep. of Renato Sousa at 119, 124, 235)*

25. He is not qualified per OSHA 29 CFR 1910.269(a)(2). He has no training as required by OSHA, National Electrical Safety Code, nor PSEG safety rules. No one ever went over any electrical safety rules with him. He has no training on how to determine if a line is live or not, other than hair standing up on his body. He also has no training as to OSHA fall protection rules. *(Exhibit 41, dep. of Renato Sousa at 224, 227-234) (Exhibit 42, DOL Testimony of Renato Sousa at 245)*

26. As far as he knew, Valdeni DeSouza also had no such training. *(Exhibit 41, dep. of Renato Sousa at 234)*

27. Renato DeSousa testified:

Q. If you got to the tower and looked up and said I think this is unsafe, this is dangerous, I don't want to climb up there and do this until it's made safe, what do you expect would have happened?
A. They would always tell me you can look for another job then because there's people that will do that.

Q. If you climbed up the tower and you felt the hair on your body stand up from the current and you climbed back down the tower and told them I'm not going to continue working until you shut off the power, based upon your experience of having worked there what do you expect would have happened?
A. Well, nothing would have happened, but I wouldn't have had any more work.· Yeah, he would tell me the same thing, there are plenty of people that will do it so you can look for another type of work.

(Exhibit 41, dep. of Renato Sousa at 237)

VIII. Why?

1. As stated, Tower Maintenance had painted towers for PSEG in 2008-2009.

2. In connection with that, PSEG Senior Chief Transmission Construction Coordinator, Glen Black, wrote a letter of recommendation for Tower Maintenance which stated:

> This is in reference to the painting Tower Maintenance Co. has done for PSE&G. Tower Maintenance has painted 65 pole type 500 KV structures for us while they were still energized. This resulted in a huge savings for the company as we did not have to take these circuits out of service.

(Ex. 43, Glen Black letter)

3. Courtney Russell confirmed, "**If the meter's not spinning, nobody's making money, so--**" *(Ex. 11, Russell dep. at 19)*

4. Greg Player said, "if the power's shut off, meters probably aren't spinning, so that's how we get revenue." *(Ex. 9, Player dep. at 11)*

5. And Ryan Hill confirmed PSEG does not want to shut down the power because, "you know, revenue, the money." *(See also Ex. 26, Hill dep. at 27)*

6. But this is what PSEG's Jose Obarrio had to say on the matter:

Q. ...Let's assume PSE&G knew that the safety rules weren't being followed and permitted it, and they did it because they wanted to realize a huge savings for the company. That sit okay with you?
A. No, it would not.
...
Q. Okay. Having read that portion of Ryan Hill's deposition, your colleague at PSE&G, what are your thoughts on that?
A. It looks like he's admitted that they were too close to the lines

(Ex. 38, Obarrio dep. at 36-37)

IX. No Investigation, No Responsibility, No Remorse

1. Despite all this, PSEG has refused to accept any responsibility whatsoever for this incident. *(Ex. 22, Chris Brozowski dep at 149-150, 230-231) (Ex. 7, Wallace dep at 90) (Ex. 9, Player dep at 17) (Ex. 8, DeShong dep at 251)*

2. Chris Brozowski testified:

Q. It just seems like no one at PSE&G has accepted any responsibility. They just seem like, "Hey, not our problem..."...it just seems astonishing to me.
A. Well, I don't...know of anyone that took any responsibility for it.

(Ex. 22, Chris Brozowski dep at 231)

3. Allric DeShong testified:

Q. Do you accept any responsibility for what happened here? Do you feel that you or PSE&G did anything wrong?
A. I don't believe I did anything wrong.

Q. Do you think PSE&G did anything wrong?
A. No.

(Ex. 8, DeShong dep at 251)

4. A basic safety principle is that when an incident occurs, there is supposed to be an investigation as to what caused it so measures can be taken to prevent the same kind of thing from happening again. (*Ex. 16, PSEG Environmental Health & Safety Program Guide at 4, 23- "Corrective and preventative actions shall be taken to address the underlying causes of accidents and incidents...") (Ex. 10, PSEG Contractor Safety) (Exhibit 18, PSEG Standards of Integrity at 2, 16) (Ex. 34, Gallagher Report)*

5. But PSEG chose to do no investigation and has not changed any of its practices.

6. Chris Brozowski testified:

Q. As far as you knew -- after the incident did you get any kind of memos or any policy, procedures or changes that were done after the incident?
A. No.

Q. Was there any kind of thing where, you know, they did the investigation, found out what happened and then, you know, wrote a memo or something saying what happened and what would be done in the future to prevent it from happening again? Do you remember anything like that?
A. No, no, nothing like that.

Q. Any verbal changes or, you know, policy changes or changes in the way they would do things after the incident that you recall?
A. No.

(Ex. 22, Chris Brozowski dep at 246-247)

7. Allric DeShong testified:

Q. Did PSE&G conduct any sort of investigation into this incident?
A. No.

Q. Did PSE&G conduct any kind of investigation into the incident to determine what caused it so as to prevent it from happening again in the future?
A. No.

(Ex. 8, DeShong dep at 33)

Q. What is PSE&G's understanding of what happened to cause the accident at the worksite?
A. I don't know.

Q. PSE&G did not conduct an investigation?
A. No.

(Ex. 12, DeShong DOL Testimony at 128)

8. Although he knows the paint PSEG chose contains a metallic substance that is conductive, and he is aware of the mechanism of the electrocution, he does not "see any safety concerns about that from a safety standpoint." *(Ex. 8, DeShong dep at 36)*

9. In fact, they released the same requests for proposals to complete the work and apparently intend on doing it the same way again once this litigation is over. *(Ex. 8, DeShong dep at 39-42)*

10. Chris Brozowski unfathomably testified:

Q. And so based on all the circumstances and everything we talked about today and all the information that you now have in front of you, based upon all that and your training, knowledge and experience <u>in your mind it was acceptable for them to be on the towers as they were at the time?</u>
A. <u>Yes</u>.

Q. And when I say "at the time" I mean at the time of the incident. Do you understand that?
A. Yes.

(Ex. 22, Chris Brozowski dep at 114-115) (See also Ex. 8, DeShong dep at 198- "<u>I don't think I would do anything differently</u>.")

11. This company simply has no remorse:

Q. Before coming to the deposition today, did you give any thought to what PSE&G could have done that would have prevented the incident, is that something you thought about before coming here?
A. No.
...
Q. <u>Part of your job as a safety official at PSE&G is to work to prevent the very kind of thing that happened here, right</u>?
A. <u>Correct</u>.

Q. Is there anything that you would like to say to, you know, the injured worker or to the family of the worker that will read this transcript?

A. No.

(Ex. 7, Deposition of Lee Wallace at 96, 98)

X. Product Liability Tower Design Defect and Failure to Warn

1. Jose Obarrio is the PSEG representative most knowledgeable in the design of the tower at issue. *(Ex. 38, Jose Obarrio at 10-11)*

2. PSEG designed the towers at issue, including the incident tower and its distance of the lines to the tower body. *(Ex. 38, Jose Obarrio at 39-43) (Ex. 29, Architectural Drawing of the Incident Tower) (Ex. 8, DeShong dep at 230-231)*

3. PSEG knew when they design the towers that workmen would have to climb them for painting and other maintenance. *(Ex. 38, Jose Obarrio at 44)*

4. In fact the towers were designed with ladder step bolts intended for people to climb them. *(Ex. 29)*

5. Yet PSEG designed them with the line perilously close to where the workmen would have to climb. *(Ex. 22, Brozowski dep. at 79) (Ex. 38, Jose Obarrio at 39-43) (Ex. 29, Architectural Drawing of the Incident Tower)*

6. Chris Brozowski testified, "[T]his is an odd design of tower with lines being this close..." *(Ex. 22, Brozowski dep. at 79)*

7. In fact, the design is so dangerous, that they cannot be safely climbed by either qualified, nor unqualified people. *(Exhibit 8, DeShong dep. at 95, 114) (Ex. 11, Dep of Courtney Russell at 16-17)*

8. It was entirely feasible for PSEG to have designed the towers with the 26kv lines 10 feet away from the body of the tower. *(Ex. 38, Jose Obarrio at 39)*

9. There is also no warning on the tower step bolts or otherwise that the lines are so close to where workers would be expected to be. There is also no warning that the lines should be shut down before servicing the towers. *(Ex. 38, Jose Obarrio at 45)*

10. Michael Caggiano, Electrical Engineer, wrote:

As previously stated, PSE&G also could have designed the towers such that the lines

> were at least 10 feet away from the tower body. PSE&G permitted this work to be done in violation of numerous safety rules, including its own rules, as set forth in the record of safety research, Inc. PSE&G designed the tower at issue. *(DeShong deposition at 220, 230) (Obarrio deposition at 42-43)*. It should have designed the tower with the arms at least 10 feet away from the tower structure, particularly since eight new workers would have to maintain and paint the tower which is also designed with step bolt latter's for workers to climb on it. *(Obarrio deposition at 44)* it could have a retrofitted this design after the tower was originally erected. The tower also should have been designed with an adequate warning to the effect that it could not be serviced while the lines were energized and still meet applicable safety standards. These kinds of warnings very easily could have been placed on the tower anytime after was it was erected. PSE&G chose not to incorporate such warnings nor this safer alternative design, nor retrofit the tower after it was erected , at a minimum it should have followed applicable safety rules, including its own rules, and make sure the power was shut off while this work was being done including, as set forth in the report of Safety Research, Inc.

(Ex. 3, Caggiano Report at 7-8)

11. In fact, PSEG is in the process of replacing these obsolete towers. *(Ex. 22, Brozowski dep. at 117)*

12. The new designs keep the insulators and lines 10 feet from the edge of the tower. This is a safer alternative design and there is no reason it could not have been done like that before. *(Ex 26, Hill dep. at 40-42) (Exhibit 44, Tower Upgrades)*

LEGAL DISCUSSION[6]

I. The Supreme Court Has Made it Clear PSE&G Owes a High Degree of Care Duty to Protect Workers and Others from the Killing Quality of its High Voltage Transmission Lines

PSEG has moved for summary judgment on the basis that it has no responsibility for injuries to employees of independent contractors that come near its transmission lines. In doing so it relies upon a line of cases that primarily deal with ordinary building owners. As discussed in the following sections, this line of cases does not support PSEG's claim that it can have no liability under the facts of this case. More importantly however, the traditional building owner line of cases is not the correct law to be applied to a utility company with regard to its high degree of care duty to protect workers and others from the killing quality of its high voltage lines. But under either line of cases, PSEG's motion for summary judgment should be denied and Plaintiffs' cross-motion for partial summary judgment on the issue of breach should be granted.

Our Supreme Court set forth PSE&G's responsibility to prevent needless death and injury from its transmission lines in *Black v. PSE&G*, 56 N.J. 63 (1970):

> An uninsulated high voltage power line carrying a deadly current must be considered one of the most dangerous contrivances known to man. In the pursuit of its business by installing and maintaining such a line [PSE&G] must use care commensurate with the risk of harm, I.e., a high degree of care, to others who in the course of their ordinary and lawful activities might suffer injury, death or damage therefrom. [PSE&G] must be aware not only of the killing quality of its high voltage lines, but also the need to adjust the degree of care exercised in its control and maintenance of such wires to the demands of commonly known technological advances in other forms of industrial and business development.

Black, 56 N.J. at 72-73.

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[6]In order to reduce the amount of pages of this brief for the Court to read, we are not rehashing or unduly restating the Statement of Facts section in this Legal Discussion section. Instead we will generally refer back and incorporate same by reference herein.

> We believe the just and appropriate rule to be that when uninsulated wires carrying a deadly current of electricity are placed on poles along, adjacent to or across public highways, streets or ways, or private property, it is reasonably foreseeable that persons engaged in a lawful operation in the proximity of such wires may come into contact with them in the ordinary course of the work and suffer injury. In such circumstances, in our judgment a jury question is presented as to whether [PSE&G] is guilty of negligence if it fails to post conspicuous warnings of the hazard on or near the poles or on the wires [and] it follows that where such actual knowledge appears ...Not only would a factual issue be present as to whether warning signs are required in such areas where others have the right to be for work, business or pleasure...but it would also be for the jury to say whether due care required other precautionary measures on the part of the utility. For example, issues might well arise as to whether the electric lines could or should be **de-energized**, rerouted or by-passed temporarily, **or whether the third person's operation should be supervised by the utility**, or whether the wires could have been insulated or placed underground, or finally whether, if warning signs were posted in the area, they were adequate for the purpose.

