



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

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September 22, 2016

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

Re: Petition of UGI Penn Natural 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-2016-2537594

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:

Please be advised that the Bureau of Investigation and Enforcement (I&E) **Main Brief** in this proceeding.

Copies are being served on parties as identified in the attached certificate of service. If you have any questions, please contact me at (717) 783-6156.

Sincerely,

Carrie B. Wright
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. #208185

CBW/snc
Enclosure

cc: Certificate of Service
ALJ Angela T. Jones

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission :

v. :

UGI Penn Natural Gas, Inc. :

and :

UGI Central Penn Gas Inc. :

Docket Nos. P-2016-2537594
P-2016-2537609

**MAIN BRIEF
OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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Dated: September 22, 2016

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
	A. Distribution System Improvement Charge Background.....	1
	B. The Role of the Bureau of Investigation & Enforcement.....	3
II.	PROCEDURAL HISTORY.....	4
III.	BURDEN OF PROOF	5
IV.	WAIVER OF 5% LIMITATION AND AUTHORIZATION FOR HIGHER MAXIMUM ALLOWABLE DSIC	8
	A. Summary of Briefing Party's Position.....	8
	B. Standard for Granting the Waiver.....	9
	C. Have CPG and PNG Met Standard for Waiver of 5% Cap?.....	9
IV.	CONCLUSION	16

TABLE OF CITATIONS

Cases

<i>Norfolk & Western Ry. Co. v. Pennsylvania Public Utility Commission</i> , 413 A.2d 1037 (Pa. 1980)	7
<i>Pennsylvania Pub. Util. Comm'n v. PGW</i> , P-2015-2501500, pp. 41-42 (Order entered January 26, 2016)	13
<i>Petition of PPL Elec. Utilities Corp. for Approval of A Distribution Sys. Improvement Charge Ppl Elec. Utilities Corp.</i> , C-2013-2345729, 2015 WL 1754563, at *40 (Apr. 9, 2015)	9
<i>Reidel v. County of Allegheny</i> , 633 A.2d 1325, 1329 n. 11 (Pa. Commw. 1993).....	6
<i>Samuel J. Lansberry, Inc. v. Pa. PUC</i> , 578 A.2d 600, 602 (Pa. Cmwlth. 1990).....	6
<i>Se-Ling Hosiery v. Margulies</i> , 70 A.2d 854 (Pa. 1950).....	6

Statutes

66 Pa. C.S. § 101	4
66 Pa. C.S. § 308.2	3
66 Pa. C.S. § 308.2(2)(11).....	3
66 Pa. C.S. § 332(a).....	6
66 Pa. C.S. § 1352	1, 2
66 Pa. C.S. § 1356	3
66 Pa. C.S. § 1358(a)(1).....	7, 9
66 Pa. C.S. § 1501	2

Regulations

49 C.F.R. § 192.1005	3
49 C.F.R. § 192.1007	3
52 Pa. Code § 1.1	4

I. INTRODUCTION

A. Distribution System Improvement Charge Background

On February 14, 2012, Governor Corbett signed into law Act 11 of 2012 (“Act 11”), which, in part, amends Chapters 13 of the Pennsylvania Public Utility (“Code”) to allow water and wastewater utilities, electric distribution companies (“EDCs”), and natural gas distribution companies (“NGDCs”) to petition for a distribution system improvement charge (“DSIC”).¹ An essential element of DSIC qualification is that DSIC recovery should accelerate infrastructure improvement, in some form.² Act 11 requires that all such infrastructure improvements must “performed by qualified employees or contractors in a manner that protects system reliability and safety of the public.”³

At the outset, Act 11 requires that as a precondition to the implementation of a DSIC, a utility must file a Long-Term Infrastructure Improvement Plan (“LTIIP”) with the Commission.⁴ The LTIIP

ensure[s] that the quarterly DSIC repairs, improvements, and replacements to eligible property are being made consistent with a LTIIP that has carefully examined the utility’s current distribution infrastructure, including its elements, age, and performance and that also reflects reasonable and prudent planning of expenditures over the course of many years to replace and improve aging infrastructure in order to maintain the safe, adequate, and reliable service required by law.⁵

¹ Implementation of Act 11 of 2012, Final Implementation Order (M-2012-2293611) Entered on August 2, 2012, p. 1.

