



Dennis A. Whitaker
Office: 717 236-1300 x226
Direct: 717 703-0805
dawhitaker@hmslegal.com

Kevin J. McKeon
Office: 717 236-1300 x235
Direct: 717 703-0801
kjmckeon@hmslegal.com

Todd S. Stewart
Office: 717 236-1300 x242
Direct: 717 703-0806
tsstewart@hmslegal.com

100 North Tenth Street, Harrisburg, PA 17101 Phone: 717.236.1300 Fax: 717.236.4841 www.hmslegal.com

December 13, 2021

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Filing Room
Harrisburg, PA 17120

RE: Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc. v. Philadelphia Gas Works; Docket No. C-2021-3029259; **ANSWER OF GRAYS FERRY COGENERATION PARTNERSHIP AND VICINITY ENERGY PHILADELPHIA, INC. TO THE MOTION TO STAY DISCOVERY PENDING THE RULING ON PRELIMINARY OBJECTIONS OF THE PHILADELPHIA GAS WORKS**

Dear Secretary Chiavetta:

Please find enclosed for filing the Answer of Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc. to the Motion to Stay Discovery Pending the Ruling on Preliminary Objections of the Philadelphia Gas Works in the above-captioned matter. Copies of the Answer have been served in accordance with the attached Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

Dennis A. Whitaker
Kevin J. McKeon
Todd S. Stewart
*Counsel for Grays Ferry Cogeneration
Partnership and Vicinity Energy
Philadelphia, Inc.*

TSS/jld

Enclosure

cc: ALJ Marta Guhl (via email, mguhl@pa.gov)
Pam McNeal, Legal Assistant (via email, pmcneal@pa.gov)
Per Certificate of Service

**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. | : | |

**ANSWER OF GRAYS FERRY COGENERATION PARTNERSHIP
AND VICINITY ENERGY PHILADELPHIA, INC.
TO THE MOTION TO STAY DISCOVERY PENDING THE RULING ON
PRELIMINARY OBJECTIONS OF THE PHILADELPHIA GAS WORKS**

Grays Ferry Cogeneration Partnership (“GFCP”) and Vicinity Energy Philadelphia, Inc. (“VEPI”) (collectively “Vicinity”) hereby Answer the Motion to Stay Discovery Pending the Ruling on Preliminary Objections (“Motion”) of the Philadelphia Gas Works (“PGW”) filed on November 22, 2021. For the reasons stated herein, Vicinity asks that the Commission deny the Motion as it is neither judicially efficient nor permissible under the Commission’s regulations and is nothing more than a delay tactic by PGW to prejudice Vicinity’s complaint.

PGW’s renewed demand¹ that it be allowed to postpone discovery until after a ruling on its Preliminary Objections will prejudice Vicinity by denying access to discoverable information that the Commission’s Regulations make clear Vicinity has a right to seek and receive upon the filing of the complaint. Moreover, the Motion runs contrary to the Commission’s requirement that

¹ PGW raised this same objection in its November 18, 2021 Objections to Vicinity’s Set I discovery. Vicinity filed a timely Motion to Dismiss the Objections and Compel responses on November 23, 2021.

discovery start as early in the proceeding as possible. Specifically, the Commission’s Regulations provide that:

A party shall initiate discovery as early in the proceedings as reasonably possible. In a proceeding, the right of discovery commences when a complaint, protest or other adverse pleading is filed

52 Pa. Code § 5.331(b). PGW’s request to delay discovery is contrary to the very letter of Section 5.331(b). There is no basis in the Commission’s Regulations or in practicality to delay discovery in this matter. The requirement that discovery start as early in a proceeding as possible recognizes that discovery can be time consuming and getting started early can reduce the overall time of litigation and thus the burden on the parties and on the Commission. Indeed, the prejudice to Vicinity is manifest where ALJs, the Commission, and the Commonwealth Court have affirmed that delaying discovery in contrast to 52 Pa. Code § 5.331(b)’s requirements can lead to the denial of discovery all together.²

As answered below, PGW’s request must be denied:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.

