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December 7, 2022

**VIA ELECTRONIC MAIL**

[mguhl@pa.gov](mailto:mguhl@pa.gov)

Administrative Law Judge Marta Guhl  
Pennsylvania Public Utility Commission  
Office of Administrative Law Judge  
800 Market Street, Suite 4063  
Philadelphia, PA 19107

RE: Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc. v. Philadelphia Gas Works; Docket No. C-2021-3029259; **LETTER BRIEF ON PETITION FOR INTERIM EMERGENCY RELIEF**

Dear Judge Guhl:

**I. Introduction**

The existing Contract between Vicinity Energy Philadelphia, Inc. (“VEPI”) and Grays Ferry Cogeneration Partnership (“Grays Ferry”) (collectively, “Vicinity”) and Philadelphia Gas Works (“PGW”) will expire on December 31, 2022. PGW asserts that the Commission cannot force it to extend the existing Contract to Vicinity at the just and reasonable rates that will be determined by the Commission, along with the other terms that constitute PGW’s service to Vicinity. Preservation of the current Contract by extension will enable the Commission, upon reaching its decision on the complex issues of the case, to modify the Contract to reflect such terms. The need to extend the current Contract creates the necessity to obtain emergency relief.

In short, this Petition is about the Commission retaining an option to resolving the Complaint; it is not about deciding the merits of that option. PGW’s position that the contract should be left to expire, eliminates that option and the Commission would forever lose the ability to consider it, while Vicinity’s position leaves the parties in the same position as when the litigation began, with all options available.

When it was apparent to Vicinity and PGW that the Commission order in the Complaint filed 14 months ago would not be issued in by December 31, 2022, both parties agreed to continue utility service under the same terms and conditions as have existed for the past 25 years. PGW notified Vicinity that it would willingly extend the tariff. To preserve the complex service arrangements currently in place, Vicinity asked PGW to also extend the existing Contract. When

PGW refused, it became apparent that its refusal was strategic: to achieve its goal of eliminating the Commission's ability to effectuate its decision by modifying the existing Contract. In other words, PGW desires to limit the Commission's authority to remedy the problem. At that point, Vicinity recognized that it must file for emergency relief to preserve the current contractual rates it has been receiving thereby maintaining the status quo.

The sole question to be addressed in this emergency relief proceeding is whether Vicinity is entitled to interim emergency relief to preserve that status quo<sup>1</sup> in the form of a brief extension of Vicinity's existing Contract for service with PGW that will otherwise expire on December 31, 2022. The requirements to obtain such an order are the same as those typically required when injunctive relief is sought. The moving party must prove that: 1) the right to relief is clear; 2) the need for relief is immediate; 3) without the relief requested they will suffer irreparable harm; and 4) the relief requested will not injure other parties. Vicinity has proven all four.

The status quo when Vicinity filed its Complaint 14 months ago, was what it is today. Vicinity receives natural gas delivery services under a contract with PGW that was set to expire on the last day of 2022. Prior to filing the Complaint, beginning in 2017 (five years ago), Vicinity had tried to negotiate a new contract with PGW. Vicinity filed the Complaint only when that effort had clearly failed. Vicinity did not delay, and the fact that a Commission decision has not yet been issued on the merits, contrary to PGW's assertions, is not due to any delay on Vicinity's part. The status quo is service under a contract, not a rate class, which is a status that PGW seeks to avoid in the case below. PGW has argued that the Commission cannot order PGW to enter a contract with Vicinity and PGW will not voluntarily enter into such an agreement. If the Commission were to adopt PGW's position, Vicinity would be denied the ability to continue to take service under a contract, if the present Contract were allowed to expire, because there would be no other legal avenue under which the Commission would be able to preserve any contract between PGW and Vicinity. That is, if the current Contract is allowed to expire, the Commission would lose its authority under Section 508 of the Public Utility Code, 66 Pa.C.S. § 508, to modify the existing Contract. That is the harm that is sought to be avoided by temporarily extending the current Contract, until the Commission has had a chance to consider these arguments, which would maintain the status quo between the parties.

### **1. The Right to Relief is Clear.**

In determining whether the right to relief is clear, "it is not necessary to determine the merits of the controversy in order to determine that a petitioner's right to relief is clear. Rather, the only required determination is that the petition raises substantial legal questions." *Meghan Flynn Rosemary Fuller Michael Walsh Nancy Harkins Gerald McMullen Caroline Hughes Melissa Hanes v. Sunoco Pipeline, L.P.*, Docket No. C-2018-3006116 (Opinion and Order entered Feb. 1, 2019) 2019 WL 632236 at \*6 (citing *T.W. Philips Gas and Oil v. Peoples Natural Gas*, 492 A.2d 776 (Pa. Cmwlth. 1985)).

