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March 14, 2022

**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; **COMPLAINANTS' ANSWER TO PHILADELPHIA GAS WORKS' MOTION TO DISMISS OBJECTIONS AND COMPEL RESPONSES TO SET I INTERROGATORIES**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc.'s Answer to Philadelphia Gas Works' Motion to Dismiss Objections and Compel Responses to Set I Interrogatories in the above-captioned proceeding. Copies have been served in accordance with the attached Certificate of Service.

Should you have any questions, please feel free to contact me directly.

Very truly yours,

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Todd S. Stewart, Esq.  
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*Counsel for Grays Ferry Cogeneration  
Partnership and Vicinity Energy Philadelphia,  
Inc.*

BRB/jld  
Enclosure

cc: Administrative Law Judge Marta Guhl (Letter only via electronic mail – [mguhl@pa.gov](mailto:mguhl@pa.gov))  
Athena Delvillar, Legal Assistant (Letter only via electronic mail – [sdelvillar@pa.gov](mailto:sdelvillar@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.	:	

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**GRAYS FERRY COGENERATION PARTNERSHIP  
AND VICINITY ENERGY PHILADELPHIA, INC.’S  
ANSWER TO PHILADELPHIA GAS WORKS’ MOTION TO DISMISS OBJECTIONS  
AND COMPEL RESPONSES TO SET I INTERROGATORIES**

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Pursuant to 52 Pa. Code § 5.342, Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc. (collectively “Vicinity”) submits this Answer to Philadelphia Gas Works’ (“PGW”) Motion to Dismiss Objections and Compel Responses to Set I Interrogatories and Requests for Production of Documents filed on March 7, 2022 (“Motion”). In support of this Answer, Vicinity respectfully asserts as follows:

**I. INTRODUCTION**

1. On February 15, 2022, PGW served on Vicinity Interrogatories and Request for Production of Documents Set I.

2. On February 25, 2022, Vicinity interposed the below stated Objections to Set I Nos. 20-22, 25, 30, \*31, and 34. Vicinity contends that such discovery into Vicinity’s ability to pay PGW’s demanded unjust and unreasonable rates is irrelevant and not reasonably tailored to lead to the discovery of admissible evidence regarding the Complaint which alleges PGW has violated

the Public Utility Code, and the requests are nothing more than a fishing expedition beyond the scope of discovery in this matter.

3. On March 7, 2022, PGW filed the above-mentioned Motion to Compel.

4. Also on March 7, 2022, Vicinity produced its responses to the remainder of PGW-I. Vicinity also produced its response to PGW-I-31 to which was previously objected, subject to the objection of relevance to this matter as the attachments to PGW-I-31 were determined to be a part of Vicinity's last base rate case proceeding at Docket No. R-2021-3024060 which Vicinity agreed to provide. Therefore, for the purposes of clarity in this Answer, Vicinity has produced the responsive information to PGW-I-31, subject to the objection of relevance to this proceeding, and references to PGW-I-31 in this Answer will be indicated as "\*31" denoting the response was answered subject to objection.

## **II. OBJECTION TO PGW-I NOS. 20-22, 25, 30, \*31, and 34**

5. Vicinity provided the below objections to PGW on February 25, 2022. Due to the nature of PGW's Motion, Vicinity is restating its objections with this Answer as if set forth in full for Your Honor's disposition. PGW-I Nos. 20-22, 25, 30, \*31, and 34 provide:

- 20) On page 1 of the Grays Ferry/Vicinity complaint it states that it purchases natural gas from PGW to power its combined heat and power facility and that: "Grays Ferry produces electricity, which is sold into the PJM market, and waste heat, in the form of steam, which is then sold to its affiliate VEPI.
- a) Please provide, (by month if available), for the last five (5) years the revenues from the sale of electricity from Gray's Ferry to the PJM market. In answering, please provide both MWH sold and the monthly average price that Gray's Ferry received for its electricity production.
  - b) Please provide, (by month if available), the costs for fuels used at Gray's Ferry for the production of electricity and steam. Please identify whether the fuel used was natural gas or oil.
  - c) Please provide, (by month if available), for the last five (5) years the costs incurred for O&M expenses at Gray's Ferry in the production of electricity.

