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File #: 153583

September 2, 2016

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Petition of UGI Central Penn Gas, Inc. for a Waiver of the Distribution System Improvement Charge Cap of 5% of Billed Distribution Revenues and Approval to Increase the Maximum Allowable DSIC to 10% of Billed Distribution Revenues
Docket No. P-2016-2537609

Dear Secretary Chiavetta:

Enclosed for filing please find the Answer of UGI Central Penn Gas, Inc. to the Motion to Compel of Central Penn Gas Large Users Group in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

Jessica R. Rogers

JRR/skr
Enclosures

cc: Honorable Angela T. Jones
Certificate of Service

CERTIFICATE OF SERVICE

UGI Central Penn Gas, Inc.
(Docket No. P-2016-2537609)

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

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Jessica R. Rogers

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of UGI Central Penn Gas, Inc. for a Waiver of the Distribution System Improvement Charge Cap of 5% of Billed Distribution Revenues and Approval to Increase the Maximum Allowable DSIC to 10% of Billed Distribution Revenues	:	Docket No. P-2016-2537609

ANSWER OF UGI CENTRAL PENN GAS, INC. TO THE MOTION TO COMPEL OF CENTRAL PENN GAS LARGE USERS GROUP

TO ADMINISTRATIVE LAW JUDGE ANGELA T. JONES:

UGI Central Penn Gas, Inc. ("UGI-CPG"), hereby files this Answer to the Motion to Compel of Central Penn Gas Large Users Group ("CPGLUG") in this proceeding pursuant to the provisions of 52 Pa. Code § 5.342(g). In support thereof, UGI-CPG represents as follows:

I. Background

1. On March 31, 2016, UGI-CPG filed the above-captioned petition requesting that the Public Utility Commission ("Commission") allow the Company to waive the 5% Distribution System Improvement Charge ("DSIC") revenue cap, and allow the Company to implement a cap at 10% of billed distribution revenues.

2. A prehearing conference was held in this matter on June 17, 2016. At the prehearing conference, CPGLUG announced that it would be intervening out of time. Subsequent to the prehearing conference, CPGLUG filed its Petition to Intervene and Answer on June 29, 2016. UGI-CPG did not object to that intervention.

3. Pursuant to the procedural schedule adopted at the prehearing conference, direct, rebuttal, and surrebuttal testimony have been filed in this proceeding. At each due date, CPGLUG filed a letter indicating that it did not intend to file testimony.

4. On August 29, 2016, CPGLUG served on UGI-CPG its Set I Interrogatories.

5. On August 31, 2016, UGI-CPG filed objections to CPGLUG's Set I interrogatories.

6. On September 1, 2016, CPGLUG filed its Motion to Compel.

II. Answer

7. In its Motion to Compel, CPGLUG addresses the two primary grounds upon which UGI-CPG objected, which are that the Set I interrogatories are irrelevant and untimely. In its response, CPGLUG erroneously describes the scope of this proceeding, the nature of the Company's ability to eliminate or reduce the DSIC charge for competitive customers, and fails to acknowledge that raising these issues after surrebuttal testimony when the proceeding is at the point of hearing is fundamentally different from raising issues at an earlier point in the proceeding. For these reasons, the Motion to Compel should be denied.

A. The Scope of the Proceeding is Determined by the Petition and the Testimony

8. UGI-CPG's proposal in this proceeding involves a modification to its existing Commission-approved tariff that would change the current revenue cap identified in Rider G from "5%" to "10%". No other changes have been proposed to Rider G. The question before the Commission is what standard is applicable to a request for waiver under Section 1358(a)(1), and whether UGI-CPG has met that standard. UGI-CPG's proposal does not modify the treatment of customers with competitive alternatives. The Petition, taken alone, does not encompass the question of the elimination or reduction of the DSIC for competitive customers with negotiated or contract rates.