² *Id.*

³ Implementation of Act 11 of 2012, Tentative Order (M-2012-2293611) Entered on May 11, 2012, p. 6

⁴ 66 Pa. C.S. §1352.

⁵ Implementation of Act 11 of 2012, Final Implementation Order (M-2012-2293611) Entered on August 2, 2012, p. 11; 66 Pa. C.S. § 1501.

In accordance with the Public Utility Code, the utility's LTIP must include the following: (1) identification of the types and age of eligible property owned or operated by the utility for which the utility would seek recovery; (2) an initial schedule for the planned repair and replacement of eligible property; (3) a general description of the location of the eligible property; (4) a reasonable estimate of the quantity of eligible property to be improved; (5) projected annual expenditures to implement the plan and measures taken to ensure that the plan is cost effective; and (6) an explanation of the manner in which the replacement of aging infrastructure will be accelerated and how the repair, improvement or replacement will ensure and maintain adequate, efficient, safe, reliable and reasonable service.⁶ Moreover, if the plan is not adequate and sufficient to ensure and maintain adequate, efficient, safe, reliable and reasonable service, the commission shall order a new or revised plan.⁷

Furthermore, the LTIP must incorporate its framework for prioritization of investment improvements via its Distribution Integrity Management Program ("DIMP").⁸ The DIMP plan requirement, which originated in Federal Pipeline safety laws, requires all gas distribution operators to develop and implement a plan that addresses risk evaluation and ranking, performance measurement and monitoring, and periodic evaluation and improvement.⁹

⁶ 66 Pa. C.S. §1352.

⁷ *Id.*

⁸ 49 C.F.R. §§ 1001-1015.

⁹ 49 C.F.R. § 192.1005; 49 C.F.R. § 192.1007.

Lastly, if the LTTIP is ultimately approved, the utility would then also be required to file an annual asset optimization plan that would include a description of all eligible property repaired, improved and replaced in the immediately preceding 12-month period pursuant to its approved LTIP and its prior year's asset optimization plan, as well as a detailed description of all the facilities to be improved in the upcoming 12-month period.¹⁰ For the Commission to approve a Company's LTIP, it must be adequate and sufficient to maintain safe, reliable and reasonable service. If this is not the case, then the NGDC's LTIP will not be approved. Therefore, it is implicit that the repairs, improvements, and replacements contained within a Commission approved LTIP are eligible for recovery under the DSIC.

B. The Role of the Bureau of Investigation & Enforcement

Act 129 of 2008, 66 Pa.C.S. § 308.2, authorized the Commission to establish bureaus, offices and positions to, *inter alia*, take appropriate enforcement actions that are necessary to insure compliance with the Public Utility Code and Commission regulations and orders. 66 Pa.C.S. § 308.2(a)(11). In accordance with Act 129, the Commission established the Bureau of Investigation and Enforcement ("I&E") to serve as the prosecutory bureau for the purposes of representing the public interest in ratemaking and service matters, and enforcing compliance with the Public Utility Code, 66 Pa.C.S. §§ 101 *et seq.*, and Commission regulations, 52 Pa. Code §§ 1.1 *et seq.* See *Implementation*

¹⁰ 66 Pa.C.S. § 1356.

of Act 129 of 2008; Organization of Bureaus and Offices, Docket No. M-2008-2071852 (Order entered August 11, 2011).

II. PROCEDURAL HISTORY

On March 31, 2016, CPG and PNG, respectively, filed pursuant to Section 1358(a) of the Public Utility Code, Petitions requesting (1) waivers of the Distribution System Improvement Charge (“DSIC”) cap of 5% of billed distribution revenues, and (2) approval to increase the maximum allowable DSIC to 10% of billed distribution revenues.

Pursuant to a Prehearing Conference Order, Administrative Law Judge Angela Jones (the “ALJ”), was assigned to develop an evidentiary record and Recommended Decision in this proceeding, and the ALJ conducted a Prehearing Conference on June 17, 2016. Counsel for I&E attended the Prehearing Conference, and other active participants, included the Office of Consumer Advocate (the “OCA”) and the Office of Small Business Advocate (the “OSBA”). At the hearing, a procedural schedule and the procedures applicable to this proceeding were set forth and subsequently memorialized in a Prehearing Order. Later in the proceeding, the Central Penn Gas Large Users Group (“CPGLUG”) intervened in the CPG proceeding only. After the Prehearing Conference, I&E, OCA, OSBA, and CPGLUG engaged in a substantial amount of discovery.