- d) Please provide, (by month if available), for the last five (5) years, the revenues from the sale of capacity from Gray's Ferry to the PJM market. Please include any revenues from PJM's ICAP, RPM, Capacity Performance or any other capacity market construct that might have been in place at the time of such sale.
    - (1) If in any year, Gray's Ferry did not participate in PJM's capacity market, please explain why.
  - e) Please provide, (by month, if available), for the last five (5) years, the volume of natural gas purchased to operate Gray's Ferry.
- 21) Please provide, (by month, if available) for the last five (5) years to the present, the revenues from the sale of ancillary services from Gray's Ferry to the PJM market. Please include any revenues from PJM's Synchronized Reserve market, PJM's Non-Synchronized Reserve Market, PJM's Regulation market, or any other service PJM procures from generators on its system.
  - 22) Please provide full and complete copies of the last five (5) years of audited income statements and balance sheet reports for Grays Ferry.
  - 25) Provide full and complete copies of the monthly bills for steam service tendered by Grays Ferry to Vicinity for each of the last twelve (12) months. Fully and completely describe all billing components.
  - 30) Please provide, (by month, if available) for the last five (5) years to the present, the revenues from the sale of ancillary services from Gray's Ferry to the PJM market. Please include any revenues from PJM's Synchronized Reserve market, PJM's Non-Synchronized Reserve Market, PJM's Regulation market, or any other service PJM procures from generators on its system.
  - \*31) Please provide full and complete copies of any and all current agreements between Grays Ferry and Vicinity.
  - 34) Provide a full and complete history (five years) of the cost of fuel (all types separately stated) to the Gray's Ferry steam generating facility and the pass through of such costs to Vicinity.

6. Vicinity objected to these requests because they seek information irrelevant to this proceeding and not reasonably tailored to lead to the discovery of admissible evidence. Pursuant to 52 Pa. Code § 5.321(c), a party may obtain discovery of any matter not privileged that

is relevant to a pending proceeding and that is reasonably calculated to lead to the discovery of admissible evidence. *Id.* The information sought in PGW-I Nos. 20-22, 25, 30, \*31, and 34 is not relevant to any issues to be addressed in this proceeding or any relief sought in the Complaint. The Complaint requests relief on four distinct points:

- Find that the rate demanded by PGW for service to Grays Ferry post 2022 is unjust and unreasonable;
- Require PGW to continue to provide Grays Ferry with firm transportation service;
- Require PGW to execute a new contract under Rate GTS-Firm for that service at a rate that is just and reasonable; and
- Require PGW to cease and desist from targeting VEPI's customers within VEPI's franchised service territory for rate discounts and financial incentives in order to entice them to switch from VEPI's steam service to PGW's natural gas service.

*See* Complaint at page 13-14. Thus, the basis of the Complaint is that of PGW is demanding unjust and unreasonable rates for Vicinity after 2022, forcing Vicinity to take service under inappropriate terms (i.e., service that is interruptible), and requesting that PGW cease and desist targeting VEPI's steam customers to convert to natural gas. PGW-I Nos. 20-22, 25, 30, \*31, and 34 do not seek information reasonably calculated to lead to the discovery of admissible evidence on any of this relief and is ultimately irrelevant to the disposition of any portion of this matter.

7. The thrust of PGW's Set I Nos. 20-22, 25, 30, \*31, and 34 is to gather information on which to argue that Vicinity has the *ability to pay* the unjust and unreasonable rates demanded by PGW. As admitted by PGW in its Motion, however, customer *ability to pay* is irrelevant to the process of cost allocation and rate design. *See* J. Cawley and N. Kennard, *Rate Case Handbook, A Guide to Utility Ratemaking before the Pennsylvania Public Utility*

*Commission* (Pennsylvania Public Utility Commission 2018) at 138-141. Rather, rates must be set and designed based on the actual cost of service of each customer and customer class. Indeed, appellate courts have consistently held that cost of service is the “polestar” of ratemaking principles in Pennsylvania. *Lloyd v. Pa. P.U.C.*, 904 A.2d 1010 at 1020-21 (Pa. Cmwlth. 2006).

