**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of UGI Penn Natural Gas, Inc. for Waiver : P-2016-2537594

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

**RECOMMENDED DECISION**

Before

Angela T. Jones

Administrative Law Judge

# I. INTRODUCTION

 For the reasons set forth below, this Recommended Decision concludes that

UGI Penn Natural Gas (UGI-PNG or Company or Petitioner) has met its burden of proof with respect to waiver of the 5% cap on its Distribution System Improvement Charge (DSIC). However, the Company has not met its burden of proof through substantial evidence to raise the cap to 10%. Based on the record evidence, it is recommended to raise the cap to 6.89%.

# II. HISTORY OF THE PROCEEDINGS

 On February 14, 2012, Governor Corbett signed into law Act 11 of 2012 (Act 11), effective in sixty (60) days, which, among other things, amended Chapter 13 of Title 66 of the Public Utility Code (Code) to approve a DSIC for natural gas distribution companies (NGDCs). See, 66 Pa.C.S. §§ 1350-1360. Act 11 provides utilities with the ability to implement a DSIC to recover reasonable and prudent costs incurred to repair, improve or replace certain eligible property that is part of the utility’s distribution system. 66 Pa.C.S. § 1353. Eligible property for NGDCs is defined in Section 1351(1) of the Code, 66 Pa.C.S. § 1351(1).

 As a precondition to the implementation of a DSIC, each utility is required to file a Long-Term Infrastructure Improvement Plan (LTIIP) with the Pennsylvania Public Utility Commission (Commission), consistent with 66 Pa.C.S. § 1352. Certain limitations are included in Act 11; specifically, the DSIC may not exceed 5% of distribution rates unless a Commission waiver is requested and approved, and is to be reset to zero upon the effective date of new base rates and if overearning is shown in any quarter. 66 Pa.C.S. §§ 1358(a)(1) and (b). In addition, Act 11 sets out specific audit and reconciliation procedures, including refunds with interest to customers of any over-collections.

 On August 2, 2012, the Commission issued its *Final Implementation Order*, at Docket No. M-2012-2293611, establishing procedures necessary to implement Act 11. The *Final Implementation Order* adopted the requirements established in Act 11, provided additional standards that each utility must meet in developing a LTIIP and DSIC, and gave guidance to utilities for meeting the Commission’s standards.

 On December 13, 2013, UGI-PNG filed a LTIIP with the Commission, pursuant to Section 1352, of the Code, 66 Pa.C.S. § 1352 to set the Company’s plans to repair and replace distribution infrastructure for the year 2014 through 2018. Concurrent with the LTIIP the Company filed a petition for approval to implement its DSIC. The Commission approved both the LTIIP and the DSIC on September 11, 2014, subject to refund pending the resolution of DSIC-related issues. The DSIC-related issues were resolved by Commission Order entered July 8, 2015. *See Petition of UGI Penn Natural Gas, Inc. for Approval of its Long-Term Infrastructure Improvement Plan; Petition of UGI Penn Natural Gas, Inc. for Approval of a Distribution System Improvement Charge,* Docket No. P-2013-2397056 (Opinion and Order entered July 8, 2015).

The Company implemented the DSIC on October 1, 2014, in compliance with Commission order and set the DSIC at 0.0% of distribution revenues. On April 1, 2015, the Company charged its first non-zero DSIC. In the quarterly update filed on March 21, 2016, the DSIC rate had reached 5.00% of the distribution revenues. The Company has alleged that the DSIC calculation would go beyond 5% for DSIC-eligible property but for the cap; and thus, has petitioned for the waiver of the 5% cap.

