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November 22, 2021

Via Electronic Filing

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

Re: Grays Ferry Cogeneration Partnership, and Vicinity Energy Philadelphia, Inc. v.
Philadelphia Gas Works, Docket No. C-2021-3029259

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Philadelphia Gas Works' Preliminary Objections to Formal Complaint with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Daniel Clearfield, Esquire

DC/lww
Enclosure

cc: Hon. Charles E. Rainey, Jr., w/enc.
Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of PGW's Preliminary Objections upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email Only

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Dated: November 22, 2021



Daniel Clearfield, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Grays Ferry Cogeneration Partnership, and :
Vicinity Energy Philadelphia, Inc., :
Complainants, : Docket No. C-2021-3029259
:
v. :
:
Philadelphia Gas Works, :
Respondent. :

NOTICE TO PLEAD

TO: Grays Ferry Cogeneration Partnership	Vicinity Energy Philadelphia, Inc.
c/o Dennis A. Whitaker, Esquire	c/o Dennis A. Whitaker, Esquire
Kevin J. McKeon, Esquire	Kevin J. McKeon, Esquire
Todd S. Stewart, Esquire	Todd S. Stewart, Esquire
Hawke McKeon & Sniscak LLP	Hawke McKeon & Sniscak LLP
100 N 10th Street	100 N 10th Street
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Pursuant to 52 Pa. Code § 5.101, you are hereby notified that an answer to the enclosed **Preliminary Objection** of Philadelphia Gas Works (“PGW”) must be filed within 10 days of the date of service of the Preliminary Objection.

All pleadings, such as an Answer to Preliminary Objection, must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to counsel for PGW and where applicable, the Administrative Law Judge presiding over the above-referenced proceeding.

File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

With a copy to:

Dan Clearfield, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101



Dan Clearfield, Esquire

Date: November 22, 2021

Attorney for Philadelphia Gas Works

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Grays Ferry Cogeneration Partnership, and :
Vicinity Energy Philadelphia, Inc., :
Complainants, : Docket No. C-2021-3029259
:
v. :
:
Philadelphia Gas Works, :
Respondent. :

**PHILADELPHIA GAS WORKS’
PRELIMINARY OBJECTIONS TO THE FORMAL COMPLAINT**

Philadelphia Gas Works (“PGW” or “Respondent”) submits the following Preliminary Objections to the Formal Complaint (“Complaint”) of Grays Ferry Cogeneration Partnership (“Grays Ferry,” “GFCP” or “Partnership”) and Vicinity Energy Philadelphia, Inc. (“VEPI”) (Grays Ferry and VEPI are collectively referred to as the “Complainants”) served by the Secretary of the Pennsylvania Public Utility Commission (“Commission” or “PUC”) on November 1, 2021. Pursuant to 52 Pa. Code § 5.61 and 5.101(d) of the Commission’s regulations, PGW filed an Answer with New Matter to the Complaint on this same date. In support of these Preliminary Objections, PGW states as follows:

I. INTRODUCTION

As more fully set forth in PGW’s Answer and New Matter, the Complainants, Grays Ferry and VEPI, are seeking a special rate and there is no reason for them to have it. They have enjoyed enormously discounted rates and special services pursuant to a contract that was entered into almost twenty five years ago as a settlement of a litigation. That arrangement was grandfathered into PGWs Tariff as a pre-PUC, “legacy contract” and never reviewed as just, reasonable, cost-based and non-discriminatory. Nevertheless, Complainants have insisted that they should continue to receive service under that no longer available Tariff provision and, when PGW’s initial suggestion as to how Complainants could receive service post 2022 was not to

their liking they sued PGW in the midst of those discussions. The Complaint not only alleges that they be permitted to continue to receive service under a closed rate but that PGW, in even suggesting that the Complainants will have to be subject to one of PGW's existing Tariffed rates just like any other customer, was engaging in a "price squeeze" to try to drive up the rates of VEPI, the steam utility that buys steam from the other Complainant and that PGW was using its authority set forth in its tariff to promote this "unfair competition."