8. Whether Vicinity *can afford* the new rates demanded by PGW for Vicinity’s unique, single customer pipeline service – service unlike any other portion of PGW’s distribution system – is not an issue in this case and has no place in utility ratemaking; therefore, the discovery requests are irrelevant and unlikely to lead to the discovery of admissible evidence in this matter.

9. Additionally, to the extent potential relevance could be imagined for PGW-I Nos. 20-22, 25, 30, \*31, and 34, which there is none, the requests are cast so wide over Vicinity’s operations and finances that they are nothing more than a mere fishing expedition, not reasonably tailored to discover admissible evidence. *See, e.g., City of York v. Pa. P.U.C.*, 281 A.2d 261, 265 (Pa. Cmwlth. 1971) (“Anything in the nature of a mere fishing expedition is not to be encouraged. Where the plaintiff will swear that some specific book contains material or important evidence, and sufficiently describes and identifies what he wants, it is proper that he should have it produced. But this does not entitle him to have brought in a mass of books and papers in order that he may search them through to gather evidence.”) (quoting *American Car & Foundry Company v. Alexandria Water Company*, 70 A. 867, 869 (Pa. 1908)). Instead, under 52 Pa. Code § 5.341(c), a party may propound interrogatories that relate to appropriate matters under Section 5.321. Section 5.321(c) provides that a party is entitled to obtain discovery of any matter not privileged that is **relevant to a pending proceeding and reasonably calculated to lead to the discovery of admissible evidence.** 52 Pa. Code § 5.321(c) (emphasis added).

10. Therefore, Your Honor should grant Vicinity’s objection to PGW-I Nos. 20-22, 25, 30, \*31, and 34 as irrelevant and unlikely to lead to the discovery of admissible evidence under 52 Pa. Code § 5.321(c).

### **III. ANSWER TO PGW’S MOTION TO COMPEL**

11. While explicitly acknowledging that rates are not made and set based on a customer’s ability to pay in Pennsylvania, but rather primarily based on cost of service,<sup>1</sup> PGW first argues that Vicinity’s capability to “absorb” or “offset” the cost impacts of PGW’s rates is nonetheless relevant to this matter.<sup>2</sup> As discussed below, PGW’s attempted distinction here is without a difference – whether Vicinity can “absorb” or “offset” PGW’s demanded rates is the same as whether PGW has the “ability to pay” which is not and cannot be a principle of setting and assigning rates, and ultimately has no relevance to this proceeding. PGW further contradicts itself and argues based on a material overstatement and exaggeration of the contents of the Complaint (where Vicinity merely summarized the impacts of PGW’s actions taken as a whole), that because Vicinity alleged a “price squeeze,” Vicinity’s ability to “absorb” or “offset” PGW’s unreasonable rate increase would mitigate any impact of the increased rates, and thus the discovery is relevant to this matter.<sup>3</sup> It is not. PGW’s theory is not supported under the plain language of the Complaint and is not relevant to the disposition of this matter, nor is the discovery reasonably calculated to lead to admissible evidence. Finally, PGW renews its self-raised arguments on matters never pleaded by Vicinity, and previously denied by Your Honor, to assert that because PGW believes Vicinity has alleged conduct which violates of the Sherman Act, the discovery is

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<sup>1</sup> See Motion at Page 1; See also Motion at ¶ 11: “There is no dispute that rates are not based on a customer’s ability to pay, but rather are primarily based on the cost of service. See *Lloyd v. Pa. P.U.C.*, 904 A.2d 1010 at 1020-21 (Pa. Cmwlth. 2006).”

<sup>2</sup> Motion at page 2 and ¶ 14.

<sup>3</sup> Motion at ¶ 11-12.

relevant.<sup>4</sup> As discussed below, Your Honor’s oral ruling denying PGW’s Preliminary Objections and the plain language of the Complaint clearly show otherwise, and no discovery on topics covered by the Sherman Act are relevant to this matter or disposition of violations under the Public Utility Code.

