

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held April 20, 2023

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
Stephen M. DeFrank, Vice Chairman
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Grays Ferry Cogeneration Partnership
and Vicinity Energy Philadelphia Inc.

C-2021-3029259

v.

Philadelphia Gas Works

OPINION AND ORDER

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BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc. (Vicinity¹ or Complainants) on January 17, 2023, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Marta Guhl served on December 27, 2022, in the above-captioned proceeding. In the context of a Formal Complaint (Complaint) proceeding, the Initial Decision grants a more than 750% rate increase to Philadelphia Gas Works (PGW), in addition to assigning Vicinity to a different rate class under PGW's tariff, as the "just and reasonable" rate under Section 1301 of the Public Utility Code (Code). PGW and the Office of Consumer Advocate (OCA) both filed Replies to Exceptions on January 27, 2023.

For the reasons stated below, we shall: (1) grant, in part and deny, in part, Vicinity's Exceptions; (2) adopt the Initial Decision, as modified, consistent with this Opinion and Order; and (3) direct that the issue of the "just and reasonable" rate based upon cost of service (COS) and rate class, applicable to PGW's service to Vicinity, be expressly addressed in the PGW 2023 Base Rate Case which is currently pending at Docket No. R-2023-3037933² consistent with this Opinion and Order. We further conclude, as discussed more fully, *infra.*, that in the interim until Commission approval of a new rate to take effect under PGW's pending base rate proceeding, the "just and reasonable" rate as well as the terms and condition of service applicable to Vicinity, that

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

² *Pa. PUC v. PGW*, Docket No. R-2023-3037933 (*PGW 2023 Base Rate Case*). PGW filed for a general rate base increase on February 23, 2023, two months after the ALJ's Initial Decision in this Complaint proceeding.

currently exist pursuant to the most recently approved PGW Tariff Rate GTS-F³ remain in effect by operation of law under Chapter 13 of the Code, and applicable law. *See* Chapter 13, Subpart A of the Code (pertaining to rates), 66 Pa. C. S. § 1301, et seq.

I. Background/History of the Proceeding⁴

This case is before us upon the Complaint initiated by Vicinity, under Section 701 of the Code, which raised the question of the “just and reasonable” rate applicable to PGW’s provision of service to Vicinity under Section 1301 of the Code. In the context of the Complaint, the ALJ’s analysis and disposition was premised upon the conclusion that the Commission-approved PGW Tariff Rate GTS-F, would “expire” or no longer be applicable as of December 2022, based upon the expiration of the underlying service agreements from which the rates and terms of service were derived when the Commission approved PGW Tariff Rate GTS-F. I.D. at 16. Because we conclude that the ultimate disposition of the Complaint turns upon the lawful meaning and application of PGW Tariff Rate GTS-F, our disposition shall address that issue as a preliminary matter, before addressing the disposition of Supplementary Matters and the Exceptions.

³ PGW Tariff Rate GTS-F describes the Gas Transportation Service-Firm rate class and rate schedule applicable to PGW’s provision of service to Vicinity. Vicinity is the only customer served under Rate GTS-F (PGW Tariff Rate GTS-F). *See* PGW Gas Service Tariff – Pa. P.U.C. No. 2 at Pg. 118, Effective September 1, 2003. PGW Tariff Rate GTS-F, effective September 1, 2003, is the most recently approved tariff rate in effect for PGW’s provision of service to Vicinity, where, by adoption of this Opinion and Order, the temporary Tariff Supplement No. 156 shall expire. *See Pa. PUC v. PGW*, Docket Nos. R-2022-3036472, C-2022-3036774, and C-2022-3036783 (Opinion and Order entered December 27, 2022) (approving Supplement No. 156 to expire upon entry of final order at Docket No. C-2021-3029259).

⁴ The Procedural History of the Complaint proceeding is set forth in the ALJ’s Initial Decision and is incorporated herein by reference. *See* I.D. at 1-4. As previously noted, Vicinity filed Exceptions on January 17, 2023, and PGW and the OCA filed Reply Exceptions on January 27, 2023.

A. Background of the Parties: Pre-Commission Jurisdiction

We note that the history of the rates and terms of service agreed upon by PGW and Vicinity predates the Commission's jurisdiction over PGW's Commission-approved tariff rates and terms of service.

In 1995, Vicinity actively pursued the available means to by-pass PGW's system by working in cooperation with Texas Eastern Transportation Company (TETCO) in seeking Federal Energy Regulatory Commission (FERC) approval to construct a Vicinity-owned pipeline to connect TETCO's Philadelphia Lateral and Vicinity's facilities at Grays Ferry. Vicinity's plans were to secure a source of natural gas in sufficient volume and pressure to produce both electricity and steam from a single unit of fuel. PGW actively opposed Vicinity's plan to bypass PGW. Despite PGW's opposition, the FERC approved Vicinity's plan. Exc. at 3; citing, St. JC1, 6:1-15.

In order to avoid Vicinity's bypass of its system, PGW negotiated a 25-year agreement with Vicinity whereby Vicinity would agree not to bypass PGW and would abandon the FERC-approved plan to construct a bypass with TETCO. Under the agreement, Vicinity agreed to pay PGW over \$10 million to construct a new PGW-owned two-mile segment of pipeline and repurpose a PGW-owned two-mile petroleum products pipeline to provide service to Vicinity at very high pressure directly from TETCO's interstate Philadelphia Lateral, collectively called "the four-mile line." At present, PGW has no scheduling or balancing duties or obligations related to Vicinity's interstate deliveries directly with TETCO. In addition, Vicinity pays PGW a separate annual \$160,000 Operation and Maintenance (O&M) charge for the four-mile line. Since PGW's service to Vicinity began, Vicinity has been the only customer ever served from the PGW-owned four-mile line, which is a high-pressure pipeline. Exc. at 2-3, citing Vicinity St. JC-1, 17:16-18:3; St. JC1, 17:13-19; JC1, 8:13-18.

Prior to the Commission’s assumption of jurisdiction over PGW, the rates and terms of service between PGW and Vicinity were established under a group of four contracts, referred to as “the 1996 Contracts” or hereafter referred to as “the Agreement.” *See* I.D. at 5, F.O.F. No. 9, citing PGW St. 1R at 6.⁵

B. Commission Jurisdiction of PGW Tariff Rate GTS-F

The Commission’s jurisdiction over PGW and its tariff rates arose from the legislature’s adoption of the Natural Gas Choice and Competition Act, 1999, June 22, P.L. 122, No. 21 § 3, effective July 1, 1999. (Chapter 22, Natural Gas Competition) 66 Pa. C.S. § 2201 *et seq*; 66 Pa. C.S. § 2201(b) (establishing Commission jurisdiction over PGW “with the same force as if the service were rendered by a public utility.”). Pursuant to Section 2212(g), PGW was required to file an initial tariff and restructuring filing for the Commission’s consideration and approval. Under Section 2203(11), the Commission’s jurisdiction over natural gas distribution regulation of rates **expressly continued under Chapter 13 (pertaining to rates and rate making)**. *See* 66 Pa. C.S. §§ 2212(g) and 2203(11) (emphasis added).

The Commission’s authority over PGW Tariff Rate GTS-F, as originally proposed by PGW, took effect when the Commission considered PGW’s Chapter 22 filing, including its proposed initial tariff and restructuring plan, which the Commission subsequently approved. *See Pa. PUC v. PGW*, Docket No. M-00021612 (Order entered March 31, 2003) (*PGW 2003 Restructuring Order*). Therefore, the rate class, rates, and

⁵ We note that the four 1996 Contracts which make up the Agreement between PGW and Vicinity were neither submitted into evidence as part of the record of this Complaint proceeding, nor referenced by PGW as having been entered into the record of *any* proceeding, including PGW Tariff Rate GTS-F. *See* PGW M.B. at 2, fn. 8. (PGW notes that none of the 1996 Contracts have been made a part of the record in this case).

terms of service specified under PGW Tariff Rate GTS-F were established by the Commission's approval of PGW's restructuring plan.⁶

A review of PGW's tariff filings from the time of the Commission's original adoption of PGW Tariff Rate GTS-F by the Commission's *PGW 2003 Restructuring Order*, through five subsequent base rate proceedings brought by PGW, in 2006, 2009, 2017, 2020, and 2023,⁷ reflects that PGW has never proposed a change in the Commission-approved PGW Tariff Rate GTS-F. Even though PGW, as a utility can seek a change in rate under the applicable provisions of Chapter 13, PGW failed to do so, either as part of any of its five base rate proceedings between 2006 through 2023 or in any other manner.⁸ *Id.*

⁶ As a general matter, by the *PGW 2003 Restructuring Order*, the Commission approved PGW's proposed provision of transportation service to larger volume industrial customers under the rate classes and rates and terms of service of PGW's proposed tariff rates: Gas Transportation Service-Firm (GTS-F) by which Vicinity was the only customer receiving service; Gas Transportation Service-Interruptible (GTS-I); and, Interruptible Transportation (IT).

⁷ *Pa. PUC v. PGW*, Docket No. R-00061931 (Order entered September 28, 2007) (*PGW 2006 Base Rate Case*); *Pa. PUC v. PGW*, Docket No. R-2009-2139884 (Order entered July 29, 2010) (*PGW 2009 Base Rate Case*); *Pa. PUC v. PGW*, Docket No. R-2017-2586783 (Order entered November 8, 2017) (*PGW 2017 Base Rate Case*); *Pa. PUC v. PGW*, Docket No. R-2020-3017206 (Order entered November 19, 2020) (*PGW 2020 Base Rate Case*); and *Pa. PUC v. PGW*, Docket No. R-2023-3037933 (*PGW 2023 Base Rate Case*).

⁸ We note that PGW filed a Tariff Supplement related to PGW Tariff Rate GTS-F to take *temporary effect* to preserve the status quo until the Commission's final order in the present Complaint proceeding, or April 23, 2023, whichever is earlier. *See Pa. PUC v. PGW*, Docket Nos. R-2022-3036472, C-2022-3036774, and C-2022-3036783. By our final disposition of this Complaint proceeding, PGW's Tariff Supplement 156 to Gas Service Tariff – Pa. P.U.C. No. 2, is no longer effective. By this Opinion and Order we conclude that the Commission-approved PGW Tariff Rate GTS-F, effective date, September 1, 2003, remains in effect by operation of law.

C. PGW Proposes Rate Increase via Negotiation

While, to date, PGW has not proposed any change in the Commission-approved PGW Tariff Rate GTS-F by initiation of any Chapter 13 filing, PGW did propose a rate increase to Vicinity in the context of negotiating a new service agreement to replace the Agreement which was set to expire in December 2022. During negotiations, PGW extended an offer to Vicinity in late-February 2021, in a written draft contract, proposing a tenfold rate increase. Because of the looming termination date of the Agreement in December 2022, the steep rate increase proposed by PGW, and the uncertainty caused by the expiration of the Agreement, Vicinity determined that it had no choice but to file the instant Complaint seeking the Commission's review in setting "just and reasonable" gas transportation rates as well as the terms and conditions. Exc. at 3, citing Vicinity St. JC-1, 5:3-13; St. JC1, 11:7-13.

