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December 13, 2022

**VIA ELECTRONIC FILING**

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

RE: Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc. v. Philadelphia Gas Works; Docket No. C-2021-3029259; **BRIEF ON INTERLOCUTORY REVIEW FROM DENIAL OF AN INTERIM EMERGENCY ORDER**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is the Brief on Interlocutory Review from Denial of an Interim Emergency Order of Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc. in the above-captioned proceeding.

This Brief is filed in response to an Order Denying Vicinity's Petition for Interim Emergency Relief and Certifying that Denial as a Material Question for the Commission's review. The Order was disseminated by the Presiding Administrative Law Judge on Monday, December 12, 2022.

**Vicinity requests that the Commission Expedite its review of this matter and that it address the request for Emergency Relief at its Next Public Meeting scheduled for December 22, 2022, as a Carry-In item. To that end, Vicinity also is requesting that other parties be required to submit responsive briefs no later than December 15, 2022. If the Commission is unable to address this matter at its December 22, 2022, Public Meeting, Vicinity alternatively requests that the Commission address this matter via notational voting no later than December 31, 2022.**

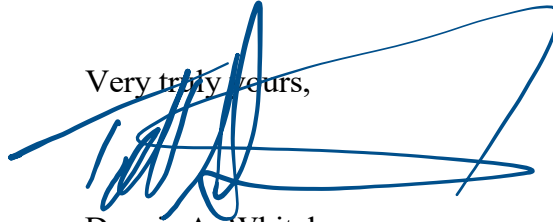
**Vicinity informed all parties to the proceeding of its intention to request expedited treatment, by email sent at 9:15 am on December 13, 2022.**

Copies of this Brief have been served in accordance with the attached Certificate of Service.

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
December 13, 2022  
Page 2

Thank you for your attention to this matter. If you have any questions related to this filing, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in blue ink, appearing to be 'Dennis A. Whitaker', written over the text 'Very truly yours,'.

Dennis A. Whitaker  
Kevin J. McKeon  
Todd S. Stewart  
*Counsel for Grays Ferry Cogeneration  
Partnership and Vicinity Energy  
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TSS/jld  
Enclosure

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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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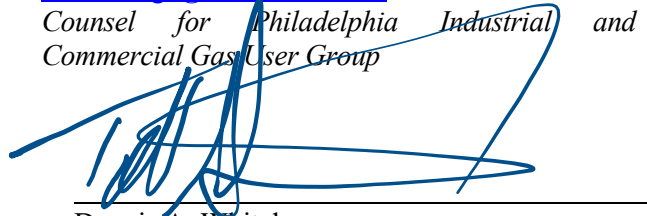
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Dennis A. Whitaker  
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Todd S. Stewart

DATED: December 13, 2022

**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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**BRIEF ON INTERLOCUTORY REVIEW  
FROM DENIAL OF AN INTERIM EMERGENCY ORDER  
OF GRAYS FERRY COGENERATION PARTNERSHIP  
AND VICINITY ENERGY PHILADELPHIA, INC.**

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

DATED: December 13, 2022

## **I. REQUEST FOR RELIEF**

Grays Ferry Cogeneration Partnership LLC (“Grays Ferry”) and Vicinity Energy Philadelphia, Inc. (“VEPP”) (collectively, “Vicinity”) seek an interim emergency order in this contract and service dispute with Philadelphia Gas Works (“PGW”) to prevent the underlying Contract from expiring on December 31, 2022, so as to maintain the status quo and keep all remedial options open until the Commission is able to decide Vicinity’s Complaint now pending before Administrative Law Judge Marta Guhl.<sup>1</sup> If the Contract expires, the Commission will lose the ability to exercise its power under Section 508 of the Public Utility Code and Vicinity will be irreparably harmed. If the Commission grants the requested interim relief and extends the Contract until the Commission is able to act on the merits of the Complaint, no one will be harmed.

## **II. REQUEST FOR EXPEDITED PROCEDURE<sup>2</sup>**

Vicinity requests the following procedure be applied:

- 1) that the Commission require PGW to file a responsive brief no later than December 15, 2022;
- 2) that the Commission consider this matter during its December 22, 2022, Public Meeting, or,
- 3) in the alternative, that the Commission decide this issue no later than December 31, 2022, through notational voting.

## **III. SUMMARY**

Vicinity receives natural gas delivery and other services from PGW under a contract that was executed in 1995 and which the Commission grandfathered as part of its approval of PGW’s

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<sup>1</sup> This is not a request for the Commission to consider whether Section 508 is or is not a viable option for the Commission to use in considering the Complaint currently pending before Judge Guhl.

<sup>2</sup> Vicinity contacted Counsel for PGW by email early on December 13, 2022, to inform PGW of its intention to submit this brief and to request the expedited treatment requested herein.

restructuring proceeding in 2003. The Contract will expire December 31, 2022. After attempts to negotiate with PGW proved fruitless and reached impasse, Vicinity filed a Complaint with the Commission at this docket on October 22, 2021, seeking relief in the form of a continuation of just and reasonable terms and conditions of service, including through the Commission's exercise of its powers under Section 508 of the Public Utility Code, 66 Pa. C.S. § 508, to modify the existing Contract by extending its term. Absent interim relief extending the Contract until the Commission has the opportunity to consider the appropriate remedy, the Contract will expire on December 31, 2022, and the Commission will lose the ability to use its most valuable tool -- Section 508.

