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January 17, 2023

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; **EXCEPTIONS OF GRAYS FERRY COGENERATION PARTNERSHIP AND VICINITY ENERGY PHILADELPHIA, INC.**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is the Exceptions of Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc. to the Initial Decision issued December 27, 2022 in the above-captioned proceeding. Copies of the Exceptions have been served in accordance with the attached Certificate of Service.

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,



Dennis A. Whitaker
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TSS/jld

Enclosure

cc: Administrative Law Judge Marta Guhl (via electronic mail – mguhl@pa.gov)
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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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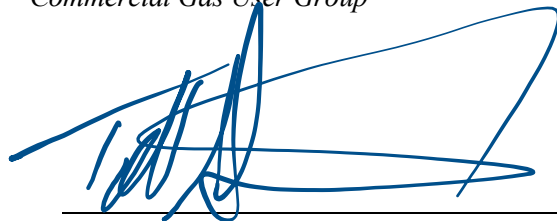
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DATED: January 17, 2023

**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.	:	

**EXCEPTIONS
OF GRAYS FERRY COGENERATION PARTNERSHIP
AND VICINITY ENERGY PHILADELPHIA, INC.**

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I. INTRODUCTION

The ALJ's Initial Decision ("ID") poses an existential threat to downtown Philadelphia's thermal heating loop ("Vicinity")¹ that serves critical governmental, educational, hospital, commercial, and industrial customers. Induced to forego a planned bypass of Philadelphia Gas Works ("PGW") in 1995, Vicinity entered a 25 year contract with PGW under which it received gas transportation service for 99% of its requirements at a rate (8 cents/dth) that reflects the actual cost to serve Vicinity on a dedicated pipeline that connects to Texas Eastern and for which the construction costs and recurring O&M costs have been paid by Vicinity. Although Vicinity made timely good faith efforts to negotiate reasonable terms to continue service after the contract's December 2022 expiration date, PGW stonewalled, demanding Vicinity accept a **tenfold increase** in its gas transportation rate – i.e., demanding that Vicinity pay a tariff rate designed for significantly smaller transportation customers that, unlike Vicinity, actually utilize PGW's extensive low pressure distribution system.

As a consequence, Vicinity was forced to file the present complaint – this complaint boils down to a disagreement over PGW's gas transportation rate and the costs of service underlying that rate. The record evidence shows that for decades, and as recently as 2020, PGW accurately represented to the Commission in cost of service studies that Vicinity does not use PGW's low pressure distribution system, but instead takes service from the dedicated high pressure pipeline Vicinity itself paid for. The rate PGW now demands from Vicinity contradicts decades of PGW's stated position and mandates Vicinity pay a full allocation of PGW's low pressure distribution system costs – a system Vicinity does not use - resulting in the demanded tenfold rate increase.²

¹ Vicinity Energy Philadelphia, Inc. ("VEPI") a regulated public utility steam provider and its affiliate, Grays Ferry Cogeneration Partnership, LLC ("Grays Ferry") are collectively referred-to as "Vicinity."

² St. JC1-SR, 16:18-17:11.

Inexplicably, the ALJ ignored the evidence of Vicinity’s special circumstances, PGW’s past representations about the way Vicinity actually uses (and, importantly, does not use) PGW’s system, Vicinity’s continuing ability to bypass PGW, and Vicinity’s own provision of essential public utility service, and denied Vicinity’s request that the Commission set the just and reasonable rate for PGW’s transportation service to Vicinity. Further, the ALJ failed to analyze or determine any of the factual issues underlying the parties’ respective positions. As a result, absent Commission correction on exceptions, Vicinity will be at the mercy of PGW to pay a stratospheric rate increase (a rate wholly disconnected from PGW’s actual cost to serve Vicinity) at least until the conclusion of PGW’s next rate case. By that time, Vicinity will either have bypassed PGW or been rendered financially unable to continue service to its utility customers.

In these exceptions, Vicinity asks the Commission to adopt one of the following outcomes:

Option one – review the record and its cost of service studies and set a proper cost-based transportation rate for Vicinity now – retroactive to 1/1/23.

Option two – require a proper cost-based transportation rate for Vicinity be set in PGW’s next general rate case while in the interim maintaining the existing rates/term/conditions of service under which PGW serves Vicinity now.