D. PGW Proposes Rate Increase via Responsive Pleadings to Complaint

In the Complaint proceeding, Vicinity sought to remove any doubt regarding the effective rates and terms of service upon the approaching expiration of the Agreement in December 2022. Vicinity argued that the "just and reasonable" rate was a continuation of the existing rate and terms of service under PGW Tariff Rate GTS-F. In response, PGW proposed, as part of its responsive pleadings in the present Complaint proceeding, that the "just and reasonable" rate to apply to Vicinity should be based upon COS at a much higher rate. PGW offered expert testimony in support of its proposed Cost of Service Study (COSS). Answer at 13 (proposing firm or interruptible tariff rates to replace Rate GTS-F); PGW M.B. at 44-48 (COSS summary).

PGW further proposed that the ALJ assign Vicinity to a different rate class in PGW's approved tariff rate schedule with a rate increase of, at a minimum, more than 750%. PGW's proposal to assign Vicinity to a different class and, at a minimum, a

COS-based 750% rate increase, was premised upon PGW's position that PGW Tariff Rate GTS-F ceased to be "available" to Vicinity by operation of the terms of the Agreement, which would expire in December 2022. PGW asserted that the "gap" in an effective tariff rate applicable to Vicinity required that the ALJ issue an order to "fill the gap," by selecting from the already approved rate schedule under PGW's tariff (except for Rate GTS-F). I.D. at 22-23⁹; PGW M.B. at 62-65.

II. Applicable Law

We advise the Parties that any issue or argument that we do not specifically address herein has been duly considered and will be denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, Univ. of Pa. v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

A. Chapter 13, Subchapter A (Regarding Rates) and General Ratemaking Principles

Because our disposition must be consistent with the mandatory provisions of Chapter 13, it is also necessary that consideration of the issues presented be rendered against the backdrop of both the mandatory statutory provisions of Chapter 13,

⁹ PGW's position was that Vicinity could elect either Rate IT or Rate GS from PGW's Rate Schedule. However, PGW's COSS related to Vicinity justified a (\$ per DTH rate) of \$0.698, which was lower than the rate of either PGW's Rate IT (interruptible) at \$0.8550, or Rate GS (Firm) which was substantially higher. PGW M.B. at 44. In addition, PGW's proposal that Vicinity be assigned to rate class IT (for interruptible service) was not consistent with Vicinity's present rate class which required firm service. Vicinity M.B. at 40.

Subchapter A (regarding rates) and the bedrock rate making principles regarding rate structure and rate design which inform our analysis of the present proceeding.

1. Chapter 13, Subchapter A (Regarding Rates)

Section 1301 of the Code establishes the requirement that every rate be “reasonable” in the circumstances. Section 1301 provides, in pertinent part:

§ 1301. Rates to be “just and reasonable.”

- (a) Regulation. -- Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be “just and reasonable”, and in conformity with regulations or orders of the commission...

66 Pa. C.S. § 1301(a).

Section 1303 of the Code establishes the requirement that every rate, once effective, shall remain in effect unless and until a new rate becomes effective.

Section 1303 provides, in pertinent part:

§ 1303. Adherence to tariffs.

No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto. **The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this part.** Any public utility, having more than one rate applicable to service rendered to a

patron, shall, after notice of service conditions, compute bills under the rate most advantageous to the patron.

66 Pa. C.S. § 1303 (emphasis added). *See PPL Elec. Utilities Corp. v. Pa. PUC*, 912 A.2d 386 (Commonwealth 2006) (Rate agreements are controlled by approved tariff rates, the “default tariff rate” is the last approved tariff rate, where the parties argued that the tariff rate “terminated” because the parties entered into a new contract, the Commission concluded the parties’ contract could not change the tariff rate by contract, the tariff rate once approved by the Commission, remains in force and effect until changed by Commission order approving a new rate to take effect).

In a rate proceeding, the public utility seeking a rate increase traditionally submits other supporting evidence relating to the development of specific rate schedules under each customer class. *See Columbia Order* at 185 (citing *Lloyd*, 904 A.2d at 1015; 66 Pa. C.S. §§ 1301, 1304). Section 1304 provides, in pertinent part:

§ 1304. Discrimination in rates.

No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, either as between localities or as between classes of service.

66 Pa. C.S. § 1304 (emphasis added).

A utility seeking a change to a rate in effect is required to file for Commission approval in advance of the proposed effective date of the change in rate, [pursuant to Section 1308(pertaining to voluntary changes in rates).] Under Section 1308, a utility may seek a voluntary change in a tariff rate, either by filing a new rate under Section 1308(b) or by filing a general rate increase under Section 1308(d).

When a utility voluntarily submits a tariff stating a new rate which is not a general rate increase, Section 1308(b) directs a hearing to determine the lawfulness of the proposed rate. *See* 1308(b) (hearing and suspension of rate change). 66 Pa. C.S. § 1308(b).

For general rate increases, Section 1308(d) provides the procedures for changing rates, the time limitations for the suspension of the new rates, and the time limitations on the Commission's actions. 66 Pa. C.S. § 1308(d) (relating to general rate increases).

Section 1308(a) establishes the general rule that existing Commission-approved tariff rates remain in effect until a new Commission-approved tariff rate takes effect. Section 1308(a) provides in pertinent part:

§ 1308. Voluntary changes in rates.

- (a) **General rule.**--Unless the commission otherwise orders, no public utility shall make any change in any existing and duly established rate, except after 60 days notice to the commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The public utility shall also give such notice of the proposed changes to other interested persons as the commission in its discretion may direct. Such notices regarding the **proposed changes which are provided to the utility's customers shall be in plain understandable language as the commission shall prescribe. All proposed changes shall be shown by filing new tariffs, or supplements to existing tariffs filed and in force at the time.** The commission, for good cause shown, may allow changes in rates, without requiring the 60 days notice, under such conditions as it may prescribe.

66 Pa. C.S. § 1308(a) (emphasis added) (requiring any changes to the effective tariff rate to be pursuant to filing with 60 days' notice in advance of any proposed change, which

filing plainly states the change proposed to the rates then in force, and the time when the changes to rates will go into effect).

Section 1308(d) further sets forth the mandatory procedure investigation of any proposed rate increase. Section 1308(d) provides in pertinent part:

- (d) **General rate increases.**--Whenever there is filed with the commission by any public utility described in paragraph (1)(i), (ii), (vi) or (vii) of the definition of "public utility" in section 102 (relating to definitions), and such other public utility as the commission may by rule or regulation direct, **any tariff stating a new rate which constitutes a general rate increase, the commission shall promptly enter into an investigation and analysis of said tariff filing and may by order setting forth its reasons therefor, upon complaint or upon its own motion, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate,** and the commission may, at any time by vote of a majority of the members of the commission serving in accordance with law, permit such tariff to become effective, except that absent such order such tariff shall be suspended for a period not to exceed seven months from the time such rate would otherwise become effective.

66 Pa. C.S. § 1308(d) (emphasis added).

2. General Ratemaking Principles

The Code gives the Commission broad authority and responsibility to ensure that the rates charged by public utilities are “just and reasonable” and not unduly discriminatory. See 66 Pa. C.S. §§ 1301, 1304. Pursuant to this “just and reasonable” standard, a public utility may obtain “a rate that allows it to recover those expenses that are reasonably necessary to provide service to its customers[,] as well as a reasonable rate

of return on its investment.” *City of Lancaster (Sewer Fund) v. Pa. PUC*, 793 A.2d 978, 982 (Pa. Cmwlth. 2002). There is no single way to arrive at “just and reasonable” rates. “The [Commission] has broad discretion in determining whether rates are reasonable” and “is vested with discretion to decide what factors it will consider in setting or evaluating a utility’s rates.” *Popowsky v. Pa. PUC*, 683 A.2d 958, 961 (Pa. Cmwlth. 1996) (*Popowsky*). The Commission is required to investigate all general rate increase filings. *Popowsky*, 683 A.2d at 961.

3. Cost of Service and Customer Class

It is well settled that the “polestar” of ratemaking concerns is the public utility’s “cost of providing service.” *Pa. PUC, et al. v. Columbia Gas of Pennsylvania, Inc.*, Docket No. R-2020-3018835, *et al.* (Order entered February 19, 2021) (*Columbia Order*) at 46, n.17 (citing *Lloyd v. Pa. PUC*, 904 A.2d 1010, 1019-21 (Pa. Cmwlth. 2006) (*Lloyd*)). Inherent in the “cost of providing service” principle of ratemaking is the recognition that public utilities are natural monopolies and that the Commission’s oversight through cost-of-service ratemaking regulation serves as a proxy for a competitive market in appropriately restraining, or exerting downward pressure on, the profit-maximizing prices a monopoly could otherwise charge in the absence of price

regulation. *Columbia Order* at 46, n.17. Other important ratemaking concerns include quality of service,¹⁰ rate gradualism,¹¹ and rate affordability.¹² *Columbia Order* at 46-47.

Once the revenue requirement or COS is determined, the next steps traditionally are to allocate these costs to customer classes and then design the specific rates. The utility will typically propose the appropriate “class cost of service,” determined by the utility’s provision of service to different customer classes. In general rate increases of more than \$1 million, a public utility traditionally submits an allocated class COSS for the test year, showing the allocation of the overall COS to each customer class based on certain allocation method(s). As previously noted, the public utility traditionally submits other supporting evidence relating to the development of specific rate schedules under each customer class. *See Columbia Order* at 185 (citing *Lloyd*, 904 A.2d at 1015; 66 Pa. C.S. §§ 1301, 1304).

¹⁰ *See* 66 Pa. C.S. § 523(a)-(b) (Commission shall consider the efficiency, effectiveness and adequacy of service when determining “just and reasonable” rates and shall give effect to this section by making such adjustments to specific components of the utility’s claim cost of service as it may determine to be proper and appropriate); *see also* 66 Pa. C.S. § 526(a) (Commission given authority to reject, in whole or in part, a public utility’s rate increase request upon finding that service rendered is inadequate in that it fails to meet quantity or quality for the type of service provided).

¹¹ *See Lloyd*, 904 A.2d at 1020 (explaining that gradualism is the principle under which utility rates are gradually increased to avoid rate shock, as part of what is overall considered a reasonable rate under the circumstances and is permitted in implementing large rate increases).

¹² *See Pa. PUC, et. al. v. Twin Lakes Utilities, Inc.*, Docket No. R-2019-3010958 (Order entered March 26, 2020) at 48, 80 (the ALJ did not err in considering evidence relating to the various quality of service and rate affordability issues in the proceeding and factoring in such evidence as part of her overall determination on which expert witnesses’ cost of equity to adopt for setting “just and reasonable” rates).

4. Burden of Proof for Rate Increase is Born by the Utility

The burden of proving the justness and reasonableness of a rate is placed on the public utility. 66 Pa. C.S. § 315(a) (relating to reasonableness of rates). The evidence necessary to meet this burden of proof must be substantial. *Lower Frederick Twp. Water Co. v. Pa. PUC*, 409 A.2d 505, 507 (Pa. Cmwlth. 1980).