PGW has systematically and thoroughly addressed and refuted these allegations in its Answer and New Matter. But, in addition, PGW submits these Preliminary Objections because many of the Complainants' claims simply are not legally cognizable by the PUC, are premature or fail to state a claim on which the PUC could grant relief.

First, PGW avers that the Complainants' claim that it should be permitted to continue to be able to take service under its present Tariff provision and contract terms is not a demand that the Commission has the legal authority to grant because the Tariff provision that Complainants are demanding terminates, by its clear terms, at the end of 2022 and any Order directing PGW to enter into a contract to continue to provide service to Complainants would also be contrary to PGW's Tariff.

Second, the Complainants have jumped the gun and have demanded that the Commission decide the justness and reasonableness of an initial offer from PGW as to what Tariff provision and terms and conditions of service that should apply to Complainants post-2022. But that demand is clearly premature and not ripe for adjudication at this time.

Third, the Complaint alleges that PGW is somehow acting incorrectly when it uses its Tariff to offer discounts to attract new customers, some of whom might be current customers of one of the Complainants – VEPI. But that allegation is invalid on its face. PGW is required to

adhere to its Tariff and can not be found to be acting illegally when doing so because it shall not “be liable for . . . enforcing any regulation, or practice when such rate, regulation, or practice is contained in a tariff properly filed with the Commission.”¹ See 66 Pa.C.S. § 1303, 3303.

Fourth, the Complaint raises issues that are beyond the Commission’s jurisdiction. The Commission lacks jurisdiction over the Complainants’ claims of an antitrust (price squeeze) violation under the federal Sherman Act. The Commission also lacks jurisdiction over claims that are beyond the applicable statute of limitations. Given the 25-year duration of the 1996 Contracts, and the time that has passed since PGW and those contracts have come under the PUC’s jurisdiction, to the extent that the Complaint is challenging the reasonableness of their *existing* terms and conditions of service, those claims are well beyond the applicable statutory period of limitation.

Fifth, the Complainants have failed to join parties who will be impacted by this proceeding. To the extent that the Complaint seeks to establish a binding future rate for service by PGW to the Complainants, PGW’s other gas customers will be affected by the outcome of this Complaint.

II. LEGAL STANDARDS FOR PRELIMINARY OBJECTIONS

1. The Commission’s Rules of Administrative Practice and Procedure permit the filing of preliminary objections.¹ The Commission’s procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice.²

¹ 52 Pa. Code § 5.101(a)(1)-(7). *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. P.U.C. LEXIS 69, Docket No. C-00935435 (July 18, 1994).

² *Id.*

2. Under Section 5.101(a) of the Commission’s regulations, preliminary objections must specifically state the legal and factual grounds relied upon and be limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding;
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter;
- (3) Insufficient specificity of a pleading;
- (4) Legal insufficiency of a pleading;
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action;
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution; and
- (7) Standing of a party to participate in the proceeding.

3. The moving party may not rely on its own factual assertions but must accept for the purposes of disposition of the preliminary objection all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts.³ However, the Commission need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion.⁴

4. In deciding the preliminary objections, the Commission must determine whether, based on the well-pleaded factual averments of the party, recovery or relief is possible.⁵

5. While the filing of a formal complaint generally entitles the complainant to a formal hearing, the Commission may dismiss any complaint without a hearing if, in its opinion, a hearing

³ County of Allegheny v. Cmwth. of Pa., 490 A.2d 402 (Pa. 1985).

⁴ Stanton-Negley Drug Co. v. Dep’t of Pub. Welfare, 927 A.2d 671, 673 (Pa. Cmwth. 2007).

⁵ Department of Auditor General, et al. v. SERS, et al., 836 A.2d 1053, 1064 (Pa. Cmwth. 2003); P.J.S. v. Pa. State Ethics Commission, 669 A.2d 1105 (Pa. Cmwth. 1996).

is not necessary in the public interest.”⁶ A hearing is necessary only to resolve disputed questions of fact.⁷

III. PRELIMINARY OBJECTIONS BY PGW

6. PGW’s responses to Paragraphs 1 to 30 of the Complaint are incorporated herein by reference. In addition, PGW’s New Matter to the Complaint is also incorporated herein by reference.