On February 29, 2016, the Company filed a petition to modify its LTIIP at Docket No. P-2013-2397056. This modified LTIIP was filed in compliance with 52 Pa.Code § 121.5(a), which recognizes a major modification as increasing total estimated cost of the LTIIP by more than 20% (“major modification” is defined at 52 Pa.Code § 121.2(iii)). The Commission approved the Company’s modified LTIIP on June 30, 2016. See *Petition of UGI Penn Natural Gas, Inc. for Approval of their Modified Long-Term Infrastructure Improvement Plan*, Docket No. P-2013-2397056 (Order entered June 30, 2016)(*UGI-PNG Modified LTIIP*). The Company has stated the “work has contributed to a 24.5% increase in the planned spending on DSIC-eligible plant over the remaining three years of the plan.” UGI-PNG M.B. at 20, citing, *UGI-PNG Modified LTIIP* at 5.

 On March 31, 2016, UGI-PNG filed a Petition for a Waiver of the Distribution System Improvement Charge Cap of 5% of Billed Distribution Revenues and Approval to Increase the DSIC to a maximum of 10% of Billed Distribution Revenues (DSIC Waiver Petition), pursuant to 66 Pa.C.S. § 1358(a). The DSIC Waiver Petition sought implementation of the waiver to be effective July 1, 2016, subject to hearing and refund, since the DSIC rate had already reached the 5% cap.

On April 20, 2016, Office of Consumer Advocate (OCA) filed an answer, notice of intervention and a public statement opposing the DSIC Waiver Petition. OCA contended that the Petitioner did not demonstrate that a waiver to the current cap and an increase in the cap up to 10% was necessary, and therefore, the Petitioner failed to meet the standard “in order to ensure and maintain adequate, efficient, safe, reliable and reasonable service” consistent with Section 1358(a) of the Code for a waiver to be granted. 66 Pa.C.S. § 1358(a).

Also on April 20, 2016, Office of Small Business Advocate (OSBA) filed an answer, notice of intervention and public statement. OSBA contended that the 5% DSIC cap was sufficient for UGI-PNG to maintain its level of investment for the DSIC-eligible plant identified in the modified LTIIP and requested proof otherwise. OSBA stated that the Petitioners failed to offer reasons why it cannot meet its obligation without a waiver and claimed that alternative methods other than a waiver are available to the Company. Consequently, the OSBA submitted that the DSIC Waiver Petition be dismissed.

On May 6, 2016, the Commission’s Bureau of Investigation and Enforcement (I&E) filed a Notice of Appearance in this proceeding.

By Notice dated May 31, 2016, an Initial Prehearing Conference was scheduled for Friday, June 17, 2016, at 10:00 a.m. regarding this proceeding. The Prehearing Conference convened as scheduled and the parties agreed to a procedural schedule.

On July 22, 2016, UGI-PNG filed a Motion for Protective Order. On July 27, 2016, UGI-PNG’s Motion for a Protective Order was granted which defined and implemented the procedure for proprietary information at this docket. On August 25, 2016, Prehearing Order #4 was issued, which addressed the relevant procedure that was raised by OSBA.

All parties submitted direct, rebuttal and surrebuttal testimony pursuant to the established procedural schedule. UGI-PNG submitted direct, rebuttal and surrebuttal testimony of Mr. William McAllister with supporting exhibits and rebuttal testimony of Mr. Hans G. Bell. I&E submitted direct and surrebuttal testimony of Mr. Sunil R. Patel. OCA submitted direct, rebuttal and surrebuttal testimony of Mr. Jerome Mierzwa. OSBA submitted direct, rebuttal and surrebuttal testimony of Mr. Robert D. Knecht.

 A hearing was held on Thursday, September 8, 2016, for the purpose of cross examining witnesses and admitting into the record the prepared testimony and exhibits after timely motions and objections were addressed. The following statements and exhibits were admitted into evidence:

1. UGI-PNG Stmt. 1 (direct testimony of Mr. McAllister with exhibits WJM-1, WJM-2, WJM-3 and WJM-4);
2. UGI-PNG Stmt. 1-R (rebuttal testimony of Mr. McAllister);
3. UGI-PNG Stmt. 1-SR (surrebuttal testimony of Mr. McAllister with exhibit WJM-1S);
4. UGI-PNG Stmt. 2-R (rebuttal testimony of Mr. Bell with exhibit HGB-1R);
5. I&E Stmt. 1 (direct testimony of Mr. Patel both non-proprietary and proprietary with exhibit 1 both non-proprietary and proprietary);
6. I&E Stmt. SR-1 (surrebuttal testimony of Mr. Patel);
7. I&E cross exhibit 2 (OSBA responses to I&E interrogatories Set 1);
8. OCA Stmt. 1 (direct testimony of Mr. Mierzwa);
9. OCA Stmt. 1R (rebuttal testimony of Mr. Mierzwa);
10. OCA Stmt. 1S (surrebuttal of Mr. Mierzwa);
11. OCA cross exhibit 1 (response by UGI-PNG to OCA-II-1 interrogatory);
12. OSBA Stmt. 1 (direct testimony of Mr. Knecht and exhibits);
13. OSBA Stmt. 1-R (redacted rebuttal testimony of Mr. Knecht);[[1]](#footnote-1)
14. OSBA Stmt. 1-S (surrebuttal testimony of Mr. Knecht); and
15. OSBA Exhibit I-5 (late-filed exhibit).

 By Order dated September 12, 2016, the undersigned admitted OSBA’s late filed exhibit as there were no objections from the other participating parties.

 By written request dated September 21, 2016, counsel for UGI-PNG presented corrections to the transcript for accuracy pursuant to 52 Pa.Code § 5.253(b). No party to the proceeding opposed the proposed transcript corrections. Since pursuant to 52 Pa.Code § 5.253(f)(2), “a request for corrections not acted upon within 20 days is deemed to be granted if unopposed,” the corrections are granted.

 All parties filed Main Briefs on September 22, 2016 and Reply Briefs by September 30, 2016, in accordance with the established procedural schedule.

 The evidentiary record closed on September 30, 2016, which was the due date of the Reply Briefs. The evidentiary hearing generated 117 pages of transcribed testimony.

By Order dated October 26, 2016, the undersigned notified the parties of official notice of the modified LTIIP of UGI-PNG at *UGI-PNG Modified LTIIP,* Docket No. P-2013-2398835, at appendix B, pursuant to 52 Pa.Code § 5.408. Because of the official notice, the record was reopened pursuant to 52 Pa.Code § 5.571(d)(1).

By letter dated November 3, 2016, OSBA responded that while it did not object to the official notice, it suggested that the entire Petition should be noticed so that the information can be placed in context. OSBA also suggested that the Commission Order approving the Petition at Docket No. P-2013-2398835 be given official notice as well. No other party objected or otherwise requested alternatives to the official notice.

By Order dated November 4, 2016, the undersigned granted the suggestion by OSBA and modified the official notice to the entire Petition including the appendices at *UGI-PNG Modified LTIIP,* but the undersigned denied the suggestion by OSBA to take official notice of the Commission’s approval of the UGI-PNG Modified LTIIP by Order entered June 30, 2016. The record was closed on November 4, 2016 with the ruling on the official notice. This matter is ripe for recommended decision.

 This Recommended Decision addresses every pertinent issue raised in each parties’ Briefs. It is noted that the Commission is not required to consider expressly and at length each contention and authority brought forth by a party to the proceeding. *University of Pennsylvania v. Pa. Pub. Util. Comm’n*, 485 A.2d 1217 (Pa.Cmwlth. 1984). When parties have been ordered to file briefs and fail to include all issues they wish to have reviewed, the unbriefed issues may properly be viewed as having been waived. *Jackson v. Kassab*, 812 A.2d 1233 (Pa.Super. 2002), *app. denied*, 825 A.2d 1261 (Pa. 2003).