In discharging its burden of proof in general rate increases, a public utility traditionally submits an overall claim of its cost of service, or total revenue requirement, which is established through the following two main components in a test year: (1) the allowed total expense claim, plus (2) the allowed return on investment. *Columbia Order* at 47. However, PGW is a cash flow utility which does not rely on equity financing.¹³ It is well settled that, pursuant to 66 Pa. C.S. § 2212(e), the Commission utilizes the cash flow method of ratemaking to establish PGW's rates, rather than having its revenue requirement determined on the basis of a fair rate of return on a used and useful rate base.

In 2010, the Commission issued a policy statement setting forth the criteria and the financial and other considerations that are to be examined in setting base rates at "just and reasonable" levels, applicable to PGW. See 52 Pa. Code §§ 69.2701-2703. In its Policy Statement, the Commission described the requirements of the Cash Flow Method as follows:

- (b) The Commission is obligated under law to use the cash flow methodology to determine PGW's "just and reasonable" rates. Included in that requirement is the

¹³ PGW's ratemaking process is based on a Cash Flow Ratemaking Method where its revenue requirement is the sum of operating expenses, debt service, and a "margin" sufficient to maintain the organization's ability to attract capital on reasonable terms. Other than PGW and Pittsburgh Water and Sewer Authority (PWSA), utilities under the jurisdiction of the Commission use the rate base/rate of return methodology to set rates.

subsidiary obligation to provide revenue allowances from rates adequate to cover its reasonable and prudent operating expenses, depreciation allowances and debt service, as well as sufficient margins to meet bond coverage requirements and other internally generated funds over and above its bond coverage requirements, as the Commission deems appropriate and in the public interest for purposes such as capital improvements, retirement of debt and working capital.

52 Pa. Code § 69.2702(b). The Commission also stated that, in determining “just and reasonable” rate levels for PGW it would consider, among other relevant factors, the following financial factors:

- PGW’s test year-end and (as a check) projected future levels of non-borrowed year-end cash.
- Available short-term borrowing capacity and internal generation of funds to fund construction.
- Debt to equity ratios and financial performance of similarly situated utility enterprises.
- Level of operating and other expenses in comparison to similarly situated utility enterprises.
- Level of financial performance needed to maintain or improve PGW’s bond rating thereby permitting PGW to access the capital markets at the lowest reasonable costs to customers over time.
- PGW’s management quality, efficiency and effectiveness.
- Service quality and reliability.
- Effect on universal service.

52 Pa. Code § 69.2703.

5. Commission Review of an ALJ's Initial Decision is *De Novo*

The parties are reminded that the Commission, not the ALJ, is the ultimate factfinder in formal complaint proceedings; it weighs the evidence and resolves any conflicts in testimony. When reviewing the initial decision of an ALJ, the Commission has all the powers that it would have had in making the initial decision except as to any limits that it may impose by notice or by rule. *Milkie v. Pa. PUC*, 768 A.2d 1217, 1220, n. 7 (Pa. Cmwlth. 2001) (citing, *inter alia*, 66 Pa. C.S. § 335(a))

III. Discussion

Informed by the mandatory statutory provisions of Chapter 13, Subpart A (Regarding Rates) and the bedrock rate making principles at issue, we shall first address the lawful meaning and application of PGW's Commission-approved PGW Tariff Rate GTS-F.

A. Lawful Meaning and Application of PGW Tariff Rate GTS-F

At the crux of this dispute is the Commission-approved PGW Tariff Rate GTS-F (PGW Gas Service Tariff – Pa. P.U.C. No. 2 at Pg. 118, Effective September 1, 2003), the Commission's approval of which, both as to rates and terms of service, has governed PGW's provision of service to Vicinity since PGW's original restructuring under Commission jurisdiction effective September 1, 2003.¹⁴

As a preliminary matter, because we conclude that, as a matter of law, the terms of PGW Tariff Rate GTS-F control the outcome of the present Complaint, and

¹⁴ *See, PGW 2003 Restructuring Order* (establishing PGW's approved rates and terms of service by Commission-approved tariff).

further conclude that PGW’s interpretation of the language of PGW Tariff Rate GTS-F, as adopted by the ALJ, to be in error and unlawful under Chapter 13 of the Code, it is necessary for us to address the lawful interpretation of PGW Tariff Rate GTS-F and its application to the present circumstances. While we agree that, as a matter of contract law, there is no question but that the private Agreement between PGW and Vicinity expired in December 2022, it is, however, a separate matter under our sole jurisdiction to determine whether, under the Code, the Commission-approved PGW Tariff Rate GTS-F remains in effect. For the purposes of Commission review under the Code, this case is not a contract case, it is a tariff case.

1. Positions of the Parties

In this Complaint proceeding, Vicinity alleged that the language of PGW Tariff Rate GTS-F should be interpreted, on its face, to continue the application of PGW Tariff Rate GTS-F for Vicinity. Vicinity argued PGW Tariff Rate GTS-F 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.” Vicinity’s position was that the reference to “currently valid contracts” pertained to the contracts then in effect on September 1, 2003. Vicinity asserted 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 PGW Rate GTS-F. I.D. at 9-12; Vicinity M.B. at 23-24. Vicinity argued that ambiguity in the tariff language, if any, should be construed against PGW.¹⁵

¹⁵ Vicinity also petitioned the Commission at this docket on an interim emergency basis requesting that the Commission exercise its authority under Section 508 of the Code, to modify and extend the Agreement between PGW and Vicinity to continue

PGW asserted in the instant Complaint proceeding that service under the PGW Tariff Rate GTS-F rate schedule was, by its terms, “closed to new customers and new contracts in 2003.” PGW argued that the tariff language allows for continued service under Rate GTS-F only for the remaining duration of the contract that were then in existence on September 1, 2003. Further, PGW maintained that upon expiration (or termination) of those contracts, service will not be renewed or extended under PGW Tariff Rate GTS-F and customers will be required to transition to service under other approved rate schedules in PGW’s Tariff. I.D. at 12-13; PGW M.B. at 10.

The OCA adopted PGW’s interpretation of the language of PGW Tariff Rate GTS-F, and concluded, therefore, that the rate schedule was “closed” in 2003, and the Agreements served under the PGW Tariff Rate GTS-F were served under that rate only as “grandfathered until the expiration of the service contracts in place on or before September 1, 2003.” I.D. at 14; OCA M.B. at 6.

Both PGW and the OCA asserted that, now that Vicinity was no longer eligible to receive service under PGW Tariff Rate GTS-F, there was a “gap” created in the existence of an approved tariff rate applicable to PGW’s service to Vicinity. PGW, and the OCA, argued that, based on the assumption that PGW Tariff Rate GTS-F was no longer “available” to Vicinity, PGW’s service to Vicinity should be allocated to one of the “remaining” rate schedules in PGW’s approved tariff, (other than PGW Tariff Rate

until the matter could be resolved under a base rate proceeding. The Commission declined to modify the contract on the basis that no emergency was established, particularly where PGW voluntarily agreed to extend PGW Tariff Rate GTS-F until the final opinion is entered in this proceeding. *See Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia Inc. v. Philadelphia Gas Works*, Docket No. C-2021-3029259, (Opinion and Order entered December 28, 2022). We note that our denial of the relief requested, (§508 modification/extension of the expiration date of the Agreement) was made pending our final disposition in this Complaint, and has no impact relevant to our present review and analysis of the question of the lawful interpretation and application of PGW Tariff Rate GTS-F.

GTS-F). They argued that Vicinity, as a customer of PGW, must pay rates that reflect COS principles just as any customer taking service under PGW's Commission-approved tariffs. PGW M.B. at 44-48; OCA M.B. at 8, 15. On this basis, PGW and the OCA averred that the applicable rate automatically *defaulted* to the "remaining rate schedule" in PGW's existing Commission-approved tariff. I.D. at 22-23 (adopting PGW and OCA position that Vicinity may elect either Rate IT or Rate GS).

PGW offered expert testimony of its COSS and the OCA offered expert testimony on its modifications to PGW's COSS, to achieve the applicable rate for Vicinity.¹⁶ PGW M.B. at 44-48. As to burden of proof, both PGW and the OCA argued that since Vicinity is seeking a new rate, the burden of proof is on the proponent of the order. PGW M.B. at 13-14; OCA M.B. at 6.

With respect to the lawful interpretation of PGW Tariff Rate GTS-F, the Office of Small Business Advocate (OSBA) agreed with PGW's position that the rate could not be applied. The OSBA argued that, once that "currently valid agreement" expires at the end of 2022, so does Vicinity's eligibility for PGW Tariff Rate GTS-F. OSBA M.B. at 12. However, the OSBA also asserted that the present Complaint proceeding was not the appropriate proceeding to determine the "just and reasonable" rate for PGW's provisions of service to Vicinity and argued that such a determination was only proper within the context of PGW's next base rate proceeding. *See* I.D. at 15-16; OSBA M.B. at 11.

¹⁶ Under PGW's COSS evidence presented the maximum rate justified was a (\$ per DTH) rate of \$0.698, the OCA modified PGW's COSS to arrive at a rate of \$0.756. However, both PGW and the OCA argued that Vicinity should nevertheless be assigned to a different rate class, at a rate of either Rate IT at \$ 0.8550, or Rate GS, which was a substantially higher rate.

With respect to PGW's COSS for Vicinity, the OSBA asserted that a separate base rate treatment may be reasonable for Vicinity. The OSBA's position was asserted as a "hybrid" approach compared to the positions argued by either Vicinity or PGW. The OSBA stated:

[T]he positions taken by the parties in this Complaint 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, the OSBA respectfully 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.

I.D. at 15; quoting OSBA M.B. at 4. The OSBA further suggested that, rather than impose an existing tariff rate which would not accurately reflect PGW's actual COS, that the Commission require the Parties to hold a follow-up proceeding to establish "placeholder values" to go into effect when PGW Tariff Rate GTS-F is no longer in effect, which could then be finalized in PGW's next base rate proceeding. OSBA M.B. at 3-4.

In rejecting PGW's COSS analysis, the OSBA further expounded upon its recommended "hybrid approach" to the question of the appropriate gas transportation rate and COS for PGW's service to Vicinity, stating:

If the Commission determines that an embedded cost-based rate is appropriate for transportation service to Vicinity, **OSBA concludes that it would not be unreasonable to establish a separate rate class for [Vicinity]**, given the facts that (a) this *customer is far larger* than any other on PGW's system, (b) this customer is *served through relatively short and readily identifiable facilities*, and (c) other Pennsylvania

NGDCs follow a similar practice. Even PGW developed a modified version of the cost allocation study from its last base rates proceeding that treats Vicinity as a separate class. However, PGW takes the position that, for cost allocation purposes, all ARS volumes are implicitly deemed to be transported using PGW's integrated distribution system, and that Complainants should be allocated a share of all of those costs.