II. BACKGROUND³

A. The Vicinity-PGW Contract

In 1995, Vicinity sought to secure the economic viability of the downtown Philadelphia steam system by adding cogeneration (the production of both electricity and steam from a single unit of fuel), which required a source of natural gas in sufficient volume and pressure. Vicinity partnered with Texas Eastern Transportation Company (“TETCO”) and sought FERC approval to

³ Vicinity’s Main and Reply Briefs are incorporated herein by reference.

construct a Vicinity-owned pipeline to connect TETCO's Philadelphia Lateral and Vicinity's facilities at Grays Ferry. Despite PGW's opposition the FERC approved Vicinity's plan that would have bypassed PGW.⁴

Prior to starting pipeline construction, Vicinity was induced to agree to abandon its FERC-approved plan to bypass PGW and instead signed a 25-year contract with PGW under which Vicinity paid PGW over \$10 million to construct a new two-mile segment of pipeline and repurpose a two-mile petroleum products pipeline to provide service to Vicinity at very high pressure directly from TETCO's interstate Philadelphia Lateral. Vicinity schedules and balances its interstate deliveries directly with TETCO⁵ (PGW has no scheduling or balancing duties or obligations), pays PGW a separate annual \$160,000 O&M charge for the line, and since service began, has been the only customer ever served from the combined 4 mile, high pressure pipeline.⁶

PGW was not regulated by the Commission in 1995, but that changed with the passage of the Natural Gas Choice and Competition Act in 1999, and the approval of PGW's restructuring in 2003, which included approval of the PGW/Vicinity contract. The contract remained in place and governed the service PGW provided to Vicinity for 25 years. Beginning in January 2017 Vicinity sought to negotiate a new contract and engaged in various discussions with PGW into 2018. Those discussions proved fruitless when PGW stopped communicating until finally putting forth in late-February 2021 a written draft contract demanding a massive tenfold rate increase. Because of the timing and the exorbitant increase, Vicinity had no choice but to file a Complaint seeking the Commission's assistance in setting just and reasonable cost-based gas transportation rates, terms and conditions.⁷ Due to the December 2022 Commission refusal to grant the emergency relief that

⁴ St. JC1, 6:1-15.

⁵ St. JC1, 17:16-18:3.

⁶ St. JC1, 7:13-19, St. JC1, 8:13-18.

⁷ St. JC1, 5:3-13; St. JC1, 11:7-13.

Vicinity requested, the contract has now expired, and Vicinity is being served under a temporary tariff that provides the same services at the same rates as in the now-expired contract, subject to rebilling.

B. Vicinity's Complaint

This complaint proceeding focused on the transportation rate PGW is to charge Vicinity on and after January 1, 2023. In its testimony, PGW has demanded a rate 750% higher than what Vicinity paid under the contract – increasing from \$0.08/Dth to \$0.601/Dth -- based on a flawed cost of service study (“COSS”) where PGW incorrectly posits that PGW uses its low pressure distribution system in moving gas molecules to Grays Ferry when, in fact, PGW directly connects Texas Eastern’s interstate pipeline to the Grays Ferry cogeneration facility using a dedicated high pressure pipeline.⁸ The idea that Vicinity gas molecules transit PGW’s low pressure distribution system and should therefore be assessed a portion of all PGW’s low pressure distribution system costs is a complete reversal of PGW’s position in its four most recent rate cases (2007, 2009, 2017 and 2020) where PGW’s witnesses stated affirmatively that Vicinity *does not use the low pressure distribution system and should not be allocated cost responsibility for it.*⁹ PGW’s witness in this complaint case admitted that nothing has changed in the manner in which Vicinity is served – gas is delivered only through the same dedicated four mile pipeline at very high pressure -- and could offer no basis for the change except the expiration of the contract.¹⁰ As PGW’s witnesses said in its prior rate cases, there is no basis to allocate low pressure distribution system costs to PGW.¹¹

⁸ This increase was less than what was originally demanded.

⁹ St. JC1-SR, 12:26-13:18.

¹⁰ Tr. 181.

¹¹ St. JC1-SR, 12:1-22; 12:26-13:18.

