ECKERT SEAMANS
ATTORNEYS AT LAW

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

TEL: 717 237 6000
FAX: 717 237 6019

Norman J. Kennard
717.237.6024
nkennard@eckertseamans.com

December 7, 2022

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

Re: Vicinity Energy Philadelphia, Inc. and Grays Ferry Cogeneration Partners v. Philadelphia Gas Works – Docket Nos. C-2021-3029259

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Philadelphia Gas Works' ("PGW") Post-Hearing Brief to Petition of Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc. for Interim Emergency Relief with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely

Norman J. Kennard
Norman J. Kennard, Esq.

NJK/lww

Enclosure

cc: Hon. Marta Guhl w/enc.
Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of PGW's Post-Hearing Brief to Petition of Grays Ferry/Vicinity's for Interim Emergency Relief, upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email Only

Dennis A. Whitaker, Esquire
Kevin J. McKeon, Esquire
Todd S. Stewart, Esquire
Hawke McKeon & Sniscak LLP
100 N 10th Street
Harrisburg, PA 17101
dawhitaker@hmslegal.com
kjmckeon@hmslegal.com
tsstewart@hmslegal.com

Gina L. Miller, Esquire
Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street, 2nd Floor
Harrisburg, PA 17120
ginmiller@pa.gov

Charis Mincavage, Esquire
McNees Wallace & Nurick LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108
cmincavage@mcneeslaw.com

Harrison W Breitman, Esquire
Andrew J. Zerby, Esquire
Office of Consumer Advocate
555 Walnut Street
Form Place, 5th Floor
Harrisburg, PA 17101-1923
hbreitman@paoca.org
azerby@paoca.org

Sharon E. Webb
Office of Small Business Advocate
555 Walnut Street
1st Floor, Forum Place
Harrisburg, PA 17101-1923
swebb@pa.gov

Craig W. Berry, Esq.
Senior Attorney
Philadelphia Gas Works
800 W. Montgomery Ave.
Philadelphia, PA 19122
Craig.berry@pgworks.com

Dated: December 7, 2022

Norman J. Kennard
Norman J. Kennard, Esquire

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

PHILADELPHIA GAS WORKS' POST-HEARING BRIEF TO PETITION OF GRAYS FERRY COGENERATION PARTNERSHIP AND VICINITY ENERGY PHILADELPHIA, INC. FOR INTERIM EMERGENCY RELIEF

Philadelphia Gas Works ("PGW," "Company," or "Respondent") submits this Post-Hearing Brief in opposition to the Petition of Grays Ferry Cogeneration Partnership ("GFCP") and Vicinity Energy Philadelphia, Inc. ("VEPI") (jointly, "GFCP/VEPI" or "Petitioners") for Interim Emergency Relief ("Emergency Petition") pursuant to the Administrative Law Judge's ruling at the December 6, 2022 hearing on the Emergency Petition. In support thereof, PGW states as follows:

I. INTRODUCTION

GFCP/VEPI's Petition seeks emergency relief in the form of an extension of a twenty-five-year-old contract, and which terminates by its agreed upon terms on December 31, 2022. PGW has filed an Answer and participated in oral argument. Your Honor offered the parties the opportunity to file briefs. PGW only will respond to new arguments made during the hearing relying on arguments and pleadings previously submitted.

II. ARGUMENT

A. Likelihood Of Success ("Substantial Question")

52 Pa. Code § 3.6 requires that a petition for interim emergency relief demonstrate each of the following: (1) The petitioner's right to relief is clear; (2) The need for relief is immediate; (3) The injury would be irreparable if relief is not granted; and (4) The relief requested is not injurious to the public interest.[1] The Commission may grant interim emergency relief only when all of the foregoing elements exist.[2] GFCP/VEPI's Petition fails to satisfy any of those requirements.

GFCP/VEPI does not have a clear right to an Order directing an extension of the 1996 Contracts because, as the Bureau of Investigation and Enforcement noted at the oral argument, there is no "privity of contract" between GFCP/VEPI and, therefore, Section 508 cannot be applied. Interim Emergency Relief cannot provide an "extraordinary" remedy that is not available. PGW agrees with this position.