# III. FINDINGS OF FACT

1. A prerequisite for a utility to implement a DSIC is a Commission-approved LTIIP. UGI-PNG Stmt. 1 at 4.
2. The Commission approved the LTIIP and DSIC for UGI-PNG by Order entered September 11, 2014. UGI-PNG Stmt. 1 at 4.
3. UGI-PNG filed a modified LTIIP in compliance with 52 Pa.Code § 121.5(a) on February 29, 2016. UGI-PNG Stmt. 1 at 4.
4. The Commission approved UGI-PNG’s modified LTIIP by Order entered June 30, 2016. UGI-PNG Stmt. 2-R at 3.
5. UGI-PNG filed Supplement No. 33 to UGI Penn Natural Gas, Inc. Tariff Gas—Pa. P.U.C. No. 8, which implemented the DSIC rate for bills rendered on or after October 1, 2014. UGI-PNG Stmt. 1 at 5.
6. As of April 1, 2016, the UGI-PNG DSIC rate reached the cap of 5% and UGI-PNG cannot recover new investment associated with the repair and replacement of infrastructure associated with the Commission-approved modified LTIIP. UGI-PNG Stmt. 1 at 5-7 and UGI-PNG Exhibit WJM-3.
7. The capped 5% DSIC rate is not sufficient to recover the expenditures associated with the Commission-approved modified LTIIP. UGI-PNG Stmt. 1 at 8-9 and UGI-PNG Exhibit WJM-3.
8. Based on the modified LTIIP, UGI-PNG is replacing gas and transmission mains, valves, fittings, couplings, service lines, meter sets, regulator stations, city gates and addresses mandatory relocations on Pennsylvania Department of Transportation projects. UGI-PNG Stmt. 1 at 8.
9. The accelerated infrastructure expenditures over the five year term of the UGI-PNG modified LTIIP are as follows:

|  |  |
| --- | --- |
| Year  | Investment (in millions of dollars) |
| 2014 | $26.1 actual |
| 2015 | $27.1 actual |
| 2016 | $35.9 projected |
| 2017 | $24.8 projected |
| 2018 | 24.8 projected |

UGI-PNG Stmt. 1 at 8.

1. The accelerated repair and improvements of the infrastructure contained in the modified LTIIP will help UGI-PNG address and reduce the number of leaks in its piping, install additional safety mechanisms and relocate meters that are currently inside customers’ buildings. UGI-PNG Stmt. 2-R at 2-5.
2. UGI-PNG is proactively and aggressively addressing leaks in the Company’s infrastructure as DSIC-eligible plant through the Company’s LTIIP. I&E Stmt. 1 at 9-11.
3. Moving meters located inside houses of customers is a safety issue and is a category of expense in the Company’s modified LTIIP. Tr. 104.
4. UGI-PNG’s cast iron and bare steel piping in its infrastructure are safety concerns. I&E Stmt. 1 at 8-9; UGI-PNG Stmt. 1 at 8; UGI-PNG Stmt. 2-R at 3; Tr. 82, 85.
5. UGI-PNG has reduced risk with the capped DSIC rate at 5%. OCA Stmt. 1R at 2.
6. The first full year the DSIC was active was 2015 at the capped rate of 5%. OCA Stmt. 1R at 2.
7. UGI-PNG is on track to replace all of its cast iron mains within 14 years and its bare steel mains within 30 years without adjusting the 5% capped DSIC rate. UGI-PNG Exhibit WJM-4; OCA Stmt. 1 at 6 citing OCA Set I-1 response.
8. The modified LTIIP increased the expenditure over the total five year term of the LTIIP from $114.5 million to $138.7 million or a 24.5% increase in planned spending on DSIC-eligible plant over the remaining three years of the plan. *UGI-PNG Modified LTIIP at 5*.
9. UGI-PNG plans to continue the aggressive repair and replacement of its infrastructure regardless of whether the capped DSIC rate is increased. OSBA Stmt. 1 at 7; OSBA Exhibit IEc-2 at OCA-I-1.
10. Every 1% increase in the DSIC rate corresponds to an additional $0.48 per month for the typical residential heating customer. UGI-PNG Exhibit WJM-3.
11. Any increase in the DSIC rate does not mean that UGI-PNG will avoid a base rate case during the remaining term of its modified LTIIP, which is through the end of 2018. UGI-PNG Stmt. 1-R at 10.
12. A base rate case requires the Company to schedule internal labor resources and is a significant financial commitment. UGI-PNG Stmt. 1-R at 12; Tr. 52.
13. The DSIC mechanism affords the Company with an opportunity to decrease the need for frequent base rate cases. UGI-PNG Stmt. 1 at 10.
14. Some of the factors that determine the frequency with which UGI-PNG must file a base rate case are within the control of the Company. OCA Stmt. 1 at 7; OSBA Stmt. 1 at 11.
15. UGI-PNG has experienced growth in its customer count and load since the Company’s most recent base rate case. OSBA Stmt. 1 at 12-13, OSBA Exhibit IEc-2 at OSBA-I-4.
16. UGI-PNG estimates under the requested 10% capped DSIC rate it would recover its investment on DSIC-eligible plant up to October 2017. UGI-PNG Exhibit WJM-3.