When the income that PGW receives from Vicinity is net of actual costs, PGW earns approximately \$2.5 million/year in incremental revenue.¹² Based on its misallocated costs, PGW has nonetheless proposed to increase the transport rate by 750%. Vicinity has made it clear that it cannot absorb such a rate increase. The ID makes no mention of the proposed 750% rate increase, nor does it address the fatally flawed COSS that is at the root of the PGW proposal and this Complaint. Correcting the major flaw in PGW's COSS (Vicinity's expert witness' analysis was limited to one single correction but noted that other COSS adjustments were needed) reduced the rate produced by Ms. Heppenstall's (PGW's rate witness) flawed COSS to approximately \$0.21/Dth; the rate should be even lower than \$0.21/Dth based on other corrections.¹³

C. The Cost of Service Evidence

The evidence shows that the current \$0.08/Dth rate remains just and reasonable and does not require adjustment, but in no event is there any basis in the record to impose a rate higher than \$0.21/Dth.¹⁴ The single correction Mr. Crist (Vicinity's expert witness) proposed, that is the basis for the \$0.21/Dth rate, was to remove the costs of PGW's low pressure distribution system from PGW's flawed COSS (it is indisputable that gas molecules moving from TETCO to Grays Ferry use ONLY PGW's dedicated high pressure pipeline (and NONE of the low pressure distribution system)). Mr. Crist's adjustment is completely consistent with multiple prior PGW rate case sworn testimony.

PGW's newly contrived COSS position is not based on new facts concerning Vicinity's usage of the PGW system, but instead on a self-serving reinterpretation of usage and operational facts that PGW has known for decades. Since 1995, Vicinity and PGW have "swapped" a portion

¹² St. JC1-SR, 9:18-10:2.

¹³ St. JC1-SR at 17, Docket No. R-2021-3030218.

¹⁴ Vicinity Reply Brief at page 2.

of their respective capacity entitlements on TETCO during winter months, so that Vicinity can increase its deliveries on TETCO's Philadelphia Lateral (which connects to the dedicated pipeline that serves Vicinity) using PGW's excess capacity on the lateral, while simultaneously arranging for the delivery of an equivalent amount of gas to PGW for the use of PGW's other customers using TETCO's downstream Skippack Lateral (which delivers gas into PGW's low pressure distribution system in Northeast Philadelphia). Vicinity pays PGW a fee for this swap (dubbed as alternate receipt service ("ARS")) that was fixed in the 1995 Contract.¹⁵ PGW has the right to refuse ARS service if the temperature is below a certain threshold. To justify the dramatic rate increase it now demands, PGW contends for the first time ever that through this swap Vicinity "uses" PGW's low pressure distribution system and is required to pay its allocable share of PGW's low pressure distribution system costs *solely because Vicinity uses TETCO capacity* to deliver gas for PGW's system supply to TETCO's Skippack Lateral and into PGW's low pressure distribution system. To be clear, none of the gas delivered to PGW on the Skippack Lateral is used by Vicinity. All deliveries to Vicinity under the swap arrangement flow from the Philadelphia Lateral to the dedicated four mile pipeline, while the gas delivered to PGW for the use of PGW customers flows from TETCO's Skippack Lateral into PGW's low pressure distribution system -- just like any other supply delivered by an interstate pipeline that arrives at PGW's city gate for use by PGW's other customers. There is no support for PGW's position. The gas delivered to Vicinity via ARS does not touch or use the low pressure distribution system to reach Grays Ferry, and the gas delivered to PGW uses only the low pressure distribution system. This swap of interstate pipeline capacity and gas, for which Vicinity pays PGW a monthly fee, does not "use" PGW's low pressure distribution system at all.

¹⁵ St. JC1, 16:8-17:2.

In addition to natural gas delivery and the ARS swap arrangement, PGW also provides some additional services, per the contract. These services are charged in addition to the transportation charge. The services include: 1) Bundled Sales Service, used infrequently for small volumes when the Philadelphia Lateral is out of service (the 1% of gas that does not utilize PGW's four mile dedicated pipe). The rate is the weighted average cost of gas plus 61 cents/Dth – there is no dispute over this rate;¹⁶ and, 2) Capacity Release, pursuant to which PGW releases non-winter capacity to Vicinity. Vicinity has purchased this capacity at a premium to market, even though Vicinity has not needed this capacity for many years. PGW has agreed to not require Capacity Release moving forward.¹⁷

D. The Initial Decision

Faced with indisputable evidence that Vicinity is a unique customer and that PGW has always – until now – treated Vicinity as such, the ID proceeds without discussion or reasoning to conclude in summary fashion that since Vicinity's contract expired as of January 1, 2023, Vicinity's only option is to avail itself of PGW's existing tariff offerings.¹⁸ This head-in-the-sand approach – which ignores the undisputed evidence that PGW has repeatedly (until now) represented to the Commission that Vicinity does not use PGW's low pressure distribution system, ignores the evidence that Vicinity does not in fact use PGW's low pressure distribution system, ignores the history of the Vicinity's relationship with PGW, and ignores the fact that PGW's existing tariff offerings will result in a **ten-fold increase in Vicinity's rates** – demands corrective action by the Commission.¹⁹ Vicinity simply cannot wait until PGW's next rate case to secure the

¹⁶ St. JC1, 17:4-14.