9. Further, the testimony in this proceeding has not addressed any issue relating to the application, reduction, or elimination of the DSIC to the competitive customers. CPGLUG has filed no testimony in this proceeding, and no other party has asserted that an increase in the

revenue cap for customers on negotiated or contract rates should be treated any differently than an increase in the revenue cap for any other customers. Any discussion about consumer protections in the testimony served in this proceeding has addressed the protections that are identified in Sections 1358(a) and 1358(b) of the statute, and has not addressed the UGI-CPG tariff section labeled "Customer Safeguards". Section 1358(a) contains the 5% revenue cap and the language on waiver. Section 1358(b) identifies the following customer protections:

> (b) Charge reset.--
>
> (1) The distribution system improvement charge shall be reset at zero as of the effective date of new base rates that provide for prospective recovery of the annual costs previously recovered under the distribution system improvement charge.
>
> (2) After the reset date under paragraph (1), only the fixed costs of new eligible property that have not previously been reflected in the utility's rate base shall be reflected in the quarterly updates of the distribution system improvement charge.
>
> (3) The distribution system improvement charge shall be reset at zero if, in any quarter, data filed with the commission in the utility's most recent annual or quarterly earnings report show that the utility will earn a rate of return that would exceed the allowable rate of return used to calculate its fixed costs under the distribution system improvement charge.

Section 1358(d), which was not raised in testimony, sets forth the requirement to apply the DSIC charge equally among all rate classes as a percentage of each customer's billed revenue. As discussed more fully in Answer Section II(B), below, Rider G's competitive customer carve out from the requirement to charge the DSIC equally among all rate classes is not a consumer protection, despite CPGLUG's assertions to the contrary, but rather was created by the Commission in order to protect utilities from losing large industrial customers.

10. In Paragraph 6 of its Motion to Compel, CPGLUG quotes the only sentence in this proceeding regarding competitive customers. In its Answer, which was filed almost two

months out of time, CPGLUG indicated that it opposed the waiver of the DSIC revenue cap and the increase to 10%, and proposed that UGI-CPG "revise its tariff to specifically exempt customers under Rates XD and IS."[1] CPGLUG bears the burden of proof as to its proposal that certain rate schedules be entirely exempt from the DSIC.

11. CPGLUG seeks to offer its Answer as proof that the application or waiver of the DSIC to competitive customers is within the scope of this proceeding. This is improper. The content of an answer does not define the scope of this proceeding.[2] An answer is not record evidence,[3] and no responsive pleading to an answer is required or even allowed as part of the Commission's practice.[4] A single sentence proposing a modification to the Company's tariff in an answer, with no supporting testimony, cannot expand the scope of this proceeding to include that issue.

12. Further, as the record from the prehearing conference reflects, the Company noted that it would move to strike testimony that it considered outside the scope of the proceeding when that testimony was offered. This discussion was directed at certain of the issues identified in the prehearing memorandum of the Bureau of Investigation and Enforcement ("I&E"). The Company was deprived of the similar opportunity to clarify at an early stage the scope of the proceeding with regard to CPGLUG's competitive customer issue, because CPGLUG failed to

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1 CPGLUG *Motion to Compel*, Paragraph 6, *citing* CPGLUG *Petition to Intervene and Answer*, Docket No. P-2016-2537609 (filed June 29, 2016) ("*CPGLUG Answer*") (emphasis added).

2 *See, e.g., Pike County Light & Power et. al.*, Docket No. R-00016849C0001 et. seq. (Order entered May 9, 2002) ("the opportunity to address issues raised in a complaint does not mean that a party has the right to discover and pursue, at hearing, the factual basis of any and all issues raised").

3 52 Pa. Code § 5.405(b).

4 *See, generally*, 52 Pa. Code § 5.61. CPGLUG's pleading took the form of a Petition to Intervene, which UGI-CPG is allowed to respond to pursuant to 52 Pa. Code § 5.66, however, the quoted language was specifically contained within the section identified as CPGLUG's "Answer" to UGI-CPG's Petition. *See CPGLUG Answer* at p. 4. UGI-CPG indicated at the prehearing conference that it did not oppose CPGLUG's intervention.

file a prehearing memorandum identifying its issues, and failed to file its Answer prior to the prehearing conference.[5]

13. CPGLUG's failure to participate in this proceeding cannot now be a shield against its improper efforts to expand the scope of this proceeding at a time when doing so is a great inconvenience to UGI-CPG and when CPGLUG has no likelihood of success.