A. PGW’s contradicting argument on the relevance of Vicinity’s “ability to pay” rephrased as “absorb” or “offset” has no merit, and the discovery remains irrelevant to this matter.

12. PGW’s first theory, which contradicts its fundamental agreement with Vicinity that a ratepayer’s ability to pay is not relevant to the rates demanded in this matter,<sup>5</sup> is that because Vicinity described the operational background of both Grays Ferry and VEPI in the Complaint, whether Grays Ferry and VEPI can “absorb” or “offset” any cost increase is relevant to diminish the impact of PGW’s demanded rates. This is the basis of PGW’s demand for vast amounts of financial information from Grays Ferry.<sup>6</sup> PGW goes on to argue for the relevance of the discovery based on the nature of the service provided by PGW to Vicinity and the fact that PGW’s two prong tactic of raising rates to Vicinity while incentivizing customers to leave Vicinity’s steam service for natural gas, taken as a whole, presents itself as “what can only be referred to as a price squeeze” on Vicinity due to PGW’s competitive interests. Motion at page 2; *See related* Complaint at page 5; *see also* Complaint at ¶ 26. Indeed, Vicinity’s statement that PGW’s conduct is, as a whole, “what can only be referred to as a price squeeze”<sup>7</sup> is not an allegation for which relief is sought under the Complaint – it is a summary statement of what PGW’s unreasonable proposed rates would result when combined with PGW’s conduct of incentivizing transitions from steam service to natural gas service.

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<sup>4</sup> Motion at ¶ 18.

<sup>5</sup> See Motion at ¶ 11.

<sup>6</sup> Motion at Page 2.

<sup>7</sup> Complaint at ¶ 26.

13. The contradicting argument in PGW’s Motion on Vicinity’s “ability to pay,” rephrased as whether Vicinity can “absorb” or “offset” provides:

These interrogatories are designed to elicit information that would permit a determination as to whether Grays Ferry or VEPI: 1) **has the financial wherewithal to absorb any increases** in the charge for PGW gas transportation and sales services; or 2) **offset any required cost increases with existing or increased profits** from sales of electricity produced in the process of making steam for sale to Vicinity, profits that, for some reason, are not currently being used as an offset to the cost of steam production.

Motion at page 2. (emphasis added). This argument is, without doubt, a distinction without a difference and seeks the same information on what a customer *can pay* that is irrelevant to setting rates.<sup>8</sup> PGW’s exercise of poorly reframing the issue should not be allowed and discovery on Vicinity’s ability to “absorb” or “offset” the increase in rates has nothing to do with the relief sought regarding the unreasonable rates demanded by PGW – the subject of the Complaint.

14. Further, at Paragraph 14 of the Motion, PGW plainly states Grays Ferry’s “wherewithal to absorb” (read “ability to pay”) is a rate setting consideration PGW wants to use in supporting its discovery request:

For example, the information requested by PGW could reveal that Grays Ferry’s current revenues far exceed its current expenses and, therefore, **Grays Ferry would have the wherewithal to absorb any natural gas transportation increase and not pass it onto VEPI.**

Motion at ¶ 14. (emphasis added). Grays Ferry’s ability to pay, absorb, or offset increased costs is not relevant to this proceeding or the unreasonable rates demanded by PGW, and as discussed below, the relationship between Grays Ferry and VEPI is governed by Commission approved affiliated interest agreements and contracts, *which were produced to PGW* in response

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<sup>8</sup> See Motion at ¶ 11.

to PGW-I No. \*31 (contract agreements) and No. 32 (Commission approved affiliated interest agreements).

15. PGW's first theory, which is in direct contradiction to its own agreement that rate making principles in Pennsylvania do not consider a customer's ability to pay, lacks all merit, and PGW-I Nos. 20-22, 25, 30, \*31, and 34 remain irrelevant to the disposition of the matter under PGW's own admission. Your Honor should grant Vicinity's objections stated above and dismiss PGW's Motion.