From a cost causation perspective, this assertion is nonsense. Physically, all of the gas that flows to the GFCP facility under normal operations flows from the Philadelphia Lateral to the customer on what appear to be dedicated mains (which Complainants paid for). As Mr. Knecht explained, the ARS is a gas supply “swap” arrangement which implicitly allows Complainants access to PGW's capacity on the Philadelphia Lateral. This is a gas supply issue, and Complainants should pay for access to that capacity at market rates, to protect the interest of both GCR and base rates ratepayers. However, once Complainants have reasonably compensated PGW ratepayers for use of the gas supply capacity, there is no reason to charge Complainants with the distribution system costs for which they bear no cost causation responsibility.

With respect to specific issues as to **how [PGW's] cost allocation study should be modified to more reasonably reflect the base rates costs actually caused by [Vicinity]**, OSBA refers to Mr. Knecht's surrebuttal testimony at pages 4-7. If the Commission decides to adopt this philosophy for base rates charges to Complainants, OSBA recommends that the Commission **should direct PGW to develop a cost of service study with [Vicinity] as a separate class, and to directly assign the costs of mains, regulating equipment and metering equipment used by [Vicinity] to that class, based on the best records available, reflecting contributions in aid of construction made by [Vicinity] related to those facilities.**

OSBA M.B. at 13-14 (emphasis added), citing, PGW Statement No. 4R, Exhibit CEH-1 and OSBA Statement No. 1-R at 3.

The OSBA set forth other considerations that it asserted to be relevant in setting a “just and reasonable” rate for Vicinity which include: (1) PGW capacity assets; (2) by-pass considerations; (3) the applicable Alternative Receipt Service (ARS) rates, costs terms and conditions; (4) bundled supply service rates and terms of service; and (5) other rate elements regarding rates and terms and conditions. OSBA M.B. at 14-22.

The Philadelphia Industrial and Commercial Gas Users Group (PICGUG) took no position on the lawful application of PGW Tariff Rate GTS-F. However, like the OSBA, PICGUG asserted that the appropriate proceeding to determine the “just and reasonable” rates for PGW’s provision of service to Vicinity should be a PGW general base rate proceeding. PICGUG asserted that an individual complaint proceeding is not the proper context in which to review issues regarding the requirements for, or charges to, PGW’s Rate IT, or any change to PGW’s methodology of the COSS used to determine the cost to serve PGW’s various rate classes. Rather, PICGUG argued that these issues are more appropriately addressed as part of a base rate proceeding. PICGUG asserted:

that any such overarching recommendations to modify the rates or provision of service to some or all rate classes must be rejected by the PUC in this proceeding. **Instead, the parties can be directed to raise these issues, if appropriate, as part of PGW’s next base rate proceeding.**

PICGUG M.B. at 3 (emphasis added).

2. ALJ’s Initial Decision

The ALJ reviewed the positions of the Parties on the issue of the application of the language of PGW Tariff Rate GTS-F as a “rate dispute” and adopted the position of PGW and the OCA that PGW Tariff Rate GTS-F, the current rate under which PGW provided service to Vicinity, “will expire after the contract expires and will be closed” to Vicinity. I.D. at 16. The ALJ further concluded that Vicinity, as the

Complainants having the burden of proof, failed to meet their burden of proof as to both, the Commission's authority to impose a new rate regarding the PGW's service to Vicinity upon the expiration of the Agreement, and the Complainant's right to have the Commission modify the terms of the existing contract under Section 508 of the Code, by extension of the contract terms.

The ALJ determined:

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.

I.D. at 16-17 (emphasis added).

The ALJ concluded, as the necessary result of the conclusion that PGW Tariff Rate GTS-F would “expire,” that the ALJ was required to “fill the gap” created by the absence of an approved tariff rate. The ALJ further concluded that Vicinity had failed to present any substantial evidence on the issue of Vicinity’s entitlement to a “special rate.” Therefore, based on the assumption that no approved tariff rate existed, the ALJ determined that Vicinity should be assigned to a different rate class under the “remaining” rate schedule in PGW’s approved Tariff (other than PGW Rate GTS-F), which resulted in a minimum rate increase of 750% for PGW’s provision of service to Vicinity. I.D. at 22-23 (adopting PGW’s position that Vicinity could elect either Rate IT or GS).¹⁷

¹⁷ The ALJ’s Conclusions of Law asserted that Vicinity could elect either Rate IT or Rate GS from PGW’s Rate Schedule. However, PGW’s COSS related to Vicinity justified a (\$ per DTH rate) of \$0.698. The increased rate proposed by assigning Vicinity to PGW’s Rate IT (interruptible) was \$0.8550, the increased rate for Rate GS (Firm) was substantially higher, which are both higher rates than the rate supported by PGW’s COSS evidence. PGW M.B. at 44. In addition, the conclusion that Vicinity be assigned to Rate Class IT (for interruptible service) was not consistent with Vicinity’s present rate class which required firm service. Vicinity M.B. at 40. It appears the ALJ concluded the interruptible service (at a lower rate) could be elected by Vicinity, where certain modifications to the service contracts with PGW may render the service essentially “firm.”

A scenario by which a utility customer could select its own rate class from a menu of rates and select a rate class based upon a lower rate, appears to conflict with the Section 1304 prohibition on discrimination in service. *See* 66 Pa. C.S. §1304 (pertaining to prohibition on unreasonable preference as to customer or class of customers).

3. Disposition: Commission-Approved PGW Tariff Rate GTS-F

This case presents a question of first impression before the Commission, regarding the lawful meaning and application of PGW's Commission-approved PGW Tariff Rate GTS-F, upon the expiration of the underlying Agreement the terms of which formed the basis for the rates and terms of service of the Commission-approved PGW Tariff Rate GTS-F.

The question is whether, under the Code, a public utility can charge a customer a different/greater rate based on the expiration of a negotiated contract, that is referenced to establish the Commission-approved tariff rate schedule, but where the existing tariff rate schedule itself does not expressly state, that the rate will change upon expiration of the contract? Upon review, we conclude that, in these circumstances, the expiration of the contract does not operate to make the tariff "expire," and that the utility may not charge any rate other than the last Commission-approved tariff rate, until a new rate takes effect by Commission order.

We conclude that the effective rate, PGW Tariff Rate GTS-F, remains in effect, and did not expire under the language of the tariff, based upon the mandatory provisions of Chapter 13, which require that any proposed change in an approved tariff rate take effect only by Commission order. 66 Pa. C.S. §1303. If a utility proposes for a tariff rate to "automatically" expire, or for a new rate to take effect upon expiration of a contract, Chapter 13 obligates the utility to state this expressly in the tariff rate schedule that it submitted for Commission approval. *See* 66 Pa. C.S. §1307. Further, the mandatory provisions of Chapter 13 expressly preclude a "gap" in the coverage of an effective tariff, by mandating that the published effective tariff rate remains in effect unless replaced by a new Commission-approved tariff rate to take effect, or that the approved tariff rate expressly state that the rate will change to another stated rate upon a date or event certain. *See* 66 Pa. C.S. §1301 et seq., (Sections 1308 and 1307). To the

extent the ALJ’s Initial Decision concluded that PGW Tariff Rate GTS-F expires, or was no longer in effect, we shall reverse the ALJ’s findings of facts and conclusions of law which contradict this Opinion and Order.

The language of PGW’s Commission-approved PGW Tariff Rate GTS-F provides, in pertinent part:

AVAILABILITY

This rate is only available to those customers who utilized this this service on or before September 1, 2003 *pursuant to a currently valid* agreement with the Company.

See Rate GTS-F, PGW Gas Service Tariff – Pa. P.U.C. No. 2 at 118, Effective September 1, 2003 (emphasis added). *See* attached “A.” PGW Tariff Rate GTS-F became effective on September 1, 2003, by Commission approval of PGW’s proposed tariff rates in the *PGW 2003 Restructuring Order*.

In this proceeding, PGW asserts that the language of PGW Tariff Rate GTS-F, which incorporated by reference the rates and terms of service of the Agreement between PGW and Vicinity, also included by reference, the expiration date of that Agreement, which thereby operated to “automatically” render the PGW Tariff Rate GTS-F no longer “available” as of the expiration date of the contract in December 2022.

PGW’s interpretation of the language of PGW Tariff Rate GTS-F is summarized by PGW as follows:

[The PGW Tariff Rate GTS-F] ... rate schedule was only available to customers with a legacy contract predating

Commission regulation of PGW and only for the life of the contracts.

PGW R. Exc. at 1.¹⁸

In PGW's view, which was adopted by the ALJ, the continued effectiveness of PGW Tariff Rate GTS-F was dependent upon the "current validity" of the underlying Agreement between PGW and Vicinity. PGW asserts that, once the Agreement expired, it was no longer "currently valid" and therefore fails under the terms of PGW Tariff Rate GTS-F to continue to qualify for the rates and terms of Vicinity service.

Ultimately the ALJ agreed, as PGW had argued, that as a result of the expiration of PGW Tariff Rate GTS-F, a "gap" was created in the existence of a Commission-approved tariff rate applicable to Vicinity.¹⁹ Therefore, the ALJ determined that to "fill the gap" in an existing approved tariff rate, the ALJ could use the remaining rate schedules in PGW's approved tariff as a "default" approved tariff rate applicable to Vicinity. Based upon this rationale, the ALJ determined that Vicinity could choose

¹⁸ We note that PGW's explanation of the tariff language requires the use of different language than the tariff language itself.

¹⁹ We note that a utility's provision of service in the absence of an approved tariff rate is unlawful. The rates set forth in the tariff are the lawful rates of the utility until changed. 66 Pa. C.S. § 1303. A tariff is a set of operating rules imposed by the Commission that each public utility must follow in order to provide service to its customers. *PPL Electric Utilities Corp. v. Pa. PUC*, 912 A.2d 386 (Pa. Cmwlth. 2006). Each public utility must file a copy of its tariff with the Commission setting forth its rates, services, rules, regulations and practices so that the public may inspect its contents. 66 Pa. C.S. § 1302; 52 Pa. Code § 53.25.

between interruptible Rate Class IT, or firm Rate Class GS.²⁰ I.D. at 22-23; PGW M.B. at 44-48.

We note that neither PGW nor any of the Parties have cited to any prior precedent in which the effectiveness of a Commission-approved tariff rate was found to have “expired” based upon the expiration of a private contract which formed the basis for the rate and terms of service approved by the tariff rate, which then resulted in a “gap” in the existence of an effective tariff rate, where there was no Commission-approved provision for a new rate to take effect. Upon review of the relevant provisions of the Code and applicable precedent, we conclude that PGW’s interpretation and application of the tariff language in question, and as adopted by the ALJ, is precluded as a matter of law pursuant to the mandatory statutory provisions of Chapter 13, Subchapter A (regarding rates), and the general provisions of the Code.