There are many other reasons that Section 508 does not apply and the Petition should fail, but lack of privity is a hurdle that cannot be overcome. Additional reasons include:

- The counterparties to the contracts are not parties to this case and are not jurisdictional to the PUC.
- The current situation does not meet the circumstances in which the Commission may order a contract to be revised. Section 508 is employed when a utility has abused its discretion or it is necessary to interfere with their managerial discretion in order to insure that customers receive adequate service. There is no such allegation here. PGW has offered to enter into a new, temporary contract to cover the Gap Period – but GFCP/VEPI has refused this remedy.
- Section 508, authorizes the Commission to modify contracts *only after* reasonable notice and *hearing*. There have been no hearings on modification of the 1996 Contracts. This is a post-trial raised issue.
- Section 508 states: "Such contract, as modified by the order of the commission, *shall become effective 30 days after service of such order upon the parties to such contract*."

---

1 52 Pa. Code § 3.6(b).

2 *Glade Park East Home Owners Ass'n v. Pa. PUC*, 628 A.2d 468, 473 (Pa. Commw. Ct. 1993).

Thus, the 1996 Contracts will no longer exist by the time that any Commission-directed modification would become effective. Therefore, the relief demanded cannot be granted.

B. Operation of Section 508 Outside Of, Or Independently From, Section 1301

GFCP/VEPI argued at the hearing that irreparable harm will occur "because without Section 508 relief, GFCP/VEPI would be relegated to the status of a ratepayer" and its rates would be potentially subject to change in a future rate case.[3] GFCP/VEPI also asserted that "Section 508 can be employed to change an agreement" and that the agreement could then set the rates and terms of service with a utility, without reference to the "just, reasonable and non-discriminatory" provisions of Chapter 13.

PGW disagrees with these propositions. On the record, GFCP/VEPI have advocated two mechanisms in which these rates, terms and conditions would be written and memorialized:

1. A new *contract with PGW* entered into pursuant to tariff, and
2. A special tariff designed solely for GFCP/VEPI.

The parties addressed these suggestions and PGW has conceded that both are legally viable procedures to publish the rates that will be determined by the Commission upon the ultimate disposition of this case.

PGW, however, has opposed the third option suggested for the first time by GFCP/VEPI in Main Brief. and disputes that underlying premise – that Section 508 can be employed to modify a contract and such contract would be a substitute mechanism to establish and publish rates. Section 508 is not a provision that sets just and reasonable rates. This new, third option is contrary to GFCP/VEPI's concession elsewhere that the "just and reasonable" standards of Section 1301

[3] Quoted statements of GFCP/VEPI are presented without the benefit of a transcript, but are believed to be an accurate representation of what was said.

and cost of service will decide this case.[4] Moreover, it is contrary to well established statutory law.

Under the Public Utility Code, tariffs are the *exclusive means* to establish and publish "all rates" as expressly set forth in Section 1302: "every public utility shall file with the commission . . . tariffs showing ***all rates*** established by it and collected or enforced, or to be collected or enforced. . . ."[5]

In turn, Code Section 1303 then requires that the tariff be followed and not deviated from:

> No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto.[6]

This statutory interpretation – that a tariff is the exclusive means in which a public utility may charge a customer for utility service – was confirmed by Commonwealth Court in *Philadelphia Suburban*.[7] In rejecting side agreements, which putatively would have set rates by contract outside of a tariff that permitted it to do so, the Court held that:

> The object of the General Assembly in choosing language almost identical to Section 2 of the Act of 1887 is clear: it sought to prevent "secret departures" from a scheduled tariff. The language "indirectly, by any device, or in anywise" must be given effect. It is the very complexity of the Amendment and the Stipulation that mark the arrangement as an unlawful "device." The Amendment will in "anywise" do "indirectly" what the Free Service Covenant cannot do directly, *i.e.*, effect a departure from Pennsylvania-American's scheduled tariff.[8]

---

4 GFCP/VEPI Main Brief at 28.

5 66 Pa.C.S. § 1302 ("Tariffs") (emphasis added).

6 *Id.* § 1303 ("Adherence to tariffs")

7 *Phila. Sub. Water Co. v. Pa. P.U.C*, 808 A.2d 1044 (Pa. Commw. Ct. 2002) ("*Philadelphia Suburban*").

8 *Id.* at 1055–56.