² See e.g. *Diamond Energy, Inc. v. Pennsylvania Pub. Util. Commn.*, 653 A.2d 1360 (Pa. Cmwlth. 1995)(affirming the Commission’s ruling under 52 Pa. Code § 5.331(b) that Diamond Energy “should have commenced discovery **around the time it filed its September 16, 1993 petition to intervene**” and that waiting three months until December 17, 1993 to serve discovery was untimely.)(emphasis added); *Vermeychuk v. PECO Energy Company*, Docket No. C-2013-2388323, Opinion and Order (Order entered Nov. 5, 2015)(holding “Section 5.331(b) of our Regulations, 52 Pa. Code § 5.331(b), provides that ‘[a] party shall initiate discovery as early in the proceedings as reasonably possible’ and that ‘the right to discovery commences when a complaint . . . is filed.’ In this case, the Complaint was filed on September 27, 2013, **and the Complainant could have started discovery as early as that time.**”)(emphasis added).

5. Admitted.
6. Denied as stated. PGW's Preliminary Objections were not currently pending before the Commission as of the filing of the Motion. Vicinity filed its Answer to Preliminary Objections on December 2, 2021, and has filed contemporaneously with this Answer Vicinity's Answer to New Matter. These matters, therefore, are now pending before the Commission.
7. Denied. It is denied that a stay of all discovery pending disposition of PGW's Preliminary Objections is either appropriate in this context or allowed under the Commission's regulations. Indeed, while labeled as a "motion," PGW is not in fact asking leave to delay answering discovery for a valid purpose but is rather unilaterally *telling* the Commission it has no intention of complying with the Commission's discovery regulations until ordered to do so, to which Vicinity has no remedy short of seeking sanctions for PGW's intentional delay and interference with allowable discovery. Denied that "the answer period... should begin anew..." Vicinity served Set I discovery on November 8, 2021. PGW filed the instant Motion on November 22, 2021, 14 days later. It is entirely improper to grant the answer period to begin anew, as doing so would only further delay and prejudice Vicinity and ultimately grant PGW over 34 days to reply to Set I.³
8. Denied.
9. Denied. PGW makes no attempt to tie specific discovery requests to any specific preliminary objections. To the extent that PGW wants a blanket denial of all Set I discovery

³ Vicinity notes that any time elapsed from when PGW filed the Motion on November 22, 2021 to its ultimate disposition would lend even more support to denying PGW's extension at this time.

without specific arguments based on any granting or denial of a future ruling on preliminary objections, such arguments must be given no weight.

10. Denied. A future ruling on Preliminary Objections does not overcome the Commission's discovery regulations. Denied that such ruling would necessarily "affect the scope of permissible discovery..." A party is entitled to discovery under the Commission's regulation, subject to limitations in 52 Pa. Code § 5.361.
11. Denied. It is denied that discovery should be stayed simply because a party represents or believes that the scope of discovery "may change depending on [a] ruling on PGW's Preliminary Objections."
12. Admitted in part and denied in part. It is admitted that the Orders cited by PGW stayed discovery in those unique proceedings. It is denied that either of the proceedings are relevant to or binding to support PGW's Motion. Unlike the Orders cited by PGW, the instant proceeding is unlikely to be disposed of in part or in whole on preliminary objections.⁴ As discussed in Vicinity's Answer to Preliminary Objections filed December 2, 2021, PGW's preliminary objections failed to prove they are entitled to relief as a matter of law.⁵ Rather than accepting Vicinity's well-pleaded material and factual averments as

⁴ Indeed, that the Office of Consumer Advocate, the Office of Small Business Advocate, and Bureau of Investigation and Enforcement have intervened shows that there is public interest in the disposition of the factual averments within complaint.

⁵ By way of example, PGW raised the preliminary objection alleging violation of the statute of limitations. PGW Preliminary Objections at 8-9 (dated Nov. 22, 2021). This preliminary objection, if accurate and based on the actual relief sought in the Complaint, would dispose of the complaint as a matter of law. However, PGW's statute of limitations claim is entirely fabricated – Vicinity is not seeking *any* retroactive relief which is obvious on the face of the Complaint as described in Vicinity's Answer to Preliminary Objections. Vicinity's Answer to Preliminary Objections at 8-9 (dated Dec. 2, 2021). It is clear that based on the statute of limitations objection, no relief is warranted and thus there is no reason to stay discovery in this matter.

true under Pennsylvania's preliminary objections standards,⁶ PGW submitted a counter-factual pleading containing significant disputed and contrary assertions to the averments of the Complaint which shows that granting any relief requested in PGW's preliminary objections is unwarranted. PGW's counter-factual preliminary objections must be denied as it failed to prove that based on the facts pleaded *in Vicinity's Complaint*, the law says with certainty that no recovery is possible.⁷ It is clear that PGW's counter-factual preliminary objections show that dismissal is fully unwarranted and the request is not free from doubt.⁸ Therefore, as this matter is unlikely to be disposed of on preliminary objections, PGW's reliance on the Orders cited is unpersuasive, and the instant motion should be denied.

