**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Grays Ferry Cogeneration Partnership and :

Vicinity Energy Philadelphia, Inc. :

v. : C-2021-3029259

:

Philadelphia Gas Works :

**ORDER**

**DENYING PETITION FOR ISSUANCE OF AN INTERIM EMERGENCY ORDER**

**ON AN EXPEDITED BASIS FILED PURSUANT TO SECTIONS 3.6, 3.6a and 3.7 OF THE COMMISSION’S REGULATIONS AND CERTIFYING MATERIAL QUESTION**

INTRODUCTION

This Order denies a petition for issuance of an interim emergency order on an expedited basis because the Petitioners, Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc., have failed to demonstrate that the need for relief is immediate, and that the injury would be irreparable if relief is not granted. Consequently, the requirements for the Petition to be granted as set forth in Section 3.6 of the Commission’s regulations are not satisfied. This order also certifies a material question to the Commission pursuant to Section 5.305 of the Commission’s regulations.

HISTORY OF THE PROCEEDING

On October 22, 2021, Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc. (Grays Ferry/Vicinity or GFCP/VEPI or Petitioners) filed a formal Complaint against Philadelphia Gas Works (PGW) pursuant to 66 Pa. C.S. § 701 and 52 Pa. Code § 5.21, *et seq.* (“Formal Complaint”). Petitioners allege that PGW is demanding unjust and unreasonable rates from it, that the demand to provide service under a variable rate is unreasonable, and that PGW is providing unreasonable and discriminatory services.

On November 22, 2021, PGW filed an Answer with New Matter to Formal Complaint and Preliminary Objections to the Complaint.

On November 18, 2021, the Office of Consumer Advocate (OCA) filed a Notice of Intervention and Public Statement. On December 6, 2021, the Office of Small Business Advocate (OSBA) filed a Notice of Intervention, Public Statement, and Verification. On December 7, 2021, the Bureau for Investigation and Enforcement (I&E) entered its appearance in this proceeding.

On December 7, 2022, an Initial Call-In Prehearing Conference was scheduled for Thursday, January 13, 2022 at 10:00 a.m.

Pursuant to a Prehearing Conference Order dated December 22, 2021, Administrative Law Judge Marta Guhl was assigned to develop an evidentiary record and Recommended Decision in this proceeding. In accordance with the Prehearing Conference Order, PGW, GFCP/VEPI, I&E, OCA, and OSBA submitted prehearing memoranda to the presiding officer on January 10, 2022. A Prehearing Conference was held on January 13, 2022. After the Prehearing Conference, the Parties engaged in a substantial amount of discovery.

In accordance with the procedural schedule agreed to by the parties in their prehearing memoranda, the parties exchanged direct, rebuttal, and surrebuttal testimony. On April 22, 2022, GFCP/VEPI submitted the Direct Testimony of James L. Crist. On

June 17, 2022, PGW submitted the rebuttal testimony and exhibits of John C. Zuk, Ryan E. Reeves, Florian Teme, Constance E. Heppenstall, Frank Lacey, and Ronald Carrier. Also on June 17, 2022, OCA submitted the Rebuttal Testimony and Exhibits of Jerome D. Mierzwa and OSBA submitted the Rebuttal Testimony and Exhibits of Robert D. Knecht.

On June 10, 2022, the Philadelphia Industrial and Commercial Gas Users Group (“PICGUG”) submitted a Late-Filed Petition to Intervene. GFCP/VEPI and PGW filed letters not objecting to PICGUG’s intervention on June 14, 2022 and June 15, 2022, respectively. The Petition to Intervene was granted at the evidentiary hearing on August 9, 2022.

On July 22, 2022, PGW submitted the Surrebuttal Testimony of Ryan E. Reeves, Florian Teme, Constance E. Heppenstall, and Frank Lacey. That same day, GFCP/VEPI submitted the Surrebuttal Testimony of James L. Crist, OCA submitted the Surrebuttal Testimony of Jerome D. Mierzwa, and OSBA submitted the Surrebuttal Testimony of Robert D. Knecht.