It is settled law that the rates and terms of service may be established by contract terms which are subsequently approved by the Commission’s adoption of the rates and terms of service incorporated by reference to contract terms. *PPL Electric Utilities Corp. v. Pa. PUC*, 912 A.2d 386, 402 (Pa. Cmwlth. 2006). However, contract terms, once incorporated by reference to establish the rates and terms of service in a Commission-approved tariff rate, do not supersede the authority of the Commission to interpret the tariff or the mandatory application of Chapter 13. *Id.* (parties’ private

²⁰ We note that the ALJ’s conclusion that Vicinity should be assigned to a different rate class, which purported to rely on COS basis, was not consistent with PGW’s COSS evidence which did not justify any of the scheduled rate classes to which the ALJ determined Vicinity should be assigned. *See* PGW M.B. at 44-45 (summary of COSS). We further note that the conclusion that Vicinity could be assigned to a rate class for interruptible service was not consistent with the type of service Vicinity received, *i.e.*, firms service. As such, the assignment of Vicinity to Rate Class IT raised the question of whether it was in violation of Section 1304 (prohibiting discrimination in service) *see*, 66 Pa. C.S. § 1304, and 66 Pa. C.S. § 1502.

contract cannot change an effective tariff rate unless and until the contract change is approved by commission order creating a new effective tariff).

Under Section 1303 (regarding adherence to tariffs) once a tariff rate becomes effective, by operation of law, it remains so unless a new Commission-approved tariff rate takes effect in its place. The effectiveness of rates is “prospective” and a current Commission-approved tariff rate remains in effect unless and until the Commission enters an order directing the new rate to take effect. 66 Pa. C.S. § 1303.

Section 1303 of the Code establishes the requirement that every rate, once effective, shall remain in effect unless and until a new rate becomes effective. Section 1303 provides, in pertinent part:

§ 1303. Adherence to tariffs.

*No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto. **The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this part.** Any public utility, having more than one rate applicable to service rendered to a patron, shall, after notice of service conditions, compute bills under the rate most advantageous to the patron.*

66 Pa. C.S. § 1303 (emphasis added). See, e.g., *Cheltenham & Abington Sewerage Co. v. Pa. PUC*, 344 Pa. 366, 25 A.2d 334(1942) (tariff entitled company to collect rates fixed by it, until new tariff was effective).

It is settled law that:

There can be no rate except the last tariff rate published as provided by law...and the effective rate thus published supersedes all prior rates covering the service therein called for”...

Suburban Water Co. v. Oakmont Boro., 268 Pa. 243, 248, 110 A. 778 (1920). See, also, *Bell Telephone. Co. v. Pa. PUC*, 417 A.2d 827 (Pa. Comwlth. 1980) (In the absence of an exception by the Commission, a public utility may not charge any rate for services other than that lawful tariffed, and contracts fixing rates are superseded by rate in effect at the time the service was delivered). Further, it is well-settled in the Commonwealth that:

Contracts for the service of utilities are presumed to have been made subject to the police power of the state . . . , [T]he Public Utility Law *supplant[s] any agreement in so far as rates are involved between the consumer and the utility.* (Citations omitted, emphasis added.)

Delph v. Pa. PUC, 46 Pa. Commonwealth Ct. 552, 555, 406 A.2d 1209, 1210 (1979) (quoting *Scranton Electric Co. v. Avoca Borough School District*, 155 Pa. Superior Ct. 270, 274, 37 A.2d 725, 727 (1944)).

As to the Commission’s reliance on the then-existing contracts between PGW and Vicinity in 2003 for the rates and terms of service, in this sense, PGW correctly concludes that the tariff rates and terms of service may be *derived* from the contract. However, PGW is incorrect, to the extent that a contract does not control a tariff. 66 Pa. C.S. § 1303 (a tariff cannot be changed “directly or indirectly, **by any device whatsoever...**”) (emphasis added). To say that a contract can serve to “automatically change a tariff” or “cause a tariff to expire” without express approval granted by the Commission, is in violation of the plain language of 1303. A tariff has the full force and effect of law because it is approved by the Commission, and a utility must adhere to its

tariff. 66 Pa. C.S. § 1303. PGW must adhere to its tariff because once the Commission approved PGW's Tariff Rate GTS-F, the rates and terms and conditions of PGW's provision of service to Vicinity became effective upon publication on September 1, 2003, and shall remain in effect until they are changed by the Commission. 66 Pa. C.S. § 1303.

We note that, since PGW Tariff Rate GTS-F became effective in 2003, PGW has not initiated any change to it by a proposed change to tariff filing under Chapter 13. To date, PGW has only proposed a change in its Tariff Rate GTS-F in *negotiation with Vicinity* and in the *responsive pleadings* in the present Complaint. However, PGW's proposed change to PGW Tariff Rate GTS-F in the context of negotiation and in the context of this Complaint proceeding fail to satisfy the mandatory filing requirements under Chapter 13 (pertaining to changes in rates). 66 Pa. C.S. § 1308. PGW remains obligated by the mandatory provisions of Chapter 13 regarding changes in rates, to submit a filing seeking Commission approval of such change *in advance* of such change to take effect.

In order to be valid, any proposed change in an approved tariff rate, including "expiration" of a tariff rate, and specifically, any proposed new rate to be approved in its place, must be expressly requested and set forth by the utility in a mandatory tariff filing, which will not take effect unless and until approved by the Commission. *See* 66 Pa. C.S. § 1308(a) (stating general rule that any change in rate requires 60 days advance notice of the proposed change to take effect, which is expressly stated in plain understandable language) and 66 Pa. C.S. § 1307 (setting forth rule that a utility must seek Commission approval of proposed automatic adjustment or change in rate).

As a matter of procedure, Chapter 13 clearly establishes the mandatory process by which a utility may seek a change in its Commission-approved and published effective tariff rate. As a rule, changes in published effective rates are to be sought by a

Chapter 13 filing submitted 60 days in advance of any proposed change in tariff, with notice to all effected parties. 66 Pa. C.S. § 1308(a). Such filings must expressly state the change sought in plain language, in order to provide sufficient notice of the change to all interested parties. *Id.* The utility may seek a change in rate by several available means under Chapter 13. Under Section 1308(d) a utility may seek a change in tariff rates as part of its general base rate proceeding, or under Section 1308(b) (by tariff filing changing a rate²¹) (pertaining to voluntary changes in rates). Chapter 13 provides for the special process by which a utility may seek a change in rate which the utility proposes in special circumstances to take automatic effect, without the need for a new tariff filing, under Section 1307 (pertaining to sliding scale of rates; adjustments). 66 Pa. C.S. § 1307. Under Section 1307, the utility seeking an automatic change in rate must propose, and the Commission must approve, the expressly stated scenario under which any automatic change in rate may occur, and the expressly stated new rate to take effect. *See* 66 Pa. C.S. § 1307(a) and (b).

In the present case, PGW argued that the language of PGW Tariff Rate GTS-F regarding the “availability” of the rate by reference to “currently valid” agreements should be interpreted not only to conclude that PGW Tariff Rate GTS-F expired, but also that in the absence of an approved tariff rate in effect, the “default” rate would be any rate available under PGW’s existing Rate Schedule. However, under Chapter 13, if a utility seeks Commission approval of any proposed change in an effective tariff rate, the proposed “automatic change” and the new rate to take effect must be expressly stated in the plain language of the utility’s Chapter 13 filing. *Id.*

²¹ For example, PGW filed a Tariff Supplement No. 156 under the Section 1308(b) procedure and set forth an expressly stated proposal for temporary effect of the Supplement, with an expressly stated date for termination of the Supplement’s effectiveness. *See Pa. PUC v. PGW*, Docket Nos. R-2022-3036472, C-2022-3036774, and C-2022-3036783 (PGW Tariff Supplement No. 156).

Upon review of the language of PGW Tariff Rate GTS-F, we find the language to be ambiguous where the “expiration of the tariff rate upon expiration of the underlying contract” was, at best, implied, but not directly stated. Under that plain language standard for an automatic change in rate under Section Chapter 13, the language of PGW Tariff Rate GTS-F fails, on its face, to establish in plain language either an automatic change in rate or the new rate to take effect, as required by Chapter 13.

If PGW wished to have an applicable expiration date for PGW Tariff Rate GTS-F to take effect, upon which PGW’s existing rate schedule IT or GS would apply, PGW should have expressly stated so in its original filing seeking approval of PGW Tariff Rate GTS-F in PGW’s restructuring filing in 2003, or in any of its subsequent base rate proceedings in 2006, 2009, 2017, 2020, and 2023. At any point in the interim PGW could have, but did not, propose a new rate to take effect in place of PGW Tariff Rate GTS-F. While the expiration date of the Agreement between PGW and Vicinity may have been “crystal clear” to the Parties to the Agreement and lawful as a contract term, as to a tariff provision, we conclude it was not stated in plain language as required by Chapter 13, and was not clear to other interested or potentially impacted parties to each of PGW’s base rate proceedings, with the specificity necessary to be construed as a lawful provision of PGW Tariff Rate GTS-F.²²

²² Even if the tariff *had stated an expiration date*, it is within the Commission’s authority to interpret the tariff to find that the expiration of a tariff must be sought separately from a tariff approving rates. *See, Peoples Natural Gas v. Public Service Commission*, 123 A. 799 (1924) (utility filed a tariff with an expiration date with the intent to no longer provide service after a date certain, the Commission approved the tariff, however, in later interpreting it, concluded the effective tariff rate remained in effect until the utility expressly sought the Commission’s approval of the utility’s limitation of service to its customers. The Commission concluded that the utility, having failed to expressly request Commission approval for the limitation of service, was bound by the tariff rate in effect and must continue to serve.).

Therefore, we conclude the expiration of the Agreement between PGW and Vicinity did not alter the Commission-approved PGW Tariff Rate GTS-F and did not exempt PGW from the mandatory filing provisions of Chapter 13 for a proposed new rate to take effect. The language of a contract does not supersede the effectiveness of a Commission-approved tariff rate. *See Lackawaxen Water & Sewer Co.*, 481 A.2d at 1389 (**A public utility cannot divest the Commission of its plenary power to regulate rates and the terms and conditions of service by entering into a private contract.** *See, Bell Telephone of Pennsylvania v. Pa. PUC*, 53 Pa. Commonwealth Ct. 241, 417 A.2d 827 (1980). *Cf.* Section 508 of the Public Utility Code, 66 Pa. C.S. § 508 (Authority of Commission to vary, reform, and revise contracts.)).