In accordance with the procedural schedule outlined in Prehearing Order #1, the parties exchanged direct, rebuttal, and surrebuttal testimony. I&E introduced the following statements of testimony:

- I&E Statement No. 1, the Direct Testimony of Sunil R. Patel, in both Proprietary and Non-Proprietary format.
- I&E Exhibit No. 1, the Exhibit to Accompany the Direct Testimony of Sunil R. Patel in both Proprietary and Non-Proprietary format;
and
- I&E Statement No. 1-SR, the Surrebuttal Testimony of Sunil R. Patel.

During the course of litigation the parties were unable to resolve the issues presented in PNG and CPG's respective Petitions. On August 7, 2016, at the time and place set for the evidentiary hearing, the parties appeared before ALJ Jones and cross-examination and entered testimony into evidence. At that time, I&E moved into evidence the pieces of I&E testimony and exhibits identified above.

I&E now submits this Main Brief ("I&E MB") in support of the arguments made by the I&E witness and the record evidence presented.

III. BURDEN OF PROOF

As the petitioner, CPG and PNG have the burden of proof in this proceeding to establish that they are entitled to the relief requested.¹¹ In a case such as this one, pending before an administrative tribunal, Courts have held that a "litigant's burden of proof before is satisfied by establishing a preponderance of evidence which is substantial

¹¹ 66 Pa. C.S. § 332(a).

and legally credible.”¹² Therefore, to meet the burden of proof in this proceeding, GPG and PNC must “present evidence more convincing, by even the smallest amount, than that presented by any opposing party.”¹³

This burden of proof is comprised of two distinct burdens: the burden of production and the burden of persuasion. The burden of production tells the adjudicator which party must come forward with evidence to support a particular position.¹⁴ The burden of persuasion determines which party must produce sufficient evidence to convince a judge that a fact has been established, and it never leaves the party on whom it is originally cast.¹⁵ CPG and PNG must satisfy its burden of proof by presenting a preponderance of evidence.¹⁶ A preponderance of the evidence is such evidence that is more convincing, by even the smallest amount, than that presented by another party.¹⁷ If a preponderance of evidence is submitted, the burden of going forward with competing evidence shifts to opposing parties to produce credible evidence of at least equal weight.

While the burden of going forward and producing evidence may shift back and forth between the parties, the ultimate burden of persuasion remains with CPG and PNG, and the Commission must ensure that any adjudication is supported by substantial

¹² *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

¹³ *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

¹⁴ *See, In re: Loudenslager's Estate*, 430 Pa. 33, 240 A.2d 477 (1968).

¹⁵ *Reidel v. County of Allegheny*, 633 A.2d 1325, 1329 n. 11 (Pa. Commw. 1993).

¹⁶ *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600 (Pa. Commw. 1990).

¹⁷ *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

evidence. “Substantial evidence” is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.¹⁸

Specific to this proceeding, CPG and PNG rely on Section 1358 of the Public Utility Code¹⁹ in its Petition. Section 1358 states in pertinent part: “[t]he Commission may upon Petition grant a waiver of the 5% limit under this paragraph for a utility in order to ensure and maintain adequate, efficient, safe, reliable and reasonable service.”²⁰ Therefore, ultimately and considering all of the above, CPG and PNG have the burden of producing a preponderance of substantial evidence to support the argument that a waiver of the 5% limit is necessary to ensure and maintain adequate, efficient, safe, reliable and reasonable service.

I&E submits that CPG and PNG have presented evidence that the requests made in the Petition, with limited exception, are more convincing than the evidence offered by any other party opposing the requests and therefore met its burden in this proceeding to show that a waiver of the DSIC maximum cap is warranted. However, I&E does not believe the Companies provided sufficient evidence to support setting the maximum DSIC cap to 10%. I&E, instead, recommends a more reasonable maximum cap of 7.5%.

¹⁸ *Norfolk & Western Ry. Co. v. Pennsylvania Public Utility Commission*, 413 A.2d 1037 (Pa. 1980);

¹⁹ 66 Pa. C.S. §1358(a)(1).