¹⁷ Vicinity Main Brief at 21.

¹⁸ The ID concludes that PGW does have a rate class in its tariff, Rate IT, that would apply to Vicinity in the absence of Rate GTS, and orders that PGW provide service under that rate going forward. ID, Ordering ¶ 2.

¹⁹ The ten-fold increase would result from applying PGW's lowest IT rate presently in its tariff.

just and reasonable cost-based rate it deserves. The evidence compels the Commission to make a finding that Vicinity is entitled to a rate as low as the existing \$0.08/Dth rate and in no event higher than \$0.21/Dth, and the Commission should so order. In the alternative, the Commission should order that the existing \$0.08/Dth rate and all other existing contract services and charges as between Vicinity and PGW remain in effect, subject to refund/recoupment, until new rates as determined in PGW's next rate case can be determined on a cost of service basis.

III. EXCEPTIONS

1. Vicinity is a Unique Customer and Meets the Standard for a Special Rate.

By any measure, Vicinity meets the standard for a "special rate". It is a unique customer for many reasons, including how it became a PGW customer and that PGW has served Vicinity for 25 years. In addition to the obvious facts that Vicinity is by far the largest customer on the PGW system, it is served by a dedicated facility constructed to meet its need for a high pressure/high volume delivery of natural gas, Vicinity pays for the Operations and Maintenance ("O&M") on the line, paid for the line's construction and is the only customer served by the direct connection to the interstate pipeline.

The Commission's standards provide that there be a compelling reason for the rate and that the rate must be just and reasonable and non-discriminatory.²⁰

The cost of service should be the "polestar" of utility ratemaking. *Lloyd v. Pa. PUC*, 904 A.2d 1010 (Pa. Cmwlth. 2006), *appeal denied*, 591 Pa. 676, 916 A.2d 1104 (2007)...Therefore, any **special rate** approved by the Commission in this proceeding is subject to the requirement that the rate be just, reasonable and non-discriminatory. . . a **special rate** should not be approved absent a compelling reason for doing so. We also agree with the OSBA that special rates *generally* should be limited to cases where there is a threatened loss of the customer's load, and where the revenues from the customer would exceed the cost of serving that customer, since other

²⁰ *Pennsylvania Public Utility Commission v. PPL Electric Utilities Corporation*; Docket No. R-2010-2161694 (Opinion and Order entered June 21, 2012) ("PPL").

ratepayers would be economically better off if the load is retained than if it is lost.²¹

Commonwealth Court also has held that different rates for different classes of customers are permissible, i.e., so long as the differential is founded upon some reasonable basis, 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.²² 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 one customer of class of customers while causing a burden to other customers. In *PPL* the Commission added two conditions that are addressed also in the record of this matter; 1) the ability of the customer to bypass the utility; and 2) that the revenues from the customer would exceed the cost of serving that customer.

Vicinity meets all the criteria for a special rate. There is substantial evidence that Vicinity has taken, and continues to take, major strides toward constructing its own facility to bypass PGW.²³ In 1995, Vicinity already had obtained FERC approval for bypass and already had purchased the needed rights-of-way and already had undertaken needed engineering studies. Vicinity's current status is more than sufficient to establish its trajectory to bypass PGW.²⁴ The Commission cases on special rates speak of the "threat" of bypass, not having actually built the facilities. The work already performed amply demonstrates that bypass by Vicinity is more than a mere threat. Vicinity now has invested hundreds of thousands of dollars in project planning, has preliminary engineering studies performed, has completed 65 percent of the engineering, has

²¹ *PPL, slip op. at 11* (emphasis in original).

²² See, *Philadelphia Suburban Transp. Co. v. PUC*, 281 A.2d 179 (Pa. Cmwlth. 1971).

²³ St. JC1-SR, 7:13-8:4.

²⁴ St. JC1-SR, 8:8-9:2.

initiated permitting – including substantive meetings with the various permitting entities - and is developing bid packages.²⁵ Vicinity also is a unique customer due to its utility scale size and proximity to TETCO. Twenty-five years ago, PGW took seriously Vicinity’s intention to construct its own line, but now seems intent on forcing Vicinity to construct a new line to prove its intention.