PGW was incorrect in its assumption that the applicability of the rates and terms of service established by Commission approval of PGW Tariff Rate GTS-F would automatically expire, based on the expiration of the underlying Agreement. However, even if PGW assumed that PGW Tariff Rate GTS-F “expired,” PGW remained under the burden to seek approval of a new tariff rate to take effect. Therefore, where and when PGW assumed the existing tariff rate would “expire,” PGW had the burden to act under Chapter 13, to initiate a filing seeking Commission approval of a change in the rate, and request approval for the proposed new rate to take effect *prior to the expiration of the existing rate*, otherwise no change in the rate would take effect. *See* 66 Pa. C.S. § 1301, et seq. In the absence of action by PGW to seek Commission approval of a new rate to take effect, the last Commission-approved rate remains in effect. *See, PPL Electric Utilities Corp. v. Pa. PUC*, 912 A.2d 386.²³

²³ We note that we reject PGW’s assertion that without the existence of the Agreement, which expired in December 2022, there can be no rates and terms of service derived from an Agreement which no longer exists. We disagree. The rates and terms of service were derived by reference to the Agreement and fixed on the effective date of PGW Tariff Rate GTS-F, September 1, 2003. PGW and Vicinity are required to continue

We note that a utility's failure to comply with the Chapter 13 mandatory filing requirements for a proposed change in an existing tariff rate, raises concern for the violation of not only statutory rights and duties under the Code, but also, the Constitutional rights impacted where a change in rate is proposed. Procedural safeguards of notice and a hearing as to rate changes are required statutorily under the Code and in Commission Regulations. The reason they are required is primarily due to the constitutional due process owed to utility customers given that a rate increase involves a substantial property interest of a customer. As the Pennsylvania courts have held, procedural safeguards (*i.e.*, notice and a hearing) should accompany a situation where the administrative action is adjudicatory in nature and involves substantial property rights. Because an increase in rates involves a substantial property right, ratepayers are entitled to notice of a Commission's administrative proceeding in which a decision is made as to rates. *McCloskey v. Pa. PUC.*, 195 A.3d 1055, 1067-1068 (Pa. Cmwlth. 2018) (citing *Conestoga Nat'l Bank of Lancaster v. Patterson*, 275 A.2d 6, 9 (Pa. 1971); *Barasch v. Pa. PUC*, 546 A.2d 1296, 1305-1306 (Pa. Cmwlth. 1988); U.S. Const. amend. XIV, § 1).

We conclude that because the provisions of Chapter 13 establish a mandatory statutory scheme by which the rates approved by the Commission are prospective in nature, a Commission-approved tariff rate becomes effective, and by operation of law under Chapter 13, remains in full force and effect, unless and until a Commission-approved rate takes effect in its place. As such, the mandatory provisions of Chapter 13 establishing that rates are prospective thereby preclude, as a matter of law, a

to operate under those rates and terms of service, unless and until changed by Commission order. 66 Pa. C.S. § 1303. Further, we note that, at PGW's request, the Commission has already approved the extension of the rates and terms of service of PGW Tariff Rate GTS-F despite the expiration of the Agreement between PGW and Vicinity. *See, Temporary Tariff Extension Order*. Therefore, the expiration of the Agreement is immaterial to the approved tariff rates and terms of service which were derived from it, at the time when PGW Tariff Rate GTS-F was approved.

“gap” in existence of an approved tariff rate in effect. Therefore, in the present case we conclude that, by operation of law, the “just and reasonable” rate applicable to Vicinity in the present circumstances, is the last Commission-approved Tariff Rate, which is PGW Tariff Rate GTS-F, established at PGW Gas Service Tariff – Pa. P.U.C. No. 2 at Pg. No. 118, Effective September 1, 2003, which remains in effect until the Commission issues an order approving a new rate to take effect.

B. Supplemental Matters

ALJ Guhl made twenty-eight Findings of Fact and reached eleven Conclusions of Law. I.D. at 4-8, 21-22. We hereby adopt the said findings and conclusions, unless they are expressly rejected, or rejected by necessary implication from our disposition of the Exceptions.

We remind the Parties that in our review of the ALJ’s Initial Decision, the Commission has all the powers that it would have had in making the initial decision. 66 Pa. C.S. § 335(a) *See, Milkie v. Pa. PUC*. On review of the record, we shall address supplemental matters which are relevant to our review and disposition of the present Complaint, as set forth below:

- 1. Transfer of the Section 1301 Question of the “Just and Reasonable” Rate for Vicinity to the PGW 2023 Base Rate Case Pending at Docket No. R-2023-3037933**

We note that the OSBA and PICGUG expressly asserted that the issues arising under the present Complaint should not be addressed in this context, but rather, should be heard at PGW’s next base rate proceeding. OSBA M.B. at 13-14; PICGUG

M.B. at 7. The ALJ expressed agreement with the OSBA's and PICGUG's position, notwithstanding the ALJ's other findings, stating:

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 interests of the specific customer classes, including [Vicinity].

I.D. at 17 (emphasis added).

We find that, as a procedural matter, the issue of whether PGW's proposed rate increase regarding Vicinity is "just and reasonable" is not properly before us. For the Commission to engage in review of the evidentiary record in the present proceeding that was developed regarding PGW's COSS to provide service to a single customer, Vicinity, would be procedurally improper and would raise due process and other concerns associated with prohibited single-issue rate making.²⁴ Because this proceeding is an individual customer complaint focused upon the rate to be charged to a single PGW customer, which should be addressed in a base rate proceeding and which may touch upon changes to the overall rate-making scheme for PGW, the proceeding raised due process and other concerns associated with prohibited single-issue rate making.

For example, in the present case, we note that PGW's COS as it pertains to Vicinity has already been encompassed by the Commission's prior PGW base rate filings

²⁴ The doctrine of the prohibition on "single issue rate making" is in recognition that the COS basis for a rate increase, and its allocation to various customer classes, can only be done fairly within the context of a base rate proceeding in which all the parties impacted receive due process. *See Popowsky v. Pa. PUC*, 13 A.3d 583 (Pa. Cmwlth. 2011).

which formed the basis of the Commission-approved tariff rates for all customer classes. As argued by the OSBA and PICGUG, any consideration of a change to PGW's COS and COSS methodology, and customer rate class from the precedent previously set by the Commission in PGW's base rate proceedings should only occur as part of a full distribution rate case. Addressing PGW's COS and COSS methodology in an individual customer complaint proceeding precludes the mandatory review and in-depth analysis required under a general base rate proceeding and is rejected. *See* 66 Pa. C.S. § 1308, *et. seq.* Therefore, we conclude that the question of the proper COS-based gas transportation rate applicable to PGW's service to Vicinity is properly considered at PGW's currently pending base rate proceeding. As such, we shall direct that the question be expressly addressed in that proceeding.

Accordingly, we shall direct that the Section 1301 question of the “just and reasonable” rate and rate class applicable to PGW's service to Vicinity be expressly examined under COS principles in the currently pending *PGW 2023 Base Rate Case*.

2. PGW's Chapter 13 Filing Requirement for a Proposed Change in PGW Tariff Rate GTS-F at the PGW 2023 Base Rate Case Pending at Docket No. R-2023-3037933

We note here that PGW has just recently completed its initial direct filing for the rate increase on February 27, 2023, when PGW filed proposed Supplement No. 105 to PGW Gas Supplier Tariff – Pa. P.U.C. No. 1 and proposed Supplement No. 159 to PGW Gas Service Tariff – Pa. P.U.C. No. 2 to become effective April 28, 2023.²⁵

²⁵ We note that, as a procedural matter, it is to be anticipated that, by Commission Order, pursuant to 66 Pa. C.S. § 1308(d), the filing will be suspended by operation of law until November 28, 2023, unless permitted by Commission Order to become effective at an earlier date (Suspension Order).

We also note that in the ongoing base rate proceeding, PGW discussed the impact of the instant complaint proceeding as follows:

PGW has included only Vicinity’s Historic Test Year revenues as part of the rate case. PGW has been litigating for Vicinity to pay “just and reasonable” rates in an effort to hold down the rate increases faced by PGW’s firm residential and commercial customers. However, the ultimate impact of these efforts remains unknown. **Once the Commission issues a final ruling in Docket No. C-2021-3029259, PGW will supplement the proposed rates to account for the Commission’s determination.**

Pa. PUC v. PGW, Docket No. R-2023-3037933, PGW St. 6 at 11 (emphasis added).

PGW’s statement reflects its understanding of the need for a supplemental filing in its base rate proceeding, based upon our determination in this proceeding. We agree with PGW and shall require such a filing.

As previously explained, our determination in the present Complaint directs the issue of the “just and reasonable” rate for PGW’s provision of Service to Vicinity to PGW’s ongoing base rate proceeding, at Docket No. R-2023-3037933. Consistent with that direction, by this Opinion and Order, we shall also direct that PGW comply with the mandatory filing requirements of Chapter 13 and Commission Regulations at 52 Pa Code § 53.53, and file either a direct supplement to its initial filing under Section 1308(b) setting forth its expressly stated request for a new rate applicable to Vicinity and the supporting data, or, if PGW prefers or determines it necessary, PGW may refile the base rate proceeding to address the inclusion of Vicinity into its overall COS and overall justification for the proposed rate increase.

It is evident from the present record that PGW proposes a substantial rate increase for its provision of service to Vicinity, which will potentially have ramifications

for the overall determinations of COS and rate classifications in the base rate proceeding. As we have previously noted, PGW’s “proposal of a rate increase,” when made in the context of contract negotiations or as part of a responsive pleading in the present Complaint proceeding, does not satisfy Chapter 13’s mandatory filing requirement to request a rate increase. Therefore, it is necessary to require PGW’s compliance with the mandatory Chapter 13 filings regarding a proposed rate increase.

Consequently, PGW is directed to make a supplemental Chapter 13 filing, which shall serve, as a procedural matter, to effectively bring the pending question of the proper rate class and actual COS of PGW’s provision of service to Vicinity for resolution at PGW’s pending base rate proceeding at Docket No. R-2023-3037933. We note that, given the new matter being directed to PGW’s base rate proceeding and the statutory time limits in place for a base rate proceeding under Chapter 13, we urge the Parties to work cooperatively to allow sufficient time for consideration of these new issues.

3. Burden of Proof

Regarding the burden of proof in this proceeding, the ALJ adopted the position of PGW and the OCA that Vicinity bore the burden of proof as the proponent of change in tariff rate. I.D. at 1. In this manner, the ALJ construed Section 332(a) of Code to place the burden of proof on Vicinity. 66 Pa. C.S. § 332(a). Section 332(a) provides that the proponent of a rule or order has the burden of proof. However, under Section 315, “[i]n any proceeding involving any proposed or existing rate of any public utility the burden of proof to show that the rate involved is “just and reasonable” shall be upon the utility.” *Id.* § 315(a).

In the present case, if a party seeks to change PGW's Tariff (whether relating to PGW’s provision of Service to Vicinity, or the customers to be assigned to PGW Rate IT, or the COSS methodology previously approved by the PUC) the party

seeking the change to the tariff bears the burden of proof and must establish facts by a “preponderance of the evidence.” *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. 2 Pa. C.S. § 704; *Mill v. Pa. PUC*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. PUC*, 623 A.2d 6 (Pa. Cmwlth. 1993). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

As noted earlier, we find that here, it was PGW, not Vicinity which sought to impose a newly proposed increase to the tariff rate as it relates to PGW’s provision of Service to Vicinity, as well as a change to the customers assigned to PGW’s tariff rate schedules, and a change as to the COSS methodology and data previously approved by the PUC under prior base-rate filings. We note that Vicinity *did not* propose a change in the existing PGW Tariff Rate GTS-F. To the contrary, Vicinity has maintained throughout the proceeding, and on Exception, that the “status quo” under the existing PGW Tariff Rate GTS-F should be preserved until PGW filed a new base rate proceeding. Therefore, we find that the ALJ erred by placing the burden of proof regarding PGW’s proposed rate increase and change in rate class for PGW’s provision of service to Vicinity. *See I.D. at 8-9.*

In summary, in the circumstances of the present case, if the utility desired that a new tariff rate take effect, it could not rely upon the terms of the underlying contract which the utility believed established an “expiration date” of the existing tariff, then somehow “shift the burden” to establish a *new rate* on to the Complainant in a complaint proceeding. Under the mandatory provisions of Chapter 13, the utility which

proposes a rate increase retains the burden of establishing a new rate to take effect in place of the last Commission-approved tariff rate. *See* Section 315, 66 Pa. C.S. § 315.