# LEGAL STANDARDS

 UGI-PNG is the petitioner and proponent of a rule or order that would modify the Company’s existing DSIC. Therefore, UGI-PNG bears the burden to prove that it is entitled to the waiver that is sought. Sections 315(a) and 332(a) of the Code, 66 Pa.C.S. §§ 315(a), 332(a) provide that the burden of establishing the justness and reasonableness of waiving the capped DSIC rate is clearly on UGI-PNG in this proceeding. UGI-PNG must persuade the Commission by a preponderance of the substantial evidence that the relief sought is proper and justified under the circumstances. *Se Ling Hosiery, Inc. v. Margulies,* 70 A.2d 854, 855-56 (Pa. 1950)(*Se-Ling Hosiery)*.

The Pennsylvania Commonwealth Court has interpreted Section 315(a) of the Code as follows:

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

*Lower Frederick Twp. v. Pa. Pub. Util. Comm’n*, 409 A.2d 505, 507 (Pa.Cmwlth. 1980) (emphasis added). See also, *Brockway Glass v. Pa. Pub. Util. Comm’n*,  437 A.2d 1067 (Pa.Cmwlth. 1981).

 A preponderance of the evidence is that which is more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery,* 70 A.2d 854 (1950); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n,* 578 A.2d 600 (Pa.Cmwlth. 1990) *alloc. den.*, 602 A.2d 863 (Pa. 1992).

In addition, the Commission’s decision must be supported by “substantial evidence,” which consists of evidence that a reasonable mind might accept as adequate to support a conclusion. *Dutchland Tours, Inc. v. Pa. Pub. Util. Comm’n*, 337 A.2d 922 (Pa.Cmwlth. 1975). A mere "trace of evidence or a suspicion of the existence of a fact" is insufficient. *Norfolk and Western Railway Co. v. Pa. Pub. Util. Comm’n*, 413 A.2d 1037 (Pa. 1980).

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

 While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm’n*, 768 A.2d 1217 (Pa.Cmwlth. 2001). Thus, if competing evidence exists regarding any issue, the petitioner has the burden to establish by a preponderance of substantial evidence, the issue based on the overall weight of the evidence.

This does not mean, however, that in proving its case, a public utility must affirmatively defend claims that no party has questioned. As held by the Pennsylvania Commonwealth Court:

While it is axiomatic that a utility has the burden of proving the justness and reasonableness of its proposed rates, it cannot be called upon to account for every action absent prior notice that such action is to be challenged.

*Allegheny Center Assocs. v. Pa. Pub. Util. Comm’n*, 570 A.2d 149, 53 (Pa.Cmwlth. 1990); see also, *Pa. Pub. Util. Comm’n v. Equitable Gas Co.*, 73 Pa. PUC 301, 359-60 (Order entered November 21, 1990).

 In the final analysis, a utility’s rates must be just and reasonable, as required by Section 1301 of the Code, 66 Pa.C.S. § 1301, and it is UGI-PNG’s burden in this proceeding to demonstrate that, with respect to its request for a waiver of the DSIC cap up to 10%, that the granting of the request will yield just and reasonable utility rates.

