

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Grays Ferry Cogeneration Partnership and	:	
Vicinity Energy Philadelphia, Inc.	:	
	:	
v.	:	C-2021-3029259
	:	
Philadelphia Gas Works	:	

**INITIAL DECISION**

Before  
Marta Guhl  
Administrative Law Judge

**INTRODUCTION**

This Initial Decision dismisses the Complainants’ Formal Complaint as they failed to meet their burden of establishing that the rates offered by the Respondent were unjust and unreasonable. Further, the Complainants failed to demonstrate that the Respondent was providing inadequate, unsafe or unreasonable services under the terms of the Public Utility Code, Commission regulations or orders, or under the Respondent’s Commission-approved tariff.

**HISTORY OF THE PROCEEDING**

On October 22, 2021, Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc. (Grays Ferry/Vicinity or GFCP/VEPI or Complainants) 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”). The Complainants 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 the 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 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 a 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 approved at the prehearing conference, 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. I denied the Motion to Strike at the August 9, 2022 evidentiary hearing but permitted 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, the Complainants filed a Petition for Interim Emergency Relief (Petition). In its Petition, Grays Ferry/Vicinity requested 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 indicated that the matter

would not be able to be decided before the Commission could rule on the merits and no party would 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).

By Hearing Notice issued on November 29, 2022, a Further Call-In Telephonic Hearing was scheduled for December 6, 2022, at 10:00 a.m. in order to address the Petition for Interim Emergency Relief.

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

The emergency evidentiary hearing related to the Petition 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. I issued an Order denying the Petition for Interim Emergency Relief on December 12, 2022.

The record closed in this matter on October 4, 2022, when the parties filed their Reply Briefs in the case.

#### FINDINGS OF FACT

1. The Complainants in this case are Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc.
2. The Respondent in this case is Philadelphia Gas Works.

## **GFCP/VEPI**

3. Grays Ferry and Vicinity are non-residential (industrial) customers of PGW. PGW St. 1R at 6–8.

4. Vicinity is a public utility certificated by the Commission to provide steam service and chilled water service to non-residential customers in portions of Center City, Philadelphia and West Philadelphia, Pennsylvania. PGW St. 1R at 5.

5. Vicinity operates two steam producing facilities and a significant portion of the steam distributed by it to its customers has been produced by a cogeneration facility owned by Grays Ferry. PGW St. 1R at 5.

6. If Grays Ferry cogeneration plant cannot produce enough steam to satisfy Vicinity's customer demand, steam boilers owned by Vicinity or its sister company, Veolia Energy Efficiency (PA), LLC (VEEPA) are used. PGW St. 1R at 5.

7. Grays Ferry uses natural gas to produce electricity and steam at its cogeneration plant. PGW St. 1R at 5.

8. Grays Ferry sells electricity into the wholesale PJM market and sells the waste steam to Vicinity. PGW St. 1R at 5.

## **The 1996 Contracts**

9. In January 1996, the Philadelphia Authority for Industrial Development (PAID) entered into a total of four agreements: (a) two service contracts: one with Grays Ferry (the Partnership Service Contract) and one with Vicinity (then known as Trigen) (Trigen Service Contract) (collectively, Service Contracts); and (b) two service agreements with the City of Philadelphia on behalf of PGW: one regarding the Partnership Service Contract (Partnership Service Agreement) and one regarding the Trigen Service Contract (Trigen Service Agreement)

(collectively, Service Agreements). The Service Contracts and the Service Agreements are collectively referred to as the 1996 Contracts. PGW St. 1R at 6.

10. The duration (term) of the 1996 Contracts is twenty-five years. PGW St. 1R at 14–15.

11. The 1996 Contracts were the product of negotiations as part of the settlement of a proceeding before the Federal Energy Regulatory Commission (FERC). PGW St. 1R at 6.

12. PAID and the City acted as conduits for the real party in interest, PGW, in negotiating the 1996 Contracts. PGW St. 1R at 12.

13. Prior to the settlement, PGW had never provided GFCP/VEPI with gas service. Rather than using gas service from PGW, GFCP/VEPI in or around 1995–1996, threatened to construct a lateral to, and connection point, with the “Philadelphia Lateral” – which is part of the interstate pipeline system owned and operated by Texas Eastern Transmission Company (TETCO) and subject to Federal Energy Regulatory Commission’s (FERC) jurisdiction. PGW St. 1R at 5–6.