A. Dismissal Based On Lack Of Commission Jurisdiction

7. Section 5.101(a)(1) of the Commission’s regulations permits a party to file a preliminary objection based on the lack of Commission jurisdiction. To act on the Complaint, the Commission must have jurisdiction.⁸ The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code.⁹ The Commission must act within, and cannot exceed, its jurisdiction.¹⁰ Jurisdiction may not be conferred by the parties where none exists.¹¹ Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.¹²

8. Not all acts or functions performed by a regulated entity fall under the jurisdiction of the Commission. Rather, as an administrative agency, the Commission must act within and

⁶ 52 Pa. Code § 5.21(d).

⁷ *Lehigh Valley Power Comm. v. Pa. P.U.C.*, 128 Pa. Cmwlt. 259, 563 A.2d 548 (1989).

⁸ *See* 52 Pa. Code § 5.101(a)(1), 5.102.

⁹ *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937, Opinion and Order entered May 28, 2008; *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

¹⁰ *City of Pittsburgh v. PUC*, 43 A.2d 348 (Pa.Super. 1945).

¹¹ *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

¹² *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa.Cmwlt. 1992), appeal denied, 637 A.2d 293 (Pa. 1993).

cannot exceed its jurisdiction.¹³ The Commission is not a “super board” of directors¹⁴ and is not authorized to micromanage the day-to-day operations of the regulated entities under its jurisdiction.¹⁵

Counts I and II: The Commission lacks the statutory power to direct the execution of a non-standard contract

9. The Complaint demands that the Commission require PGW to execute a contract under Rate GTS-Firm. Complaint at Prayer for Relief, ¶ 3. They are requesting that special rates be fixed, based on the Complainants’ costs and circumstances, by a way of a contract. *Id.*

10. The current version of the “Contract” that Complainants are demanding is incorporated into PGW’s Tariff via its Rate GTS-Firm. PGW Tariff No. 2, Page 118-On its face, Rate GTS-Firm is limited to current service agreements that were in place (executed) or before September 1, 2003.

11. By Complainants’ own admission, the “Contract” under which they receive service pursuant to Rate GTS-Firm terminates on December 31, 2022.

12. Upon the termination of this sole remaining contract under this Tariff provision, Rate GTS-Firm will be closed and no longer available as a basis for providing service to customers.

13. PGW, as a public utility may only provide service to customers pursuant to its approved tariff (66 Pa. C. S. §1303) and all rates charged to customers must be set forth therein. 66. Pa. C.S. § 1302.

¹³ See, e.g., Feingold v. Bell of Pa, 383 A.2d 791 (Pa. 1977).

¹⁴ See, e.g., *Bell Tel. Co. of Penna. v. Driscoll*, 118 A.2d 912, 916 (Pa. 1941) (PUC is not a super board of directors for public utilities).

¹⁵ See, e.g., Joint Application of Verizon Commc’ns, Inc. and MCI, Inc. For Approval of Agreement and Plan of Merger, Docket No. A-310580F0009, Final Order entered January 11, 2006, affirmed, *Popowsky v. PUC*, 937 A.2d 1040 (Pa. 2007).

14. The Public Utility Code does not provide the Commission with jurisdiction or the power to order a public utility to extend an existing contract or to enter into a new contract with a customer to provide service at dictated rates terms and conditions when those rates, etc., or the authority to enter into such a contract are not reflected in a tariff provision approved by the PUC. The provisions of PGW's Tariff that would be available for service after 2022 plainly state that PGW may enter into a contract to provide service at non-standard rates terms and conditions only at its sole discretion and only when it is economically advantageous to PGW. PGW Tariff No. 2, Page 18. For Rate IT, PGW and the customer may agree to a service agreement term of more or less than the standard one year, but only "upon mutual agreement." Accordingly, the Commission lacks the legal authority to order PGW to continue to provide service to Complainants under Rate GTS-Firm or direct PGW to renew or extend the existing 1996 Contracts.