Vicinity will soon reach the point where there is no reasonable option but to build, and PGW will be left with an unused asset; one that currently produces, on an annual basis, more than \$2.5 million of incremental revenue for PGW, but which will thereafter provide nothing for ratepayers and incur the cost of decommissioning.²⁶

A special rate must consider the cost of service -- the cost to serve a special rate customer cannot exceed the revenue collected from the service, otherwise the special rate will result in a subsidy.²⁷ Here, that requirement is met even at the current rate – Vicinity has annually contributed 2.5 million dollars of revenue net of costs to the benefit of PGW’s distribution service customers.²⁸

PGW’s rate witness, Ms. Heppenstall, admitted under cross examination that nothing in the physical or operational manner in which PGW has served Vicinity has changed in the past 25 years, nor is it expected to change.²⁹ Considering the precedent set by similar rates offered by other natural gas utilities in the commonwealth, such as Columbia’s Rate MLDS, which assigns only the cost of serving the special rate customer to the rates paid by the MLDS customer, any special rate must be cost of service based, and in this case, cost of service means “actual” direct costs, not fictional costs.

²⁵ See, Confidential Exhibit JC-14.

²⁶ St. JC1-SR, 9:18-10:2.

²⁷ St. JC1-SR, 9:5-15.

²⁸ St. JC1, 25:11-26:16.

²⁹ Tr. 181.

Vicinity's need for a special rate is compelling. Its ability to continue to provide environmentally friendly steam to VEPI's customers, electricity to PJM and the City of Philadelphia, and the continued viability of the businesses is at stake. But also, for PGW's customers, if Vicinity is not able to receive service at a reasonable cost-based special rate, Vicinity will leave PGW's system, one way or another, which provides no benefit, only detriment to PGW's other customers, who will be asked to make up the contribution that Vicinity already provides. Vicinity has clearly established its qualification for a special rate.

2. The Rate PGW Demanded from Vicinity is Unreasonable and Based on a Flawed Cost of Service Study.

In its 2021 proposed draft contract, PGW demanded an increase for the transportation rate on the dedicated, four-mile, pipeline from \$0.08/Dth to \$0.75/Dth, a 937 percent increase.³⁰ This increase was premised on PGW's assertion that costs have increased but that assertion was unsupported by any cost of service study. During this proceeding, however, PGW's rate witness, Ms. Heppenstall, proposed a lower rate increase to \$0.601/Dth or 762 percent based on her flawed Cost of Service Study that treated the ARS volumes as though they were delivered to Vicinity through PGW's low pressure distribution system, even though those volumes flow down the Philadelphia Lateral like all other high-pressure gas delivered to Vicinity. (St. JC1, 12:3-16; OSBA St. No. 1-SR, 2:11-18). This flawed allocation methodology is the primary basis for the dramatic increase in rates PGW proposes in this case.

Cost causation is the "polestar" of utility ratemaking, as the *Lloyd* case³¹ holds, and the very ratemaking manual upon which PGW's witness relies-on so states.³² Moreover, direct assignment is the first step in any cost of service study, but Ms. Heppenstall did not consider that

³⁰ St. JC1, 12:17-13:8.

³¹ *Lloyd v. Pa. PUC*, 904 A.2d 1010 (Pa. Cmwlth. 2006), *appeal denied*, 591 Pa. 676, 916 A.2d 1104 (2007).

³² Ms. Heppenstall responded that she relied up on "Gas Rate Fundamentals" in reaching her conclusions.

step.³³ PGW previously employed the direct assignment methodology proposed by Vicinity in all its prior rate cases. It directly assigned the cost of service using the four mile, high pressure pipe to Rate GTS, and thus Vicinity, but did not allocate any low pressure distribution system costs to Vicinity because Vicinity does not cause any other distribution system costs: Vicinity uses a single dedicated high pressure pipeline facility for which it long ago paid.³⁴ Ms. Heppenstall’s revised cost of service study, (Exhibit CH-1) assigns low pressure system costs to Rate GTS based solely on the false premise that the ARS volumes “use” the entire PGW system.³⁵ When questioned on what fact changed in order for Ms. Heppenstall to contradict her own and prior PGW witnesses’ sworn positions less than two years ago, Ms. Heppenstall conceded that nothing physically or operationally has changed in the manner or expense of providing service to Vicinity.³⁶ The upshot is that PGW saw the expiration of the Contract as an opportunity to increase the revenue it receives from Vicinity in order to subsidize other customers, and so directed Ms. Heppenstall to assign low pressure distribution system costs to Vicinity even though PGW never has done so before and there is no basis in the actual cost to serve for doing so now.³⁷

PGW’s assignment of low pressure distribution system costs to Vicinity violates the holding in *Lloyd*, that makes clear that one customer cannot be required to subsidize other customers or customer classes, and that the primary means of avoiding subsidies is by basing allocation on cost of service first. It is true that in *Philadelphia Suburban*, which predates *Lloyd*, the Commonwealth Court did find that cost of service was not the only consideration in allocation, listing other considerations. The court made it clear that, “[d]ifferences in rates between classes

³³ These errors may be attributable to the fact that Ms. Heppenstall has very little experience in natural gas distribution company COSS. St. JC1, 20:4-18.