14. Under the 1996 Contracts, PGW both constructed a new, 16-inch pipeline at GFCP/VEPI’s expense (Distribution Extension) and refurbished and repurposed an existing PGW gas liquids line (Naphtha Line) (the Distribution Extension and Naphtha Line are collectively referred to as the Four Mile Line). PGW St. 1R at 7–8.

### **PGW’s Grandfathering of the 1996 Contracts under Rate GTS-F**

15. In 2003, PGW came under the jurisdiction of the Commission, was made subject to the Public Utility Code, and, therefore, could no longer render service pursuant to contracts but only pursuant to Commission-approved Tariffs. PGW St. 1R at 8–9.

16. As part of PGW’s restructuring plan, the Commission approved PGW’s plan to incorporate the rates terms and conditions that had been previously agreed to in the 1996 Contracts into Rate “GTS-F” in its PUC-authorized Tariff. PGW St. 1R at 9.

17. PGW’s Rate GTS-F is only available to those customers who utilized that service on or before September 1, 2003 pursuant to a currently valid agreement with PGW. PGW Gas Tariff – Pa. P.U.C. No. 2 at 118.

18. The rates, terms, and conditions set forth in the 1996 Contracts and Rate GTS-F will expire December 31, 2022. PGW St. 1R at 8; Formal Complaint ¶ 7.

19. At the time that the 1996 Contracts were incorporated into Rate GTS-F, it was anticipated that Rate GTS-F would not be renewed or extended and that GFCP/VEPI (or their successors) would transition to service under other PGW tariff provisions at the end of the twenty-five-year 1996 Contracts term. PGW St. 1R at 9.

### **PGW’s Existing Tariff Rates**

20. GFCP/VEPI have two existing tariff options by which to receive natural gas transportation service from PGW: (1) Rate Schedule General Service (Rate GS); or (2) Rate Schedule Interruptible Transportation (Rate IT).

21. PGW’s Rate GS is available for firm transportation service, anticipates no planned interruptions, and requires a service agreement. PGW St. 3R at 6.

22. PGW’s Rate IT is available for interruptible transportation service to those who can manage their businesses without the use of gas during periods of curtailment or interruption at PGW’s option under the terms of the tariff and can be supplemented by standby service or back-up service to assure sufficient firmness. PGW St. 3R at 4–6.

23. GFCP/VEPI are able to receive interruptible transportation service because GFCP/VEPI can meet their needs during periods of interruption for all or a portion of its load. Tr. 76–78.

24. Because service is available to GFCP/VEPI after the expiration of Rate GTS-F under two more PGW rate schedules, GFCP/VEPI must select the rate schedule under which they desire to receive service and be billed. PGW St. 3R at 3–4.

25. PGW has not had an unplanned interruption of any Rate IT customer since 2004. PGW St. 3R at 4.

26. The reliability of service under PGW’s Rate IT can be increased by adding “Standby Service” at the customer’s choice whereby PGW provides gas supply to the customer in the event that the customer experiences an interruption or curtailment in transportation service by a supplier. PGW St. 3R at 5.

27. Both PGW’s Rate GS and Rate IT require service agreements, which could be modified under Rule 2.3 of PGW’s Tariff. PGW St. 1R at 15; PGW St. 3R at 3–5.

### **Sales and Marketing by PGW**

28. Natural gas end use customers in Philadelphia have many energy options at different price points and terms. PGW St. 3R at 10.

### DISCUSSION

The Public Utility Code, 66 Pa.C.S. § 332(a), places the burden of proof upon the proponent of a rule or order. As the proponent of a rule or order, complainant has the burden of proof in this matter pursuant to 66 Pa.C.S. § 332(a).

To establish a sufficient case and satisfy the burden of proof, complainant must show that the respondent public utility is responsible or accountable for the problem described in



the Complaint. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa.P.U.C. 196 (1990), *Feinstein v. Phila. Suburban Water Co.*, 50 Pa.P.U.C. 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992). A preponderance of the evidence is evidence more convincing, by even the smallest amount, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993); 2 Pa.C.S. § 704. 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. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Rev.*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Dep't of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the Complainant shifts to the Respondent. If the evidence presented by the Respondent is of co-equal weight, the Complainant has not satisfied his burden of proof. The Complainant would be required to provide additional evidence to rebut the evidence of the Respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 461 A.2d 1234 (Pa. 1983).