²⁰ 66 Pa. C.S. §1358(a)(1) (*emphasis added*).

IV. WAIVER OF 5% LIMITATION AND AUTHORIZATION FOR HIGHER MAXIMUM ALLOWABLE DSIC

A. Summary of Briefing Party's Position

I&E recommends and agrees that a waiver of portions of 66 Pa. C.S. § 1358 should be granted. However, I&E does not believe that there is sufficient evidence in the record to demonstrate that a maximum DSIC cap of 10% of billed distribution revenues is warranted; therefore, I&E recommends that the maximum DSIC cap be set at 7.5% of billed distribution revenues.

I&E avers that increasing CPG and PNG's DSIC to 7.5%, is in the public interest because it will facilitate CPG and PNG's replacement of dangerous cast iron mains in a more timely manner, ultimately promoting safe and effective service to CPG and PNG's customers. One benefit of the DSIC is that it provides a way for a utility to receive a return on its capital investment without the usual regulatory lag. Because of this utilities are able to more quickly replace aging infrastructure and continue to provide safe and reliable service to their customers. As noted by CPG and PNG Witness Hans Bell, if not granted a waiver, the Companies' ability to sustain the level of investment found in their annual asset optimization plan and LTIIP becomes harder.²¹ The DSIC is an important tool for utilities because the DSIC can serve to facilitate recovery of expenses used improve service quality, improve rate stability, reduce the number of main breaks, lower the amount of service interruptions, increase safety, and for an NGDC, lower the levels of

²¹ Transcript PNG, p. 88.

lost and unaccounted for gas. In addition, the DSIC can reduce the number of lengthy and time consuming base rate proceedings a company files. All of the above are important considerations when looking at NGDC safety.

B. Standard for Granting the Waiver

A natural gas distribution organization's DSIC may not exceed 5% of the amount it bills to customers under its applicable rates.²² However, the Commission may, upon petition, may grant a waiver of a utility's 5% limit for a utility in order to ensure and maintain adequate, efficient, safe, reliable and reasonable service.²³ The denial of a waiver which would result in the unnecessarily delay in future infrastructural improvements is contrary to the purpose of the DSIC.²⁴ Further, a granting of this waiver must be shown to be necessary in order to provide "adequate, efficient, safe, reliable and reasonable service."²⁵

C. Have CPG and PNG Met Standard for Waiver of 5% Cap?

I&E submits that CPG and PNG have met this standard for waiver of the 5% cap because CPG and PNG's existing infrastructure implicates safety concerns for the I&E Gas Safety Division. The Companies' current level of investment may not be so easily sustained in the event that a waiver is not granted. CPG and PNG have shown that additional DSIC funding will be prudently used, as evidenced in the underlying LTIP

²² 66 Pa.C.S.A. § 1358(a)(1).

²³ *Id.*

²⁴ *Petition of PPL Elec. Utilities Corp. for Approval of A Distribution Sys. Improvement Charge Ppl Elec. Utilities Corp.*, C-2013-2345729, 2015 WL 1754563 (Apr. 9, 2015).

²⁵ 66 Pa.C.S.A. § 1358(a)(1).

modification proceedings, to address those safety concerns identified by the I&E Gas Safety Division. Furthermore, as denying the waiver would result in the unnecessary delay in cast iron main and unprotected steel main replacement, which is not only contrary to the purpose of the DSIC, but it would produce a result that is unjust, unreasonable, and contrary to the public interest because it would expose the public to the unnecessary danger of untimely main replacement.

As noted by the Companies in their respective Petitions, under current projections, CPG will exceed the 5% DSIC cap as of the July 1, 2016 quarterly filing date²⁶ and PNG has already exceeded the 5% DSIC cap.²⁷

Of paramount importance in this matter is the concern for public safety. I&E is the only party to this proceeding with a dedicated Gas Safety Division. As such, I&E has an obligation to inspect the Companies' pipelines for safety related issues. Further, I&E is the only party that has been given the authority to enforce the safety regulations found at 49 CFR § 192. As noted by I&E Gas Safety Witness Sunil Patel, "Compared to other NGDCs, PNG has the highest number of total leaks/mile."²⁸ This fact was not disputed by the Companies' Witness Hans Bell, who is the Vice President of Engineering and Operations Support.²⁹ While the statewide average leaks per mile rests at .95, PNG averages a total of 1.65 leaks per mile. Further PNG's corrosion related leaks have

²⁶ CPG Petition p. 6.