13. This paragraph contains legal conclusions to which no response is required.

14. Denied. While a procedural schedule has not yet been entered in this matter, Vicinity is prejudiced by PGW's self-serving delay in discovery to further try to run out the clock. Further, the Commission's regulations require parties to begin discovery as early as reasonably possible. 52 Pa. Code § 5.331(b).

15. Denied.

⁶ In determining whether to sustain preliminary objections, all well-pleaded material, factual averments and all inferences fairly deducible therefrom are presumed to be true. *Marks v. Nationwide Ins. Co.*, 762 A.2d 1098, 1099 (Pa. Super. Ct. 2000), *appeal denied*, 788 A.2d 381 (Pa. 2001).

⁷ Indeed, the standard for dismissal is *not* based on new facts raised in PGW's counter-factual preliminary objections, but rather based on the facts averred by plaintiff the law says with certainty that no recovery is possible. *Soto v. Nabisco, Inc.*, 32 A.3d 787, 790 (Pa. Super. Ct. 2011), *appeal denied*, 50 A.3d 126 (Pa. 2012).

⁸ *Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental Resources*, 406 A.2d 1020 (Pa. 1979).

16. While this paragraph contains a conclusion to which no response is required, it is important to note that PGW's outright refusal to even participate in discovery until the Commission orders it to do so should not be condoned.

WHEREFORE, Vicinity Answers PGW's Motion, and respectfully requests that said motion be denied and that PGW be required to respond to Vicinity's discovery at the earliest possible date and that it be ordered to comply with any additional discovery requests in a timely manner unless actual objections are raised and further requests that the Commission take any other action that it believes to be necessary or proper under the circumstances.

Respectfully submitted,



Dennis A. Whitaker, Attorney ID No. 53975
Kevin J. McKeon, Attorney ID No. 30428
Todd S. Stewart, Attorney ID No. 75556
Hawke McKeon & Sniscak LLP
100 N 10th Street
Harrisburg, PA 17101
(717) 236-1300
(717) 236-4841 (fax)
dawhitaker@hmslegal.com
kjmckeon@hmslegal.com
tsstewart@hmslegal.com

DATED: December 13, 2021

*Counsel for Grays Ferry Cogeneration
Partnership and Vicinity Energy
Philadelphia, Inc.*

VERIFICATION

I, Charles Melcher, certify that I am the Senior Vice President for Vicinity Energy Philadelphia & Grays Ferry Cogeneration Partnership and that, in this capacity, I am authorized to and do make this Verification, that the facts set forth in the foregoing document are true and correct to the best of my knowledge, information and belief, and that I expect Vicinity Energy Philadelphia & Grays Ferry Cogeneration Partnership to be able to prove same at any hearing hereof. I understand that false statements made therein are made subject to the penalties in 18 Pa. C.S. §4904, relating to unsworn falsifications to authorities.

DATE: 13 Dec 2021



Charles Melcher
Senior Vice President
Vicinity Energy Philadelphia & Grays Ferry
Cogeneration Partnership

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party)

VIA ELECTRONIC MAIL ONLY

Daniel Clearfield, Esquire
Carl R. Shultz, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
dclearfield@eckertseamans.com
cshultz@eckertseamans.com
Counsel for Philadelphia Gas Works

Lauren M. Burge, Esquire
Eckert Seamans Cherin & Mellott, LLC
U.S. Steel Tower
600 Grant Street, 44th Floor
Pittsburgh, PA 15219
lburge@eckertseamans.com
Counsel for Philadelphia Gas Works

Gregory J. Stunder, Esquire
Craig W. Berry, Esquire
Philadelphia Gas Works
800 West Montgomery Avenue
Philadelphia, PA 19122
Gregory.Stunder@pgworks.com
Craig.Berry@pgworks.com

Harrison W. Breitman
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
HBreitman@paoca.org

Sharon E. Webb
Assistant Small Business Advocate
Office of Small Business Advocate
Forum Place
555 Walnut Street, 1st Floor
Harrisburg, PA 17101
swebb@pa.gov

Gina L. Miller, Esquire
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
ginmiller@pa.gov



Todd S. Stewart

DATED: December 13, 2021