While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

A. Rate Dispute

Grays Ferry/Vicinity Position

The Complainants allege that PGW's tariff for Rate GTS declares that the rate is available to customers "who utilized this service on or before September 1, 2003, pursuant to a

currently valid agreement with the Company.” The Complainants note that while the language is arguably ambiguous, it appears on its face to state that customers that had a currently valid agreement with PGW on September 1, 2003, were and are eligible to remain on Rate GTS. The Complainants state that any ambiguity should be enforced against PGW: “any ambiguous language in a contract is construed against the drafter and in favor of the other party if the latter’s interpretation is reasonable.”<sup>1</sup> Moreover, the Complainants argue that “[t]he court will not extend the language by implication or enlarge the meaning of terms beyond what is expressed.”<sup>2</sup> Grays Ferry/Vicinity MB at 23-24.

The Complainants note that the Contracts contain a renewal clause that allows the parties to agree to extend them. The statutory language that required customers with existing contracts to be bound to the terms of their contracts does not appear to contemplate an intervening tariff altering the terms of the contract.<sup>3</sup> This section of the statute states that the “customer shall be bound by its terms and conditions and shall not have the right to receive natural gas service from another source, until the expiration of the term of the agreement or otherwise pursuant to the terms and conditions of the agreement.”<sup>4</sup> The Complainants indicate that the language of the contracts does make it clear that a customer is bound by a contract but makes no reference to what happens beyond the contract expiration, and allows a customer to agree, along with PGW, to continue to be bound by a contract that could be renewed indefinitely. The Complainants contend that there is nothing in the statute or the tariff that requires Rate GTS to become unavailable when the current contract reaches its term, the contract could be renewed or extended. The Complainants state that the determination of the continued availability of GTS is a function of the agreement between PGW and Vicinity. Grays Ferry/Vicinity MB at 24-25.

Grays Ferry/Vicinity’s position is also that PGW’s approach to the renewal requests constitutes unreasonable and discriminatory service in violation of the Public Utility

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<sup>1</sup> *Sun Co. (R&M) v. Pa. Tpk. Comm’n*, 708 A.2d 875, 878-879 (Pa. Cmwlth. 1998).

<sup>2</sup> *Cobbs v. Allied Chemical Corp.*, 661 A.2d 1375, 1377 (Pa. Super. 1995).

<sup>3</sup> 66 Pa.C.S. § 2212(o).

<sup>4</sup> *Id.*

Code.<sup>5</sup> Grays Ferry/Vicinity argue that there is no evidence in the record that PGW or the Complainants ever contemplated that service after the Contract's initial term would be proposed to change radically, or even that the Contract would be extinguished after the Complainants shelved their ongoing project to build its own pipeline as part of the 1996 deal. Grays Ferry/Vicinity MB at 25.

As to the availability of Rate GTS, the Complainants contend that so long as it had a valid contract as of September 1, 2003, it is able to take service under Rate GTS. Grays Ferry/Vicinity assert that the Commission has the authority, in the public interest, to modify the terms of the Contract.<sup>6</sup> The Complainants maintain that the Commission could adjust any of the terms of the Contract going forward if it found a contract of such consequence to be in the public interest. The Complainants suggest that one adjustment the Commission is clearly empowered to make is to extend the Contract for some reasonable period, either with its present terms or with modified terms as the Commission sees fit to impose. Grays Ferry/Vicinity MB at 25-27.

Lastly, the Complainants argue that the Commission has authority under § 1308 to determine whether any rate that PGW might seek to impose on Vicinity is just and reasonable.<sup>7</sup> *Grays Ferry/Vicinity MB at 28*. The Commonwealth Court has also held that different rates for different classes of customers are permissible, a utility may charge different rates for different classes of customers. The question of whether the classification utilized by the utility is reasonable is a question of fact to be determined by the finder of the fact, namely the Commission.<sup>8</sup> Taken together, the legal standards for special rates include the general standards for all rates, that the rate be just and reasonable and not discriminate, i.e., provide a benefit to

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<sup>5</sup> 66 Pa.C.S. §§ 1304, 1501-1502.