Black, 56 N.J. at 79-80, 84-85. "The test of liability is whether under the particular circumstances injury ought reasonably to have been anticipated." *Beck v. Monmouth Lumber and PSE&G*, 137 N.J.L. 268 (1948). Despite not having appraised the Court of this controlling precedent, PSEG is obviously well aware of it. As set forth in exacting detail in the Statement of Facts section, the charges of negligence as to PSEG run deep. As our Supreme Court established decades ago, PSEG's high degree of care under these circumstances indeed required them to supervise the painting activities of Tower Maintenance, and they did just that.

PSE&G v. Waldroup, 38 N.J.Super. 419 (App.Div. 1955), involved the electrocution death of a worker who was doing road work on the Turnpike. The Turnpike Authority had hired Brewster & Sons, Inc. to construct an interchange on the Turnpike. An employee of Brewster, Roy Waldroup, was operating a large dirt mover near a PSE&G high voltage distribution pole. At the time of the incident, the decedent, Ralph Snyder, also an employee of Brewster, was standing next to the pole and metal guy wire holding it up. At some point while moving dirt, Snyder was killed when

Waldroup hit the guy wire causing one end to contact the live lines and the other to contact Snyder. *PSE&G*, 419 N.J.Super. at 427.

The ensuing lawsuit alleged that PSE&G was negligent in not protecting the workmen from its high voltage lines. It knew they would have to get in close proximity to the poles, lines and guy wires. It further alleged PSE&G was negligent in that it did not take sufficient steps to protect the workmen from the live wires by, for example, providing a sufficient warning, safely constructing the equipment, <u>or shutting off the power while the work was taking place</u>. *PSE&G*, 419 N.J.Super. at 427-428. PSE&G admitted responsibility for the allegations and entered into a consent judgment.

Thereafter PSE&G brought an action against Brewster & Sons, Inc. and Waldroup for contribution and indemnification. *PSE&G*, 419 N.J.Super. at 428. PSE&G argued its responsibility was merely passive and that therefore they should be fully reimbursed by defendants which actually caused the harm. The court disagreed and found:

> [PSE&G's fault] was primary and was directly the result of plaintiff's failure to fulfill its duty to the decedent, to whom it owed a high degree of care. Adams v. Atlantic City Electric Co., 120 N.J.L. 357 (E. & A.1938).
> ...
> It was plaintiff's duty to construct, locate and guard its high voltage transmission lines in such a manner as not to be dangerous to the public and those, to its knowledge, working near and about them, and this duty could not be shifted to the defendant.

PSE&G, 419 N.J.Super. at 432, 434. For all the reasons set forth in exacting detail in the Statement of Facts section above, PSEG was negligent in this regard. Its motion for summary judgment should be denied and the cross motion for partial summary judgment on the issue of breach should be granted.

Similarly, in *Beck v. Monmouth Lumber and PSE&G*, 137 N.J.L. 268 (1948), a worker was

killed when he was repairing a crane at a lumber yard. PSE&G moved for a directed verdict on the basis it had no duty and could not be found liable in negligence. The Court recognized the high degree of care the electric utility must exercise in the management of its electricity, poles and wires. The Court stated:

> [W]hoever uses a highly destructive agency such as electricity is held to a correspondingly high degree of care toward all persons who in the exercise of their lawful right may come in contact with it.
> ...
> Whoever uses, controls, or manages a highly destructive agency (electric current) is held to a correspondingly high degree of care. ...the exercise of that degree of care, of that manner of fulfillment of duty, which comprehends a circumspection, a foresight, a prevision which has due and proper regard to reasonably probable contingencies.
>
> The test of liability is whether under the particular circumstances injury ought reasonably to have been anticipated.

Beck, 137 N.J.L. at 272-273 (citations omitted).

In *Bailey v. Pennsylvania Electric Company*, 409 Pa.Super. 374 (Sup. Ct. 1991), the utility company hired a contractor to inspect by helicopter its transmission towers and lines for upkeep and maintenance purposes. While the contractor was doing an inspection, the helicopter collided with one of the utility's 46kv lines and crashed, severely injuring the piolet and killing his co-worker passenger. A jury verdict was rendered for the plaintiffs. *Id.* at 379.

The defendant utility moved for jnov on the basis it had no responsibility to prevent injury to employees of an independent contractor. It also argued it had no notice of any dangerous condition alleged to have caused the crash. *Id.* at 382. The court rejected those arguments and found the utility certainly had notice that its high voltage wires were in the air and could potentially cause injury to the workers who were hired to fly around and inspect them. The court quoted the duty a

utility owes as follows:

> But the power company, of course, owed more than a negative duty to the deceased pilot. That a transmission line is a dangerous instrumentality is recognized everywhere. No matter where located it is a source of grave peril and the law requires that the possessor of such an instrumentality exercise a high degree of care: "Vigilance must always be commensurate with danger. A high degree of danger always calls for a high degree of care. The care to be exercised in a particular case must always be proportionate to the seriousness of the consequences which are reasonably to be anticipated as a result of the conduct in question."

Bailey v. Pennsylvania Electric Company, 409 Pa.Super. at 383 (citations omitted). The fact that the utility hired the plaintiffs' employer to perform the aerial inspections was, "sufficient proof that the power company was aware that aviation activities would be taking place over its lines. ...Thus, it is clear that the power company had notice of a dangerous condition." *Id.* at 384-385. The court further stated, "We reject Penelec's contention that it owed the appellees any less of a duty because the pilots were independent contractors, not everyday fliers." *Id.* at 385.

The *Bailey* court further noted (just like New Jersey courts hold):

> A transmission line is a dangerous instrumentality and the law requires that the possessor of such instrumentality exercise *a high degree of care.* [Citations omitted].
>
> Enigmatic as is the basic element of electricity, no one with the slightest mentality is ignorant of its vast potentialities for destruction. The degree of care required to protect people from this devastating element is no less than that required to prevent poisonous reptiles from breaking loose from their restraining enclosures. As the proprietor of ferocious beasts may not, by pleading excessive cost for confining them, escape liability for the loss of life occasioned by his savage wards, so also *the owner of high-voltaged electric machinery may not avoid responsibility for the devastation caused through his failure to adequately guard such uninhibited devices.* This court has declared that *when human life is at stake the rule of due care and diligence require everything that gives reasonable promise of its preservation to be done regardless of difficulties or expense.*

Bailey, 409 Pa.Super. at 388 (citations omitted) (emphasis in original); *See also Black v. PSE&G*, 56 N.J. at 72-73 ("An uninsulated high voltage power line carrying a deadly current must be

considered one of the most dangerous contrivances known to man. [PSE&G] must use [high degree of] care commensurate with the risk of harm..."); *Stark v. Lehigh Foundries, Inc.,* 388 Pa. 1, 7–15, (1957) ("Those handling electricity of high voltage are not only bound to know the extent of the danger but to use the very highest degree of care practicable to avoid injury to everyone who may be lawfully in proximity to such wires and liable to come accidentally or otherwise in contact with them.")

In the instant matter there is no question plaintiffs' activities were "lawful" in the sense they were not trespassing or stealing equipment; they were assigned job duties to be doing what they were doing. As such, PSEG is well aware it owed them a high degree of care. As a starting point, it owed them a duty to provide appropriate warnings of the hazardous conditions "that were adequate for the purpose" of preventing this incident. *Black* at 85. As the Statement of Facts set forth above, PSEG did not provide an adequate warning.

Simply writing in the contract that the lines would not be de-energized is not a "posted sign" nor otherwise is a sufficient warning. *Black* at 85 ("[jury] issues might well arise as to whether ...if warning signs were posted in the area, they were adequate for the purpose."). Also, perhaps telling the workers "be careful, the lines are live" is also hardly a sufficient warning or preventative measure. There is testimony in the case PSE&G did not even do that much. *(Ex. 13, Mackevicz dep at 93-94, 145) (Ex. 25, Peter Vlahopoulos dep at 335-336*) As set forth in the Statement of Facts, these workers would need years of training and experience before they would be properly considered "qualified" to get closer than 10 feet to the 26kv lines. And as has been demonstrated in the Statement of Facts, given these lines are so close to where the workers had to go to paint the towers, there is no way these lines could have been safely painted while the power was on, regardless of

whether the workers were qualified under 29 CFR 1910.269(a)(2) of OSHA.

Furthermore, there was no warning whatsoever about the conductive, killing quality of the paint PSEG specified. There was no warning that if it spills on the lines, they could be killed. In fact, PSEG's Safety Standards and Procedures Manual states at 7.7, "Workers should be aware of the contents of all paints and thinners [and] Sufficient clearance from electrical and mechanical hazards is required." *(Exhibit 19, PSE&G Safety Standards and Procedures Manual at Part 3, 2-4, 9-35)* The workers received absolutely no training or warning about this. In fact, PSEG never even shared these rules with TM or their workers. No one even talked about the hazard of PSEG's paint.

There was also no warning whatsoever that the towers were not suitable for climbing with harnesses. Instead, the men needed to be in lifts, just like the PSEG workers were when they came to the scene afterwards to take pictures. Many parts of the towers were not suitable for the workers to secure their harnesses. The step bolts were not suitable attachment points. The cross braces were also too large for the Pelican clips and many were in any event on a vertical angle. *(Ex. 22, Gallagher Report at 17-18, 25)*

But regardless, the warning issue is largely an academic exercise because the reality is no warning would have been a sufficient preventative measure to permit these towers to be painted live. Indeed, the Supreme Court in Black further stated:

> [I]t would also be for the jury to say whether due care required other precautionary measures on the part of the utility. For example, issues might well arise as to whether <u>the electric lines could or should be de-energized</u>...<u>or whether the third person's operation should be supervised by the utility</u>,...

Black at 85. The Statement of Facts above is replete with testimony and other evidence the lines indeed had to be de-energized. Having these towers painted while the lines were live violated state

and federal safety laws, industry safety standards and PSEG's own contractor and work safety rules. (*See Statement of Facts Sec. VI*)

Under OSHA 29 C.F.R.§1910.269 and §1926, Subpart V, PSEG in connection with this painting project is considered a "host employer." A host employer is an employer who operates, or controls the operating procedures for, an electric power generation, transmission, or distribution installation. In many cases, the host employer is an electric utility company. The host employer has to coordinate their work rules and procedures with the contract employer so that each employee of the contract employer and the host employer is protected as required by the OSHA electrical safety standard. 29 C.F.R.§1910.269. (*See also Ex.22, Chris Brozowski dep. at 172-173, Ex. 8, DeShong dep. at 100*)

Furthermore, under the New Jersey High Voltage Lines Act, *N.J.S.A.* § 34:6-47.1, et seq. The utility operator shall be the person responsible for the completion of any necessary safety measures. *N.J.S.A.* § 34:6-47.5. Furthermore, PSEG also as the "supervising agent" had a responsibility to not permit these workers to come within 6 feet of the high voltage lines. PSEG was not permitted to allow this work "unless and until danger from accidental contact has effectively been guarded against." (*See also Ex. 19, PSEG Safety Standards and Procedure Manual at 9-46 - 9-47*) PSE&G was also responsible to supervise and manage safety on the job under the National Electrical Safety Code. *(Chris Brozowski dep. at 219-220)* The report of Vincent Gallagher further sets forth in detail the numerous codes and standards PSEG violated in connection with this matter. (*Ex. 34*). Indeed, as the Supreme Court pointed out in *Fernandes v. DAR Development*, 222 N.J. 390, 405 (2015), in cases like this, "The standard of care is derived from many sources, including codes adopted by the Legislature, regulations adopted by state and federal agencies, and standards

adopted by professional organizations."

The evidence is clear PSEG was responsible to de-energize the lines. The Statement of Facts digests in detail that these distribution lines were too close to where the workers had to paint. PSEG was specifically asked about this at the pre-bid meeting and PSEG wrote it is the, "PSE&G project owner who will be responsible for securing the necessary outages with the local distribution divisions." *(Exhibit 45, PSEG Bidder Questions)* There is even testimony and other evidence that Chris Brozowski pointed out the lines were too close during the pre-job walk through and was specifically asked and agreed he would see to it the lines would be de-energized.