On July 29, 2022, PGW submitted the Further Surrebuttal Testimony of Ryan E. Reeves solely responding to a new issue raised for the first time in the Surrebuttal Testimony of OSBA witness Robert D. Knecht after obtaining consent from counsel for OSBA. GFCP/VEPI filed a Motion to Strike “Further Surrebuttal Testimony” of PGW on August 1, 2022 (“Motion to Strike”). PGW filed its Answer to GFCP/VEPI’s Motion to Strike on August 4, 2022. The ALJ denied the Motion to Strike at the evidentiary hearing but authorized GFCP/VEPI to submit rejoinder, which they did at the hearing through Mr. Crist.

On August 9, 2022, a full evidentiary hearing was held telephonically. During the hearing, GFCP/VEPI presented its testimony, including oral rejoinder to PGW’s Further Surrebuttal Testimony, and made its witnesses available for cross-examination by the other parties. PGW presented its witnesses’ various testimonies, and also made its witnesses available for cross-examination by the other parties. The testimony and accompanying exhibits (if any) of the witnesses for PGW, GFCP/VEPI, OCA, and OSBA were each entered into the record. Hearing Exhibits submitted by PGW were also admitted into the record.

I issued a Briefing Order dated August 15, 2022, which indicated that Main Briefs were due on September 20, 2022 and Reply Briefs were due on October 4, 2022. Main Briefs were filed by Grays Ferry/Vicinity, PGW, OCA, OSBA and PICGUG. Reply Briefs were filed by Grays Ferry/Vicinity, PGW, OCA and OSBA. I&E did not file any briefs in this matter and PICGUG did not file a Reply Brief.

On November 28, 2022, Petitioners filed the Petition for Interim Emergency Relief (Petition). In its Petition, Grays Ferry/Vicinity requests that the Commission extend the Contract at issue in the underlying case and preserve all of its terms and conditions until the Commission is able to issue a final order on the merits. The Petitioners indicate that the matter will not be able to be decided before the Commission can rule on the merits and no party will be harmed by a brief extension of its current contract with PGW, which expires on December 31, 2022, to allow the Commission to consider the matter and the use of Section 508. 66 Pa.C.S § 508 (Section 508).

On November 29, 2022, a Further Call-In Telephonic Hearing was scheduled for Tuesday, December 6, 2022, at 10:00 a.m in order to address the Petitioner for Interim Emergency Relief.

On December 5, 2022, PGW filed an Answer to the Petition

The emergency evidentiary hearing convened as scheduled on December 6, 2022. Counsel for Grays Ferry/Vicinity, PGW, I&E, OCA, OSBA, and PICGUG were all present. Grays Ferry/Vicinity presented the verified statement of James Crist, which was entered into the record. PGW presented the verified statement of John Zuk, which was entered into the record. Both Grays Ferry/Vicinity and PGW presented arguments regarding the Petition.

Grays Ferry/Vicinity and PGW filed letter briefs on December 7, 2022. The expedited transcript was filed with the Secretary’s Bureau on December 8, 2022. This Petition is now ripe for a decision.

LEGAL STANDARDS

Legal Standards Governing Emergency Relief

Section 3.6 of the Commission’s regulations allows a party to submit a petition

for interim emergency order during the course of a proceeding. 52 Pa. Code § 3.6(a). The petition shall be filed with the Secretary and served contemporaneously on the Chief Administrative Law Judge and on the parties. *Id.* To the extent practicable, a petition for an interim emergency order must be in the form of a petition as set for in Section 5.41 of the Commission’s regulations and must be supported by a verified statement of facts which establishes the existence of the need for emergency relief. 52 Pa. Code § 3.6(b).

The purpose of an interim emergency order is to grant or deny injunctive relief during the pendency of a proceeding. 52 Pa. Code § 3.1. “Emergency” is defined in the Commission’s Regulations as “[a] situation which presents a clear and present danger to life or property or which is uncontested and requires action prior to the next scheduled public meeting.” 52 Pa. Code § 3.1. However, the Commission has pointed out that “Commission determinations under Section 3.6 of our Regulations focus on the four elements required for interim emergency relief and do not typically address or require the presence of a clear or present danger.” *Birdsboro Kosher Farms Corp. v. Pa.-Am. Water Co*., P-2021-3026165 (Opinion and Order entered July 7, 2021) at 7. (*Birdsboro*) (citations omitted).