²⁷ PNG Petition p. 6.

²⁸ I&E St. No. 1, pp. 11-12.

²⁹ Transcript PNG p. 80.

increased from 2013 to 2015 by 64%.³⁰ At hearing Mr. Bell made an important point. In October of 2013, the Companies (both PNG and CPG) began applying more stringent leak classification criteria.³¹ What this means is that the leaks per mile we are seeing being reported at this point are a very accurate assessment of the problem PNG is facing. This is not a bookkeeping issue; these leaks exist regardless of how PNG chooses to classify them and in the interest of public safety should be repaired. The best way to curtail this type of problem is to accelerate the replacement of at risk pipe.

In addition, although CPG's risk for cast iron mains has gone down, its risk for steel mains has increased from 63,475 points in 2012 to 65,441 points in 2015. While these Companies are facing different risk factors, the fact that some of these Companies' risks are going down in certain areas, does not mitigate the fact that risks are increasing in other areas for both Utilities.

It is an undisputed fact that cast iron and cathodically unprotected bare steel pipelines pose a safety risk for NGDCs. Both CPG and PNG Witness Bell and I&E Witness Patel agree that in an ideal world, an NGDC would have no cast iron or bare steel mains in their system.³² PNG has already exceeded its 5% DSIC cap and CPG will likely exceed that as well. If the Companies efforts to reduce the amount of this pipe in their systems are curtailed because the investment required becomes too much for the Companies to maintain this could lead to disastrous consequences for the Companies

³⁰ I&E St. No. 1, p. 10.

³¹ Transcript PNG, p. 80.

³² Transcript PNG, pp. 90 and 104.

such as an explosion. I&E believes that it is better for the Companies and their ratepayers to take a proactive approach and prevent these types of incidents rather than a reactive approach after the fact.

Ultimately, it was the unsafe state of PGW's pipeline that warranted the Commission granting the utility a DSIC maximum cap waiver. On April 21, 2015, the Commission issued its *Staff Report: Inquiry into Philadelphia Gas Works' Pipeline Replacement Program* (the "Staff Report") whereby the Commission independently determined that an assessment of PGW's infrastructure had become warranted: "an assessment of PGW's pipeline infrastructure is necessary because approximately 66 percent of its system is comprised of cast iron and unprotected steel, both of which are high-risk pipe that pose a potential threat to life and property in PGW's service territory."³³ In its Order in the PGW DSIC waiver proceeding the Commission stated:

Based on our review of the record, the positions of the Parties, and the applicable law, we will grant PGW's request for a waiver of the 5% DSIC cap, pursuant to Section 1358(a)(1) of the Code, and we will permit PGW to raise its DSIC cap to 7.5%, subject to the conditions set forth herein. It is undisputed in this proceeding that PGW's aging gas distribution infrastructure poses significant safety and reliability issues, and that the current pace of the Company's replacement efforts is unacceptable and potentially harmful to the public. The record reflects that 66% of PGW's 3,000 miles of gas main infrastructure consists of at-risk cast iron and unprotected steel mains. This percentage is among the highest of any natural gas distribution company in Pennsylvania. In addition, there has been a definite upward trend in gas leaks and broken pipes on the Company's system

³³ Staff Report, p. 3.

over the past several years. This state of affairs is particularly troubling given that PGW operates in an urban environment with a high population density. PGW St. 1 at 1-9. The Staff Report cited by PGW and I&E further describes the poor condition of PGW's distribution infrastructure and confirms the need for PGW to undertake an aggressive main replacement strategy. Staff Report at 33-34.³⁴

It is clear that in order for PGW to address these substantial infrastructure issues, it must obtain the additional funding necessary to further accelerate its main replacement efforts. We believe that granting PGW a waiver of the statutory 5% DSIC limitation, as provided for in Act 11, may be the most cost-effective and least problematic means of ensuring that the Company can obtain this additional funding in a timely fashion.³⁵

I&E opines that it is not prudent to wait until a utility falls into an extreme state of disrepair to permit a waiver of the DSIC cap maximum. I&E believes the DSIC can and should be used as an effective preventative measure for an NGDC. If we wait until a significant safety incident, such as an explosion, occurs before considering a DSIC cap waiver we have failed in achieving the mission of a mechanism such as the DSIC; that is, to provide safe and reliable service to the utility customers of the Commonwealth.