<sup>6</sup> 66 Pa.C.S. § 508. Section 508, authorizes the Commission to “vary reform or modify, upon fair reasonable and equitable basis, any obligations, terms or conditions of any contract heretofore and hereafter entered into between any public utility and any person, corporation or municipal corporation, which embrace or concern a public right, benefit, privilege, duty, or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well-being of the Commonwealth.” *See also, Octoraro Railway, Inc. v. Pa. Pub.Util. Comm’n*, 482 A.2d 278 (Pa. Cmwlth. 1984).

<sup>7</sup> 66 Pa.C.S. § 1308.

<sup>8</sup> *See, Phila. Suburban Transp. Co. v. Pa. Pub. Util. Comm’n*, 281 A.2d 179 (Pa. Cmwlth. 1971).

one customer of class of customers while causing a burden to other customers. Grays Ferry/Vicinity MB at 29.

By any measure, Grays Ferry/Vicinity argue that they meet the standard for a “special rate.” It is a unique customer for many reasons, perhaps none so significant for purposes of determining if it should be eligible for a special rate than the fact that PGW already serves the Complainants under a special rate, and nothing has changed in 25 years to deviate from that special rate going forward. In addition to the fact that the Complainants are the largest customer on the PGW system and is already served by a unique facility constructed to meet its unique need for a high pressure/high volume delivery option, there is substantial evidence on the record that Vicinity has taken, and continues to take, substantial strides toward bypassing PGW, for the second time.<sup>9</sup> The Complainants assert that they are almost certain to bypass PGW if the rate result of this proceeding is close to the proposals PGW has made to date because it would be financially irresponsible to do otherwise. The Complainants state that they have already invested hundreds of thousands of dollars in project planning.<sup>10</sup> Grays Ferry/Vicinity MB at 31-32.

The Complainants indicate that they were on the brink of executing a bypass in 1995 and was halted only when PGW decided to provide service.<sup>11</sup> The Complainants maintain that there is no indication that PGW will agree to provide service at rates that will cost less than Vicinity’s bypass options. Grays Ferry/Vicinity MB at 32.

### PGW Position

PGW asserts that service under the GTS-F rate schedule was closed to new customers and new contracts in 2003. The tariff language allows for continued service under Rate GTS-F only for the remaining duration of contracts that were in existence on September 1, 2003 to continue. Upon expiration (or termination) of those contracts, service will not be

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<sup>9</sup> St. JC1-SR, 7L13-8:4.

<sup>10</sup> *See*, Confidential Exhibit JC-14.

<sup>11</sup> GFCEP/VEPI St. JC-1, 24:16-17.

renewed or extended under Rate GTS-F and customers will need to transition to service under other provisions in PGW's Tariff. PGW MB at 10.

PGW also maintains that the contractual provisions regarding duration allow contracting parties to adjust to changing conditions without the necessity of litigation to end the relationship. It is not disputed that the 1996 Contracts will end on December 31, 2022. PGW asserts that the Commission has no power to order a public utility to enter into a particular contract as to do so would put the Commission in the role of a "super board of directors." Moreover, PGW contends that extending the duration of the 1996 Contracts, as argued for by GFCP/VEPI, would not be in the public interest. PGW asserts that it has submitted substantial evidence proving that the current terms of the 1996 Contracts would decidedly *not* be in the public interest to continue. In fact, even GFCP/VEPI acknowledge that PGW is not recovering the cost of service for transportation service to GFCP/VEPI's facilities under the Existing Contract.<sup>12</sup> PGW argues that the remaining customers must make up any short fall for the subsidized rates for the Complainants. PGW MB at 11.

Further, PGW alleges that GFCP/VEPI's demand that the Commission use its Section 508 power to modify the rates, terms and conditions of the Existing Contracts to GFCP/VEPI's liking is both contrary to law and grossly unreasonable. PGW also states that the Commission does not have the power to create a new contract or to vary, reform or revise the Existing Contracts because the contract will be terminating and thus any argument about modifying it is moot. Moreover, Section 508 only allows the Commission to vary, reform or revise the obligations, terms, or conditions in a utility contract, upon a fair, reasonable, and equitable basis, if it is affected or concerned with the public interest or "otherwise contrary or adverse to the public interest and the general well-being of this Commonwealth."<sup>13</sup> PGW asserts that only after such a finding can the Commission determine and prescribe just, reasonable, and equitable obligations, terms, and conditions of said contract. Finally, PGW argues that it would not be consistent with the "general well-being of this Commonwealth" to resurrect these

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<sup>12</sup> See GFCP/VEPI Statement JC-1SR at 17.