PSEG is well aware of the Supreme Court's pronouncement in *Black* that meeting its high degree of care very well may require that the painting "operation should be supervised by the utility..." *Id.* Indeed, the Statement of Facts above digest in detail the steps PSEG took to supervise the painting operation, especially with regard to managing safety. In fact the record shows Chris Brozowski and the other PSEG representatives were *required* to correct unsafe work conditions on the tower painting job. (*Ex. 27, Brozowski DOL Testimony at 467, 444-445, 448, 462-463*)(*Ex. 12, DeShong DOL Testimony at 151*) (*See also Ex. 19, The PSE&G Safety Standards and Procedures Manual at Chapter 1, "Each associate has the absolute right* <u>*and*</u> <u>*obligation*</u> *to question, stop and correct any unsafe act or condition."*) There is substantial evidence in the record that PSEG was negligent in this regard. Among other things, PSEG's <u>direct</u> negligent breach of its high degree of care can be distilled to the following:

- permitting the workers to carry open buckets of conductive paint within inches of the live wires;
- permitting the workers to scale the tower with insufficient fall protection methods including harnesses with nowhere to clip onto and clips that were frozen in the open

position;

- permitting workers to get too close to the lines, regardless of whether or not they were "qualified."[7] The facts show these towers being painted by anyone with the lines hot violates a multitude of safety standards and rules;

- failing to shut off the power, despite acknowledging the need and that it was their responsibility to do so;

- giving ineffective and unworkable safety instructions to the workers such as, "go inside the tower," while failing take any real corrective action, such as shutting off the power;

- selecting a conductive paint that can kill if it touches the lines;

- failing to adequately warn about the live wires, minimum approach distances, the impossibility of safely attaching to the tower, the inability to safely paint the towers while they were live, and the hazardous conductive paint they chose;

- failing to inform TM or its workers of the PSEG safety rules that have to be followed when working around high voltage transmission towers;

- negligently managing safety including assigning a safety watcher that permitted obvious safety violations to take place over the course of 3 months and;

- requiring Tower Maintenance to follow erroneous PSEG tower diagrams that incorrectly depicted danger zones as safe zones.

All these points are discussed in extensive detail in the Statement of Facts section. Indeed, the record strongly shows PSEG made a conscious decision to have this work done in violation of a whole host of safety standards and rules, including with the lines hot, because, "This resulted in a huge savings for the company..." (*Ex. 43, Glen Black letter*)

PSEG''s motion for summary judgment should be denied. Because *Black v. PSE&G*, 56

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[7]Whether or not the workers were "qualified" is largely a red herring since it was impossible for even "qualified" workers to have painted these towers live and comply with the safety rules. But regardless, the facts show these workers were not qualified and PSEG did nothing to confirm they were. They turned a blind eye to obvious safety hazards in the name of maximizing profits.

N.J. 63 (1970) and the above cases are the controlling law when it comes to a utility company's duty to prevent injury and death from its high voltage facilities, the Court need not go any further to deny defendants' motion. Furthermore, given the overwhelming evidence as discussed herein, there is no jury question that PSEG breached its common law duty and the cross-motion for partial summary judgment on the issue of breach should be granted.

II. Even If There Were No Heightened Liability Rules for Utility Companies and PSE&G Were an Ordinary Building Owner, its Motion for Summary Judgment Would Still Be Properly Denied

The Supreme Court has long established a special and heightened duty of care when it comes to utility companies like PSE&G managing "one of the most dangerous contrivances known to man." *Black v. PSE&G*, 56 N.J. at 72-73. Since in this special context, "The test of liability is whether under the particular circumstances injury ought reasonably to have been anticipated.", *Beck v. PSE&G*, 137 N.J.L. 268 (and it can not be disputed this incident was indeed foreseeable), a traditional landowner analysis is neither controlling nor necessary. But even under this analysis, summary judgment in favor of PSE&G would still not be in order and partial summary judgment on the issue of breach would still be the proper result.

A. A Landowner Has a Non-delegable Duty to Protect Invitees Against Dangerous Conditions on the Property

As a general rule, a landowner has "a non-delegable duty to use reasonable care to protect invitees against known or reasonably discoverable dangers." *Moore v. Schering Plough*, 746 N.J. Super. 300 (App. Div. 2000). This general rule operates to protect individuals performing work on the premises of the landowner, most commonly independent contractors and their employees. *See Accardi v. Enviro-Pak Sys. Co.,* 317 N.J.Super. 457 (App.Div.1999). The duty a landowner such

as PSEG owed to the workers in this case is succinctly set for in *Sanna v. National Sponge Co*., 209 N.J.Super. 60 (App.Div. 1986):

> The owner of land who invites workmen of an independent contractor to come upon his premises is under a duty to exercise ordinary care to render reasonably safe the areas in which he might reasonably expect them to be working. The landowner's duty includes the obligation of making a reasonable inspection to discover defective and hazardous conditions. The obligation upon the landowner of either making the condition of his premises reasonably safe or giving adequate warning imposes upon him the duty to furnish such safeguards as may reasonably be necessary. Moreover, the duty of a landowner to such an invitee is nondelegable. The landowner cannot escape its responsibility to provide a safe place to work by attempting to transfer it to another. The possibility that another person may also have been negligent does not relieve the landowner of his legal duty.

Sanna, 209 N.J.Super. at 66-67 (citations omitted) This has been the law of New Jersey since at least 1893. *Murphy v. Core Joint Concrete Pipe Co.*, 110 N.J.L. 83, 86 (E&A 1932); *Phillips v. Library Co. of Burlington*, 55 N.J.L. 307 (E&A 1893)

However, a "landowner is under no duty to protect an employee of an independent contractor from the very hazard created by doing the contract work." *Sanna*, 209 N.J.Super. at 67; *Accardi v. Enviro-Pak Sys. Co.*, 317 N.J.Super. 457, 463 (App.Div.1999); *Burger v. Sunoco, Inc.* 2009 WL 4895207 (D.N.J. 2009) This is known as the "Contractor's Hazard Exception" to the general duty. *Id.* It only applies where the contractor created the dangerous condition by doing the work; it does not apply to dangerous conditions that preexisted their work. *Dawson v. Bunker Hill,* 289 N.J.Super. 309, 320 (App.Div. 1996) (exception does not apply where "the plaintiffs were injured by conditions on the landowner's property that preexisted their work" and is limited to instances where the dangerous condition "was created by the very work that plaintiffs were hired by...to perform."). This exception originated in *Broecker v. Armstrong Cork Co.*, 128 N.J.L. 3 (N.J.1942). In *Broecker*, an independent contractor fell through a rotted portion of the roof that he was repairing and replacing.

The court reasoned that there should be an exception to the general duty owed by a landowner when "an independent contractor, comes upon lands, at the instance of the owner or occupier, to correct the precise condition which causes the injury." *Id.* at 7.

1. Even If the *Black v. PSE&G* Line of Cases Were Not the Controlling Law, the Contractor's Hazard Exception Still Would Not Apply Because Tower Maintenance Neither Created the Dangerous Condition Nor Contracted to Service the Electrical Wires

As a threshold matter the "Contractor's Hazard Exception" does not apply here because the independent contractor, Tower Maintenance, and its employees did not create the dangerous condition of hot transmission lines and a tower that could not be safely climbed with harnesses. *Sanna*, 209 N.J.Super. at 67; *Accardi,* 317 N.J.Super. at 463. As the Court articulated in *Burger*:

> Even though every injury that occurs on a contractor's job site can ultimately be reduced to some decision made by the contractor about how to perform the job, the scope of the exception does not extend to every possible injury that occurs in the course of the contractor's work. *See Reiter v. Max Marx Color & Chem. Co.,* 170 A.2d 828, 829-30 (N.J.Super.Ct.App.Div.1960), *aff'd,* 35 N.J. 37 (1961) (declining to apply the exception when a contractor was injured by a defective ladder). Instead, the exception applies when the contractor is called "to correct the precise condition which causes the injury," *Broecker,* 24 A.2d at 196 (fix collapsing roof), or the injury results from a hazardous condition created by the contractor. *E.g., Wolczak,* 168 A.2d at 415 (constructing a structure on which employees would work without scaffolding); *Dawson,* 673 A.2d at 852 (choosing not to brace the trusses). Thus, if a contracted worker is injured while ascending a ladder with an unknown defect belonging to the landowner, the exception would not apply. *Reiter,* 170 A.2d at 829-30. While a contractor could be said to have created the hazardous condition in that case by choosing to ascend the faulty ladder without inspecting it or without a separate safety harness, that is not the kind of creation of the hazard falling under this exception.

Burger 2009 WL 4895207 *3. In *Burger*, Plaintiff's employer was contracted to repair leaky skylights in the building's roof. *Id.* at *2. In the course of traversing the roof, plaintiff was caused to fall due to a defect in the roof that preceded the work. Furthermore, Tower Maintenance was not

hired to repair the transmission wires. Therefore, the Contractor's Hazard Exception further does not apply. *Broecker v. Armstrong Cork Co.*, 128 N.J.L. 3, 7 (N.J.1942) (the exception applies when the contractor is called "to correct the precise condition which causes the injury.")

Breach of the general duty of a landowner to independent contractor employees has been found on multiple occasions. For example, in *Piro v. PSE&G,* 103 N.J.Super. 456, 459-60 (App.Div. 1968) the defendant provided plaintiff's employer with a workplace and a very large saw and saw table, which caused plaintiff's injuries. The saw did not have safety guards in place and the work area was not barricaded to protect workers from flying wood. *Id.* at 460-61. The jury verdict in favor of plaintiff was affirmed on the ground that defendant had breached its duty to make the premises reasonably safe for the work. *Id.* at 463.

In *Moore v. Schering Plough, Inc.,* 328 *N.J.Super.* 300, 302 (App.Div.2000), the court considered whether defendant had a duty to an employee of its security service to remove snow and ice from walkways and ramps to walkways. The motion judge had ruled that " 'a security guard has to take the risk of weather' and that slipping on snow or ice was a 'risk of employment.' " *Id.* at 306. Yet, the plaintiff was not hired for "snow removal on the walkways." *Id.* at 307. As a result, the Appellate Division concluded the defendant owed plaintiff, a business invitee, a duty of reasonable care that included removal of snow and ice. *Id.* Similarly here, TM was not hired to service or repair the electric lines.

In *Steward v. Esso Standard Oil Co.*, 111 N.J.Super. 426 (App.Div. 1970), an employee of an independent contractor was electrocuted doing work at the defendant's oil refinery. The defendant claimed it was not liable for injuries to employees of its contractor. The court disagreed, finding the landowner was duty bound to maintain the premises where the work was being done in

a safe condition. Just like the instant matter where these workers were hired to paint towers, not perform service on electrical lines, the court found:

> Reason and logic point to the conclusion that if the work area is made unsafe by the proximity of wires carrying a lethal charge of electricity, it should make no difference whether those wires are on the owner's property, or so close thereto as to interfere with the doing of the work in a normal manner. The gist of the owner's liability is the fact that the employee is being required to work too close to a hazard of which the owner knows, or should have knowledge.

Steward, 111 N.J.Super. at 533; *See also Gallas v. PSE&G*, 56 N.J. 101 (1970) (directed verdict in favor of PSE&G reversed where contractor came in contact with transmission line and was killed; defendant's compliance with National Electrical Safety Code and industry standards is not dispositive.); *Ishaky v. Jamesway Corp.*, 195 N.J.Super. 103 (App.Div. 1984) (landowner liable for electric shock injuries to electrician contractor hired to fix electrical outlet.); *Piro v. PSE&G*, 103 N.J.Super. 456 (App.Div. 1968) (PSE&G liable for failure to provide safe place where independent carpenter contractor was injured during a sawing operation in carpentry shop.).

PSEG failed to provide a reasonably safe place to work. The Contractor's Hazard Exception would not in any event apply as a threshold matter because the record is clear TM neither created the dangerous condition of the hot wires nor contracted to repair them.

2. Even If the Contractor's Hazard Exception Did Apply, PSE&G's Supervisory Responsibilities Including Involvement with Managing Safety on the Project and Giving Job Instructions to TM Workers Implicates the "Manner and Means" Exception

The general rule is that a landowner has a non-delegable duty to make its premises safe for contractors. An exception to this general rule is that the landowner has no duty to cure dangerous conditions that the contractor either created or was hired to fix. An exception to this exception is that a landowner is liable if it exercised a degree of control over the manner or methods by which

the work is to be completed. *Sanna v. National Sponge Co.*, 209 N.J.Super. 60, 67 (App.Div. 1986)

The Court in *Sanna* held:

> In determining whether the landowner was implicated in negligence, both the *Wolczak* and *Gibilterra* decisions stressed the degree to which the landowner participated in, actively interfered with, or exercised control over the manner and method of the work being performed at the time of the injury. *See Gibilterra*, 19 N.J.171, *Wolczak,* 66 N.J. Super at 73.