Since we shall direct that the issue of any change in rate for PGW’s provision of service to Vicinity be directed to the pending *PGW 2023 Base Rate Case*, there is no need to reweigh the matter under the corrected burden of proof.

4. Weight of the Evidence Regarding “Special Rate”

By our discussion here, we make no determination that Vicinity has satisfied the standard for applying a special rate. *See Pennsylvania Public Utility Commission v. PPL Electric Utilities Corporation*; Docket No. R-2010-2161694 (Opinion and Order entered June 21, 2012). We only note that, to the extent the ALJ disregarded the evidence of record, that Vicinity’s service from PGW is unique, and that the record evidence that Vicinity received a special rate pursuant to contract for 25 years based upon Vicinity’s actual plan to bypass PGW’s system, is substantial and sufficient evidence to satisfy the *prima facie* standard for burden of proof on that issue. Therefore, to the extent the ALJ concluded that Vicinity failed to proffer any substantial evidence on that point, we reject the ALJ’s analysis. *See* I.D. at 16-17.

5. Vicinity’s Claim that PGW Violated Sections 1301, 1304, and 1501

Apart from our conclusion regarding the lawful interpretation of PGW Tariff Rate GTS-F and the Supplemental Matters addressed, we conclude that the remaining matters alleged in Vicinity’s Complaint fail to establish that PGW violated Sections 1301, 1304 or Section 1501 of the Code. As we have previously noted, PGW’s “proposal of a rate increase” when made in the context of contract negotiations, or as part of a responsive pleading in the present Complaint proceeding, do not satisfy Chapter 13’s mandatory filing requirement to request a rate increase. However, PGW’s conduct, in

this context, also does not constitute unreasonable provision of service, an unreasonable or unjust rate, or discrimination in service under Sections 1501, 1301 and 1304. The rate and rate class proposed by PGW for Vicinity remain “proposed” as they have not taken effect, and by this Opinion and Order, will not take effect until the Commission renders a final decision on the approved Tariff rate and class to take effect, to replace the current effective PGW Tariff Rate GTS-F, if any. Therefore, apart from our findings as set forth, we conclude that Vicinity fails to state a claim for a violation by PGW under Section 1301, Section 1304 and/or Section 1501 of the Code.

**6. The PGW 2023 Base Rate Case Treatment of PGW Tariff Rate GTS-F
Re: COS**

Based upon our review in the present proceeding, we find it necessary to expressly address PGW’s treatment of PGW Tariff Rate GTS-F as it pertains to COS, not only in the present case, but also in every PGW base rate proceeding following the Commission’s original adoption of PGW Tariff Rate GTS-F in the Commission’s *PGW 2003 Restructuring Order*. In the present Complaint, Vicinity repeatedly alleged that PGW’s position on COS as argued in the present case, and supported by PGW’s expert testimony, was in direct contradiction of PGW’s position in every prior base rate filing by PGW. Exc. at 4; Vicinity M.B. at 1. Based upon our review of PGW’s tariff filings since the Commission’s *PGW 2003 Restructuring Order*, it appears that Vicinity’s claim is accurate. See, *PGW 2006 Base Rate Case*; *PGW 2009 Base Rate Case*; *PGW 2017 Base Rate Case*; *PGW 2020 Base Rate Case*; and *PGW 2023 Base Rate Case*.

In the present case, and in response to the Complaint initiated by Vicinity, PGW asserted for the first time before the Commission that PGW’s Service to Vicinity at the existing rate constituted a “subsidized rate” which must be brought under a COS basis. Answer at 2-3; 21-22. Notably, PGW’s present position on PGW’s COS

attributable to Vicinity directly contradicts PGW's position in every prior PGW base rate proceeding, including PGW's original restructuring under Commission jurisdiction.

In fact, from the time PGW's original restructuring plan was approved by the Commission in 2003, through every subsequent base rate proceeding filed by PGW, in 2006, 2009, 2017, 2020,²⁶ until this Complaint proceeding and PGW's recent base rate filing in 2023, PGW Tariff Rate GTS-F has never reflected a cost-based analysis in any of PGW's base rate proceedings, despite being expressly directed by the Commission to bring the subsidized Rates GTS-F and IT under a cost-based analysis in the *PGW 2003 Restructuring Order*. In that Opinion and Order, the Commission acknowledged that the ALJ's Recommended Decision described Rate GTS-F and Rate IT as problematic as non-COS based subsidized rates. *See, PGW 2003 Restructuring Order* at 29, Ordering para. No. 11 (That PGW's transportation rates be approved consistent with this Opinion and Order and that PGW file cost-based rates as part of its next base rate proceeding.”).

In PGW's 2006 Base Rate Case, the Commission again mandated cost-based rates for PGW's "GTS/IT" rate class group. *See Pa. PUC v. PGW*, Docket No. R-00061931 (Order entered September 28, 2007), Ordering Paragraph No. 13.²⁷

²⁶ In PGW's present base rate filing PGW did, for the first time, allocate costs to its service to Vicinity under Rate GTS-F as a separate class in the amount of \$10.237 million. However, PGW did not assert any rate increase to Vicinity. Rather, PGW asserts that, "in order to bring rates to parity," PGW indicates that Vicinity would experience an 806.7 % rate increase. *See PGW 2023 Base Rate Case*, PGW Exh. CEH-1, Schs. A and A-1.

²⁷ In the compliance stage of the *PGW 2006 Base Rate Case*, the Commission determined that PGW complied with the Commission's directive and moved the rates for those classes into line with allocated costs. *See Compliance Filing of Philadelphia Gas Works filed pursuant to the Commission's Order entered September 28, 2007*, Docket No. R-00061931 (Order entered November 8, 2007) at 8. However, it is evident that regardless of the determination of compliance, PGW, in fact, did not, and has never, moved the PGW Tariff Rate GTS-F to a cost-based analysis.

In the present Complaint proceeding, upon questioning, PGW's witness explained why PGW has never complied with the Commission's express directive to bring PGW Tariff Rate GTS-F to a cost-based rate. The PGW witness John C. Zuk stated:

Since 2003 PGW has filed numerous base rate cases. In all of those cases PGW took the position that, because the rates in GTS-F were grandfathered and subject to a pre-PUC contractual arrangement they could not be changed.

PGW St. 1R at 9-10 (John C. Zuk)

On review, we are concerned that PGW's assertion in sworn testimony reflects that PGW made a unilateral determination to not comply with the Commission's twice-stated order to bring PGW Tariff Rate GTS-F into a cost-based analysis at its next base rate proceeding. As we are directing that the question of the "just and reasonable" rate for PGW's service to Vicinity be resolved at PGW's pending base rate case, we are assured that the proper COS analysis will be conducted. We further, upon our own motion, direct that I&E examine the circumstances of PGW's conduct regarding the Commission's instruction to bring PGW Tariff Rate GTS-F under its own COS, as to whether PGW should be found in violation of a Commission order.²⁸

Further, it is not only PGW's position that PGW Tariff Rate GTS-F must be brought to COS attributable to Vicinity which has done a complete reversal, but also PGW's rationale for allocating such costs. In every past rate proceeding PGW has directly asserted that it would not attribute costs to Vicinity based on Vicinity's use of PGW's low-pressure distribution system, not only because the customer was served

²⁸ In this regard, the burden is on PGW to show it complied with the Commission's prior orders to bring PGW's provision of service to Vicinity by PGW Tariff Rate GTS-F under a COS basis. *See* 66 Pa. C.S. § 315(b) (the burden of proof shall be in the utility that it has complied with a Commission order).

under an existing contract, but also because Vicinity *did not utilize PGW's distribution system*.

The record in the *PGW 2017 Base Rate Case* explained why PGW's proposed COSS did not assign costs related to PGW Tariff Rate GTS-F customers (Vicinity), by utilizing a combined rate class group "GTS/IT." PGW's witnesses, Philip Q. Hanser and Kenneth S. Dybalski presented rebuttal testimony supporting the contention that the large GTS-F customers, which were included in the combined rate class group "GTS/IT" in Mr. Hanser's COSS, do not take service from PGW's integrated distribution system:

As explained by Company witness Mr. Dybalski in his rebuttal testimony, these GTS customers are served on a separate individual gas main that was financed by those customers upon installation, and that is not part of PGW's distribution system. **Because these GTS customers are served on a separate self-financed individual gas main, their distribution mains and supply costs are directly assignable and, thus, they should not be assigned responsibility for distribution system costs in the same way as other customers that receive service via PGW's interconnected distribution system.**

I currently lack the detailed data required to quantify the results of a COSS that treats the GTS Rate Class separately from the IT Rate Class. I believe that such a study would show *that GTS customers impose limited mains-related costs on the distribution system*. The result would be quite similar to that presented in my Original COSS and would demonstrate *that Rate IT customers are not appropriately contributing their share of system costs*.

Pa. PUC v. PGW, Docket No. R-2017-2586783, PGW St. 5-R at 11 (citing PGW St. 6-R at 1-2) (*emphasis added*).

The rebuttal testimony of Mr. Hanser is further highlighted as follows:

- Q. Do you agree with Mr. Baudino's development of a hypothetical scenario in which GTS customers are charged similar rates to those paid by IT customers?
- A. I do not, as this analysis is misguided. The rates of the GTS customers that remain in PGW's system are governed by contracts and reflect the fact that *these customers do not receive service via PGW's interconnected distribution system, but rather are served on a separate individual gas main that is not part of PGW's distribution system.* Thus, a hypothetical scenario that estimates the revenues and corresponding rate of return that would result from the GTS class paying higher rates is not relevant...

Pa. PUC v. PGW, Docket No. R-2017-2586783, PGW St. 5-R at 11 (*emphasis added*).

In this regard, PGW's own witness established PGW's position that Vicinity did not utilize the PGW distribution system.