<sup>13</sup> 66 Pa.C.S. § 508. If the Commission finds the terms to be inequitable, then the Commission can determine the just, reasonable and equitable obligations, terms and conditions of a contract and can modify the contract.

contracts in which the rates are grossly below cost of service and where the only reason for doing so would be to award the rates, terms and conditions of service that GFCP/VEPI desires. PGW MB at 11-12.

PGW argues that a special rate should not be approved absent a compelling reason and where the service to the entity is “unique.” Here, GFCP/VEPI have failed to satisfy their burden because the record clearly demonstrates that GFCP/VEPI have not justified a special rate. PGW states that the size of their load is not a unique and compelling circumstance so as to justify a special rate. PGW contends that the other factors cited by GFCP/VEPI witness Crist are either irrelevant or fail to justify a special rate under Commission precedent. Moreover, PGW maintains that GFCP/VEPI’s threat of bypass is unsubstantiated and should not be used to justify a special rate for GFCP/VEPI. PGW MB at 12.

#### OCA Position

OCA argues that the Complainants’ requested relief should be denied due to the fact that service under Rate GTS-Firm was closed in 2003, and the contracts they were served under “were grandfathered until the expiration of the service contracts in place on or before September 1, 2003.”<sup>14</sup> OCA notes that “the statutory burden placed on a proponent of a rule or order under Section 332(a) does not shift to the utility simply because such rule or order is proposed within the context of the utility’s 1308(d) general base rate proceeding.”<sup>15</sup> OCA asserts that based on the evidence presented, the Complainants have failed to meet their burden of proof. OCA MB at 6.

Under the current circumstances, as the utility’s existing tariff has been approved by the Commission as just and reasonable, and as Vicinity is advocating for a new rate before the Commission, the burden of proof is on the proponent of the order. OCA submits that the Complainants, as customers of PGW, must pay rates that reflect cost of service principles as any customer taking service under PGW’s Commission-approved tariffs. OCA MB at 8, 15.

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<sup>14</sup> PGW St. 1R at 8-9.

<sup>15</sup> *Pa. Pub. Util. Comm’n. v. Duquesne Light Co.*, 2021 Pa. PUC LEXIS 604, \*11-14 (Dec. 16, 2021).

## OSBA Position

OSBA asserts that it has an interest in the rate arrangement between PGW and Complainants because (a) PGW incurs various base rate costs associated with delivery services both for normal operations and bundled supply backstop service, (b) Complainants implicitly rely on PGW capacity on the Philadelphia Lateral that is included in PGW's Gas Cost Rate (GCR) revenue requirement, and (c) Complainants rely on other GCR capacity for bundled supply services. Because PGW is a cash-flow regulated utility, OSBA states that revenues from Complainants for these services will generally offset costs that would otherwise be borne by both base rate and GCR ratepayers, many of whom are small businesses. OSBA MB at 3.

OSBA submits that the positions taken by the parties in this proceeding vary widely in terms of both cost allocation and rate design philosophy. Given this wide variation in positions, much of the detailed information necessary to establish specific rates is not available in this proceeding, and it will likely change over time. Thus, OSBA recommends that the Commission focus on establishing the basic regulatory philosophy that it deems should apply to PGW service to Vicinity, and that it should defer the development and evolution of specific tariff rates and charges to future base rates and GCR proceedings. OSBA suggests that the Commission require parties to hold a follow-up proceeding to establish placeholder values for the charges for base rates and gas supply services that will go into effect when the current tariff expires, to be finalized in future rate proceedings. OSBA MB at 3-4.

OSBA takes the legal position that PGW and the eligibility criteria for Rate GTS state, *"This rate is only available to those customers who utilized this service on or before September 1, 2003 pursuant to a currently valid agreement with the Company."*<sup>16</sup> Once that "currently valid agreement" expires at the end of 2022, so too does Vicinity's eligibility for Rate GTS. OSBA MB at 12.

Moreover, OSBA observes that the Contract between Vicinity and PGW predates natural gas industry restructuring, and it includes various inter-related provisions regarding both

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<sup>16</sup> PGW Gas Tariff Pa P.U.C. No. 2, Original Pg. No. 111.

sales and transportation service that are anachronisms in today's regulatory environment. While OSBA believes that separate base rate treatment may be reasonable for Vicinity, it should be implemented in the context of unbundled services. Finally, OSBA argues that continuation of the existing contract would be inconsistent with the existing tariff and with today's regulatory environment. OSBA MB at 12.