B. The Competitive Customer Provisions in UGI-CPG's DSIC Are Not a Consumer Protection

14. CPGLUG argues in its Motion to Compel that the ability to eliminate or discount the DSIC is a consumer protection. Just the opposite is true. The ability to eliminate or discount the DSIC was intended to provide the company with the ability to maintain large industrial customers who have competitive alternatives that would otherwise allow them to bypass the utility's distribution system. The Commission recognized that the loss of competitive customers would be detrimental to the utility and its smaller business and residential customers, and that the utility therefore needed the ability to eliminate or reduce the DSIC charge rather than lose its large industrial customers. Specifically, the Commission stated:

> Where the customer has negotiated rates based on competitive alternatives, it would be contrary to the contract terms and counterproductive in the long term to add costs that may induce the customer to leave the system and provide no support for infrastructure costs.[6]

As the Commission indicated in its *Final Implementation Order*, for customers being charged negotiated rates under existing agreements that were not eligible for renegotiation, a utility could not automatically apply the DSIC at the time it was approved by the Commission, because it was

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[5] The Administrative Law Judge's prehearing conference order specifically identified that "parties and those intending to become parties" were required to submit a prehearing memorandum that identified "those issues which the entities plan to address." Prehearing Order, at p. 3 (Issued June 8, 2016) (emphasis added).

[6] Implementation of Act 11 of 2012, Docket No. M-2012-2293611, at p. 46 (Order entered Aug. 2, 2012) ("*Final Implementation Order*").

outside the rates that had already been negotiated. Therefore, some flexibility was required.[7] For customers with competitive alternatives who are being charged negotiated or contract rates, the utility is often already charging the maximum amount that the customer will agree to pay before that customer seeks to exercise its competitive alternatives.[8] From the clear language in the Commission's *Final Implementation Order*, the ability to reduce or exclude a particular competitive customer from the DSIC is not a customer protection, but rather a *utility* protection.

15. The Commission's directive in the *Final Implementation Order* makes it readily apparent that any proposal to exclude certain customer classes entirely, such as Rate XD and IS, is unlawful. The Commission held "the DSIC need not be applied to... specific [competitive] customers, but the general DSIC rate applicable to the customer class itself must be the same for all customer classes" and that the DSIC must maintain the "equal application provision for the general distribution rates for each customer class, in accordance with Section 1358(d)(1), but not for individual customers with competitive alternatives and negotiated rates." It is the equal application of the DSIC to all customers that is the customer protection.[9] The carve out of specific competitively situated customers is an exception to that general protection, wherein the Commission balanced the good of charging large commercial customers the DSIC with the harm to all customers of having a large industrial customer leave the system.

16. Further, CPGLUG's proposal in its Answer to exclude Rate XD and IS customers from being charged the DSIC, which it did not support with any testimony in this proceeding, has already been rejected by the Commission. In *Petition of Columbia Gas of Pennsylvania, Inc.*

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7 *Id.*

8 *See, e.g., Final Implementation Order*, at p. 44. ("At the workshop, it was suggested that application of a uniform DSIC rate to every customer class may not be appropriate where, for example, a natural gas customer is the beneficiary of a lower rate designed to retain load...")

9 *Petition of Columbia Gas of Pennsylvania, Inc. for Approval of a Distribution System Improvement Charge*, Docket No. P-2012-2338282, at p. 7 (Order entered May 22, 2014).

for Approval of a Distribution System Improvement Charge ("*Columbia DSIC*"),[10] the first Act 11 DSIC proceeding decided by the Commission, the Pennsylvania State University ("Penn State") proposed that the DSIC should not be applied to customers that have negotiated rates due to competitive or potential competitive alternatives. The Office of Consumer Advocate ("OCA") argued that a universal exemption was inappropriate and inconsistent with the Commission's *Final Implementation Order*, and that utilities should attempt to charge the DSIC where it was possible to do so. The Commission rejected the position of Penn State, finding that OCA's position "strikes a reasonable balance between the interests of residential customers, public utilities, and competitive customers."[11] The language on competitive customers in UGI-CPG's tariff, which the Company does not propose to change in this proceeding, is identical to the language approved by the Commission in *Columbia DSIC*.

17. CPGLUG's insistence in its Motion to Compel that reduction or elimination of the DSIC to competitive customers is a customer protection is in error. UGI-CPG's ability to reduce or eliminate the DSIC as to specific competitive customers was intended by the Commission as a utility protection and an exception to the customer protections identified in Section 1358; it is not a customer protection. The line of inquiry in CPGLUG's Set I interrogatories is outside the scope of this proceeding, and cannot lead to information that could be used at the hearing or in briefs.