B. Whether Grays Ferry or VEPI may have the ability "absorb" or "offset" the unreasonable rates demanded by PGW is wholly irrelevant to whether PGW violated the Public Utility Code as alleged in the Complaint.

16. Even if PGW's first theory was not a self-contradicting, distinction-without-a-difference, which it indeed is, PGW grossly exaggerates what the Complaint states regarding the alleged consequences of the rate increase on VEPI's public utility customers and purposefully casts a false light on the matters subject to the Complaint. Such exaggerations cannot change the plain language of the Complaint, and indeed cannot allow PGW to go on a fishing expedition on irrelevant matters far outside any relief sought.

17. First, PGW contends that Complainants' make an argument with the "crucial assumption ... that Grays Ferry *will have to pass* on to Vicinity any increase in the cost of natural gas transportation services provided by PGW." Motion at ¶ 12. (emphasis added). In the Complaint, however, Vicinity made no such allegation. The Motion cites paragraph 26 of the Complaint which discusses the impact of the unreasonable rates demanded by PGW, coupled with PGW's competitive actions to discount and subsidize its natural gas service to make steam less competitive. *See* Complaint at ¶ 26. Ignoring that context, PGW purposely misstates this

paragraph to argue that Vicinity alleged any PGW rate increase *will have to pass* onto the utility customers of VEPI, rather than its plain language which provided:

PGW is aware that even a modest increase in the rate Grays Ferry pays for natural gas delivery will increase the rates VEPI must charge steam customers to recover its costs, thereby making VEPI's steam service less competitive with PGW's discounted and subsidized natural gas service.

Complaint at ¶ 26.

18. The Complaint has not alleged a specific impact or dollar-for-dollar<sup>9</sup> recovery of any rate increase that PGW's unreasonable rates would have on VEPI's steam customers. Paragraph 26 of the Complaint merely acknowledges the fact that PGW is aware that an increase to gas delivery would impact VEPI's steam rates, notably at the Commission's discretion in a future VEPI base rate case.

19. Rather than simply a dollar-for-dollar<sup>10</sup> impact which PGW seems to argue, the relationship between Grays Ferry and VEPI is governed by legally binding contracts and Commission approved affiliated interest agreements which contain the formula rate for steam sales between Grays Ferry and VEPI that includes the price of fuel. **Critically**, Vicinity provided these contracts and Commission approved affiliated interest agreements to PGW in response to PGW-I Nos. \*31 and 32. Therefore, as Vicinity is legally required to follow its contractual agreements and Commission approved affiliated interest agreements, further considerations and discovery on Vicinity's ability to pay are irrelevant and unlikely to lead to the discovery of admissible evidence. Worse, raising such issues in this proceeding would ultimately be a collateral attack on the Commission's prior approval of said affiliated agreements provided in response to PGW Set I No. 32.

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<sup>9</sup> See Motion at Page 2.

<sup>10</sup> *Id.*

20. Further, PGW's argument in support of its discovery on Vicinity's ability to absorb or offset the rate impact on VEPI's steam customers misses a key and critical factor which PGW would have Your Honor ignore – the Public Utility Commission is the ultimate decision maker as to whether increases in costs to VEPI *can be passed on to customers in a general base rate proceeding*. VEPI's last rate case was filed and approved at Docket No. R-2021-3024060. PGW cannot turn this complaint proceeding into a de-facto rate case and rate investigation of VEPI under the Public Utility Code to collaterally attack VEPI's Commission approved rates<sup>11</sup> in order to justify PGW's unreasonable rate demand subject to this Complaint. Indeed, this is not a VEPI general base rate proceeding – the books of VEPI are not under investigation as they were at Docket No. R-2021-3024060. If PGW indeed wanted to contest, examine, or investigate VEPI's rates and ability to absorb and offset costs of natural gas, it could have participated in VEPI's base rate case. It did not. PGW cannot call into question the Commission approved rates and affiliated interests as *a defendant* to a complaint proceeding for its own unreasonable and unjust conduct and rates.

21. Therefore, Your Honor should grant Vicinity's objections and deny PGW's Motion to Compel on discovery into Vicinity's ability to absorb or offset any increase as irrelevant to the disposition of this Complaint.