Vicinity will suffer irreparable harm if it cannot continue to receive service under a contract, because the Commission will have lost its ability to consider legitimate arguments that

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<sup>1</sup> 52 Pa. Code §§ 3.6-11.

the Contract should be modified. PGW clearly does not desire to serve Vicinity under a contract and argues that it cannot be forced to enter into a contract. PGW's version of the status quo, which it seeks to preserve, is a world where the present Contract no longer exists and cannot be revised, and no such revision can be considered. Section 508 allows the Commission, in the public interest, to revise contracts of public utilities. The applicability of this section to the facts of this case is obvious. The Contract impacts not only public utility service provided by PGW to Vicinity, but it also impacts VEPI's public utility service to its many customers. PGW may not have threatened any immediate discontinuation of service, but it has made clear its intention to cease providing service under a contract. The loss of the ability to receive service under a contract would be irreparable. Without a contract (at rates, terms and conditions that the Commission determines to be just and reasonable under Vicinity's unique circumstances) Vicinity is subject to the uncertainty of being a ratepayer, served under a tariff rate that is to be developed and subject to changes and modifications every time PGW files a rate case. What is clear, as it was 25 years ago, is that Vicinity is not a normal customer. Vicinity is a utility-scale customer that paid PGW to modify and construct a dedicated four-mile-high pressure pipeline. Here, Vicinity raises substantial legal questions regarding its ability to continue to receive service under a contract rather than through a tariff, and that is sufficient, making its right to relief clear.

**a. As PGW is Obligated by the Contract, PGW is able to act to extend it.**

PGW asserts that it is unable to extend the existing Contract because it is not a party to the Contract. The Contract, which obligates PGW to provide public utility service, consists of the agreement between the Philadelphia Authority for Industrial Development ("PAID") and Vicinity, and one between PAID and the City, which wholly owns PGW and assigns all operational responsibility to PGW. The Contract obligates the City, operating through PGW, to provide services to Vicinity. Moreover, PGW admits that the contract was addressed in its restructuring filing and was authorized to continue in force.<sup>2</sup> It is clear from the plain language of Section 2212 of the Code, 66 Pa. C.S. § 2212, that such approval could not occur if the Contract were not an "agreement for natural gas service" between Vicinity and "a City Natural Gas Distribution Operation." The approval, which by statute, requires Vicinity to adhere to the terms of the Contract, could not have been given if PGW was not obligated by the Contract.

Moreover, even if the Commission's authorization of the Contract under Section 2212 was not conclusive, there clearly is a principal/agent relationship between PAID, the City and PGW wherein PAID, and the City are acting through PGW. With respect to an agency relationship, the Superior Court stated:

The basic elements of agency are the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking. The creation of an agency relationship requires no special formalities. The existence of an agency relationship is a question of fact. The party asserting the existence of an agency relationship bears the burden of proving it by a fair preponderance of the evidence. In establishing

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<sup>2</sup> Verified Statement of John C. Zuk, page 2.

agency, one need not furnish direct proof of specific authority, provided it can be inferred from the facts that at least an implied intention to create the relationship of principal and agent existed. However, we do not assume agency by a mere showing that one person does an act for another.

*B & L Asphalt Industries, Inc. v. Fusco*, 753 A.2d 264, 269 (Pa. Super. 2000) (internal citations omitted). Further, a corporation *may be bound by a contract negotiated by its agent* while the agent is acting within the scope of their apparent authority. *Simon v. H.K. Porter Co.*, 180 A.2d 227, 229 (Pa. 1962) (emphasis added).

The language in the Contract states that the City, which owns PAID, is acting through PGW. PGW, by providing service and receiving payment from Vicinity is acting for the City and PAID, making it an agent of same. Accordingly, PGW is an agent of both PAID and the City. It can, therefore, stand in PAID's stead regarding the Contract. As a result, PGW could, on its own, extend the Contract on behalf of PAID even though it was not an original signatory, through a principal-agent relationship. If PGW can extend the contract, the Commission can require it to do so.