Count III: The Commission lacks jurisdiction over claims of an antitrust (price squeeze) violation

15. While Complainants have not included this in their Prayer for Relief, in Count III of their Complaint, Complainants appear to argue that PGW should be found to be attempting a "price squeeze" in violation of § 2 of the Sherman Act, 15 U.S.C.S. §2(a). Complaint at ¶ 25, *citing, Town of Concord, Mass. V. Boston Edison Company*, 915 F.2d 17 (1st Cir. 1990) (discussing price squeeze in violation of Sherman Act). *See also* Complaint at Introduction, at p. 5; Complaint at ¶ 26. The Complainants seek to use these claims, *inter alia*, to demand limitations on PGW's marketing efforts to attract and retain load on its system. *See* Complaint, Prayer for Relief at ¶ 4.

16. While, as noted, it is not clear exactly what they are demanding, to the extent that the Complainants seek such a determination, the Commission does not have jurisdiction to determine any violations of the Sherman Act. Jurisdiction over violations of the Sherman Act is with the courts, not the Commission. Nothing in the Sherman Act or the Public Utility Code

empowers the Commission to determine violations of the Sherman Act. See *Re: Investigation Upon the Commission's Own Motion With Regard to PJM Installed Capacity Credit Markets*, Docket No. I-00010090, Opinion entered June 13, 2002, 2002 Pa. PUC LEXIS 27, 218 P.U.R.4th 149.

Counts I, II and III: The Commission lacks jurisdiction over allegations that are beyond the Commission's statute of limitations.

17. In several places in the Complaint, Complainants appear to be claiming that the rates, terms and conditions of service set out in the existing 1996 Contracts are somehow unjust or unreasonable. See Complaint at ¶ 8 to 10. For example, the Complaint suggests that the capital contribution that was made pursuant to the contract was “in excess of what was required” (Complaint at ¶ 8), the O&M contributions required in the Contract is [allegedly] excessive (Complaint at ¶ 9) and that the capacity release options are [allegedly] insufficient (Complaint at ¶ 10). While not included in its existing prayer for relief, to the extent that Complainants intend to argue that the rates, terms and conditions of the existing 1996 Contracts are somehow unreasonable or otherwise not consistent with the Public Utility Code those claims are barred by the applicable statute of limitations.

18. The statute of limitations in Section 3314 is a jurisdictional issue. The applicable statute of limitations, 66 Pa.C.S. § 3314, requires that any complaint seeking relief under the Public Utility Code be brought within three years from the date at which the liability therefor arose. As a jurisdictional issue, the statute of limitations and the Commission's lack of jurisdiction may be raised at any time. See, e.g., *Application of Laurel Pipe Line Company*, Docket No. A-2016-2575829 (Order entered July 12, 2018), at 23; *Hasty v. Philadelphia Gas Works*, Docket No. C-2014-2419203 (Final Order entered January 27, 2015).

19. The Complaint alleges that PGW has been using the rates and terms under Rate GTS-Firm and the 1996 Contracts for more than three years. *See* Complaint at Introduction, p. 2 (charges began in 1998); Complaint at ¶ 10 (conduct since 1996).

20. The Complaint was filed October 26, 2021.

21. The 1996 Contracts were incorporated into PGW's Tariff by Rate GTS-Firm on and after September 1, 2003.

22. Given the 25 year duration of the 1996 Contracts, and time since the Contract terms have come under the PUC's jurisdiction via the approval of Rate GTS-Firm, the Complaint makes allegations and claims that are well beyond the applicable statutory period of limitation. *See, e.g.*, Complaint at ¶ 8 (capital contribution was excessive); Complaint at ¶ 9 (O&M rate is excessive); Complaint at ¶ 10 (release of firm capacity are unreasonable); Complaint at ¶ 10 (ARS rate is excessive).

23. Any allegations and claims that are beyond the applicable statutory period of limitation are barred and are outside of the Commission's jurisdiction.