The four elements that govern the issuance of interim emergency order are set forth at 52 Pa. Code § 3.6. Section 3.6 requires that a petition for interim emergency relief be supported by a verified statement of facts that establishes the existence of the need for emergency relief, including facts to support 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.

(4) The relief requested is not injurious to the public interest.

52 Pa. Code § 3.6(b). The Commission may grant interim emergency relief only when all the foregoing elements exist. *Glade Park East Home Owners Ass’n v. Pub. Util. Comm’n*, 628 A.2d 468 (Pa. Cmwlth. 1993) (*Glade Park*).

The party seeking relief bears the burden of proving that the facts and circumstances meet all four of the requirements of 52 Pa. Code § 3.6(b). The burden of proof must be carried by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pub. Util. Comm’n*, 578 A.2d 600 (Pa. Cmwlth. 1990). That is, the petitioner’s evidence must be more convincing, by even the smallest amount, than that presented by the other party. *Se‑Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950).

Additionally, any finding of fact necessary to support the Commission’s decision must be based upon substantial evidence. *Mill v. Pub. Util. Comm’n*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transp. Corp. v. Pub. Util. Comm’n*, 623 A.2d 6 (Pa. Cmwlth. 1993). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and W. Ry. Co. v. Pub. Util. Comm’n*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Dept. of Pub. Welfare, White Haven Ctr.*, 480 A.2d 382 (Pa. Cmwlth. 1984).

Furthermore, the Commission’s regulations require that “[a]n interim emergency order may not be issued until the presiding officer holds a hearing on the merits of the petition. The hearing must be held within 10 days of the filing of the petition.” 52 Pa. Code § 3.6a. The presiding officer is required to issue an order granting or denying interim emergency relief within 15 days of the filing of the petition setting forth the findings required by 3.6(b). 52 Pa. Code § 3.7(a)-(b). An interim emergency order or an order denying interim emergency relief will be served as expeditiously as practicable on the parties. 52 Pa. Code § 3.7(c). The order following the hearing on a petition for interim emergency relief must include a brief description of the evidence presented and a grant or denial of the petition. 52 Pa. Code § 3.8(a).

The order granting or denying interim emergency relief is immediately effective upon issuance by the presiding officer and no stay is permitted. 52 Pa. Code § 3.10(a). When the presiding officer rules upon the petition for an interim emergency order, the presiding officer is also required to certify the question of the grant or denial of relief to the Commission as a material question in the form set forth in Section 5.305 of the Commission’s regulations and, thereafter, the parties and the Commission are to follow the procedures in Section 5.305, if applicable. 52 Pa. Code § 3.10(b) (*citing*, 52 Pa. Code § 5.305). The interim emergency order expires upon entry of the final Commission order. 52 Pa. Code § 3.11.

Relief Requested

Grays Ferry/Vicinity requests that the Commission extend the contract at issue in this case and preserve all of its terms and conditions util the Commission is able to issue a final order on the merits of this case. Specifically, Petitioners seek an interim order extending its contracts with PGW, which are set to expire on December 31, 2022, until such time as the Commission can rule on the merits of its pending complaint in this proceeding which seeks just and reasonable terms for service from PGW for the period commencing January 1, 2023. The Petitioners contend that interim relief is required to maintain the *status quo ante*.

Although this case is now fully briefed and pending decision, it is not possible for the Commission to issue a final order prior to the expiration of the contract based on the Commission’s current schedule of public meetings. The Petitioners assert that a brief extension of the contract until the Commission has the chance to rule is both needed and warranted.

DISCUSSION

1. Whether the Petitioner’s Right to Relief is Clear

The first requirement to receive interim emergency relief requires the Petitioners to demonstrate that its right to relief is clear. 52 Pa. Code § 3.6(b)(1). For the reasons discussed below, I find that the Petitioners have satisfied this requirement because this matter raises substantial legal questions, consistent with recent Commission decisions. *See, Birdsboro; Petition of Twin Lakes Utils., Inc*., Docket No. P-2020-3020914 (Opinion and Order entered Sept. 22, 2020) and cases cited therein.