On November 29, 2022, Vicinity filed a Petition for Interim Emergency Relief in the ongoing Complaint proceeding, seeking to extend the Contract with PGW for the short period of time required to maintain the Contract in effect until the Commission is able to decide whether a long-term remedy under Section 508 is appropriate.

On December 12, 2022, Vicinity was served with a copy of the Order of Presiding Administrative Law Judge Marta Guhl ("Order") denying the Petition for Interim Emergency Relief. Importantly, while ALJ Guhl found that Vicinity's right to relief is clear, and that the relief requested will not harm the public or PGW, she nonetheless denied the Petition on the grounds that the need for relief is not immediate, and that the harm Vicinity will suffer is not irreparable. But the need for relief is plainly immediate: the Contract will expire December 31, 2022, absent an order entered on or before that date that grants a brief interim contract extension so that the Commission can consider the full range of remedial options. In allowing the contract to expire, the Order fails to maintain the status quo that existed when the litigation began -- Vicinity being served under a contract, not simply a generic tariff.

Likewise, the ALJ erroneously held that the loss of Section 508 as a tool for the Commission to address the current contract dispute will not constitute irreparable harm. Vicinity has requested that the Commission consider the Contract under Section 508, which provides the Commission with the authority to modify and/or extend the Contract, and the loss of that consideration is irreplaceable and thus irreparable. There is no other section in the Public Utility Code that allows the Commission to address or reform contracts for service. Moreover, PGW maintains that the Commission lacks the authority to require PGW to serve Vicinity under a contract in the first instance. In short, allowing the Contract to expire, which is what ALJ Guhl's Order will do absent Commission intervention, means the Commission will lose the ability to provide a complete remedy in this matter, and the status quo will not be maintained.

#### **IV. BACKGROUND**

The Contract at issue in this proceeding was negotiated as an alternative to Vicinity's 1995 plan to build its own pipeline to deliver gas over the approximate four-mile distance from the Texas Eastern Transmission Company's ("TETCO") Philadelphia Lateral to Grays Ferry and VEPI's facilities in south Philadelphia. The FERC had already approved Vicinity's bypass of PGW. The Contract provides a number of services not typically found in a gas supply contract and is unique.

As the Contract was reaching its end, Vicinity sought to negotiate a new contract with PGW, but by October 2021, it became obvious that a new contract with reasonable terms and conditions was impossible without the intervention of the Pennsylvania Public Utility Commission. Vicinity filed the Complaint on October 22, 2021. That Complaint proceeding has not yet produced a Recommended Decision, even though it was filed more than 14 months ago, so there is no possibility that the Commission will reach the merits before the end of this year when

the Contract expires. On November 28, 2022, Vicinity sought interim emergency relief under 52 Pa. Code §§ 3.6.-3.12, requesting that the Commission preserve the Contract, and thus the status quo, until the Commission can consider whether to use Section 508 to modify and/ or extend the Contract as the appropriate remedy.

**A. The Order Correctly Found that Vicinity’s Right to Relief is Clear.**

The Order finds that Vicinity has established a clear right to relief. That is, Vicinity has raised a substantial legal question, which is all that is required to establish that the right to relief is clear.<sup>3</sup> The Order, however, does not materially address the arguments made by the parties with regard to the applicability of Section 508, thus leaving any consideration of the merits of this matter to the Commission. Without Commission action now to preserve its ability to reach a decision on the need for Section 508 relief, however, that ability will be lost.

**B. The Order Incorrectly Found that the Need for Relief is not Immediate.**

Despite acknowledging that Vicinity has raised substantial legal questions regarding the applicability of Section 508, the Order does not find that the need for relief is immediate. These two conclusions are contradictory to the extent that the substantial legal arguments that the ALJ already found to exist will evaporate when, under the ALJ’s Order, the Contract is allowed to expire on December 31, 2022. Expiration of the contract means expiration of the substantial legal arguments. The basis of the Order’s erroneous conclusion that the need for relief is not immediate

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<sup>3</sup> *Birdsboro Kosher Farms Corp v. Pa. American Water Co.*, Docket No. P-2021-3026165 (Opinion and Order entered July 7, 2021)(*eligibility for emergency relief does not include the presence of a clear or present danger*); *Petition of Twin Lakes Utils., Inc.*, Docket No. P-2020-3020914 (Opinion and Order entered Sept. 22, 2020) 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*) (meeting the clear right to relief standard does not require petitioner to demonstrate with certainty that litigation will be resolved in its favor, which would be an impossible burden); *Level 3 Commc’ns, LLC v. Marianna & Scenery Hill Tele. Co.*, Docket No. C-20028114 (Opinion and Order entered Aug. 8, 2002) (*Level 3*) (the question is whether the claim raises substantial legal questions); *T.W. Phillips Gas and Oil Co. v. The Peoples Nat. Gas Co.*, 492 A.2d 776 (Pa. Cmwlth. 1985) (*T.W. Phillips*) (if the claim raises substantial legal questions the right to relief is clear).