B. Dismissal Based On Legal Insufficiency Of The Complaint

24. Section 5.101(a)(4) permits a party to file a preliminary objection if the complaint is legally insufficient.¹⁶ In order to be legally sufficient, a complaint must set forth "an act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has the jurisdiction to administer, or of any regulation or order of the Commission."¹⁷ This means that the Complainants must show that they are entitled to the requested

¹⁶ 66 Pa. C.S. § 5.101(a)(4).

¹⁷ 66 Pa. C.S. § 701 (emphasis supplied).

relief.¹⁸ As the party seeking relief, the Complainants bear the burden proving (a) that PGW is in violation of the Public Utility Code, the Commission’s Regulations or the Commission’s Order and (b) their right to the requested relief.¹⁹

Counts I, II and III: The unaccepted PGW proposal does not present an actual controversy for resolution by the Commission

25. Counts I, II and III of the Complaint alleges that PGW presented a proposal to the Complainants for service post 2022 that was not to Complainants liking. Complaint at Introduction, p. 4, 5. *See also* Complaint, Prayer for Relief at ¶ 1 to 3.

26. Ripeness is a prerequisite to review. To be ripe, an actual case or controversy must exist. *Treski et al. v. Kemper National Insurance Companies*, 674 A.2d 1106, 1113 (Pa. Super. 1996) *citing* *Richard v. Trimbur*, 543 A.2d 116 (Pa. 1998).

27. The Public Utility Code requires that all rates “made, demanded, or received” be just and reasonable, and that “as to rates, [n]o public utility shall ... make or grant any unreasonable preference or advantage.”

28. By their own admission, PGW did not “make, demand or receive” a particular rate, or make a formal determination of the Tariffed rates, terms and conditions it was willing to offer Complainants, freely admitting that it was merely a “rate proposal.” Complaint, Introduction at p. 5. There is no allegation in the Complaint that the Complainants accepted that proposal from PGW under protest or otherwise. On its face, the proposal, as described by the Complaint, requires the Complainants to execute a new contract. *See* Complaint at Introduction, p. 4; Complaint at ¶ 21, 26. The proposal was not executed by the Complainants. Moreover, nothing in the Complaint

¹⁸ *See* 52 Pa. Code § 5.101(a)(4), 5.102.

¹⁹ 66 Pa. C.S. § 332(a).

alleges that: (a) PGW threatened to provide service to the Complainants on the terms in PGW's February 2021 Preliminary Offer — if the Complainants did not actually accept PGW's February 2021 proposal prior to the expiration of their grandfathered rates; or (b) PGW threatened to terminate service to the Complainants — if the Complainants did not accept PGW's February 2021 proposal prior to the expiration of their grandfathered rates.

29. PGW's non-binding proposal was made as a starting point for discussion with the Complainants and pursuant to PGW's perceived obligation to attempt to provide the most suitable tariff rate available to a customer in its service territory. In no instance was it PGW's intention to force Complainants to subscribe to a service that did not meet its needs, to the extent PGW could accommodate them.

30. There is nothing in the Public Utility Code that empowers the Commission to adjudicate whether an initial, non-binding starting point for discussion is reasonable or in the public interest. Nor is it reasonable from an administrative efficiency standpoint to do so.

31. Accordingly, the Complaint should be dismissed without prejudice so that PGW and Complainants can continue discussions to ascertain the terms and conditions of service that Complainants desire after 2022, whether PGW can provide those services and, finally, establish the tariffed rate or rates, as well as the additional terms and conditions of service that it believes should apply to Complainants post 2022. If Complainants are still not happy with that Tariffed rates (with modifications) available it would still have the right to file a complaint against that rate as it applied to it. .

Count I, II and III; PGW's reliance upon PGW's tariff does not present an actual controversy to be resolved by the Commission

32. Counts I, II and III of the Complaint allege that PGW's adherence to PGW's Tariff and rates will cause a "price squeeze," and/or "damage" to VEPI, as noted above.

33. The allegations in the Complaint are that by PGW's intention to charge a just, reasonable, cost-based and non-discriminatory rate to Complainants will result in one of the Complainants – VEPI – to have to raise its rates to cover those higher energy costs, which, in turn, will allegedly drive VEPI's customers to switch to PGW for their energy needs. This potential switching, it is alleged, will be promoted and facilitated by PGW's offering of "discounted rates pursuant to the "TED" Rider provision of its Tariff (which permits PGW to discount its rates when needed to support new technologies and for business retention and attraction.)