The Commission has interpreted the first requirement as requiring only a determination that a petition raises “substantial legal questions,” rather than a determination of the merits of a controversy in order. *Birdsboro* at 8, citing *Core Commc’ns, Inc. v. Verizon Pa., Inc. and Verizon N. LLC*, No. P-2011-2253650 (Opinion and Order entered Sept., 23, 2011) (*Core*); *Level 3 Commc’ns, LLC v. Marianna & Scenery Hill Tele. Co.*, Docket No. C-20028114 (Opinion and Order entered Aug. 8, 2002) (*Level 3*); *T.W. Phillips Gas and Oil Co. v. The Peoples Nat. Gas Co.*, 492 A.2d 776 (Pa. Cmwlth. 1985) (*T.W. Phillips*). For example, in *Core*, the Commission held that the ALJ’s conclusion that this prong requires a finding that a petitioner will prevail on the underlying complaint is an “unreasonably strict” interpretation of Section 3.6(b). The Commission stated:

The basis for determining whether a petitioner has met this standard [a clear right to emergency relief] is whether the petitioner has raised “substantial legal questions.” *T.W. Phillips Gas and Oil v. Peoples Natural Gas*, *supra*. The inquiry into whether this standard has been met does not require determination of the merits of the underlying controversy.

As stated above, the ALJ based her conclusion on a finding that it is “wholly uncertain” whether Core will prevail in the underlying Complaint. In our view, this interpretation of the “right to relief” standard is unreasonably strict. The outcome of litigation by its nature is nearly always uncertain. Requiring a petitioner seeking emergency relief to demonstrate, with certainty, that litigation will be resolved in its favor would be an impossible burden to meet.

*Core* at 12 (record citation omitted).

Grays Ferry/Vicinity Position

The Petitioners indicate that the right to relief is clear and that it seeks reformation and extension of the contract under Section 508 of the Public Utility Code, but the Commission, through no fault of it, will be unable to consider and award the relief Vicinity seeks if the contract is permitted to expire on December 31, 2022. The Petitioners assert that the Commission has the power to use Section 508 to extend the contract for the brief period needed until the Commission enters a final order in this case, so that the merits for relief under Section 508 can be considered. Granting the relief requested here will preserve both the Commission’s power to use Section 508 and its right to seek that relief. *Grays Ferry/Vicinity Petition at 4.*

Further, the Petitioners indicate that the contract, which obligates PGW to provide public utility service, consists of the agreement between the Philadelphia Authority for Industrial Development (PAID) and it, and one between PAID and the City, which wholly owns PGW and assigns all operational responsibility to PGW. The Petitioners note that the contract obligates the City, operating through PGW, to provide services to it. Moreover, PGW admits that the contract was addressed in its restructuring filing and was authorized to continue in force.[[1]](#footnote-1) The Petitioners assert that 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 it and “a City Natural Gas Distribution Operation.” The approval, which by statute, requires it to adhere to the terms of the contract, could not have been given if PGW was not obligated by the contract *Grays Ferry/Vicinity Letter Brief at 3.*

Moreover, the Petitioners contend that 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. The Petitioners state that the language in the contract states that the City, which owns PAID, is acting through PGW. PGW, by providing service and receiving payment from it 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 Petitioners assert that the Commission can require it to do so. *Grays Ferry/Vicinity Letter Brief at 4.*

Lastly, the Petitioners argue that PGW also is a third-party beneficiary to the contract. While PGW is not a signatory, it is referenced throughout the contract. In this instance, the Petitioners maintain that while PGW is not a party or signatory to the contract, it is still receiving tangible benefits under same. First, GFCP/VEPI is sending payments directly to PGW and PGW is invoicing it. 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. *Grays Ferry/Vicinity Letter Brief at 4.*

PGW Position

PGW argues that GFCP/VEPI have failed to raise “substantial” legal questions. First, PGW maintains that GFCP/VEPI’s characterization of Section 508 is flawed. The Commission has no greater powers under Section 508 than it does under the reminder of the Public Utility Code, particularly Chapters 13 and 15, to shape a fair and adequate remedy in this case. The Commission does not have “equitable” powers as GFCP/VEPI appear to claim. As a creation of the General Assembly, the Commission only has the power and authority granted to it by the General Assembly contained in the Public Utility Code. *PGW Answer to Petition at 13-14.*