Sanna, 209 N.J.Super. at 67. The "manner and means" exception applies if the owner exercised some degree of control or involvement in job safety issues. *Olivo v. Owens-Illinois, Inc.*, 186 N.J. 394, 407-08 (2006) The Supreme Court in *Olivio* noted:

> This exception to the landowner's general duty...only applies, however, when "the landowner does not retain control over the means and methods of the execution of the project." Consideration of the above principles leads to the conclusion that there are genuine issues of material fact about the extent of the duty that Exxon Mobil owed to Anthony, and whether Exxon Mobil satisfied that duty....Issues of fact remain as to...the extent of Exxon Mobil's supervision and control over the work. Exxon Mobil contends that Anthony's work was controlled by his employers, but that contention is contradicted in part by Anthony's testimony that Exxon Mobil gave safety instructions [to the workers]."

Olivo v. Owens-Illinois, Inc., 186 N.J. at 407-08; *see also Carvalho v. Toll Brothers*, 143 N.J. 565, 577 (1996) ("Courts in several other jurisdictions have imposed a duty on a supervising architect or engineer with actual knowledge of a serious safety risk <u>even if the supervisor never expressly assumed responsibility for safety</u>...."). The instant case presents far more compelling circumstances of job supervision and control by PSEG, especially with regard to safety. As it is required to do under *Black* and a whole host of other authorities, PSEG recognized its duty to supervise the painting work in close proximity to the transmission lines. This included, among other things, assigning a person to watch the work at all times, including for safety and to make sure the workers were not electrocuted and did not fall from the towers. This is all set forth in detail in the Statement of Facts

section. Additionally there is testimony and other evidence that PSE&G provided direct safety instructions and training to TM employees. *(Ex. 7, Wallce dep. at 15) (Ex. 25, Peter Vlahopoulos dep. at 91) (Ex. 13, Mackevicz dep. at 116-119)* Among numerous other evidence items set forth in the facts, Chris Brozowski even acknowledged he, "suggested to [Tower Maintenance workers] a certain method of the way they would do their work so that they don't die..." But he never did anything to have the power shut off. (*Ex. 22, Brozowski dep at 151-152*)

PSEG's motion for summary judgment should be denied. *Ishaky v. Jamesway Corp.,* 195 N.J.Super. 103, 107 (App.Div. 1984) ("some degree of involvement [in the work] removes the limited immunity provided by *Wolczak*"). Indeed, as the *Ishaky* Court stated, "A showing of control by the owner over the operation is not necessary." *Id.* Here we <u>have</u> control.

Furthermore, the Supreme Court in *Pfenninger v. Hunterdon Cent. Reg. High School,* 167 N.J. 230 (2001) noted:

> Thus, in a contractual relationship, an individual may be liable in tort if he or she undertakes "gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things." *Restatement (Second) of Torts* § 323 (1965).

Pfenninger, 167 N.J. at 241. It is well-established that supervision, once undertaken, must be conducted in a non-negligent manner. *See Troth v. State*, 117 N.J. 258 (1989); *Dudley v. Victor Lynn Lines, Inc.*, 32 N.J. 479 (1960); *Restatement (Second) of Torts* § 323 (discussing negligent performance after undertaking to render services)

Similarly, in *Medina v. BRW Ltd. Holdings, L.L.C,* 2008 WL 2520882 (App. Div. June 26, 2008), a worker who was applying laquer finishing to wood floors was injured when the gas water heater in the building turned on and ignited the fumes. The Law Division improperly granted the

owner summary judgment on the basis that it was not liable for the negligence of independent contractors. The Appellate Division found the trial court improperly overlooked the fact that the hazardous condition was not created by the worker and the owner failed to provide a reasonably safe work environment. *Id.* at 6. The Court also noted the building owner undertook a duty for safety in connection with turning off the gas to the building during the laquer application process and that its failure to do so was a cause of the explosion and injuries. The Court held that because the owners agreed to be responsible for turning off the gas, they breached their contractual duty and are thereby liable in tort for the resulting injuries. *Id.* at 6-7.

Similarly in the instant matter, PSEG had and took steps to meet its responsibility to manage safety. It was negligent in this regard by having the work done in violation of numerous safety standards. PSE&G is not entitled to summary judgment.

3. PSE&G Is Also Responsible Because it Hired a Contractor That Was Not Safety Competent to Do this Work and That PSE&G Admitted Was "Unacceptable"

Another exception to the Contractor's Hazard Exception is that a landowner is liable for injuries arising from the hiring of a contractor that is not competent to safely complete the work. *Mavrikidis v. Petullo*, 153 N.J. 117, 136 (1998); *Puckrein v. ATI Transport, Inc.*, 186 N.J. 563, 575-76 (2006) Liability against a landowner for hiring an incompetent contractor is derived from basic negligence principles. *The Restatement (Second) of Torts section 411* (1965) states:

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons.

Comment a to *section 411*, in turn, defines a competent and careful contractor as "a contractor who

possesses the knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others." (emphasis added). Comment b to *section 411* further explains:

> The employer of a negligently selected contractor is subject to liability under the rule stated in this Section for physical harm caused by his failure to exercise reasonable care to select a competent and careful contractor, but only for such physical harm as is so caused. In order that the employer may be subject to liability it is, therefore, necessary that harm shall result from some quality in the contractor which made it negligent for the employer to entrust the work to him.

Restatement (Second) of Torts section 411 (1965); *see also Bergquist v. Penterman*, 46 N.J. Super. 74, 84 (App. Div. 1957), *certification denied* 25 N.J. 55 (1957). In other words, to prevail against the principal for hiring an incompetent contractor, a plaintiff must show that the contractor was incompetent or unskilled to safely perform the job for which it was hired, that the harm that resulted arose out of that safety incompetence, and that the principal knew or should have known of the incompetence. *Puckrein v. ATI Transport, Inc.*, 186 N.J. 563, 575-76 (2006); *citing Mavrikidis, supra* at 136-37.

As set forth in detail in the Statement of Facts section I., Tower Maintenance was not safety competent to do this work. PSEG admits they violated their own contractor safety rules in hiring them. They admit TM should have been flagged as "unacceptable" and should not have been hired. In fact, the facts show that none of the TM employees were properly trained and they did not have the proper equipment to do this work. Furthermore, TM was the predecessor to another tower painting business (Tower Painting Co., Inc.) also run by Peter Vlahopoulos that accumulated numerous OSHA citations related to inadequate fall protection. PSEG knew or should have

inquired about this kind of history as well. Certainly it is not uncommon for companies with a checkered regulatory or financial history will close up shop and reopen under a different name.

Therefore, summary judgment should be further denied. In fact, given PSEG's admissions on this issue, plaintiffs' motion for partial summary judgment on the issue of breach should be further granted.

4. Misplaced Reliance upon Inapposite Case Law

The gravamen of plaintiffs' claims is that PSE&G was itself negligent, as opposed to being vicariously liable for TM's acts. *See e.g. PSE&G v. Waldroup*, 38 N.J.Super. 419, 434 (App.Div. 1955) ("[PSE&G's fault] was primary and was directly the result of [PSEG's] failure to fulfill its duty to the decedent, to whom it owed a high degree of care.") This has been set forth in detail in the facts section and otherwise throughout this presentation. Therefore, Defendants' reliance on cases like *Cassano v. Aschoff*, 226 N.J. Super. 110, 114 (App.Div. 1988) and *Donch v. Delta Inspection Services, Inc.*, 165 N.J. Super. 567 (1979) are misplaced because those cases addressed the question of *vicarious* liability for the acts of the independent contractor. Furthermore in *Cassano* (as well as the other cases defendants rely upon), "plaintiff does not claim that the property owners retained any control over the manner and means... Nor is it claimed that the work was...inherently dangerous." There was also insufficient evidence about negligent hiring in *Cassano* because unlike the case here where TM's "unacceptable" history including its prior death was known to PSEG, in *Cassano*, "[the contractor's] poor performance was only known by these landowners in retrospect." *Id.* at 114.

Defendants' reliance upon *Wolczak v. National Electric Products Corp.*, 66 N.J.Super. 64 (App.Div.1961) is similarly misplaced. First, *Wolzak* has largely been rendered bad law. *See Meder*

v. Resorts International, 240 N.J.Super. at 476 (App. Div. 1989) (characterizing the lower court's reliance upon *Wolczak* a "flawed analysis" since it is no longer controlling authority); *Kane v. Hartz Mountain*, 278 N.J.Super. 129, 140-143 (App. Div. 1994) (reiterating the *Wolczak* rule has been replaced); *Izzo v. Linpro Company*, 278 N.J.Super. 550, 555-556 (App.Div. 1995) (same). Furthermore, central to the Court's decision in *Wolczak* was that "that neither had any control over the plaintiff in the area in which he was working." *Wolczak* at 70. As the Statement of Facts show, this is far from the case here. PSEG had substantial control over the project, especially with regard to safety issues. Furthermore it was important to the Court in *Wolczak* that the defendant, "did not -- in actuality or by contractual privilege -- supervise, direct, or concern itself in any way with the [work]." *Id.* at 71. To the contrary in the instant case, PSEG retained substantial control in its contract, in practice, and according to its own company safety policies. Indeed as discussed above, as a utility in control of high voltage systems, it was required to under the law and industry standards.

Defendant's reliance upon the New Jersey Tort Claims Act case of *Muhammad v. New Jersey Transit*, 176 N.J. 185 (2003) is also misplaced. In *Muhammad*, the plaintiff fell through a hole in a dilapidated roof that the contractor was hired to demolish. *Id.* at 187. The only question for the Court was whether NJT acted in a "palpably unreasonable" fashion under the Tort Claims Act. *Id. at* 194 ("The liability of a public entity for an injury caused by a dangerous condition on its property is circumscribed by *N.J.S.A. 59:4-2*.") There was no claim in *Muhammad* that NJT had any control or supervision with regard to safety or otherwise at the worksite. There was also no claim that NJT had any legal responsibility to manage the project in any way, including as to safety. There was no claim that NJT was a utility in charge of high voltage systems. Nether the legal standards applicable in *Muhammad* nor the facts have anything to do with the instant matter.

Finally, PSEG's argument that is should have no liability for the death of Valdeni DeSouza nor the catastrophic injuries of Renato Sousa, because only the latter received workers compensation benefits should be dismissed out of hand. Whether the worker received such benefits is of no moment to third party liability. New Jersey law is clear any remedy the plaintiff may have had in workers compensation, is neither intended nor adequate to make the worker whole. *Joy v. Barget*, 215 N.J.Super 268, 272 (App. Div. 1987)). Furthermore, it is well settled that an employer cannot be a party to a negligence action and thus can never be considered a joint tortfeasor subject to the Comparative Negligence Act. *Ramos v. Browning Ferris Indus. of South Jersey, Inc.*, 103 N.J. 177 (1986)*; see also Bahrle v. Exxon Corp.*, 279 N.J.Super. 5, 22 (App.Div.1995) (defendants precluded at trial from using "empty-chair" defense that employer was negligent.), *aff'd on other grounds,* 145 N.J. 144 (1996).

Similarly, defendants' argument they can have no liability since OSHA did not issue them a citation should be flatly rejected.[8] A party's liability does not hinge on whether OSHA investigated any particular incident or party or what the focus of any investigation may have been. OSHA has limited resources and does not thoroughly litigate all aspects of a matter nor focus on all potentially responsible parties. Furthermore, the Supreme Court in *Alloway v. Bradlees* could not have been any more clear:

> In sum, although OSHA issued a violation to Bernhard Excavating, and not to Pat Pavers, the failure by OSHA to find a violation against a particular party does not preclude a determination that the party nevertheless was subject to a duty imposed by OSHA regulations and that the standards prescribed by OSHA were violated.

Alloway v. Bradlees, 157 N.J. at 240; *See also Constantino v. Ventriglia*, 324 N.J.Super. 437

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[8]Since the OSHA investigator did not issue PSEG any tickets, PSEG's liability in this matter was simply not an issue in the DOL proceeding nor Judge Baumerich's decision.

(App.Div. 1999) (OSHA standards pertinent even if defendant could not receive OSHA citation.).