34. The allegations on their face claim that PGW's activities constitute "unreasonable service" even though, in both cases they are specifically authorized and permitted by PGW's Tariff.

35. As to the rate to be charged to Complainants, that rate, per force, will be required to be reviewed and approved by the Commission and determined to be just, reasonable, cost-based and non-discriminatory pursuant to the Public Utility Code, Sections 1301 and 1304. PGW is required to adhere to PGW's Tariff by Section 1303 of the Public Utility Code, 66 Pa.C.S. § 1303 (adherence to tariff).

36. Similarly, PGW's program of offering rate discounts to customers when needed to retain or expand customer load on its system is specifically authorized and permitted by the TED Rider provision of its Tariff (as well as its authority in Section 2.3 of its Tariff).

37. A public utility cannot be liable for enforcement of its Tariff. Section 3303(a) of the Public Utility Code provides that a public utility, including PGW, shall not "be liable for any penalty or forfeiture, or be subject to any prosecution, on account of demanding, collecting, or receiving any rate for any service, or for enforcing any regulation, or practice when such rate, regulation, or practice is contained in a tariff properly filed with the Commission." (Emphasis added.)

38. The Commission can not legally find that PGW is somehow acting unreasonably by charging a rate that is authorized and required under Section 1301 and 1304 of the Public Utility Code. Nor can PGW be found to be somehow acting unreasonably when it is, by Complainants own admission, simply utilizing provisions of its Tariff that authorize those very actions. There is simply no basis to suggest that those well-established rules could somehow be modified or abrogated if the actions allegedly adversely affected another public utility.

39. Consistent with the foregoing, Counts I, II and III of the Complaint do not allege a violation of the Public Utility Code, the Commission’s regulations or the orders of the Commission on which relief can be granted and should be dismissed.

Count III: The Commission cannot reasonably prevent PGW from communication with potential gas customers located in the City

40. VEPI, as part of its 2021 rate proceeding (Docket No. R-2021-3024060), stated that: “Competition to retain existing thermal energy customers and to attract new ones is intense. This competition stems from a number of sources in Philadelphia and includes Philadelphia Gas Works, PECO Energy and various energy service companies. These competitors attempt to lure existing and prospective customers from VEPI by offering incentive-laden proposals to install gas or electric based energy systems in lieu of steam based systems.” Docket No. R-2021-3024060, VEPI Statement No. 1, Michael J. Smedley, Vice President, at p. 10-11.²⁰

41. The Complaint seeks to prevent VEPI’s customers from switching “from VEPI’s steam service to PGW’s natural gas service.” Complaint at Prayer for Relief, ¶ 4. To accomplish this, the Complainants request that the Commission direct PGW to cease providing informing VEPI’s customers about PGW’s gas service. *Id.*

²⁰ <https://www.puc.pa.gov/pdocs/1702027.pdf>.

42. As to communications from PGW to potential gas customers located in the City, the relief requested in Count III and Paragraph 4 of the Prayer for Relief do not allege a violation of the Public Utility Code, the Commission's Regulations, the Commission's Orders or PGW's tariff.

43. The relief, as requested, would create an unreasonable prejudice or disadvantage for VEPI customers. On its face, the requested relief would require that PGW treat VEPI's customers differently from other potential gas customers. The Complaint appears to violate the rights of VEPI's customers (who are not parties to the Complaint), since the requested relief (a) would deprive VEPI's customers of adequate and accurate information regarding gas service and (b) would deprive VEPI's customers of discounts and incentives that are available to similarly-situated potential customers under PGW's tariff. It follows that the Complaint would impact the ability of VEPI's customers to learn about incentives from PGW and to make informed choices regarding their energy purchases.