³⁴ St. JC1, 28:1-8.

³⁵ St. JC1, 17:1-17.

³⁶ Tr. 181.

³⁷ St. JC1-SR, 16.

of customers based on such criteria as quantity [] used, the nature of the use, the time of the use, the pattern of the use, or based on differences of conditions of service, or *cost of service* are not only permissible but often are desirable and even necessary to achieve reasonable efficiency and economy of operation.”³⁸

In this case all these factors suggest that the high pressure service to Vicinity is vastly different from the service needs of PGW’s low pressure distribution levels in a manner that clearly justifies not assigning low pressure distribution system costs to Vicinity. Because Vicinity is served by a unique and distinct high pressure dedicated facility, that Vicinity paid for, for which it bears substantial responsibility for its own supply and the delivery and balancing thereof, as well as operating and maintenance expenses, there is no basis to impose costs on Vicinity that it does nothing to cause.

The flaw in the ID is that it does not even consider the evidence on what an appropriate new rate for Vicinity might be, and instead concludes that one of PGW’s existing tariff rates will do. The ID fails to recognize that service at the lowest available IT rate would be even higher than the rate proposed by PGW in this case and that there is no support in this record that any IT rate would be just and reasonable for Vicinity nor based on PGW’s cost to serve Vicinity. Instead, the ID mechanically applies PGW’s existing, unsuitable IT rate to Vicinity without any rationale or recognition of the dire consequences.

3. The Corrected COSS Produces a Maximum rate of \$0.21/Dth.

The highest rate produced by PGW’s cost of service study, as corrected, is \$0.21/Dth.³⁹ Vicinity’s witness adjusted PGW’s witness Ms. Heppenstall’s proposal to remove the new allocation methodology, and instead return to PGW’s methodology used in its prior rate cases; one

³⁸ *Philadelphia Suburban Transp. Co. v. Pa PUC*, 281 A.2d 179, 186 (Pa. Cmwlth. 1971) (emphasis added).

³⁹ St. JC1-SR, 16:2-17:11.

that affirmatively states that costs associated with the low-pressure distribution system should not be assigned to Vicinity because it does nothing to incur them. PGW's "hook" for allocating those costs, the ARS service, has been part of the contract since the beginning, so it was not new, and the pipelines used to deliver gas to PGW and Vicinity likewise did not change. In fact, Ms. Heppenstall admitted under cross examination that nothing had changed except the expiration of the contract, and PGW's decision to charge Vicinity a higher rate was because it believes Vicinity can pay a higher rate.⁴⁰ Vicinity witness Mr. Crist's testimony, and the testimony of PGW's witnesses in prior rate cases squarely refutes PGW's new approach and instead relies on the true cost of service which shows plainly that Vicinity's rates already subsidize PGW's other customers.⁴¹

The ID does not even acknowledge that Vicinity proved that the cost of service produced a rate far lower than that demanded by PGW, nor does it address PGW's flawed approach to ratemaking that would demand higher rates of customers deemed capable of paying higher rates. Rather, the ID appears to assign Vicinity to an existing rate -- one that is even higher than PGW demanded.

4. PGW's proposed \$0.61 rate, or the lowest currently available Interruptible rate would jeopardize Vicinity's Business.

Vicinity has made it clear throughout this proceeding that it cannot long survive if it is forced to pay the \$0.61/Dth rate demanded by PGW. It should also follow that the interruptible rate IT required by the ID, which is more than \$0.80/Dth, would likewise be even more untenable. That is not to say that Vicinity would be immediately forced to close its doors, but in the longer term, it would make what is now the most environmentally beneficial energy source in downtown

⁴⁰ Tr. 202.

⁴¹ Tr. 181.

Philadelphia, namely steam produced by cogeneration and distributed through the center city steam loop, less economically viable by forcing Vicinity to significantly increase steam rates to its Philadelphia customers and the electric power Vicinity sells through PJM would eventually be priced out of the market.

Unless the ID is corrected and PGW directed to charge an appropriate, COSS-based rate, Vicinity will have no choice but to invest the capital needed to bypass PGW completely by constructing its own gas transportation pipeline to connect it directly to TETCO's Philadelphia Lateral – a process that has been under way for over a year and which is approaching the tipping point. That is reality.