PGW states that the termination of these agreements is not prejudicial in any way to the establishment of just and reasonable rates and terms for PGW service to GFCP/VEPI – either temporarily or permanently – pursuant to its tariff. Indeed, tariffed rates and terms of service are the only way in which a public utility can provide service. PGW cannot provide service merely via a “contract.” But there is no lack of remedy to GFCP/VEPI, or any of the parties for that matter, under the service and rate setting provisions of the Code. The Commission’s powers are broad and inclusive.[[2]](#footnote-2) *PGW Answer to Petition at 14.*

Further, PGW asserts that it was not and is not a party to any of the 1996 Contracts with GFCP/VEPI. The 1996 Contracts that GFCP/VEPI insist be “extended” are actually between GFCP/VEPI and PAID, an industrial development authority.[[3]](#footnote-3) PGW agreed to honor the service terms of those contracts by incorporating them by reference into its Tariff via Rate GTS-F. However, PGW, as a non-party, has no contractual capacity to extend the 1996 Contracts. *PGW Answer to Petition at 14.*

Moreover, PGW argues that the Commission lacks *in personam* jurisdiction over GFCP/VEPI’s counterparty, PAID, and PAID’s counterparty, the City, to force an extension of the agreements beyond the agreed to termination date of the 1996 Contracts. Neither PAID nor the City are utilities or customers whose rights are justiciable under the Public Utility Code. PAID and the City are not parties to this Complaint case. Further, granting an extension of the 1996 Contracts in the absence of PAID and the City would deny them their due process rights to be heard on matters of substance. Therefore, PGW maintains that it would not have the legal ability to comply with a Commission order to “extend” the existing 1996 Contracts. *PGW Answer to Petition at 15.*

Moreover, PGW states that even if it were possible for it to extend the contract, the Commission has found in the past that such an order will only be considered when a utility has abused its discretion and it is necessary to interfere with their managerial discretion in order to insure that customers receive adequate service.[[4]](#footnote-4) As a general matter, the courts and the Commission have ruled that entering into a contract is a decision of utility management, that “utility management is in the hands of the utility and the Commission may not interfere with lawful management decisions . . . unless, on the basis of record evidence, it finds an abuse of the utility's managerial discretion.”[[5]](#footnote-5) PGW indicates that GFCP/VEPI have not even argued that any of those conditions exist here. *PGW Answer to Petition at 15.*

In this matter, PGW contends that the Commission does not have authority under Section 508 to “revise” the existing contracts to unilaterally extend their terms. Most importantly, both the Commission and the courts have held that the Commission may only use its Section 508 power to revise or abrogate an *existing* contract. The contract that GFCP/VEPI want to have “extended” will not exist during the time of the extension. Also, Section 508 limits the Commission’s use of this authority to circumstances where modification is in the public interest and the “general well-being.”[[6]](#footnote-6) The Petitioner has failed to explain how extending a twenty-five year old set of contracts would be in the public interest or benefit the “general well-being.” The only entities that would possibly benefit from this demand are GFCP and VEPI. *PGW Answer to Petition at 16.*

Determination

Under the standard for this prong, it is clear that there are substantial legal questions in this matter. Both parties provided extensive legal arguments regarding this case and this included whether Section 508 of the Public Utility Code applies, how new rates should be determined in this matter, and whether PGW is providing adequate and reasonable service to the Petitioners.

As a result, Petitioners have met its burden to satisfy the first element to have the Petition granted.

1. Whether the Need for Relief is Immediate

The second requirement to receive interim emergency relief requires the Petitioner to demonstrate the need for relief is immediate. 52 Pa.Code § 3.6(b)(2). For the reasons discussed below, I find that Petitioner has not satisfied this requirement.

The need for relief is not immediate where the complained of events are not imminent, or likely to occur. *Application of Fink Gas Company for Approval of the Abandonment of Service by Fink Gas Company to 22 Customers Located in Armstrong County, Pennsylvania, and the Abandonment by Fink Gas Company of all Natural Gas Services and Natural Gas Distribution Services*, Docket No. A-2015-2466653, 2015 Pa. PUC LEXIS 408, (Order entered Aug. 20, 2015) (*Fink)*; *see also* *Zebra v. School Dist.*,296 A.2d 748, 752 (Pa. 1972).