### PICGUG Position

PICGUG argues that the purpose of this proceeding is to address issues raised by GFCP/VEPI regarding the rate to be charged by PGW for Grays Ferry's natural gas service. Although some parties have raised issues regarding Rate IT in general, as well as the appropriate methodology for determining PGW's costs to serve all rate classes, PICGUG contends that these issues are not appropriate for review as part of this proceeding. Rather, PICGUG asserts that any arguments regarding these issues would be more appropriately raised and, if necessary, reviewed, as part of PGW's next base rate proceeding. PICGUG MB at 3.

### Determination

Based on the arguments presented by the parties in this matter, it is clear that the Complainants have not met their burden to establish that there is authority to force the parties into a new rate arrangement upon the expiration of the current contract at the end of the contract period. The Complainants have not demonstrated that they are entitled to a continuation of the current contract beyond the agreed to terms. There is nothing in the record to establish, with certainty, the circumstances will change after the expiration of the contracts. While the Complainants insist they will bypass PGW service if forced into unfavorable terms, there is nothing to indicate that PGW's proposals are unjust and unreasonable. PGW has provided service for many years to the Complainant and there is no indication that PGW no longer wishes to continue. Further, I agree with PGW and OCA's position that the current rate under which the Complainants receive service will expire after the contract expires and will be closed based on PGW's current Commission-approved tariff. Further, Grays Ferry/Vicinity has not provided substantial evidence that PGW will definitively charge them an unjust or unreasonable rate.



I also agree with the positions of OSBA and PICGUG, that this matter is better dealt with under PGW's next base rate case. That proceeding is specifically designed to provide interested parties with an opportunity to present evidence of just and reasonable rates for all classes of customers. It will also provide the opportunity to weigh the public interest with the interests of the specific customer classes, including Grays Ferry/Vicinity. As such, the Complainants have failed to meet their burden of proof in this Complaint, and it must be denied and dismissed.

B. PGW Marketing Activities

Grays Ferry/Vicinity Position

At the beginning of this case, the Complainants argued that they had good reason to believe that there was no coincidence in PGW's efforts at incentivizing the conversion of its steam customers to PGW gas customers and the demands by PGW to increase the delivery rates for the utility service upon which both Grays Ferry and VEPI depend for their existence—natural gas. Vicinity alleged in its Complaint that PGW was engaging in what could be referred to as a price squeeze, by seeking to raise the rates on gas while simultaneously competing against Vicinity for the common product they both sell, i.e., energy. Vicinity conducted extensive discovery on this point, to supplement its belief and the facts to which it was aware, but it became clear that the competitive allegations were a distraction from Vicinity's primary mission in this matter which is to secure continuation of service at the current 1996 Contract rates. So rather than divert its resources to prosecuting those claims, Vicinity chose to narrow the scope and focus instead on the rate issue and offered no response to PGW's Rebuttal Testimony on those issues. Vicinity does not withdraw the claims but does concede that presently there is insufficient evidence and resources available to it to meaningfully address rate issues. Complainants' MB at 42.

## PGW Position

PGW asserts that the energy markets in Philadelphia are highly competitive.<sup>17</sup> PGW maintains that energy resources competition exists among the three utilities serving Philadelphia, PGW, PECO Energy Company (PECO), and the Complainants, and has been ongoing for years.<sup>18</sup> PGW also notes that other energy sources which are not jurisdictional to the Commission, such as fuel oil, solar, propane and geothermal also actively compete for these same customers.<sup>19</sup> In other words, end use customers in Philadelphia have many energy options at their choice at prices and terms acceptable to them.<sup>20</sup> PGW MB at 71.

PGW accepts the fact that the energy markets are competitive in Philadelphia and believes that this is in the best interests of the region to allow suppliers to compete so that customers obtain the arrangement that best suits their needs and budget.<sup>21</sup> Moreover, PGW asserts that competitors should not be hobbled by artificial rules that restrict one side but not the other,<sup>22</sup> as the Complainant's witness, Mr. Crist suggests.<sup>23</sup> PGW contends that the unrefuted evidence in this record is that PGW's sales and marketing efforts are fully compliant with its Tariff and constitute reasonable and appropriate steps to attempt to gain new load and maintain existing load, which directly benefits existing customers. PGW states that the Commission has approved tariff provisions that allow PGW to retain and attract new customers.<sup>24</sup> This has the

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<sup>17</sup> PGW St. 3R at 10.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 11.