The ID's assigning Vicinity to a rate to be "agreed to" in the future by Vicinity and PGW, creates greater uncertainty for Vicinity. At page 17 the ID states that this matter is better dealt with in PGW's next base rate case and then in Ordering Paragraphs Nos. 2 & 3, authorizes PGW to provide natural gas transportation service to Grays Ferry and VEPI under rate IT -- with or without standby service – consistent with service agreement(s) agreed to by Grays Ferry, VEPI, and PGW, for service after January 1, 2023. The ID is unclear whether it would place Vicinity into an existing Rate IT tier or allow for the creation of a new more appropriate tier, but in case it is the former, it would be a rate that is even higher than what PGW demanded in this case - an absurd and clearly reversible position. While Vicinity does qualify for interruptible service and while it understands the availability of stand-by service, such a requirement does not resolve the controversy, it merely prolongs it, while at the same time, requiring Vicinity to pay dramatically increased rates into the indefinite future.

5. Burden of Proof

Without discussion of the evidence presented in the case, the ID reaches the bald conclusion Vicinity has failed to carry its burden of proof, stating “there is nothing in the record to establish, with certainty, the circumstances will change after the expiration of the contracts.”⁴² This conclusion is entirely unsupported, and contrary to the record.

To be sure, the complaining party before the Commission generally bears the burden of proof. 66 Pa. C.S. § 332(a). In proving the matter complained-of, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990). “Burden of proof” means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party.⁴³ The offense complained of must be a violation of the Public Utility Code, the Commission’s regulations or an outstanding order of the Commission. 66 Pa. C.S. § 701. Here, Vicinity has carried the burden. Vicinity has established that, in failing to propose reasonable and non-discriminatory rates, PGW failed to provide reasonable service.

The evidence establishes that PGW’s conduct – failure to negotiate with Vicinity in good faith regarding continuation of the existing contract, failing to propose rates that are just and reasonable for continued service, and proposing rates or classes of service that are inadequate and discriminatory – violates 66 Pa. C.S. §§ 1301 1304 and 1501. Although Vicinity bears the burden to prove its claim that PGW’s conduct violates the statute, PGW bears the burden of proving that any rate it proposes to charge Vicinity, post December 31, 2022, is just and reasonable pursuant to 66 Pa. C.S. § 315(a).

⁴² ID At 16.

⁴³ *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

Section 315(a) of the Public Utility Code, 66 Pa. C.S. § 315(a), places the burden of proving the justness and reasonableness of a proposed rate hike squarely on the public utility. *It is well-established that the evidence adduced by a utility to meet this burden must be substantial.*

Lower Frederick Twp. Water Co. v. Pa. PUC, 409 A.2d 505, 507 (Pa. Cmwlth. 1980) (emphasis added); *see also, Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067 (Pa. Cmwlth. 1981). PGW also has an obligation to provide reasonable service. 66 Pa. C.S. § 1501.

Vicinity has produced more than sufficient evidence that the rate PGW has proposed is far in excess of what is reasonable. For its part, PGW has entirely failed to explain or at all justify the basis for the drastic about-face in its cost of service study methodology, allocating to Vicinity for the first time and in direct contrast to previous sworn testimony, PGW's low pressure distribution system costs.⁴⁴ The rationale adopted by the witness in PGW's prior rate cases does not change simply because the contract is expiring as the COSS is based on cost causation, not the ability to recover such costs.⁴⁵ The ID fails to analyze any of the COSS evidence which must be the basis for any rate charged, and simplistically dismisses Vicinity's claim. The absence of substantial analysis, or indeed any analysis, leaves the ID open to significant challenge, and any final decision based on the ID and lacking in analysis and justification will not stand up to judicial scrutiny.⁴⁶

In this regard, the ID's holding that Vicinity failed to definitively prove that its terms of service will change after the contract expiration simply beggars belief. The evidence is undisputed that PGW forced this proceeding by stalling negotiations for years and then finally demanding a

⁴⁴ St. JC2, 11:1-13:18.

⁴⁵ Tr. 181-184; St. JC2, 11:1-13:18.