Thus, a utility's contract with a municipality for service that departed from tariff violated Section 1303 because a utility cannot set rates by a contract: "a rate in a scheduled tariff [is] the only lawful way to make rates."[9]

> It is not a defense to a Section 1303 violation to argue that the charge meets the rate making standards of Section 1304[[10]]. If a charge deviates from the scheduled tariff, that is the basis of its unlawfulness. There is no need to go further and determine whether the unlawful rate meets the standards for a lawful rate; it is a futile exercise.[11]

Philadelphia Suburban confirms that a utility may only charge rates pursuant to its tariff, and all tariffed rates must be just, reasonable and non-discriminatory. Entering into a contract or modifying an existing contract does not provide a "back door" means of setting rates outside the strictures of Chapter 13 of the Code.

Moreover, ***GFCP/VEPI are "ratepayers"*** and the rates established, going forward, will be subject to change upon Commission approval in future rate cases. The *Philadelphia Suburban* Court also noted the Supreme Court's *Leiper* decision,[12] which held that "a contract that fixes a utility's rates for an 'indeterminate period will not be sustained' because it would excuse the customer from tariff revisions that may take place over that period of time."[13]

Accordingly, PGW is not legally capable of providing a contract for rates to GFCP/VEPI (or any other customer for that matter) unless the rates, terms and conditions of service are reflected in or authorized by a scheduled tariff provision that have been found by the Commission to be just and reasonable. GFCP/VEPI's suggestion that an extension of the pre-regulation 1996 Contracts

---

9 *Id.* at 1060.

10 66 Pa. C.S. § 1304 (prohibiting discrimination in rates).

11 *Philadelphia Suburban,* 808 A.2d at 1061.

12 *Leiper v. Baltimore & Philadelphia Railroad Co.*, 105 A. 551 (Pa. 1918) ("*Leiper").*

13 *Philadelphia Suburban*, 808 A.2d at 1055 (citing *Leiper*, 105 A. at 554).

is required so that they might continue to receive service under the same terms and conditions pursuant to this contract, rather than tariffed rates, is legally incorrect and provides no basis for claiming either that their right to relief is clear or that they will suffer "irreparable harm" if the existing contract is not extended

C. The Commission's Regulation, Which States That The Effect of An IEO Is Immediate, Cannot Overcome the Statutory Thirty Day Delay Required by Section 508

GFCP/VEPI asserted at the hearing that the Commission's regulations at 52 Pa. Code § 3.10(a), stating that an Order entered by the presiding officer "is immediately effective upon issuance," overcomes the statutory directive of 66 Pa. C.S § 508 that any contract modification made thereunder "shall become effective 30 days after service of such order upon the parties to such contract."

Of course, a Commission regulation cannot override a statutory directive. Under Section 508, even were the contract extended in an order issued this month, the order would not become effective until *after* the contracts will have lapsed. In the Answer to the Emergency Petition, PGW cited the 1989 *Milesburg* case where the Commission agreed that the petitioner waited too long to seek the extension of a contract pursuant to Section 508, and, therefore the Commission had lost the legal ability to change the termination date of the contract, because any such order would only be effective *after* the contract had already terminated.[14] This is exactly the situation here and GFCP/VEPI's Petition should be treated the same – by dismissal.

[14] *See* PGW Answer to Petition for Emergency Relief at 16, n.38.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, PGW respectfully requests that the Commission deny GFCP/VEPI's Petition for Interim Emergency Relief.

Respectfully submitted,

/s/ Norman J. Kennard

Daniel Clearfield, Esq. (I.D. No. 26183)
Norman J. Kennard (I.D. No. 29921)
Cody T. Murphey, Esq. (admitted *pro hac vice*)
Eckert Seamans Cherin & Mellott, LLC
213 Market St., 8th Fl.
Harrisburg, PA 17101
717.237.7173 (direct dial)
717.255.3742 (direct dial)
717-237-6019 (fax)
dclearfield@eckertseamans.com
nkennard@eckertseamans.com
cmurphey@eckertseamans.com

Counsel for Philadelphia Gas Works

Of Counsel:

Craig W. Berry, Esq. (I.D. No. 328527)
Senior Attorney
Philadelphia Gas Works
800 W. Montgomery Ave.
Philadelphia, PA 19122
215.684.6049
215.684.6798 (fax)
Craig.Berry@pgworks.com

Dated: December 7, 2022