Grays Ferry/Vicinity Position

The Petitioners in this instance argue that 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 the Petitioners’ fault, which it insists 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. *Grays Ferry/Vicinity Letter Brief at 4-5.*

Further, the Petitioner asserts that Section 508 provides that any order modifying the contract cannot take effect until 30 days after it is issued. PGW citestoa 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.[[7]](#footnote-7) 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.[[8]](#footnote-8) 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. The Petitioners contend that an order temporarily extending or otherwise modifying the contract, under the terms of Section 508, which would temporarily modify the contract 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. The Petitioners maintain that 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.  *Grays Ferry/Vicinity Letter Brief at 5.*

PGW Position

PGW argues that the contract expiration will have no impact on the outcome of this case, except by creating the need to design new rates under the Public Utility Code. Further, PGW notes that as a third party it should not be forced to adopt the 1996 Contracts and that they be extended, was first raised by GFCP/VEPI at the September briefing stage. No witness testified to this result. It is untrue that “[GFCP/VEPI] filed the complaint seeking reformation of the contract...”[[9]](#footnote-9) As noted above, the Complaint invoked the standards of Chapter 13, seeking just and reasonable rates, and requested a new contract with PGW*.* *PGW Answer to Petition at 17-18.*

PGW maintains that GFCP/VEPI seek to have an emergency declared over a legal position that was not part of any pleading or record evidence and only sought the same as an afterthought in its brief. PGW states that a contract extension is unnecessary and irrelevant to designing new rates. The Commission will determine rates under the Public Utility Code, as requested in the complaint, and consider all of the parties’ arguments, including those of GFCP/VEPI seeking a continuation of the $0.08 per Mcf rate. *PGW Answer to Petition at 18.*

PGW also contends that there is no “immediate need” for relief. PGW notes that the Parties agreed to the litigation schedule, in this case and to the extent that GFCP/VEPI have now realized that it is unlikely that the Commission will rule on its latest contracts theory of the case before contract termination is a problem of their own making. GFCP/VEPI could have asked for an expedited hearing or filed a request for that relief at the same time the Complaint was filed. *PGW Answer to Petition at 18.*

Further, PGW states that it has demonstrated that there is no service emergency and that there are numerous alternatives to ensure that GFCP/VEPI continue to receive service and pay just and reasonable rates during the Gap Period. PGW has offered two solutions. Both would continue to apply “all the rates, terms and conditions of service under which PGW currently provides service to Vicinity and Grays Ferry.” GFCP/VEPI have rejected both of these solutions, but they remain open and available to them. PGW indicates that there is no way that it will fail to meet its obligations under Section 1501 of the Code and interrupt existing services during the Gap Period.[[10]](#footnote-10) PGW’s Verified Statement expressly states that, under all circumstances, service will continue under the same rates, terms and conditions. *PGW Answer to Petition at 19.*

Determination

I agree with PGW’s position in this matter. There is no immediate need for relief in this matter. PGW has indicated in its Verified Statement that it will continue service to the Petitioners under the same terms and conditions of service that the Petitioners are currently receiving and will not interrupt service. The Petitioners will still have avenues available to it to grant relief that is required in the underlying matter.

As a result, Petitioners have not met its burden to satisfy the second element to have his Petition granted.

1. Whether the Injury Would be Irreparable if Relief is not Granted

The third requirement to receive interim emergency relief requires the Petitioner to show that the injury would be irreparable if relief is not granted. 52 Pa. Code § 3.6(b)(3). For the reasons discussed below, I find that Petitioner has not satisfied this requirement.

In determining whether an injury is irreparable, the Commission considers “whether the harm can be reversed if the request for emergency relief is not granted.” *Fink,* 2015 WL 5011629, at \*9 (Pa. P.U.C. Aug. 20, 2015).