PGW also is a third-party beneficiary to the Contract. While PGW is not a signatory, it is referenced throughout the Contract. "Under Pennsylvania Law, . . . a person assumes third-party beneficiary status . . . only where both parties to the contract express an intention to benefit the third party and that intention appears in the contract." *Konyk v. Pa. State Police*, 183 A.3d 981, 987-88 (Pa. 2018). The concept of this doctrine is to give intended beneficiaries standing to bring suit to obtain the benefits in question. See *Estate of Agnew v. Ross*, 152 A.3d 247, 259-60 (Pa. 2017). Here, while PGW is not a party or signatory to the Contract, it is still receiving tangible benefits under same. First, Vicinity is sending payments directly to PGW and PGW is invoicing Vicinity. Second, the City and PAID are acting through PGW. Therefore, PGW not only knows of the existence of the Contract between Vicinity and PAID, but is directly benefitting from it. If a third-party beneficiary can enforce contractual obligations under signatories and parties to a contract, it stands to reason that a third-party beneficiary can negotiate the terms of a contract that directly benefits it, or in this case, be required to extend the contract under Section 508. PGW is a third-party beneficiary and can extend the contract despite not being a signatory to it. It would strain credulity to conclude that PGW is not susceptible to an extension of the Contract because it was not one of the entities that signed it when it in fact acted as the primary counter party for the duration of the Contract.

## **2. The Need for Relief is Immediate.**

Vicinity's testimony is clear that it began its attempt to negotiate a new agreement with PGW in 2017 and that in 2021, 14 months ago, it filed a Complaint with the Commission when those negotiations reached an insurmountable impasse. As the litigation has progressed, Vicinity became concerned that a Commission decision would not occur soon enough to allow the Commission to address its contention that the Commission revising the Contract under Section 508 would be the most appropriate manner to provide the relief Vicinity had requested in this

case.<sup>3</sup> If the Contract expires, the authority of the Commission over the contract expires with it. That is, if no action is taken, the Commission will be divested of its authority to even consider the arguments that Section 508 should be applied, let alone exercise any authority to revise the Contract. The need for immediate relief, to preserve the Commission's authority is clear. PGW ignores or disregards this immediacy, contending that any urgency is Vicinity's fault, which is not the case. It was the effort to resolve this matter and the time for litigation that created the urgency, and without urgent action, substantial legal rights will be lost.

**a. Section 508 Does not Prevent the Relief Requested.**

PGW also argues that Section 508 itself prevents the relief requested. PGW's argument is incorrect. Section 508 provides that any order modifying the contract cannot take effect until 30 days after it is issued. PGW cites to a 1989 decision addressing avoided costs under the federal Public Utility Regulatory Act for the proposition that the Commission found that it did not have the power under Section 508 to extend the deadline for financing.<sup>4</sup> However, in that same case, the Commission granted a stay of the applicability of the financing requirements, to allow for the passage of the 30 day requirement of Section 508.<sup>5</sup> What that means in this case is that an order staying the expiration of the contract can prevent its expiration, notwithstanding the 30 day effectiveness provision of Section 508. Your Honor could issue an order temporarily extending or otherwise modifying the contract, under the terms of Section 508, which would temporarily modify the contract – i.e., the term would be extended -- as of the date of the order. Such an order is subject to review by the Commission under the Section 3.10 of the Commission's regulations, 52 Pa. Code § 3.10. Furthermore, under Section 508, no action can be taken on the basis of the modification until after 30 days. In this case that would be approximately January 12, 2023.<sup>6</sup> That interpretation is supported by the Commission's Regulations, which provide that the order modifying the contract is effective immediately – that is, the contract itself will be “modified” as of the date of an order extending it.

The issue of the need for hearings under Section 508 was also raised by PGW, suggesting that without hearings specifically addressing Section 508 modification, no modification is possible. In this case, as PGW took pains to point out, all of the Contract rates and terms were subject to extensive argument and briefing with regard to both a new contract and a revised contract. PGW's argument has no merit.

**3. The Harm will be Irreparable.**

PGW contends that there is no harm and, assuming there was any harm, such harm is not irreparable because PGW has offered to provide services under a temporary tariff extension or a temporary contract that mirror the current tariff requirements. However, the key word is temporary. PGW has not conceded its argument that it cannot be required to provide service to

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<sup>3</sup> Vicinity Reply Brief at 12.

<sup>4</sup> PGW Answer in Opposition, pg. 17, FN 40.