<sup>22</sup> *Id.*

<sup>23</sup> *See* GFCP/VEPI Statement JC-1 at 27 and 29.

<sup>24</sup> PGW St. 3R at 11. The tariff provisions are: Rule 2.3, which permits PGW to enter into customized contracts when such contracts, in PGW's sole discretion, are in the best interests of the Company (PGW Gas Service Tariff – Pa. P.U.C. No. 2 at 18); Rule 10, which allows PGW to fund certain line extensions when the projected revenue from the line extension exceeds the cost (PGW Gas Service Tariff – Pa. P.U.C. No. 2 at 50–51); and the TED Rider, which authorizes PGW to support the expansion of new technologies such as, but not limited to, combined heat and power (“CHP”), natural gas vehicles, and fuel cells, to develop brownfields, and support economic development. PGW Gas Service Tariff – Pa. P.U.C. No. 2 at 155.

advantage of implicitly reducing rates for other PGW customers by increasing the margins collected and spreading cost recovery over a greater base.<sup>25</sup> PGW MB at 71-72.

PGW emphasizes that it does not offer discounts from its standard tariffed rates.<sup>26</sup> In situations using Rule 2.3, PGW may negotiate rates — if there would be an economic advantage to PGW and its customers for doing so.<sup>27</sup> Regarding the TED Rider, if the customer qualifies as having new technology under the TED Rider, PGW will negotiate the base rate, but only in those limited circumstances.<sup>28</sup> Situations relating to contributions in aid of construction (“CIAC”) or the capital contribution policy for extensions are described under Rule 10.<sup>29</sup> Under strict terms, PGW indicates that it has also advanced capital dollars to a new customer under Rules 10 and 2.3.<sup>30</sup> Those dollars contribute a portion of the construction costs of a new gas-fired facility. This applies to new construction that also includes oil and electric conversions,<sup>31</sup> and is only done when the conversion costs are viewed as a barrier to making the switch and only under conditions — including a contract term of at least twice the length of the pay-back period — that limit the risk to PGW and its other customers.<sup>32</sup> PGW notes that, contrary to Mr. Crist’s characterization, Rate IT is not a discounted rate. Rate IT exists in the Commission-approved rate schedule.<sup>33</sup> It is one of two existing rate schedules that PGW uses to offer transportation service and is only available to customers with confirmed alternative fuel or total curtailment ability.<sup>34</sup> Contrary to the allegations in the Formal Complaint, PGW has accurately followed its tariff rules and administers them to the benefit of all its customers.<sup>35</sup> PGW notes that it strictly offers this Rate IT service under the terms contained in the tariff.<sup>36</sup> As noted above, there are

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<sup>25</sup> PGW St. 3R at 12.

<sup>26</sup> *Id.* at 14, 18.

<sup>27</sup> *Id.* at 14.

<sup>28</sup> *Id.* at 14, 18.

<sup>29</sup> *Id.* at 14.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 15.

<sup>33</sup> PGW Gas Service Tariff – Pa. P.U.C. No. 2 at 111–17.

<sup>34</sup> PGW St. 3R at 3.

<sup>35</sup> *Id.* at 13.

<sup>36</sup> PGW St. 3R at 16.

two ways for a customer to qualify for Rate IT.<sup>37</sup> Under either scenario, the customer would be offline for the interruptible portion of their load and lend PGW the operational room necessary to supply essential needs customers during a period of a gas shortage.<sup>38</sup> In addition, as noted, PGW monitors continued qualification for Rate IT.<sup>39</sup> PGW MB at 73-74.

Lastly, PGW argues that its responsive testimonies were unaddressed and un rebutted in the record, and therefore, GFCP/VEPI have failed to carry their burden of proof regarding any allegations of “unfair competition” and all of these allegations must be dismissed. PGW MB at 74.

#### Other Parties Positions

None of the other parties in this matter take a position on PGW’s marketing activities.

#### Determination

Based on the above, it is clear the Complainants have not met their burden of establishing that PGW violated the Public Utility Code, Commission regulations or a Commission Order with respect to their marketing activities related to the Complainants. Nothing indicates that the Company is acting in a manner that would be unexpected in a competitive energy market. Further, there is nothing in the record to establish that the Company has violated the terms of its tariff in this respect. As such, the Complainants’ Complaint on this issue must be denied and dismissed.