Furthermore, plaintiffs' OSHA workplace safety liability expert, Vincent Gallagher, explains:

> **Explanation of Why OSHA Did Not Cite PSE&G**
>
> OSHA did not consider PSE&G to be a controlling employer under its Multi-Employer Citation Policy. OSHA should have considered PSE&G as controlling employer. Apparently, OSHA did not have the necessary information to determine whether or not PSE&G was a controlling employer. The OSHA file does not indicate that they reviewed PSE&G's safety policy as indicated in the documents cited in paragraph X of our report. Those documents indicate PSE&G's safety policy to take reasonable steps to make sure that contract workers work safely and in compliance with OSHA standards and PSE&G's contractor safety policy. Apparently PSE&G represented to OSHA that they actually performed no safety management oversight of TMC at this site. PSE&G representatives, including Chris Brozowski, all testified that PSE&G did not actually assume any responsibility for oversight of safety of this project. That is in direct violation of the PSE&G safety policy as well as the deposition testimony of the safety program manager of PSE&G, Lee Wallace. Had OSHA known of the PSE&G policy to take reasonable steps to make sure that contractors worked safely and in compliance with OSHA, they would have considered PSE&G to be a controlling employer and in violation of the aforementioned OSHA standards. They would have been able to impute knowledge to Chris Brozowski who was on the site daily and could easily look up and see violations of OSHA standards.

(*Ex. 34, Gallagher Report at 37*) (underline added). Indeed, the record strongly suggests PSEG gave false, misleading and incomplete information to OSHA investigators. Allric DeShong even gave false testimony to Judge Baumerich that he did not know about the prior fatality. *(Exhibit 8, Dep of Allric DeShong at 207-209*) (*Exhibit 12, DeShong DOL Testimony at 26*) (*Exhibit 48, PSEG email to OSHA Investigator*) PSEG certainly did not provide the kind of information Vincent Gallagher discusses above. Regardless, defendants' argument in this regard is of no legal consequence.

III. PSE&G Is Also Responsible under the "Fairness Analysis" Set Forth by the Supreme Court in Worker Safety Premises Liability Case Law

Regardless of labels placed on parties, at the end of the day it is "general negligence principles" and a "fairness analysis" that controls the legal question of duty. *Pfenninger v. Hunterdon Cent. Reg. High School,* 167 N.J. 230, 241 (2001) ("[W]hether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution."); *Carvalho v. Toll Brothers*, 143 N.J. 565, 572 (1996) ("The question of whether a duty to exercise reasonable care to avoid the risk of harm to another exists is one of fairness and policy that implicates many factors."); *Pfenninger v. Hunterdon Cent. Reg. High School,* 338 N.J.Super. 572, 583 (App.Div. 1999) ("'general negligence principles,' rather than strict categorical analysis, govern tort claims involving worker safety issues."). As the Supreme Court stated:

> The desire to maintain fairness and justness in our tort jurisprudence led to the recognition in *Hopkins,* that premises liability should no longer be limited by strict adherence to the traditional and rigid common law classifications based on the status of the person entering the premises.
> ...
> The inquiry should be not what common law classification or amalgam of classifications most closely characterizes the relationship of the parties, but ... whether in light of the actual relationship between the parties under all of the surrounding circumstances the imposition...of a general duty to exercise reasonable care in preventing foreseeable harm...is fair and just.

Olivio v. Owens-Illinois, Inc., 186 N.J. 394 (2006). Thus, defendants' argument that, "Plaintiffs' status as an employees of independent contractor...is critical to this court's analysis" (Db7) is entirely inconsistent with clear Supreme Court pronouncements. Instead, under the "general negligence principles" "fairness analysis," the Court is to consider the <u>foreseeability of harm</u>, the <u>relationship between the parties</u>, the <u>opportunity and capacity to take corrective action</u>, i.e., control, and the

public policy interest in the result. *Olivio*, 186 N.J. at 402-408; *Pfenninger,* 167 N.J. at 240-243; *Carvalho*, 143 N.J. at 572-578.

A. Foreseeability and Severe Risk

This incident was clearly foreseeable and the attendant risk was severe. In considering whether the risk of injury was foreseeable, the Court looks to the "likelihood of the occurrence of a general type of risk rather than the likelihood of the occurrence of the precise chain of events leading to the injury." *Wartsila NSD N. Am., Inc. v. Hill Int'l, Inc.*, 342 F.Supp.2d 267, 281-82 (D.N.J.2004); *Cassanello v. Luddy*, 302 N.J.Super. 267 (App.Div. 1997) ("Foreseeability does not depend on whether the exact incident or occurrences were foreseeable. The question is whether an incident of that general nature was reasonably foreseeable."). As previously discussed in the facts section, PSEG mis-managed job safety. It was clearly foreseeable that an electrocution and fall incident like this would result.

The attendant risk of a contact with a high voltage line and fall from the tower is severe. There can be no dispute about this. This is set forth in detail in the facts section and will not be repeated here.

B. Relationship of the Parties

The relationship of the parties was such that PSEG had the "opportunity and capacity ... to have avoided the risk of harm." *Alloway v. Bradlees,* 157 N.J. 221, 231 (1999). The risk of harm here is multifaceted and outlined above. PSE&G knew about the risks of their high voltage towers better than anyone else. PSEG clearly had the power and opportunity to correct these hazardous exposures, including at a minimum to stop work if safety rules were not being followed. PSEG was

constantly monitoring the work everyday. PSEG had specific authority over the workers with regard to safety. This is all detailed in the Statement of Facts section.

Carvalho v. Toll Brothers, 143 N.J. 565 (1996) was a trench collapse injury case where the Law Division granted summary judgment in favor of the property owner's representative, Bergman. The Appellate Division reversed and the Supreme Court upheld that ruling based upon a "fairness analysis." Among the critical factors the Court recognized in finding a duty was that Bergman's role included project oversight and an element of control. Like Chris Brozowski and the other PSEG representatives in the instant matter, it was critical to the Court in *Carvalho* that "Bergman had the authority to stop the job." The Court further noted:

> The record thus strongly indicates that if safety conditions could affect work progress, the engineer had the authority and control to take or require corrective measures to address safety concerns.

Carvalho, 143 N.J. at 576. The same is the case here. The testimony and evidence on this point is unequivocal. PSEG, Chris Brozowski, Ryan Hill and the others clearly had the authority and control to take or require corrective measures to address safety concerns. They could enforce their power with several means, including dismissal.

It was also important to the Court in *Carvalho* that Bergman had knowledge of the risk of harm of the unstable trench. *Carvalho* at 576. As stated above, the same thing is present here. PSEG clearly knew about the risk of the lines, the unsuitableness of the tower for climbing, and the conductive quality of their paint. As the Appellate Division recently noted in *Tarabokia v. Structure Stone,* 429 N.J.Super. 103, 118 (App.Div. 2012), in a fairness analysis, "actual knowledge of the risk of harm may be dispositive for the imposition of a duty of care..." *citing*, *Carvalho, supra,* 143 N.J. at 576–77.

Furthermore, as discussed in the facts, PSEG had legal, contractual and industry standard duties to manage safety on this job. Yet far less is sufficient to impose a duty of care:

> The existence of actual knowledge of an unsafe condition can be extremely important in considering the fairness in imposing a duty of care. Courts in several other jurisdictions have imposed a duty on a supervising architect or engineer with actual knowledge of a serious safety risk <u>even if the supervisor never expressly assumed responsibility for safety</u>.... In *Balagna v. Shawnee County,* 233 *Kan.* 1068 (1983)...The court imposed a duty on the engineer who had actual knowledge that the trenching operations were being carried out in violation of OSHA standards and had the authority to stop the work, or at least to say something to the contractor.
>
> We conclude that considerations of fairness and public policy require imposing a duty on Bergman and Stonebeck to exercise reasonable care to avoid the risk of injury on the construction site. The risk of serious injury from the collapse of an unstable trench was clearly foreseeable. Bergman had explicit responsibilities to have a full-time representative at the construction site to monitor the progress of the work, which implicated work-site conditions relating to worker safety. ...The engineer <u>had sufficient control to halt work until adequate safety measures were taken</u>. There was a sufficient connection between the engineer's contractual responsibilities and the condition and activities on the work site that created the unreasonable risk of serious injury. Further, the engineer, through its inspector, was on the job site every day, observed the work in the trench, and, inferably, had actual knowledge of the dangerous condition.
>
> In sum, <u>the engineer had the opportunity and was in a position to foresee and discover the risk of harm and to exercise reasonable care to avert any harm</u>. Under these circumstances, we hold that Bergman and Stonebeck had a duty of care to the decedent.

Carvalho, 143 N.J. at 576-578 (underline added). As such the owner's representative was properly held liable.

Defendants' reliance upon *Rigatti v. Reddy*, 318 N.J.Super. 537 (App.Div. 1999) is likewise entirely misplaced. Aside from *Rigatti* being the wrong line of cases with regard to a utility in charge of high voltage lines, in *Rigatti* there was no control or oversight by the owner over the project. In distinguishing the salient facts of *Carvalho*, the *Rigatti* court pointed out:

> [In *Carvalho*] an on-site engineer retained by the owner was fully aware of dangers inherent in a deep sewer excavation, and failed to warn employees of a subcontractor of those dangers. The Court found a duty on the engineer's part to warn of the danger, in part because of his actual knowledge of the unsafe condition and his measure of control over the job site.

Rigatti, 318 N.J.Super. at 543. And as discussed in detail in the facts section above, the facts are overwhelming that PSEG had actual knowledge of the needlessly hazardous working conditions at issue here. In fact there is more than mere knowledge here; there was a conscious decision to have this work done in violation of the law. PSEG clearly had the power and opportunity to take corrective measures. Their own documents and testimony overwhelming show it.

C. There Is a Strong Public Interest in Preventing Needless Injury and Death to People That Come near Transmission Towers

The public policy interest here can not be seriously questioned. It is discussed at length in the within case law, industry standards, the report of Vincent Gallagher and defendants' own safety documents. Congress passed the Occupational Safety and Health Act of 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 *U.S.C.A.* § 651(b); in *Fernandes v. DAR Development*, 222 N.J. 390, 405 (2915). *See also* Linder, Marc. *Fatal Subtraction: Statistical MIAs on the Industrial Battlefield.* 20 J. Legis. 99 (1994) Death and disability due to unsafe workplaces persist. In 2007 for example, there were 4 million non-fatal workplace injuries and illnesses and 5657 fatal injuries in the United States. Bureau of Labor Statistics, *Workplace Injuries and Illnesses in 2007; National Census of Fatal Occupational Injuries in 2007*.

There can be no serious dispute PSEG mismanaged safety on this job site. In fact the record

reflect a conscious effort to have this work done in violation of the rules to maximize profits. The imposition of liability through tort law is essential to discourage irresponsible conduct, compensate the injured and create incentives to minimize risks of harm. *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 448 (1993); *People Express Airlines, Inc. v. Consolidated Rail Corporation,* 100 N.J. 246, 266 (1985); *Weinberg v. Dinger*, 106 N.J. 469, 494 (1987); *see also Prosser and Keeton on Torts* § 4 (5th Ed.1984) (noting that "prophylactic" factor of preventing future harm is a primary consideration in tort law). In the construction industry, everyone recognizes quickly that "time is money." If you cut corners related to safety and no injury occurs, you can save money. But this should not be permitted because the inevitable resulting injuries end up costing society more. That is why OSHA was passed. (*Ex. 34, Gallagher report*). *See also* Linder, Marc. *Fatal Subtraction: Statistical MIAs on the Industrial Battlefield.* 20 J. Legis. 99, 104 (1994) ("'It must be frankly accepted that the most efficient method of prosecuting work is not always the safest." Conversely, the "safe builder is . . . put at a disadvantage in bidding..."'), *quoting* Ethelbert Stewart, Accidents in the Construction Industry, Monthly Lab. Rev., Jan. 1929, at 63, 65 (vol. 28); *Fernandes,* 222 N.J. at 399 (noting plaintiff's construction safety expert testified the defendant, "increased its profits by regularly hiring unscrupulous subcontractors who did not adhere to OSHA standards."); *Costa v. Gaccione*, 408 N.J.Super. 362, 367 (App.Div. 2009) (owner admitted OSHA safety rules were ignored.)

The instant matter involves PSE&G overseeing and controlling the painting of 344, 100+ foot high transmission towers carrying 664,000 kilovolts of "one of the most dangerous contrivances known to man." These unskilled, non-English speaking laborers were directed in the "dog days" of August to clip two open buckets of paint to their belts and climb these massive structures with

harnesses that could not safety attach them to these towers. They would get covered from head to toe in red primer and highly conductive green paint. This would cause their harness clips to freeze in the open position. The PSEG safety watcher would pull his vehicle away so as to not get splashed. The workers would need to get within inches or closer of the live wires. No one told them any spillage of paint could kill them. One fell 70 feet, hitting another on the way down who fell 40 feet. PSEG did not act with the care commensurate with this highly dangerous activity as set forth in the Statement of Facts section. Its summary judgment motion should be denied. Plaintiffs' cross-motion for partial summary judgment should be granted. There is a strong policy interest in holding PSEG accountable for its decision to disregard critical electrical transmission safety rules.