is reliance on PGW's argument that it has offered to provide service temporarily under a tariffed rate class or contract, thus ensuring that service to Vicinity will continue. Make no mistake, however, a temporary contract or tariffed rate that is in effect until the Commission reaches a conclusion in this matter is not the same as being served under a long term contract that provides rate certainty for Vicinity, while also providing substantial incremental revenue for PGW. It is the imminent loss of the ability to continue to be served under the Contract and the deprivation of the Commission's ability to require it under Section 508 that makes the need for the modest interim relief here requested immediate. The Commission's Section 508 authority will expire with the Contract on December 31. The clock is ticking, and the need for relief could hardly be more immediate.

**C. Vicinity's Injury, Absent the Relief Sought, will be Irreparable.**

PGW argues that Vicinity will not suffer from the expiration of the Contract because all of the services that are currently provided can continue to be provided. PGW suggests that the Petition for Interim Emergency Relief is the first time the issue of a contract extension was raised, and that there is no discussion of these terms in the record. The contention is incorrect. Vicinity raised the issue of the relief of a revised contract in Mr. Crist's Direct Testimony: "PGW should be directed to develop and execute a contract to continue the service to Grays Ferry for the next 25-year period." (St. JC1, pg. 34). To the extent the ALJ relied on PGW's representations, that reliance is gravely misplaced. Moreover, even if it were true that the record is devoid of any discussion on the need to preserve the Contract in order to preserve the Commission's ability to consider remedies that are available only under Section 508 (it is not true), the Commission would nonetheless have the inherent power to use Section 508 to fashion the appropriate remedy. No other provision in the Public Utility Code authorizes the Commission to modify contracts of public

utilities. Without a brief extension of the Contract beyond December 31, 2022, to allow time for the Commission to consider the matter and issue a final order, however, the Commission will lose the ability to use Section 508. That loss will be irreparable, foreclosing the Commission's ability to act under Section 508, and thereby depriving Vicinity of any opportunity to receive the remedy it seeks.

**D. The Order Correctly Found that Granting Relief will not Injure PGW or the Public.**

The Order finds that there would be no harm to the public interest and that the extension of the contracts at issue in this matter would not injure the public. The Order clearly stated that there is nothing in the record to indicate that the public interest would be harmed with a brief extension of the contract.

PGW contends that it will be injured if the Commission grants an extension because such an extension would "prejudge" the applicability of Section 508 to this proceeding, thus harming PGW. But there would be no prejudgment, and no harm to PGW in granting the limited interim relief here requested. Granting the requested relief merely would preserve the status quo until the Commission can decide whether to use Section 508 to grant the relief Vicinity is requesting on the merits – i.e., a continuation of the Contract and its terms and conditions of service with whatever just and reasonable modifications the Commission deems appropriate based on the record in this case. The only "harm" to PGW is that it will be thwarted in its effort to deprive the Commission of the ability to fully and fairly consider the relief requested in Vicinity's underlying Complaint using all of the powers the Commission enjoys under the Public Utility Code, including the powers conferred under Section 508. This is not cognizable harm; PGW has no right to gain advantage by running out the clock in an effort to deprive the Commission of power and Vicinity of a remedy.

Moreover, extension of the Contract for a brief period to maintain the status quo will not harm the public, as the ALJ correctly found. To the extent the Commission decides to increase the rates for service to Vicinity, any changes will be applied retroactively to January 1, 2023; PGW's other customers will not be affected in any way by a decision to grant the modest interim relief requested.

## V. CONCLUSION

For the foregoing reasons, Vicinity respectfully requests the following reliefs:

1. That the Commission expedite review of the Presiding Administrative Law Judge's certification of a material question, in light of the impending December 31, 2022 termination of the Contract at issue in this proceeding, as follows:

- a. Direct PGW to file a responsive brief no later than **December 15, 2022**;
- b. Decide the material question at its **December 22, 2022, Public Meeting**, or, in the alternative, decide the material question no later than December 31, 2022, through notational voting.

2. That the Commission answer the material question in the **negative**, thereby deciding that the Presiding Administrative Law Judge **incorrectly denied** Vicinity's expedited petition for interim emergency relief requesting, in the words of the certified question, "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", until such time as the Commission has the opportunity to consider and decide the underlying Complaint in this proceeding on the merits, so as to preserve the Commission's opportunity to utilize Section 508 of the Public Utility Code to grant contract relief to Vicinity.

3. That the Commission affirmatively extend the Contract until such time as the Commission has the opportunity to consider and decide the underlying Complaint in this proceeding on the merits, so as to preserve the Commission's opportunity to utilize Section 508 of the Public Utility Code to grant contract relief to Vicinity.

Respectfully submitted,



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DATED: December 13, 2022