<sup>5</sup> Re West Penn Power Co, 71 Pa. P.U.C. 60 (1989)

<sup>6</sup> The decision cited by PGW does find that the Commission has no authority over a contract that has already lapsed, but that is not the issue here, and is a result that Vicinity's Petition for Emergency Relief was intended to prevent.

Vicinity under a contract, nor has it agreed to serve Vicinity under a special rate moving forward. As a result, these allegedly adequate substitutes for the current contract, are short-lived. Moreover, under PGW's view of the world, the Commission would lose the opportunity to even consider modifying the existing contract if it is allowed to expire. PGW consistently claims that it can provide rates that are comparable, but it fails to acknowledge the value of the Contract. The fact is temporary rates or contracts are not a substitute for a revised contract that already contains the needed terms and conditions. Clearly the Commission would need to examine the contract to ensure that the rates were just and reasonable, which is what Vicinity proposed, but extending the contract would also retain Vicinity's contract customer status, which is appropriate, as argued in its Main and Reply Briefs, for a customer with Vicinity's unique characteristics. If the Commission does not act and stop the contract from expiring, Vicinity will be irreparably harmed as there clearly is no substitute for the contract service it now receives and desires to continue to receive. Moreover, the Commission will be deprived of the opportunity to consider whether and to what extent such relief is warranted. This loss due to the passage of time, is irreparable.

#### **4. The Requested Relief will not Injure the Public or PGW.**

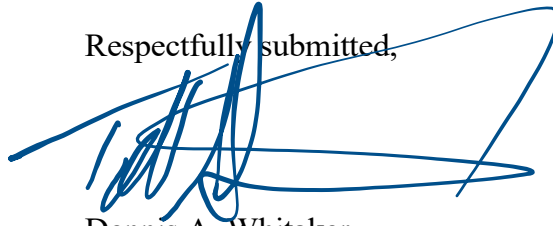
PGW contends that any continuation of the current Contract will harm the public because they will be required to continue to subsidize the rates paid by Vicinity. This argument is wrong for at least two reasons. First, the record is clear that it is Vicinity that has been subsidizing PGW customers, rather than the other way around. Second, both PGW and Vicinity have agreed that any relief provided by the Commission in the form of adjusting rates to be paid by Vicinity, will be retroactive to January 1, 2023. There is no harm. PGW's counsel also admitted that PGW does not believe that the Commission can determine in this emergency proceeding, that it is able to, and should extend the contract to allow themselves the opportunity to consider permanent modifications to the contract as requested by Vicinity. PGW believes that such a decision would compel the Commission to prejudge the merits. Whether the Commission can stay the expiration of a contract under its Regulations and Section 508, to preserve that status quo, is not the same as determining whether the Commission can or should make changes to a contract that has served well or allow that contract to continue to provide the basis of the relationship between Vicinity and PGW. The Commission can and has been able to make such decisions impartially and there is no reason it cannot do so here.

## **II. Conclusion**

PGW's misdirection that it is not party to the contract with Vicinity and that it, therefore, cannot extend the Contract, should be ignored. PGW is clearly the entity that has carried out terms of the contract for the past 25 years and is and will be the entity providing service going forward. PGW's desire to undercut the Commission's ability to modify the existing contract under section 508 should be denied. PGW's argument that it is willing to modify and extend a tariff, but not extend the underlying contract, provides no comfort that it will issue a new contract at the conclusion of the Complaint proceeding that addresses the complex components of the existing contract. Although having a new contract negotiated between Vicinity and PGW was Vicinity's hope initially, none of the actions of PGW demonstrate that it will willingly enter into a new contract, and it argues that the Commission lacks the authority to make such a directive. The

current contract must be temporarily extended through this emergency relief to preserve the Commission's ability under section 508 to order such contract modifications as necessary.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'Dennis A. Whitaker', written over the text 'Respectfully submitted,'.

Dennis A. Whitaker  
Kevin J. McKeon  
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*Counsel for Grays Ferry Cogeneration  
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TSS/jld

cc: Rosemary Chiavetta, Secretary (via electronic filing)  
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Per Certificate of Service

**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)

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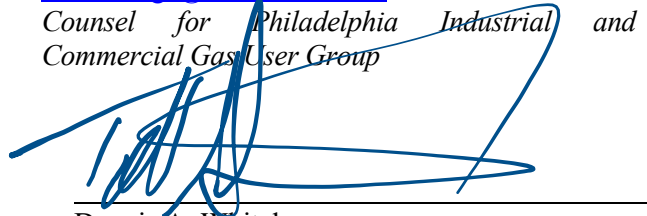
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