C. The Set I Interrogatories Are Improper

18. The Commission's standard for discovery requires that the information sought must appear reasonably calculated to lead to the discovery of admissible evidence. *See* 52 Pa. Code § 5.321(c). Clearly, the concept of what is likely to lead to admissible evidence changes

[10] Docket No. P-2012-2338282 (Order entered May 22, 2014).
[11] *Columbia DSIC*, at p. 56.

and narrows as a proceeding progresses. Where a party such as CPGLUG has no further opportunity to submit written testimony and has not identified any testifying witness for hearing, and where the subject matter of the discovery does not fall within the scope of the testimony provided by the other parties to the proceeding, the only possible means of introducing a new issue into this proceeding is on cross-examination, which is inappropriate. It is therefore reasonable to conclude that CPGLUG's solicitation of information via discovery on a new issue at this late stage in the proceeding will not lead to admissible evidence absent a significant departure from Commission precedent and procedures.

19. As the Company has articulated previously in this Answer, the treatment of specific competitive customers – because the Commission's *Final Implementation Order* requires this analysis to be done on an individual customer basis taking into consideration the specific circumstances and status of negotiations of each customer who is charged negotiated or contract rates – is not relevant to determining the statutory standard for wavier of a DSIC or the application of that standard to UGI-CPG's specific circumstances. Further, although CPGLUG states in Paragraph 7 of its Motion to Compel that its interrogatories are not intended to discover proprietary or confidential data, UGI-CPG has a limited number of competitively situated customers, and the status of negotiations with each of these customers is considered highly confidential. It may be possible to glean information about other competitive customers even from the seemingly broad interrogatories in Set I, because of the narrow class of customers that are involved, and the fact that three of those customers are members of CPGLUG.

20. It is also appropriate to prohibit discovery where that discovery is done in bad faith and would require unreasonable investigation. 52 Pa. Code § 5.361(a). Just as the calculation of the likelihood of obtaining admissible evidence changes as the proceeding

progresses, the concepts of bad faith and unreasonable burden also must be considered in the context of where in the proceeding the discovery is propounded. CPGLUG's interrogatories could have been sought at any time in this proceeding, as they do not relate to anything that was included in the testimony. Waiting until after surrebuttal testimony has been filed, and with the hearing only seven business days away, is not a good faith effort to undertake discovery. These data requests now present a burden for the Company while it also actively prepares for the hearing.

21. Critically, but for the Company's proactive effort to establish a teleconference to address its objections prior to the hearing, under the modified schedule the Administrative Law Judge would have four business days to issue an order from the date of the filing of the Company's Answer, meaning it was possible the parties would not have received an order prior to the hearing. Even with resolution at the teleconference on September 6, 2016, the Company would not be in a position to provide the data requests until the afternoon of September 7, 2016, at the earliest, because the Company must gather the data for these responses, and confirm that it in no way could allow CPGLUG to obtain highly confidential competitor information, all while trying to prepare for the hearing. CPGLUG unreasonably delayed in issuing its Set I interrogatories to the point where preparing responses now presents an unreasonable burden that may involve proprietary data and which has no likelihood of leading to admissible evidence, because the content of the interrogatories falls entirely outside the scope of this proceeding.

22. Finally, CPGLUG argues at Paragraph 17 that it can explore additional questions during cross examination at the hearing. CPGLUG assumes that it would be appropriate to cross examine one of the Company's two identified witnesses in this proceeding on issues relating to negotiations regarding competitive customers. Neither of the witnesses presented testimony on

the topic of competitive customers. There is nothing within or relating to the testimony provided by the Company's two witnesses that would allow counsel for CPGLUG to undertake a fishing expedition on a topic which frequently involves highly confidential customer information.

23. CPGLUG's Set I interrogatories are inappropriate because they are untimely, outside the scope of the proceeding, involve potentially sensitive information, are unduly burdensome at this late stage of the proceeding, and are unlikely to lead to admissible evidence. The Company should not be compelled to respond to the Set I interrogatories.

WHEREFORE, for all the reasons set forth above, UGI Central Penn Gas, Inc. respectfully requests that Administrative Law Judge Angela T. Jones deny the Motion to Compel filed by CPGLUG, and sustain UGI-CPG's objections to CPGLUG's Set I interrogatories.

Respectfully submitted,

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Date: September 2, 2016