⁴⁶ "A factfinder, under the Administrative Agency Law, is required to include findings necessary to resolve the issues raised by the evidence and relevant to the decision." *Popowsky v. Pa. Pub. Util. Comm'n*, 683 A.2d 958, 962 (Pa. Cmwlth. 1996). "Moreover, Section 703(e) of the [Public Utility] Code requires the PUC to make findings that are 'in sufficient detail to enable the court on appeal, to determine the controverted questions presented by the proceeding.'" *Id.* (quoting 66 Pa.C.S. § 703(e)).

drastic change in contract terms that featured a near ten-fold rate increase, and then refused to engage in reasonable negotiations. During the course of this proceeding, PGW clarified that its demand was an increase of “merely” 750%. Accordingly, absent Commission intervention or Vicinity’s commitment to bypass PGW, PGW holds all the cards in any future negotiation, and the only evidence of record is that PGW intends to exploit its superior bargaining position.

In short, consideration of the record, and a review of the evidence makes it clear that Vicinity has proven by a preponderance of the evidence that PGW has demanded a rate that is neither just nor reasonable, that the rate is premised on a faulty COSS, and that a just and reasonable rate must be less than \$0.21/Dth.

IV. CONCLUSION

The ALJ’s decision takes a path that ignores more than twenty-five years’ history, ignores the facts in the record and chooses instead to take the shortest path to resolution, but clearly not a viable path. There is no doubt that Vicinity was induced to forego its bypass opportunity 25 years ago and to instead agree to service from PGW under a contract rate. Now that the contract has expired, PGW seeks to dramatically increase the rate for Vicinity, with no factual basis for doing so, indeed in direct contradiction to the manner in which PGW set rates since it became subject to Commission jurisdiction. This in spite of Vicinity’s status as an environmentally beneficial energy source in center city Philadelphia that serves critical human needs customers and many other businesses. Rather than providing a fair examination of the record, the ID simply and incorrectly concludes that Vicinity has not proven that PGW will charge it an unreasonable rate without Commission action, despite the entire record, which demonstrates otherwise.

The record is clear that PGW intends to charge Vicinity a transportation rate that is at least 750 percent greater than it charges today, that PGW’s sole justification for this dramatic increase

is its new position in its flawed Cost of service study that Vicinity “uses” PGW’s low pressure distribution system when for many years and many base rate cases, PGW’s witnesses stated that Vicinity did not use the low pressure distribution system and should not be allocated the costs associated with that system. In the prior rate case when Ms. Heppenstall was PGW’s COSS witness, her study and sworn testimony likewise did not allocate low pressure distribution costs to Vicinity.

The record also is clear that Vicinity is served by a dedicated pipeline that serves only Vicinity and for which Vicinity paid the capital cost and for which it continues to pay the O&M costs, and that there is virtually no cost to PGW of serving Vicinity and that Vicinity currently provides \$2.5 million in net revenue to PGW. The record also is clear that Vicinity only came to be served by PGW as a consequence of its plan to bypass PGW 25 years ago and that it poses the same threat now, as its bypass plans are well underway. All these facts are ignored by the ID and do not appear to have been given any consideration in the outcome of this matter. All of these facts prove that Vicinity is entitled to a special rate. These facts also prove that such special transportation rate cannot be higher than \$0.21/Dth – there is no support in the record for any rate in excess of \$0.21/Dth. Again, these facts were not reviewed or analyzed in any way in the ID in its race to reach the simplistic result it does.

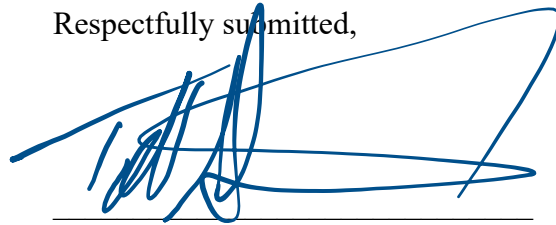
Vicinity has proven that it is entitled to continue receiving service at a special rate, and based on the record that rate cannot be higher than \$0.21/Dth. PGW’s contrived COSS notwithstanding, there simply is no reasonable basis in the record for a rate higher than \$0.21/Dth. Vicinity proposes two ways the Commission could implement a fair, just and reasonable result:

Option one – review the record and its cost of service studies and set a proper cost-based transportation rate for Vicinity now – retroactive to 1/1/23. This preferred option provides a timelier clarification of the real costs Vicinity must consider.

Option two – require a proper cost-based transportation rate for Vicinity be set in PGW’s next general rate case while in the interim maintaining the existing rates/term/conditions of service under which PGW serves Vicinity now. This option continues the uncertainty for an indefinite period, at which point all the same facts must be considered.

Either approach would work, but the ID’s approach of ignoring the obvious, cannot be left to stand.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'D.A. Whitaker', written over a horizontal line.

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