IV. Plaintiffs' Cross Motion for Partial Summary Judgment on the Issue of Breach Should Be Granted Because the Record Is Indisputably Clear and the Facts Show PSEG Essentially Admits it Failed to Meet its High Duty of Care

As set forth above, as the utility in charge of this high voltage system, PSEG had a duty to manage safety, enforce OSHA and industry standards, and take the necessary steps to prevent needless injury and death to the tower painters. The wholesale failure of PSEG to meet its obligations under New Jersey state law, the federal OSHA regulations, the National Electrical Safety Code, other industry standards and its own safety rules, is truly astonishing. In fact it is worse than wrong. Given the overwhelming, one-sided evidence that fills this record, there is no jury question PSEG breached this duty. Accordingly, this Court should find as a matter of law that PSEG breached its duty to mange safety and enforce safety standards on this project. The question of proximate cause to be left to another day, to perhaps be decided by a jury. *See, e.g. Rule* 4:46-2(c) ("[S]ummary judgment ... may be rendered on any issue in the action..."); *Harrison Riverside v. Eagle Affiliates, Inc.*, 309 N.J. Super. 470 (App. Div. 1998)

But as to the question of whether or not PSEG breached its duty to manage safety, there is simply nothing for a jury to decide. PSEG admits it should not have hired TM. It admits it was supervising safety on the job, and in fact admits it had a responsibility to do so under the law and standards. PSEG knew better than anyone the lines were too close to where the painters had to work. It knew there was no where to safely attach to its towers and admits it knew the fall protection was inadequate and unsafe. It admits it was on site on a daily basis watching the work during the three months before the incident. It knew the clips would freeze in the open position. It admits it was in charge of shutting off the power, admits the law so required it, and admits it instead decided to risk the lives of these workers because, "This resulted in a huge savings for the company..." (*Ex. 43, Glen Black letter*)

As set forth herein, PSEG literally met none of its obligations and the Court should so find as a no reasonable juror could conclude other than that PSEG breached the high degree duty it owed to manage safety and prevent harm from its high voltage towers. There is simply nothing upon which PSEG can contest the admitted facts of its breach of its duty to the Plaintiffs and the Court should grant Plaintiffs' Cross Motion for Partial Summary Judgment on the Issue of Breach.

The present version of *Rule* 4:46-2(c) reflects the Court's decision in *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520 (1995), which held that a trial court should make the same type of evaluation of evidential materials in ruling on a motion for summary judgment as in ruling on a motion for judgment under *Rule* 4:37-2(b) or *Rule* 4:40-1 or a motion for judgment notwithstanding the verdict under *Rule* 4:40-2. The standard is "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Id.* at 523. That is, "whether the evidence presents

a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Brill*, 142 N.J. at 536. Summary judgment is appropriate where the evidence "is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). This means that a summary judgment motion cannot be defeated if the non-moving party does not "offer ... any concrete evidence from which a reasonable juror could return a verdict in his favor." Id. at 256. Moreover, Rule 4:46-2(c) provides that:

> [S]ummary judgment or order, interlocutory in character, may be rendered on any issue in the action (including the issue of liability) although there is a genuine factual dispute as to any other issue (including any issue as to the amount of damages).

Accordingly, it is clear that a trial court is permitted to grant summary judgment as to a discrete issue rather than the entirety of an action. *Haelig v. Mayor & Council of Bound Brook Borough*, 105 N.J. Super. 7 (App. Div. 1969); *see also, Harrison Riverside v. Eagle Affiliates, Inc.*, 309 N.J. Super. 470 (App. Div. 1998), *cert. den.* 156 N.J. 384 (1998)(summary judgment granted as to method of calculating damages although issue of amount of damages remained in dispute).

Since there can be no material issue of fact that PSEG admits it has breached its clear high degree of care duty, Plaintiffs' Motion for Partial Summary Judgment on the Issue of Breach of that duty should be granted.

V. There Is Sufficient Evidence to Submit the Punitive Damages Claim to the Jury

The facts of this case can support a punitive damages claim and it should not be dismissed on a motion for summary judgment. Punitive damages may be awarded if plaintiff proves, by clear and convincing evidence, that defendant's conduct constitutes reckless indifference to the consequences of harm to others. *N.J.S.A. 2A:15-5.12; Smith v. Whitaker*, 160 N.J. 221, 241 (1999);

Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 49 (1984); *see also Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610 (1997) (to justify punitive damages award defendant's conduct must be reckless); *DiGiovanni v. Pessel*, 55 N.J. 188, 190 (1970)(punitive damages justified by defendant's "conscious and deliberate disregard of the interests of others")(*quoting* William Prosser, *Handbook on the Law of Torts §* 2 (2d ed. 1955)). As such, plaintiff must prove by clear and convincing evidence a "deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to the consequences." *Berg v. Reaction Motors Div.*, 37 N.J. 396, 414 (1962), *codified at N.J.S.A.* 2A:15-5.10. "The defendant, however, does not have to recognize that his conduct is 'extremely dangerous,' but a reasonable person must know or should know that the actions are sufficiently dangerous." *Parks v. Pep Boys*, 282 N.J. Super. 1, 17 (App. Div. 1995)(citing *McLaughlin v. Rova Farms, Inc.*, 56 N.J. 288, 306 (1970)). The standard can be established if the defendant knew or had reason to know of circumstances which would bring home to the ordinary reasonable person the highly dangerous character of his conduct. *Id*.

Aggravating circumstances must be evaluated on a case-by-case basis. *McMahon v. Chryssikos,* 218 N.J. Supra. 572, 580 (Law Div. 1986). Such circumstances must demonstrate a reckless disregard of persons who foreseeably might be harmed by defendant's conduct. *N.J.S.A.* 2A:15-5.12a. The Appellate Division in *Dong v. Alape*, 361 N.J. Super. 106 (App. Div. 2003), examined the non-exclusive list of circumstances prescribed by the Punitive Damages Act, *N.J.S.A.* 2A:15-5.12a, to determine whether the plaintiff was entitled to punitive damages. Under *N.J.S.A.* 2A:15-5.12(b) and Model Jury Charge 8.60 that the trier of fact must consider these four factors in determining whether punitive damages should be awarded:

1. the likelihood, at the relevant time, that serious harm would arise from the

defendant's conduct;

2. the defendant's awareness or reckless disregard of the likelihood that such serious harm would arise from the defendant's conduct;
3. the conduct of the defendant upon learning that its initial conduct would likely cause harm; and
4. consider the duration of the conduct or any concealment of that conduct by the defendant.

However, the trier of fact may consider additional factors since the four statutory factors are not intended to be exclusive. *N.J.S.A.* 2A:15-5.12(b); Model Jury Charge 8.60, "Punitive Damages"

Each one of these factors is compelling here. As set forth in detail in the Statement of Facts section and throughout this brief, the likelihood of harm from defendants' exceptional failure to follow its obligations with regard to its high voltage towers is clear. The record is replete with PSEG's knowledge and actions upon these workers and the consequences of same. The record reflects that upon learning of the inevitable result of its actions, it gave false and misleading information to federal investigators. Allric DeShong even gave false testimony to Judge Baumerich that he did not know about the prior fatality. It continued this kind of thing in this litigation, including denying under oath the existence of critically important documents which only came to light from pressing deposition questioning and substantial motion practice and orders. It has shown absolutely no remorse.

In *Santillan v. Sharmouj*, 289 F. App'x. 491(3d Cir. 2008), a case starkly similar to the instant matter, the Third Circuit upheld a jury award of punitive damages in a construction injury OSHA case involving an undocumented worker who fell from a building. Like the facts of the instant matter, the Court in *Santillan* found it compelling that the company in charge of safety on the project ignored the OSHA regulations and knew necessary safety precautions were not enforced. Taken as a whole, this was sufficient to demonstrate the company's reckless indifference towards the safety

of the workers. *Santillan v. Sharmouj,* 289 F. App'x. 491, 496 (3d Cir. 2008); *See also* V*an Dunk v. Reckson Associates Realty Corp.*, 415 N.J.Super. 490 (App.Div. 2010) (intent to injure claim permitted in construction accident case where there was a knowing disregard for OSHA regulations.)

In *Arroyo v. Scottie's Prof'l Window Cleaning, Inc,* 120 N.C. App. 154 (N.C. Ct. App. 1995) a Mexican immigrant window washer was inured when he fell while cleaning building windows. The Court permitted a punitive damages claim because the defendant had a practice of ignoring OSHA safety rules. Like in this case, there was no real OSHA training nor oversight and safety protection was neither provided nor enforced. There was a history of safety non-compliance. The Appellate Court held that plaintiff had presented sufficient allegations of reckless conduct to state a claim for punitive damages. *Id. at* 155-60; *See also* V*an Dunk*, 415 N.J.Super. 490. Similarly in this case, the jury should be entitled to decide punitive damages. *N.J.S.A.* 2A:15-5.12; Model Jury Charge 8.60.

Furthermore, in design-defect products liability cases "the question of liability for punitive damages may turn on whether the manufacturer wantonly disregarded a high probability that injury would occur once the defect manifested itself in the situation that the plaintiff encountered." *Zakrocki v. Ford Motor Co.,* A-5769-06T3, 2009 WL 2243986 at *23 (App. Div. July 29, 2009). A defendant is not insulated from punitive damages merely by showing there is a "low likelihood" a design defect will manifest itself and cause injury. *Ibid.* Awareness that a potentially dangerous condition exists and that serious injury will occur should this condition manifest itself constitutes wanton disregard and warrants an application of punitive damages. *Ibid.* There is certainly such knowledge in this case.

In *Zakrocki*, Ford Motor Co. was aware that the throttle in their motor vehicles was subject

to "sticking," that is, causing "unexpected acceleration" during periods of engine temperature change. *Ibid.* Ford also admitted that they were aware that "unexcepted acceleration following an owner's pressing of the accelerator to open a stuck throttle might cause an accident[.]" *Ibid.* Although Ford claimed that "the low rate of hot sticking... constituted a lack of notice of a significant risk [to drivers]" the jury found otherwise and imposed punitive damages. *Id.* at *23-24.

On appeal, the Appellate Division upheld the award of damages, noting that, "Ford's implicit position is that it was insulated from punitive liability by a low likelihood [that the throttle would stick], regardless of the probability of injury when such a manifestation does occur. However, the [Punitive Damages] Act does not compel such an application[.]" *Id.* at *23. Instead, "[t]he only inference the jury had to make to find wanton disregard [and thus impose punitive damages] was Ford's awareness that a significant surge at highway speeds could result in an accident with significant injuries." *Ibid.* Indeed, the Appellate Division upheld the trial judge's finding "that the jury had sufficient evidence to conclude that Ford knowingly and wantonly disregarded a high probability of injury when the throttle sticks while the engine is warm." *Id.* at *24. As such, the *Zakrocki* jury "properly could and did consider the assessment of punitive damages against Ford." *Ibid.*

The central purpose of punitive damages is punishment and deterrence. No one can put a corporation in jail. But the civil justice system can economically deter PSEG from engaging in this kind of conduct. PSEG intends to do this same thing again once this litigation is over; they are in essence seeking judicial ratification of this plan. (*Ex. 8, DeShong dep at 39-42*) Punitive damages here will save lives and the price society has to pay because of the harm PSEG's conduct will cause. The record has sufficient evidence to support punitive damages and the Court should not dismiss it.

At a minimum a punitive damages phase trial should be conducted before concluding there is insufficient evidence to support it.

VI. The Products Liability Claim Should Not Be Dismissed and Plaintiffs' Cross-Motion for Partial Summary Judgment on the Issue of Product Defect Should be Granted

A. The Tower PSE&G Designed Contains a Product Defect and Had No Adequate Warning and PSE&G Is Liable under the Products Liability Act

Defendants' assertion that Plaintiffs fail to state a products liability claim and that the matter should be decided as a matter of law defies credulity. Indeed, PSEG designed the incident tower and is thus liable under the N.J. Products Liability Act ("PLA") for designing a product for which "a practical and feasible alternative design existed that would have reduced or prevented [plaintiff's] harm." *Lewis v. Am. Cyanamid Co.*, 155 N.J. 544, 560 (1998); *see also Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 74 (1990); *Smith v. Keller Ladder Co.*, 275 N.J.Super. 280, 284–85 (App.Div.1994); *Restatement (Third) of Torts*: Product Liability 2 cmt. f (Proposed Final Draft, 1997) ("To establish a prima facie case of defect, plaintiff must prove the availability of a technologically feasible and practical alternative design that would have reduced or prevented the plaintiff's harm."). PSEG knew the tower would need to be serviced and it had climbing bolts for that purpose. PSEG representatives acknowledge the design of the tower requires workers to come perilously close to high power electrical lines and that it was entirely feasible for PSE&G to have designed the tower so the lines were 10 feet away from the body of the tower. (*Ex. 22, Brozowski dep at 79* ["this is an odd design of tower with lines being this close."]) (*Ex. 38, Jose Obarrio at 39-43*). As such, Defendants are liable under a design defect theory for their defective product.