Whereas, in the present case, PGW asserts, without providing any rationale and/or any change in circumstance to explain the reversal of its sworn position in past cases, that now, Vicinity *does* utilize PGW's low pressure distribution system, and should be allocated COS on that basis, which costs PGW allege in this proceeding to be \$8.035 million, and which would justify a minimum of a 750% rate increase to Vicinity. *See* PGW Exh. CEH-1 (at C-2022-3029259, indicating the COS for Vicinity)

In summary, PGW's Commission-approved PGW Tariff Rate GTS-F had never been proposed on its own COS basis, from its original adoption by the Commission's *PGW 2003 Restructuring Order*, through every subsequent base rate proceeding brought by PGW in 2006, 2009, 2017, 2020, on the representation by PGW that there were no costs associated with Vicinity's use of PGW's distribution system allocated to its service of Vicinity (on the assertion that Vicinity did not use PGW's

distribution system). However, now in 2023, PGW is asserting here and in its base rate proceeding that the actual COS annually to serve Vicinity is either \$8.035 million or \$10.237 million, based upon Vicinity's use of PGW's distribution system.

At a minimum, the presiding ALJ assigned to the now-pending *PGW 2023 Base Rate Case* must examine the direct opposition between PGW's prior position on PGW's COS for Vicinity, including the issue of whether or to what extent Vicinity utilizes PGW's distribution system, and PGW's current position on those same issues. If PGW asserts no factual basis, change in conditions of service, or otherwise (outside the expiration of the 1996 contracts) to explain its complete reversal of position, PGW should be required to explain why it should not be held to the position it asserted in prior proceedings, which was supported by the expert testimony of PGW's own witnesses.

7. Effect of Commission's Temporary Tariff Extension Order

We note that our final determination here, as to the lawful meaning and application of the PGW Tariff Rate GTS-F is rendered apart from and not incumbered by the parallel proceeding involving the Commission's approval of the stipulation of the parties to preserve the status quo regarding PGW's provision of service to Vicinity. *See Pa. PUC v. PGW* at Docket Nos. R-2022-3036472, C-2022-3036774, and C-2022-3036783, (Opinion and Order entered December 27, 2022) (approving PGW Tariff Supplement No. 156 to expire upon entry of final order at Docket No. C-2021-3029259) (*Temporary Tariff Extension Order*).

In adopting the stipulation of the Parties, the ALJ expressly reiterated PGW's position that the Temporary Tariff Extension of PGW Tariff Rate GTS-F does not prejudice any issue taken by Vicinity at the present docket. I.D. at 9.

Specifically, PGW asserted:

[preservation of the status quo [by extension of Rate GTS-F] pending Commission disposition of the [Complaint initiated by Vicinity] [...] is a commonsensical way to bridge the gap between tariff termination and design of a new rate by the Commission. It is simply a holding action and raises no issues regarding the “just and reasonable” rates under the Public Utility Code.

PGW Statement in Support at 5.

The ALJ concluded that with the extension of PGW Tariff Rate GTS-F, the applicable rates and terms of service are “teed up” at the Complaint docket. I.D. at 9-10, citing C-2021-3029295, PGW Answer to Emergency Petition, Verified Statement of John C. Zuk at 6-7; PGW Statement in Support at 6-7.

We agree with the Parties’ positions and the ALJ’s conclusion that the Commission’s Temporary Tariff Extension Order, and its subsequent ratification by adoption of the stipulation of the Parties, if approved by the Commission without modification, has no impact upon our disposition of the present Complaint proceeding.

By this Opinion and Order, the question of “just and reasonable” COS-based rates applicable to PGW’s provision of service to Vicinity shall be referred to the PGW’s pending base rate proceeding at Docket No. R-2023-3037933. Further, by our Opinion and Order in this proceeding, the temporary tariff, effective January 1, 2023, is cancelled, and the Commission-approved PGW Tariff Rate GTS-F, published at PGW Gas Service Tariff – Pa. P.U.C. No. 2 at Pg. No. 118, effective September 1, 2003, remains in effect.

8. Exceptions

On Exception, Vicinity raised challenges to the ALJ's Initial Decision which were premised upon matters which we deem to be resolved by our disposition of the lawful meaning and application of PGW Tariff Rate GTS-F and the Supplementary Matters. Given the discussion, *supra.*, we find that it is not necessary to engage in a discussion of the Exceptions and Replies thereto.

As discussed *supra.*, the relief sought by Vicinity on Exception is granted, in part, as we find that the lawful meaning and application of PGW Tariff Rate GTS-F requires that the rates and terms of service under that tariff, which were adopted by Commission approval and became effective September 1, 2003, remain in effect until a new tariff rate and terms of service between PGW and Vicinity are established and become effective to replace the existing rate by Commission order. Further, we find that the disposition of the Section 1301 question of the COS-based "just and reasonable" rate and rate class applicable to PGW's provision of gas transportation service to Vicinity shall be directed to be addressed by PGW's pending base rate proceeding at Docket No. R-2023-3037933.

IV. Conclusion

Consistent with the discussion in this Opinion and Order, the Exceptions of Vicinity are granted, in part, and denied, in part; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc., filed on January 17, 2023, are granted, in part, and denied, in part, consistent with this Opinion and Order.

2. 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 granted, in part.

3. That the determination of the “just and reasonable” rate for the provision of gas transportation service by Philadelphia Gas Works to Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc., based upon actual cost of service and applicable rate class under Section 1301 of the Public Utility Code, must be resolved by and is hereby referred to Philadelphia Gas Works’ currently pending base rate proceeding at *Pa. PUC v. PGW*, Docket No. R-2023-3037933.

4. That, in compliance with the mandatory filing requirements of Chapter 13 of the Public Utility Code and Commission Regulations at 52 Pa. Code § 53.53, Philadelphia Gas Works shall initiate the Chapter 13 filing by which it proposes a rate increase for provision of service to Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc., and file either a direct supplement to its initial direct filing for a general rate increase consistent with Section 1308(a) and Section 1308(d) of the Public Utility Code, setting forth its expressly stated proposed new rate applicable to Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc., to take effect, or, if Philadelphia Gas Works prefers or determines it necessary, Philadelphia Gas Works may refile the general base rate proceeding to address the inclusion of Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc., into its overall cost of service and overall justification for the proposed rate increase, consistent with the filing requirements of 52 Pa. Code § 53.53 (pertaining to information to be furnished with proposed general rate increase filings in excess of \$1 million).

5. That upon receipt by the Pennsylvania Public Utility Commission of the Philadelphia Gas Works’ tariff filing directed under Ordering Paragraph No. 4, such

filing shall be directed to the existing general rate proceeding at *Pa. PUC v. PGW*, Docket No. R-2023-3037933.

6. That upon receipt of Philadelphia Gas Work's tariff filing directed at Ordering Paragraph No. 4, the presiding Administrative Law Judge at *Pa. PUC v. PGW*, Docket No. R-2023-3037933 shall, under the Section 1308(d) of the Public Utility Code, 66 Pa. C.S. § 1308(d) develop a record which includes, but is not limited to, evidence relevant to:

- a) the proper rate class for Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc., including, if necessary, whether a special rate class is appropriate,
- b) the appropriate methodology and evidence necessary to apply the methodology, to determine Philadelphia Gas Works' actual cost of service for Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc.
- c) consideration and resolution of the question of whether and, if so, to what extent Philadelphia Gas Works' transportation service to Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc., utilizes PGW's low pressure distribution system, and if so, what impact does such use have upon the Philadelphia Gas Work's actual cost of service and the resulting "just and reasonable" rate for Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc.
- d) consideration and resolution of the question whether Philadelphia Gas Works should be held to its prior position in base rate proceedings that Grays Ferry Cogeneration Partnership and Vicinity Energy Philadelphia, Inc., do not utilize Philadelphia Gas Works' distribution system.

7. That the Commission’s Bureau of Investigation and Enforcement shall examine, as a separate matter to any base rate proceeding, whether Philadelphia Gas Works’ conduct subsequent to the Commission’s directive to bring “its transportation rates into a cost-based analysis as its next base rate proceeding” *Pa. PUC v. PGW*, Docket No. M-00021612 (Order entered March 31, 2003) (*PGW 2003 Restructuring Order*) at Ordering Paragraph No 11, was in compliance with the Commission’s directive, and take such further action as deemed necessary.

8. That the Initial Decision of Administrative Law Judge Marta Ghul issued on December 27, 2022, at Docket No. C-2022-3029259 is adopted as modified by this Opinion and Order. To the extent the Findings of Fact and Conclusions of Law in the Initial Decision of the Administrative Law Judge Marta Ghul served on December 27, 2022, at Docket No. C-2022-3029259 conflicts with the findings and conclusion reached by this Opinion and Order, such Findings of Fact and Conclusions of Law are expressly rejected.

9. That by our Opinion and Order in this proceeding at Docket No. C-2022-3029259, the Philadelphia Gas Works’ temporary Tariff Supplement No. 156 approved by *Pa. PUC v. PGW* at Docket Nos. R-2022-3036472, C-2022-3036774, and C-2022-3036783 (Opinion and Order entered December 27, 2022) (approving Philadelphia Gas Works Tariff Supplement No. 156 to Gas Service Tariff – Pa. P.U.C. No. 2, First Revised Pg. No. 118, Cancelling Original pg. No 118, Effective January 1, 2023), is cancelled, and the Philadelphia Gas Works’ Gas Service Tariff – Pa. P.U.C. No. 2 at 118, Effective September 1, 2003 (PGW Tariff Rate GTS-F), effective September 1, 2003, remains in effect.

10. That the matter at Docket No. C-2021-3029259 be marked closed.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is fluid and cursive, with the first name being more prominent.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: April 20, 2023

ORDER ENTERED: April 20, 2023

ATTACHMENT A

**GAS TRANSPORTATION SERVICE - RATE GTS
FIRM SERVICE**

Rate: Applicable to all Transportation Services rendered pursuant to this Rate Schedule on or after September 1, 2003

AVAILABILITY

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.

CHARACTER OF SERVICE

Transportation Service under this rate schedule is firm and shall be interrupted only in cases of operating emergencies experienced by the Company. Company assumes no liability for interruptions caused by failure of supply sources or by third parties such as Suppliers and shall not be obligated to deliver Gas under this rate schedule on any day that Gas is not received at its gate station for the Customer's account except as specified under provisions for Standby Service contained herein.

MONTHLY RATE

The Monthly Charge shall be the sum of the following:

1. **CUSTOMER CHARGE:** \$250.00 per month.
2. **DELIVERY CHARGE:**

The Delivery Charge applicable for each Customer shall be specified in the individual Transportation Service Agreement.
3. **TRANSPORTATION SURCHARGE:**

The Customer shall reimburse Company for any expense actually incurred for Customer's benefit from third party sources in the provision of this Service, such as directly assignable taxes, pipeline balancing penalties, governmentally imposed charges, and contingent liability for external transportation charges and fuel requirements. Additionally, for existing Customers, any unavoidable Gas supply costs (e.g., pipeline demand charges) incurred on the Customer's behalf, may be recovered under this surcharge. Such surcharge is in addition to charges specified elsewhere in this rate schedule. Such potential charges are to be specifically defined and identified in the individual Transportation Service agreement.
4. **STANDBY SERVICE CHARGES, IF APPLICABLE:**

See Standby Service Provision.
5. **MINIMUM MONTHLY CHARGE:**

The minimum monthly charge shall be the Customer Charge.