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 17.

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of and the parties to this proceeding. 66 Pa.C.S. § 701.

2. The burden of proof is on the parties seeking affirmative relief from the Commission. 66 Pa.C.S. § 332(a).

3. Section 1301(a) of the Code mandates that “[e]very rate made, demanded, or received by any public utility . . . shall be just and reasonable, and in conformity with [the] regulations or orders of the [C]ommission.” 66 Pa.C.S. § 1301(a).

4. The Commission has no authority to allow a public utility to deviate from its tariff even where the Commission concludes it is in the public interest. *Phila. Suburban Water Co. v. Pa. Pub. Util. Comm’n*, 808 A.2d 1044 (Pa. Cmwlth. 2002).

5. The Complainant has the burden of proving by a preponderance of the evidence that the utility’s Commission-approved tariff is either unreasonable or discriminatory. *MCI Airsignal of Pa., Inc. v. Pa. Pub. Util. Comm’n*, 512 A.2d 600 (Pa. Cmwlth. 1986); *Pa. Pub. Util. Comm’n v. PPL Elec. Utils. Corp.*, Docket No. R-2010-2161694 (Opinion and Order entered June 21, 2012).

6. A utility may not enter into a private contract with a customer that sets forth rates or terms and conditions of service that is not set forth or authorized by its tariff. *Phila. Suburban Water Co. v. Pa. Pub. Util. Comm’n*, 808 A.2d 1044 (Pa. Cmwlth. 2002).

7. A utility cannot unreasonably discriminate for or against one of its customers by establishing a special rate for them. *Popowsky v. Pa. Pub. Util. Comm’n*, 683 A.2d 958 (Pa. Cmwlth. 1996).

8. A special rate should not be approved absent a compelling reason, and is limited to cases where there is a serious and credible threat of loss of load and where revenues from the customer exceed the cost of serving the customer. *Pa. Pub. Util. Comm'n v. PPL Elec. Utils. Corp.*, Docket No. R-2010-2161694 (Opinion and Order entered June 21, 2012).

9. Simply having a large volume of usage does not entitle a customer to a preferred rate. *U.S. Steel Corp. v. Pa. Pub. Util. Comm'n*, 390 A.2d 849 (Pa. Cmwlth. 1978) (citing *Carpenter v. Pa. Pub. Util. Comm'n*, 15 A.2d 401 (Pa. Super. Ct. 1940)).

10. A utility's offering of discounts and incentives to attract and retain customers is in furtherance of its obligations to provide adequate and reasonable service and to maintain its rates as just and reasonable, as required by 66 Pa.C.S. §§ 1301, 1501.

11. The Complainant has failed to meet its burden of establishing that the Company failed to provide adequate, safe and reasonable service. *See* 66 Pa.C.S. § 332(a).

### ORDER

THEREFORE,

IT IS ORDERED:

1. That the Formal Complaint of Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc., against Philadelphia Gas Works, Docket No. C-2021-3029259, is hereby denied and dismissed.

2. That Philadelphia Gas Works is authorized to provide gas transportation service to Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc., under existing rate schedule Interruptible Transmission (Rate IT), either with or without a subscription to stand-by service thereunder – as elected by Grays Ferry Cogeneration Partnership and Vicinity

Energy Philadelphia, Inc. – consistent with service agreement(s) agreed to by and between Grays Ferry Cogeneration Partnership and/or Vicinity Energy Philadelphia, Inc. and Philadelphia Gas Works, for service rendered on and after January 1, 2023.

3. That if Grays Ferry Cogeneration Partnership and/or Vicinity Energy Philadelphia, Inc., do not receive service under Rate IT consistent with Ordering Paragraph No. 2 above, that Philadelphia Gas Works is authorized to provide gas transportation service to Grays Ferry Cogeneration Partnership and/or Vicinity Energy Philadelphia, Inc., under existing rate schedules general service (Rate GS) and Daily Balancing (Rate DB) for service rendered on and after January 1, 2023.

4. That this matter docketed at Docket No. C-2021-3029259 be marked closed.

Date: December 27, 2022

\_\_\_\_\_/s/\_\_\_\_\_  
Marta Guhl  
Administrative Law Judge