Additionally, Defendants are liable under the Products Liability Act for the tower having no adequate warning that the towers cannot be safely climbed with the power on due to the close

proximity of the tower body to the electrical lines and that the lines have to be shut down prior to servicing the towers. (*Ex. 38, Jose Obarrio at 45*). See *N.J.S.A.* 2A:58C-4. A product designer who fails to warn of a product's dangers is presumed to have a breached its duty to warn and the fact finder is to consider proximate cause only:

> Defendant . . . opined that no warning was needed because the [product] presented an open and obvious danger...Nothing in the [Products Liability] Act or case suggests that the obviousness of danger may not be considered as a factor to establish what is an 'adequate warning'...or whether a breach of that duty could be a proximate cause of the accident. Of course, in the same manner as a protective device, a warning sign is provided to protect the inattentive worker. For that reason, the plaintiff's lack of attention is not an answer to the failure to post a warning sign.
>
> Properly posted signs may be an important indication that a duty to warn was discharged...However, if there is an absence of signs, defendants must come forward with some indication that the sign would not have been heeded, since there is a presumption that the missing warning, if given, would have been followed.

Fabian v. Minister Mach. Co., Inc., 258 N.J. Super. 261, 278-79 (App. Div. 1992). Moreover, as the party who designed this product, PSEG has an ongoing duty to warn as it comes to learn more information about the dangers of their unreasonably dangerous product; namely that the electrical lines are so close to the tower as to endanger workers and that the electricity has to be shut off before work is begun on the product towers. *Dixon v. Jacobsen Mfg. Co.*, 270 N.J. Super. 569, 583 (App. Div. 1994) ("Unlike N.J.S.A. 2A:58C-3a(1) applicable to design defects, N.J.S.A. 2A:58C-4, applicable to warning defects, requires the manufacturer to warn of dangers it discovers or reasonably should discover after the product leaves its control.") (*citing Fabian*, *supra* 258 N.J. Super. at 274-75). PSEG failed to provide any adequate warning about the dangers associated with their product and their motion for summary judgment should be denied.

Plaintiffs' cross-motion for partial summary judgment on the issue of product defect and failure to warn should be granted. Because PSEG admits all the elements to demonstrate product

defect and failure to warn, there is simply no jury question of fact on these issues and partial summary judgment is proper. PSEG admits:

- that it designed the towers at issue, including the incident tower and its distance of the lines to the tower body. (Ex. 38, Jose Obarrio at 39-43) (Ex. 29, Architectural Drawing of the Incident Tower) (Ex. 8, DeShong dep at 230-231)

- that the lines are too close to the body of the tower to be safely climbed by both qualified and unqualified workers. (Exhibit 8, DeShong dep. at 95, 114) (Ex. 11, Dep of Courtney Russell at 16-17) If they were to now maintain they are safe for climbing and servicing by only qualified workers, they nevertheless admit they provided no such warning of same on the towers (Ex. 22, Brozowski dep. at 79) (Ex. 38, Jose Obarrio at 39-43) (Ex. 29, Architectural Drawing of the Incident Tower);

- that it knew when they designed the towers that workmen would have to climb them for painting and other maintenance. It designed them with ladder step bolts for this purpose. (Ex. 29). (Ex. 38, Jose Obarrio at 44)

- that, "[T]his is an odd design of tower with lines being this close..." (Ex. 22, Brozowski dep. at 79)

- that it was entirely feasible for PSEG to have designed the towers with the 26kv lines 10 feet away from the body of the tower. (Ex. 38, Jose Obarrio at 39);

- that there is also no warning on the tower step bolts or otherwise that the lines are so close to where workers would be expected to be. There is also no warning that the lines should be shut down before servicing the towers. (Ex. 38, Jose Obarrio at 45) and;

- that it is in the process of replacing these obsolete towers and the new designs keep the insulators and lines outside the MAD from the edge of the tower. This is a better design and there is no reason it could not have been done like that before. (Ex 26, Hill dep. at 40-42) (Exhibit 44, Tower Upgrades) (Ex. 22, Brozowski dep. at 117) .

Accordingly, Plaintiffs' cross motion for partial summary judgment on the issues of design defect and failure to provide an adequate warning should be granted.

B. <u>Plaintiffs' Products Liability Claim is Premised on the Defective Design and Failure to Warn Associated with the PSE&G Designed and Owned Tower</u>

Plaintiffs' product liability claims are not premised on allegations the electricity or services provided by PSE&G were somehow defective, but rather on the defectively designed towers which are dangerous for the reasons set forth herein. Defendants strawman attempts to re-frame Plaintiffs' case should be rejected and the motion for summary judgment denied.

1. The Product at Issue is the Tower, Not The "Electricity"

Defendants make a weak attempt to say Plaintiffs' claim the product is the electricity. But a plain reading of everything on this issue shows the product is the tower, not the electricity. In support of this position, Defendants rely on a single thirty-five-year-old Law Division case, *Aversa v. Public Serv. Elec. & Gas Co.*, 186 N.J. Super. 130 (Law Div. 1982). (Db 31-33). This case is neither binding nor persuasive to the facts at issue here. *See, e.g. Universal Underwriters Ins. Group v. Public Serv. Elec. & Gas Co.*, 103 F.Supp. 2d 744, 747 (D.N.J. 2000) ("Aversa is not an appellate division case and therefore offers little guidance to the Court."). In *Aversa* a plaintiff was injured when he was asked to test a service wire in a switch house. *Aversa*, supra at 186 N.J. Super. at 131. Plaintiff tested the wire using equipment capable of measuring up to 600 volts, however the service line had 4,160 volts of electricity running through it at the time Plaintiff contacted it, thus causing him injury. Ibid. Plaintiff brought suit against the electrical company, among others, on the following grounds:

> Plaintiffs aver that in failing to lock and seal the circuit breakers and in failing to provide proper directions as to the safe use of their product, electric power, introduced into the stream of commerce, defendant is liable on the basis of strict liability

Id. at 133 (emphasis added). This claim is markedly different from Plaintiffs' claims in the case at hand. Again, here, the product is not the electricity; it's the tower. (*See, Ex. 3, Caggiano Report at 7-8*). The *Aversa* has no relevance to this matter.

2. Plaintiffs Are Not Barred from Pursuing Their Product Liability Suit Because They Were Injured While Performing Maintenance Work on the Towers.

Defendants again attempt to mis-characterize Plaintiffs' claims to create a straw man by saying Plaintiffs PLA claims are based upon PSEG not properly maintaining their towers. (Db at 33). This argument is self-evidently without merit and has no relevance to the standard for proving a claim under the PLA. This false recasting of the Plaintiffs' claims is the straw man. Their misplaced reliance upon *Universal Underwriters Ins. Group v. Public Serv. Elec. & Gas Co.*, 103 F.Supp.2d 744, 747-48 (D.N.J. 2000) is their attempt to knock down the scarecrow. In *Universal Underwriters* an insurance company brought suit against PSE&G for property damage resulting from a fire it alleged would have been mitigated had PSE&G properly trained its employees and implemented appropriate response procedures. *Id. at 746.* Unlike the case at hand, the claims in Universal Underwriters related to the *services* provided by PSE&G:

> Specifically, the design defect alleged by the Plaintiff is PSE&G's 'failure to have procedures and properly trained [personnel] which directly affects the safety of the product at issue' . . . However, the facts that Plaintiff cites in support of this assertion focus not on any defect inherent in the product itself, but rather in PSE&G's alleged failure to act promptly and efficiently in shutting off its electrical service [to avoid further property damage]

Id. at 747. Since the conduct complained of in *Universal Underwriters* related to a service provided by PSE&G and not a "defect inherent in the product," the claim was not cognizable under the Products Liability Act. *Id. at 748.* Here, Plaintiffs unequivocally set forth a design and failure to warn defect claim which is premised on an unreasonably safe product - Defendants' transmission tower. The claim in no way arises from Defendants' services, nor is their even an allegation they improperly maintained their product thus causing injury. Defendants; arguments in this regard should be rejected.

C. **There Is No Exception under the PLA for the Design of Defective Products Where the User May Be Aware the Product Is Dangerous**

Defendants are no more absolved from their duty to manufacture safe products because plaintiffs may have known the lines were hot, than would a company be that designs a saw or punch press without a guard that injures workers who may have known the products were dangerous. Defendants' argument that they need not provide warnings because Plaintiffs should have been aware of the dangers of working near "energized electrical lines on the tower" is contrary to basic product liability law and similarly frivolous. (Db 35). A manufacturer who fails to warn of a product's dangers is presumed to have a breached its duty to warn and the fact finder is to consider proximate cause only:

> Defendant...opined that no warning was needed because the [product] presented an open and obvious danger ...Nothing in the [Products Liability] Act or case suggests that the obviousness of danger may not be considered as a factor to establish what is an 'adequate warning'...or whether a breach of that duty could be a proximate cause of the accident. Of course, in the same manner as a protective device, a warning sign is provided to protect the inattentive worker. For that reason, the plaintiff's lack of attention is not an answer to the failure to post a warning sign.
>
> Properly posted signs may be an important indication that a duty to warn was discharged...However, if there is an absence of signs, defendants must come forward with some indication that the sign would not have been heeded, since there is a presumption that the missing warning, if given, would have been followed.

Fabian, supra 258 N.J. Super. at 278-79. Indeed, unlike the case relied upon by Defendants, *Matthews v. University Loft Co.*, 387 N.J. Super. 349, 353 (App. Div. 2006) (college student's claim that bed manufacturer should have provided warning you could roll out of bed was dismissed since danger of rolling out of bed was obvious) this is a workplace setting products liability claim and presumed knowledge of a danger is no defense to Defendants' failure to warn. (Db 35-36). Indeed, as stated in the plain language of *N.J.S.A.* 2A:58C-3a(2) it is not a defense that a user was

subjectively aware of a product's dangers when the product is "industrial machinery or other equipment used in the workplace." Indeed, as stated in *Coffman*, "[a] plaintiff's mere knowledge of a product's inherent danger or risk will not absolve a manufacturer from its duty to warn." *Coffman v. Keene Corp,* 133 N.J. 581, 603 (1993). "We have consistently emphasized that a plaintiff injured in the workplace as a result of a known dangerous product cannot and should not be characterized as someone who has voluntarily and unreasonably encountered a known danger." *Id.* at 604-05. Defendants' arguments should be rejected.

D. OSHA Regulations are Relevant to the Standard Of Care

It is hardly "unprecedented" to use safety rules and regulations such as OSHA to establish a baseline for dangerous activity. Indeed, as the Supreme Court pointed out in *Fernandes v. DAR Development*, 222 N.J. 390, 405 (2015), in cases like this, "The standard of care is derived from many sources, including codes adopted by the Legislature, regulations adopted by state and federal agencies, and standards adopted by professional organizations."

As such, OSHA standards are relevant to the standard of care in designing and warning of the dangers of Defendants' tower. *See, e.g., McComish v. DeSoi*, 42 N.J. 274, 282 (1964) ("manual" about wire rope cable and clamp use was admissible as "illustrative evidence of safety practices or rules generally prevailing in the industry, and as such it provide[d] support for the opinion of the expert concerning the proper standard of care"); *Constantino v. Ventriglia*, 324 N.J.Super. 437, 44142 (App.Div. 1999), *cert. den.* 163 N.J. 10 (2000) (OSHA regulations are admissible as evidence of the industry standard of care); *Smith v. Kris-Bal Realty, Inc.*, 242 N.J.Super. 346, 348 (App.Div. 1990).

E. Plaintiffs Were Foreseeable Users Of Defendant's Product Which Is Unreasonably Dangerous To Even Qualified Workers And Plaintiffs' Products

Liability Claims Are Not Preempted.