44. The relief, as requested, cannot be granted by the Commission without violating the rights of PGW. PGW has a duty to provide natural gas service in the City. VEPI's customers are located within the City, and are eligible to elect to receive gas service from PGW. The Complainants are seeking a complete prohibition on marketing or communications by PGW to VEPI's customers. That request would bar accurate speech and reasonable conduct by PGW.

45. Such a prohibition would: (a) infringe upon PGW's statutory rights, since any person or entity located within PGW's service area may request and receive gas service from PGW; and, (b) violate PGW's right to engage in commercial speech.²¹ The relief requested would

²¹ The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. *Central Hudson Gas & Electric Corporation v. Public Service Commission Of New York*, 447 U.S. 557 (1980), citing, *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Commercial speech has been defined by the Supreme Court as an "expression related

be adverse to PGW's ability to attract new customers to the distribution system. Attracting and retaining customer load by offering discounted rates that nonetheless recover all additional costs benefits all customers because it results in PGW's fixed costs being recovered over a larger base, thereby resulting in lower per-customer costs. In addition, the relief requested by the Complainants would unfairly and unnecessarily deprive VEPI's customers of adequate and accurate information to them customers to make informed choices regarding their energy purchases.

Conclusion

46. Even when all factual averments set forth in the Complaint are accepted as true, they do not show that PGW violated the Public Utility Code, a Commission regulation, a Commission order or PGW's tariff. Therefore, the Complaint should be dismissed without a hearing, which would needlessly consume valuable resources of PGW and the Commission.

C. Dismissal Based On Failure to Join Indispensable Parties

47. Section 5.101(a)(5) of the Commission's regulations permits a party to challenge the failure to join an indispensable party.

PGW's Customers are indispensable parties

48. To the extent that the Complaint seeks to establish a binding future rate for service by PGW to the Complainants, PGW's other gas customers may be affected by the outcome of this Complaint. If the Complainants are permitted to pay rates that did not cover their costs, those subsidies would have to be covered by PGW other gas customers.

solely to the economic interests of the speaker and its audience. *Central Hudson*, 477 U.S. at 561, citing, *Virginia Board of Pharmacy*, 425 U.S. at 762.

49. The interests of PGW's other gas customers are not represented in this proceeding. Nor have those customers received notice of Complainants' demands.

50. While the Pennsylvania Office of Consumer Advocate (OCA) has now intervened in the proceeding, the OCA only represents residential customers. This means that the remaining customers classes are still unrepresented and could be adversely affected by any order setting non-cost-based and discriminatory rates for Complainants.

51. Without providing notice that this proceeding could result in an order that would cause them to have to subsidize the rates of Complainants there is no apparent way to insure that those customers are on notice and have an opportunity to challenge Complainants' claims.

52. Wherefore, Complainants should be required to provide notice of their Complaint to PGW customers and representatives of those customers, to include the Pennsylvania Office of Small Business Advocate (OSBA) and the PUC Bureau of Investigation and Enforcement should be joined as indispensable parties.

[Signature appears on next page]

IV. CONCLUSION

WHEREFORE, PGW respectfully requests that this Commission (a) grant PGW's preliminary objections; (b) dismiss the Complaint; and (c) grant any other relief to PGW that is deemed to be reasonable and appropriate.

Respectfully submitted,



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Date: November 22, 2021

Attorneys for Philadelphia Gas Works

VERIFICATION

I, Florian Teme, hereby state that: (1) I am the Vice President – Marketing and Sales for Philadelphia Gas Works (“PGW”); (2) the facts set forth in the foregoing **Preliminary Objections** are true and correct to the best of my knowledge, information and belief; and (3) I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

November 22, 2021

Dated



Florian Teme
Vice President – Marketing and Sales
Philadelphia Gas Works

VERIFICATION

I, Ryan E. Reeves, hereby state that: (1) I am the Director of Gas Supply, Transportation and Control for Philadelphia Gas Works (“PGW”); (2) the facts set forth in the foregoing **Preliminary Objections** are true and correct to the best of my knowledge, information and belief; and (3) I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

November 22, 2021

Dated



Ryan E. Reeves

Director of Gas Supply, Transportation and
Control
Philadelphia Gas Works