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<sup>11</sup> *PA PUC v. Vicinity Energy Philadelphia, Inc.*, Docket No. R-2021-3024060, Order (Order entered August 26, 2021).

- C. PGW's renewed attempt to introduce antitrust violations in this matter has no merit and cannot form the basis of discovery – the Complaint does not allege antitrust violations, but rather violations of the Pennsylvania Public Utility Code.

22. As PGW did in its Answer and New Matter<sup>12</sup> as well as its Preliminary Objections in this matter<sup>13</sup> which Your Honor orally denied on the record at the Prehearing Conference on January 13, 2022, PGW again *sua sponte* injects the theory that Complainants assert that the Commission has jurisdiction and authority to consider the allegations that PGW is committing an antitrust violation in its consideration of whether the rates being charged to Vicinity are just and reasonable.<sup>14</sup> As Your Honor is aware, Vicinity has pleaded no such violation of the Sherman Act or antitrust violations in this Complaint as clearly stated in Vicinity's Answer to PGW's Preliminary Objections at ¶ 16.<sup>15</sup> PGW is correct that the Commission lacks jurisdiction over such matters. As Your Honor has rejected PGW's prior arguments misconstruing the allegations in the Complaint, such arguments must be rejected as discovery into never pleaded violations is clearly not relevant to this proceeding and will not lead to the discovery of admissible evidence. Vicinity has pleaded PGW is in violation of the Public Utility Code, and as such the scope of the Complaint before this Commission does not include PGW's own assessment of whether or not PGW has violated the Sherman Act or committed other antitrust violations not pleaded by Vicinity.

23. Therefore, Your Honor should dismiss PGW's *sua sponte* arguments under the Sherman Act never pleaded by Vicinity, and deny discovery as irrelevant and unlikely to lead to

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<sup>12</sup> See PGW's Answer and New Matter at Page 29-31.

<sup>13</sup> See PGW's Preliminary Objections at Page 3, 7-8.

<sup>14</sup> Motion at ¶ 18.

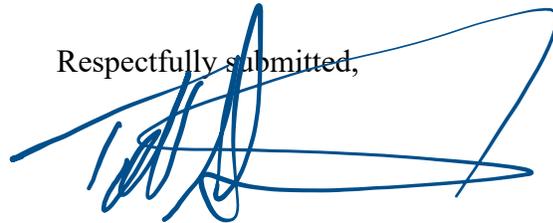
<sup>15</sup> Vicinity's Answer to PGW's Preliminary Objections, paragraph 16 states: "Denied. PGW's characterizations of the Complaint are denied. Nowhere in the Complaint does Vicinity aver that the Commission has jurisdiction to enforce the Sherman Act. [fn omitted] Rather, the Complaint avers that PGW's conduct violates the Public Utility Code. Accordingly, PGW's contention that the Commission lacks jurisdiction to adjudicate the actual claims made in the Complaint must be rejected."

the discovery of admissible evidence as presented above in Vicinity's objections to PGW-I Nos. 20-22, 25, 30, \*31, 33 and 34.

#### IV. CONCLUSION

WHEREFORE, Vicinity respectfully requests that Your Honor deny PGW's Motion to Compel responses to PGW-I Nos. 20-22, 25, 30, \*31, 33 and 34 as irrelevant to the Complaint and relief sought, and unlikely to lead to the discovery of admissible evidence under 52 Pa. Code § 5.321(c).

Respectfully submitted,



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*Counsel for Grays Ferry Cogeneration  
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DATED: March 14, 2022

**CERTIFICATE OF SERVICE**

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

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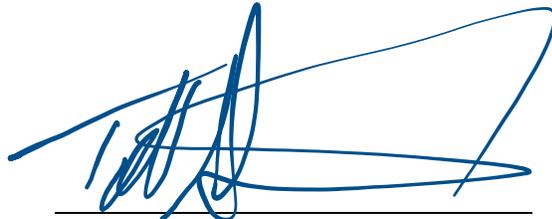
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Dated: March 14, 2022