Grays Ferry/Vicinity Position

Grays Ferry/Vicinity argue that PGW has not conceded its argument that it cannot be required to provide service to Vicinity under a contract, nor has it agreed to serve Vicinity under a special rate moving forward. As a result, Grays Ferry/Vicinity assert these substitutes for the current contract, are short-lived. Moreover, Grays Ferry/Vicinity contends the Commission would lose the opportunity to even consider modifying the existing contract if it is allowed to expire. Grays Ferry/Vicinity maintains that 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 Grays Ferry/Vicinity proposed, but extending the contract would also retain Grays Ferry/Vicinity’s contract customer status, which is appropriate, for a customer with its unique characteristics. If the Commission does not act and stop the contract from expiring, Grays Ferry/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. *Grays Ferry/Vicinity Letter Brief at 5-6.*

PGW Position

PGW argues that the fact that the 1996 Contracts will lapse according to their express, agreed-upon-terms causes no injury, let alone irreparable injury. PGW maintains the Contracts need not be extended in order for the Petitioners to argue that it should continue to receive their existing rates, terms and conditions on a permanent basis as well. *PGW Answer to Petition at 21.*

As set forth in the Verified Statement of John C. Zuk :

All of the services that GFCP/VEPI have claimed are in the 1996 Contracts and that are important to their operations can and will be provided during the Gap Period. Moreover, all of these same services have been addressed in the Complaint case and the Commission has the power to order them without extending the terminating 1996 Contracts.[[11]](#footnote-11)

PGW asserts that the Petitioners have sought to create some undefined term and condition contained in the 1996 Contacts that was not raised previously and which allegedly will be lost if the contracts are not extended. PGW states that if any such terms exist, this Petition is the first time such claims have been made in this case, and the record is devoid of any discussion about these terms. At this late stage in the proceeding, the relief sought by GFCP/VEPI should not be a mystery. *PGW Answer to Petition at 22.*

Determination

Under this prong of the criteria, the Petitioners have not established that the harm will be irreparable if relief is not granted in this case. I find PGW’s verified statement to be credible in that it has promised to provide ongoing service to the Petitioner under the same terms and conditions as are currently in effect until the Commission has the opportunity to rule on the merits of the case. The parties have agreed that any changes to the rate will be applied retroactively to January 1, 2023. There is nothing to indicate in the record that the Petitioners will suffer a specific irreparable harm if relief is not granted at this time.

As a result, Petitioners have not met its burden to satisfy the third element to have the Petition granted.

1. Whether the Relief Requested is not Injurious to the Public Interest

The final requirement to receive interim emergency relief requires the Petitioner to demonstrate that the relief requested is not injurious to the public interest. 52 Pa. Code § 3.6(b)(4). For the reasons discussed below, I find that the Petitioner has satisfied this requirement.

Grays Ferry/Vicinity Position

Grays Ferry/Vicinity states that it has been subsidizing PGW customers and therefore, the public would not be injured by the extension of the contract. Grays Ferry/Vicinity also argues that PGW and it 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 and as such there is no harm. Grays Ferry/Vicinity indicates whether the Commission can stay the expiration of a contract under its Regulations and Section 508, 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 it and PGW. Grays Ferry/Vicinity asserts that the Commission can and has been able to make such decisions impartially and there is no reason it cannot do so here. *Grays Ferry/Vicinity Letter Brief at 6.*

Finally, it must be shown that granting an injunction “will not adversely affect the public interest.” *Summit Towne Centre, Inc.*, 828 A.2d at 1001. Granting the relief requested – a brief extension of the contract to allow the Commission to consider all available remedies -- will not injure the public. The relief requested is a stop gap measure that is essentially procedural in nature – it will maintain the *status quo* *ante* for a brief period so that the Commission has the opportunity to consider the issues raised on their merits and devise whatever remedies – including remedies under Section 508 – the Commission deems necessary or appropriate. *Grays Ferry/Vicinity Petition at 6.*

PGW Position

PGW asserts that extending the 1996 Contracts will injure the public interest, as the only interest advanced is that of Grays Ferry/Vicinity. PGW argues that granting the relief requested by the Petition would be prejudicial to the Parties to the case. By extending the agreements, it would mean that the presiding officer is rejecting PGW’s arguments in brief that the Commission has no power to do so before actually considering the legal merits. PGW contends that this would then create the precedent that the Commission may continue to do so. Rather than take the time to fully consider all arguments, PGW maintains that Grays Ferry/Vicinity are attempting to force a decision on the disputed factual and legal issues under expedited circumstances. PGW, as well as the parties to the contracts, PAID and the City, are prejudiced because they are denied their due process rights to be heard on matters of substance. *PGW Answer to Petition at 22.*

Determination

I agree with Grays Ferry/Vicinity that there would be no harm to the public interest. The extension of the contracts at issue in this matter would not injure the public. There is nothing in the record to indicate that the public interest would be harmed with a brief extension of the contract.