PSE&G essentially argues that they should be permitted to cut costs by paying "unqualified workers" to paint their towers and then also escape liability under the PLA by claiming it is not foreseeable for unqualified workers to be performing this type of work. Not so. Indeed, it is not a defense in a failure to warn case that the "conventional practice of the industry" is to use qualified workers and thus it was unforseeable unqualified workers would come in to contact with the tower. *Freund v. Cellofilm Properties, Inc.,* 87 N.J. 229 (1981). Instead:

> a products liability charge in an inadequate warning case must focus on safety and emphasize that a manufacturer, in marketing a product with an inadequate warning as to its dangers, has not satisfied its duty to warn, even if the product is perfectly inspected, designed and manufactured . . . the [jury] charge must make clear that knowledge of the dangerous trait of the product is imputed to the manufacturer. It must also include the notion that the warning be sufficient to adequately protect any and all foreseeable users from hidden dangers presented by the product. This duty must be said to attach without regard to prevailing industry standards.

Id. at 243-44 (emphasis added). It is surely a jury question as to whether it was foreseeable for unqualified workers to be painting PSE&G's towers. Indeed, the case law cited by Defendant acknowledges:

> This Court has adopted the risk-utility analysis as a means of determining whether a product is defectively designed. See *O'Brien v. Muskin Corp.*, 94 N.J. 169, 181-84, 463 A.2d 298 (1983); *Suter*, supra, 81 N.J. at 172-74, 406 A.2d 140; *Cepeda*, supra, 76 N.J. at 172-80, 386 A.2d 816. The analysis requires a jury to impose liability on the manufacturer if the danger posed by the product outweighs the benefits of the way the product was designed and marketed. Id. at 173, 386 A.2d 816 (citing Page Keeton, Product Liability and the Meaning of Defect, 5 St. Mary's L.J. 30, 37-38 (1973)). The analysis imputes knowledge of the danger to the manufacturer, and then asks whether, given that knowledge, a reasonably prudent manufacturer nevertheless would have placed the product on the market. *O'Brien*, supra, 94 N.J. at 183, 463 A.2d 298; *Suter*, supra, 81 N.J. at 171-72, 406 A.2d 140; *Cepeda*, supra, 76 N.J. at 172, 386 A.2d 816. Under the risk-utility analysis, manufacturers cannot escape liability on the grounds of plaintiff's misuse or abnormal use if the actual use proximate to the injury was objectively foreseeable. Id. at 177-78, 386 A.2d 816. We have observed that an abnormal or unforeseeable use of a product is not an affirmative defense.

Johansen v. Makita U.S.A., 128 N.J. 86, 95 (1992) (emphasis added).[9] Plaintiffs were foreseeable users of Defendants' tower and its motion should be denied.

Additionally, despite Defendants claim, the towers are not safe for either qualified or unqualified workers. PSE&G argues the tower leg was 2.66 feet from the edge of the tower and therefore the design of the tower could not be defective. This is a fallacious argument on numerous levels. First, there is testimony the leg was 2 feet from the edge. *(Ex. 24, dep of Nick Psareas at 255-256) (Ex. 25, dep of Peter Vlahopoulous at 271-272) (Ex. 32, dep of Alan Alves at 84-86) (Ex. 37, dep of Marcel DaSilva at 52, 76-78)* Second, the minimum approach distance ("MAD") to the 26kv line is 4 feet. *(Ex. 11, Dep of Courtney Russell at 13-14)* Third, the edge of the tower leg is not the limit the workers get to the line in order to paint that tower edge which they were required to paint. Common sense dictates one has to go several inches or more away from the surface they have to paint.

Furthermore, PSEG essentially argues Plaintiffs can not prove they had to come within the MAD of the electrified wire and, therefore, can not show the tower was defectively designed nor that they were otherwise exposed to the hazard. Under PSEG's theory, there can be no exposure to the wires unless an employee actually comes within the four foot MAD. PSEG operates under the known misconception that the MAD constitutes the borders of the zone of danger around the electrified wire and that unless an employee actually comes within that zone of danger he or she

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[9]Of note, Defendants provided no adequate warning with their towers: either that their tower is designed in a way that brings the worker perilously close to the power lines, or that power should be shut off before performing any work on the tower. And although they now claim they were only meant to be climb by "qualified" workers, it contained no warning to this effect. (*Ex. 38, Jose Obarrio at 45*). The law presumes that had a warning been provided, Plaintiff would have heeded that warning and the incident would not have occurred. *Coffman v. Keene Corp*, 133 N.J. 581 (1993); see also, *Theer v. Phillip Carey Co.*, 133 N.J. 610 (1993); N.J. Model Civil Jury Charge, 5.40C at 7.

cannot be exposed to the hazard. This theory is false, unsupportable and dangerous. The zone of danger is broader than the established MAD. OSHA violation exposures in this regard may be proven by showing that "employees either while in the course of their assigned duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in the zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976), *quoted in Capform Inc.*, 16 BNA OSHC 2040, 2041 (No. 91-1613, 1994). Here, the evidence shows the TM workers had to scale the tower structures within inches of the live wires. The workers were frequently placed in the zone of danger because any "minimal upward movement, inadvertent or otherwise, would have placed some part of [the employee's] body closer than the [minimum approach distance] from the energized parts." *North Landing Line Construction Co.*, 19 BNA OSHC 1465, 1471 (No. 96-0721, 2001).

Indeed, PSE&G's Allric DeShong testified:

> Q. All right. Just referring to on P-2 the area of the tower to the left of the incident line of that tower. So that tower cannot be painted the way it was intended to be painted here and comply with PSE&G's minimum approach distance rules, correct?
> A. Correct. ...
>
> Q. Under PSE&G safety rules, you can't paint this tower and be in compliance with that four feet, that's pretty evident from the plans and the photos, right?
> A. Correct.

(*Exhibit 8, DeShong dep. at 95, 114*). Since the product is defective to both qualified and unqualified workers, Plaintiffs claim must stand.

Next, Defendants preemption argument based on *Gonzalez v. Ideal Tile Importing Co., Inc.*, 184 N.J. 415 (2005) is also unpersuasive. *Gonzalez* dealt with a warehouse forklift which *complied* with ANSI regulations as adopted by OSHA. There, the Plaintiff proposed adding an additional feature (more backup warnings) which would in essence make the forklift more dangerous, contrary

to the ANSI standards stating "the inclusion of warning devises other than an operator-controlled horn, may tend to create more dangers than they prevent[.]" *Id.* at 423. Here, unlike the forklift in *Gonzalez*, OSHA did not set forth design standards for electrical towers. Nor does OSHA promulgate standards on what types of warnings should be included with the tower. Defendants here include virtually no safety devices with their product - adding an adequate warning as discussed herein or redesigning the tower so that workers are not brought within inches of high voltage electrical lines would in no way "create more dangers" than would be presented. *Ibid*. Thus, *Gonzalez* is inapplicable.

Lastly, Defendants' complain that should Plaintiffs' position be accepted, this would require parties who introduce towers into the stream of commerce to retrofit their products so they are 10 feet from power lines and thus safe for workers. While Defendant acts as if this is an onerous burden, <u>it is exactly what they are now doing</u>. (*Ex. 22, Brozowski dep. at 117*) (Ex 26, Hill dep. at 40-42) (Exhibit 44, Tower Upgrades). Moreover, an adequate warning that the towers shold not be climbed or serviced until the power is shut down may have obviated the need for the alternative design they have begun to implement. Regardless, Defendants are not entitled to summary judgment.

F. <u>The Statute of Repose Argument is Particularly Frivolous</u>

The Statute of Repose acts to shield parties who perform improvement to real property from liability more than ten years after the service is performed. *N.J.S.A.* 2A:14-1.1. The statute does not apply to products liability claims as the Legislature refused to extend these protections to designers, manufacturers and sellers of dangerous products. *Ibid*.

Pursuant to the Products Liability Act, "a manufacturer or seller of a product shall be liable

in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it: a.) deviated from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or b.) failed to contain adequate warnings or instructions, or c.) was designed in a defective manner." *N.J.S.A.* § 2A:58C-2 .

The Supreme Court of New Jersey states that "a products liability cause of action accrues when the injury or damage occurs to person or property, not when the negligent conduct takes place or the defect is created." *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 142 (1973); *Rosenau v. New Brunswick & Gamon Meter Co.*, 51 N.J. 130, 137 (1968). The statute of repose does not apply to products liability actions and as such does not affect this well established principle of law. *See, e.g. State v. Perini Corp.*, 425 N.J. Super. 62, 80 (App. Div. 2012) (citing *Dziewiecki v. Bakula*, 180 N.J. 528, 532-33 (2004) ("a [product] manufacturer is not covered by the statute of repose.")); *N.J.S.A.* § 2A:14-1.1; *see also, Ramirez v. Amsted Industries, Inc.*, 171 N.J. Super. 261 (App. Div. 1979), *aff'd*, 86 N.J. 332 (N.J. 1981).

Indeed, in *Ramirez*, the Court rationed that the Legislature imposed a ten year period for the statute of repose to specifically limit liability of persons who design, plan, supervise, or construct improvements to real property following the performance of services or construction:

> Defendant [product manufacturer] contends that it would be unfair to...impose liability for a product sold so long ago. Our Supreme Court has held that a products liability cause of action accrues when the injury or damage occurs to person or property, not when the negligent conduct takes place or the defect is created. *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 142 (1973); *Rosenau v. New Brunswick & Gamon Meter Co.*, 51 N.J. 130, 137 (1968). If [the product manufacturer] had made the product originally, the passage of 28 years alone would be no defense. <u>If we were to yield to this argument, we would in effect be creating a special exception to the general statute of limitations. This we cannot do</u>. A decision to limit the period of

> liability to a set number of years after the commission of the wrongful act is one for the Legislature to make. Indeed, the Legislature has acted to specially limit the liability of persons who design, plan, supervise or construct improvements to real property to the ten-year period following the performance of services or construction. N.J.S.A. 2A:14-1.1; see discussion in *Brown v. Jersey Central Power & Light Co.*, 163 N.J. Super. 179, 192-194 (App.Div.1978), cert. den., 79 N.J. 489 (1979). It has not done so for manufacturers of products.

Ramirez v. Amsted Indus., Inc., 171 N.J. Super. 261, 276-77 (App. Div. 1979) (emphasis added); *see also Perini Corp., supra*, 425 N.J. Super. at 80 ("[s]imply 'designing' a 'standardized' product that is installed at a construction project does not constitute activity that is covered by the statute of repose.") (*quoting Dziewiecki, supra*, 180 N.J. at 532-33); *accord Rolnick v. Gilson & Sons, Inc.*, 260 N.J. Super. 564, 567-68 (App.Div.1992).

Similarly here, while the tower manufactured by PSE&G was produced more than ten years prior to this action, PSE&G is not shielded by the statute of repose since the statute's protections do not extend to parties who design dangerous unreasonably dangerous products. *Ibid.; see also, Perini Corp., supra*, 425 N.J. Super. at 80; *Dziewiecki*, *supra* 361 N.J. Super. at 96 (there is nothing in the language of the SOR that "insulates the manufacturer and/or seller of a product from liability when such product is used in or incorporated into an improvement of real property."). Indeed, as evidenced by the plain language of the statute, the Legislature has not acted to shield defendants under the Statute of Repose.

Moreover, the Statute of Repose is not available to Defendants since the statute does not apply to, "actions against any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement" results in the injury in question. *N.J.S.A*, 2A:14-1.1. That is, the Statute of Repose only applies to architectural type design and construction type activities of an improvement to real property in which control has been relinquished. *See e.g.*, *Gillian v. Admiral Corp.*, 111 N.J. Super 370, 375 (Law Div. 1970) ("It

is apparent however, that the legislature intended by this limitation to preserve the common law principle of liability in the case of any person in actual possession and control as owner, tenant, or otherwise of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought."); *Davenport v. Comstock Hills*, 46 P.3d 62 (Nev. 2002) (holding that the Nevada statute of repose does not apply to claims arising from negligent acts and omissions occurring after the improvement in question has been completed, such as negligent maintenance). In this case, as the designer of a product, Defendants are not entitled to the protections provided by the Statute of Repose. Were the protections available, Defendants would still be barred from seeking relief from same since they maintain ownership of the subject tower.

CONCLUSION

For all these reasons, its is respectfully requested the Court deny PSEG's Motions for Summary Judgment to dismiss the common law, Product Liability Act and punitive damages claims. If PSEG is conceding "Public Service Electric & Gas Company" is the proper party on all claims and is properly insured, then we would not be contesting the dismissal of the other "PSEG" entities.

It is also respectfully requested the Court grant Plaintiffs' Cross-motion for Partial Summary Judgment on the issue of breach in the common law claims and on the issue of product defect and failure to warn under the Product Liability Act.

Respectfully submitted,
Clark Law Firm, PC

By: _____

GERALD H. CLARK
Attorneys for Plaintiffs Renato Sousa and the Estate of Valdeni DeSouza

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