Furthermore, any opposition to the position does not need to show that the Petition to waive the 5% DSIC cap and implement up to a 10% cap on distribution revenues for the DSIC rate is unfair, unreasonable or not in the public interest. Rather, the opposition prevails by showing by a preponderance of substantial evidence that the Petitioner failed to meet its burden of proof.

# V. DISCUSSION

1. What is the appropriate standard for waiver of the capped DSIC rate and whether it was met
2. The Statute

Section 1358 of the Public Utility Code is entitled Customer protections and states in relevant part,

1. Limitation .—As follows:
2. Except as provided under paragraph (2), the distribution system improvement charge may not exceed 5% of the amount billed to customers under the applicable rates of the …distribution rates of the … natural gas distribution company or city natural gas distribution operation. The 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.

\* \* \*

(d) Commission.—The commission, by regulation or order, shall prescribe the specific procedures to be followed to approve a distribution systems improvement charge. A distribution system improvement charge approved by the commission shall provide:

 \* \* \*

(3) A cap on the amount that may be collected from customers under this subchapter.

66 Pa.C.S. § 1358(a)(1) & (d)(3).

 The 5% revenue cap for the DSIC is a statutory consumer protection mechanism to prevent utilities from bypassing the traditional ratemaking process and to ensure that the DSIC supplements rather than replaces base rate proceedings. OCA M.B. at 4-5 citations omitted.

The Petition by UGI-PNG requests the Commission to invoke its statutory authority under Section 1358(a) to waive the current cap on the DSIC, which is 5% of the distribution revenues, to 10%. Consequently the new cap on the DSIC would be 10% in compliance with 1358(d)(3) if the Petition is approved.

1. Parties’ Positions
	1. UGI-PNG

UGI-PNG contends that waiver of the 5% DSIC is appropriate where the utility has identified the DSIC-eligible plant in a LTIIP, and the established 5% cap on the DSIC rate is insufficient for the Company to recover revenues associated with the LTIIP projects. UGI-PNG M.B. at 9. UGI-PNG states that it has shown such insufficiency of the current 5% cap to recover DSIC-eligible property because the Company has exceeded expenditure beyond the capped DSIC as of the quarter beginning April 1, 2016 in compliance with the June 30, 2016, Commission-approved modified LTIIP. UGI-PNG Stmt. 1 at 7, UGI-PNG M.B. at 9. Thus, the Company as of April 1, 2016, has failed to receive timely cost recovery of DSIC-eligible investments, which is what the DSIC was to address. The DSIC is an alternative ratemaking mechanism where utilities timely recover costs related to repair, improvement and replacement of eligible projects outside of a ratemaking case. *McCloskey v. Pa. Pub. Util. Comm’n,* 127 A.3d 860, 863 (Pa.Cmwlth. 2015).

UGI-PNG notes that the language in Section 1358(a) of the Code, *supra* at 11, matches the language at Section 1353(a) regarding the Commission’s authority to approve the DSIC and the standard by which such approval is to be given. 66 Pa.C.S. § 1353(a). The Company further notes the same language is found in the standard to approve the LTIIP in Section 1352(a)(6) and (7) of the Code. 66 Pa.C.S. § 1352(a)(6) and (7). The Company posits where the same language is used in the statute, the same standard should be used to correspond to the language. UGI-PNG M.B. at 10-11.

UGI-PNG argues that its spending is in compliance with the Commission-approved, modified LTIIP “that ensures and maintains adequate, efficient, safe, reliable, and reasonable service is sufficient to support a request to increase the DSIC rate cap to recover spending on the projects in that plan.” UGI-PNG M.B. at 11. The Company states the standard used for the Commission-approved modified LTIIP is the same standard for the waiver. The Company has shown that the 5% capped DSIC rate is insufficient to support its current planned levels of plant replacement and DSIC-eligible spending under the modified LTIIP. UGI-PNG M.B. at 9. Consequently, the Company contends that it has met the standard to obtain a waiver for an increase in the capped DSIC-rate. UGI-PNG M.B. at 13-14.