In this proceeding OSBA Witness Robert Knecht testified that “[i]n effect, the OSBA’s interpretation is that the DSIC cap is a ‘hard cap,’ to be waived only in

³⁴ The Staff Report was a joint effort by PGW and the Commission’s Bureaus of Technical Utility Services, Audits, and I&E. PGW and I&E both rely on the Staff Report to support their respective positions that the Company’s Petition should be granted. While the Staff Report is a public document of which we may take administrative notice, we note that this Commission is not bound by the recommendations set forth in the Report. See 52 Pa. Code § 1.96, which provides that “reports drafted by Commission bureaus are only considered as aids to the public, do not have the force and effect of law or legal determinations, and are not binding upon the Commonwealth or the Commission.”

³⁵ *Pennsylvania Pub. Util. Comm'n v. PGW*, P-2015-2501500, pp. 41-42 (Order entered January 26, 2016).

extraordinary circumstances.”³⁶ It should be noted that OSBA opposed any waiver of the DSIC cap for PGW in the aforementioned PGW case. As indicated by the cross examination of Mr. Knecht, OSBA did not feel PGW met the OSBA definition of “extraordinary circumstances” to warrant a DSIC waiver.³⁷ However, it is equally clear that the Commission *did* believe PGW’s circumstances were such that a DSIC cap waiver was warranted. Therefore, it is clear that this Commission does not agree with OSBA’s interpretation of what “extraordinary circumstances” warrant a DSIC maximum cap waiver.

Further the assessment by OCA that the Companies are not risky enough to warrant a DSIC cap waiver has little weight. First, OCA Witness Mierzwa’s assessment is based on a single year of data and not the full picture of the Companies’ situation. Further, OCA Witness Mierzwa has not received the gas safety training I&E Witness Patel has received. Mr. Patel has extensive Pipeline Hazardous Materials and Safety Administration (“PHMSA”) Training, has attended over 16 gas safety courses and has performed over 350 gas safety inspections in the field.³⁸ Clearly, Mr. Patel is more qualified to assess whether a gas pipeline presents any safety risks.

The concern in any DSIC proceeding, particularly those involving and NGDC, must be the maintenance of safe and adequate service. As the only Party with a witness qualified to assess the risky state of CPG and PNG’s pipeline, I&E believes that the

³⁶ OBSA St. No. 1-S, p. 4.

³⁷ Transcript PNG p. 104.

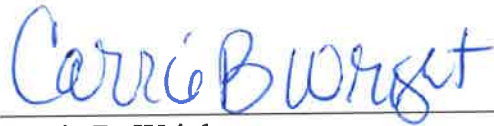
³⁸ Transcript, pp. 73-74.

Companies have met their burden for granting a DSIC cap waiver. However, I&E does not believe that the risks associated with these systems are sufficient enough to justify a maximum DSIC cap of 10% and, therefore, recommends the DSIC be set at 7.5%. It would be detrimental to both the CPG and PNG ratepayers, as well as the Companies' themselves, to be required to fall into such a state of disrepair that a safety incident becomes almost inevitable before a request for a DSIC cap waiver is granted.

IV. CONCLUSION

The Commission's Bureau of Investigation and Enforcement represents that it supports the CPG and PNG being granted a waiver of the 5% DSIC cap. However, I&E respectfully requests that Administrative Law Judge Angela T. Jones recommend, and the Commission subsequently approve, a maximum DSIC cap of 7.5% in lieu of the 10% maximum cap requested by the Companies.

Respectfully submitted,



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Dated: September 22, 2016

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of UGI Penn Natural Gas, Inc. for a :
Waiver of the Distribution System :
Improvement Charge Cap of 5% of Billed : Docket No. P-2016-2537594
Distribution Revenues and Approval to :
Increase the Maximum Allowable DSIC to :
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CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Main Brief** dated September 22, 2016, in the manner and upon the persons listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

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