As a result, the Petitioners have met its burden to satisfy the fourth element for granting the Petition.

CONCLUSION

The Petitioners have failed to demonstrate by a preponderance of the evidence that it is entitled to the requested interim emergency relief, pursuant to 52 Pa. Code § 3.6(b). Record evidence in this proceeding demonstrates that the Petitioners’ right to relief is clear and that the relief requested is not injurious to the public interest but the Petitioners do not demonstrate that the need for relief is immediate, and that the injury would be irreparable if relief is not granted. Accordingly, I will deny Petitioners’ request for interim emergency relief.

Pursuant to the Commission’s Rules of Practice and Procedure, this Order shall be immediately certified to this Commission for consideration and disposition in accordance with 52 Pa. Code § 5.305, pertaining to interlocutory review of a material question submitted by a presiding officer.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Petition for Interim Emergency Relief, filed on November 28, 2022, by Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc.is denied; and
2. That the denial of relief by interim emergency order in the proceeding at Docket No. C-2021-3029259 is certified to the Commission as the following material question requiring interlocutory review pursuant to Section 5.305 of the Commission’s regulations, 52 Pa. Code § 5.305:

Whether the presiding Administrative Law Judge correctly denied the

expedited petition for interim emergency relief requesting that Philadelphia Gas Works be directed to continue to provide service to Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc. under the terms of the 1996 contracts after their expiration on December 31, 2022.

Suggested answer: yes.

Date: December 12, 2022 /s/

Marta Guhl

Administrative Law Judge

**C-2021-3029259 - GRAYS FERRY COGENERATION PARTNERSHIP AND VICINITY ENERGY PHILADELPHIA IMC v. PHILADELPHIA GAS WORKS**

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1. Verified Statement of John C. Zuk, page 2. [↑](#footnote-ref-1)
2. The Commission has broad authority under the Public Utility Code to ensure that rates are just and reasonable and not unduly discriminatory. 66 Pa. C.S. §§ 1301, 1304. [↑](#footnote-ref-2)
3. *See* PGW St. 1R at 12; *see also* PGW Main Brief at 2. [↑](#footnote-ref-3)
4. *See* PGW Reply Brief at 22-23. [↑](#footnote-ref-4)
5. *Nat’l Fuel Gas Distrib. Corp. v. Pa. PUC*, 464 A.2d 546, 559 (Pa. Commw. Ct. 1983); *see also ALLTEL Pennsylvania, Inc. v. West Penn Power Company*, Docket No. C-00992532, 2000 Pa. PUC LEXIS 88 (Initial Decision dated Sept. 26, 2000), *adopted as modified by* 2001 Pa. PUC LEXIS 27 (Opinion and Order entered July 26, 2001). [↑](#footnote-ref-5)
6. *Friends of the Atglen- Susquehanna Trail Inc. v. Pa. PUC*, 717 A.2d 581, 588 (Pa. Commw. Ct. 1998) (finding that, under 66 Pa. C.S. § 508, the Commission has the power “to reform and revise contracts of public utilities upon a fair, reasonable and equitable basis when the Commission determines after notice and hearing that terms of such obligations are adverse to the public interest and general well-being.”). [↑](#footnote-ref-6)
7. PGW Answer to Petition, pg. 17, FN 40. [↑](#footnote-ref-7)
8. *Re West Penn Power Co*, 71 Pa. P.U.C. 60 (1989) [↑](#footnote-ref-8)
9. GFCP/VEPI Petition at 4 (“Although Vicinity filed the complaint seeking reformation of the contract more than a year ago, at this juncture it is not possible for a final Commission decision to be rendered prior to the contract’s expiration at the end of 2022.”). [↑](#footnote-ref-9)
10. GFCP/VEPI Emergency Petition, Verified Statement ofRobert L. Arendell dated November 23, 2022 at 3 (“Vicinity has agreed that any change in rates eventually ordered by the Commission should be effective as of January 1, 2023, thereby assuring that PGW and its other ratepayers will be made whole to the extent an increase in the existing rate is ordered.”). [↑](#footnote-ref-10)
11. Verified Statement of John C. Zuk at 4. [↑](#footnote-ref-11)