* 1. I&E

I&E states that the Commission is given statutory authority to grant a waiver of the 5% capped DSIC rate and said waiver must be necessary to provide “adequate, efficient, safe, reliable and reasonable service.” I&E M.B. at 9, citing 66 Pa.C.S. § 1358(a)(1). I&E posits that denial of the waiver that results in unnecessary delay in future infrastructure improvements is contrary to the purpose of the DSIC. I&E M.B. at 9, citing *Petition of PPL Electric Util. Corp. for Approval of a Distribution System Improvement Charge,* Docket No. C-2013-2345729, 2015 WL 1754563 (April 9, 2015).

I&E finds that the LTIIP proceedings addressed the safety concerns for which UGI-PNG needs the DSIC funding and any delay to obtain that funding may result in “unnecessary delay in cast iron and unprotected steel main replacement which is…contrary to the public interest.” I&E M.B. at 9-10. UGI-PNG’s leaks averaged a total of 1.65 per mile while the state average was 0.95 leaks per mile. I&E M.B. at 10. It is undisputed that UGI-PNG has the highest number of total leaks per mile compared to other NGDCs in the Commonwealth. Id, citing I&E Stmt. 1 at 11-12. If UGI-PNG’s efforts to repair the leaks that exist is restricted because the required investment is not obtained, the consequence could be catastrophic such as a gas explosion. I&E M.B. at 11-12.

I&E suggests that the more preferred policy is to allow the utilities to take proactive measures to guard against catastrophic incidents rather than reactive measures. I&E M.B. at 12. Proactive actions were supported by the Commission in its waiver of the 5% capped DSIC rate in the *Petition of Philadelphia Gas Works for Waiver of Provisions of Act 11 to Increase the Distribution System Improvement Charge Cap and to Permit Levelization of DSIC Charges,* Docket No. P-2015-2501500 (Opinion and Order entered January 28, 2016)(*PGW DSIC Waiver*) and such precedent dictates the same measures should be approved in the instant proceeding. A proactive approach achieves “the mission of a mechanism such as the DSIC; that is, to provide safe and reliable service to the utility customer of the Commonwealth.” UGI-PNG M.B. at 13.

I&E states that UGI-PNG has met its burden to show a waiver of its capped DSIC rate at 5% should be granted. I&E M.B. at 14-15. I&E does not find, however, that the record justifies a waiver up to 10%; rather, I&E recommends a DSIC capped at 7.5%. I&E M.B. at 15.

* 1. OCA

OCA contends that the standard for waiver of the capped DSIC rate is whether the DSIC revenue is necessary for the utility at issue to ensure and maintain adequate, efficient, safe, reliable and reasonable service. Even if it is determined that the additional revenue is necessary, OCA argues that the Commission has the discretion whether to grant the waiver or not. OCA M.B. at 5. OCA suggests that even if the Commission should find that the Company has met the standard to waive the 5% capped DSIC rate, the Commission should refrain from exercising its discretion to waive the capped DSIC rate up to 10%. OCA M.B. at 5.

OCA states that UGI-PNG failed to claim that its current infrastructure poses significant safety or reliability issues or that the current pace of replacement efforts by the Company is unacceptable or harmful to the public. OCA M.B. at 6. The Commission-approved modified LTIIP has the same term or timeframe for replacement as the original LTIIP approved in 2014. OCA M.B. at 6 citing *Petition of UGI Penn Natural Gas, Inc. for approval of its LTIIP,* Docket No. P-2013-2397056 (Order entered September 11, 2014) at 17; compared with *Petition of UGI-Penn Natural Gas, Inc. for approval of its modified LTIIP,* Docket No. P-2013-2397056 (Order entered June 30, 2016) at 4, 6.

OCA suggests that the condition at UGI-PNG’s distribution infrastructure and rate of replacement pales in comparison with that of Philadelphia Gas Works (PGW). 66% of PGW’s 3,000 miles of gas main infrastructure consisted of at-risk cast iron and unprotected steel, compared with 15% of UGI-PNG’s 2,575 miles of gas main infrastructure as of 2012. OCA M.B. at 7. Furthermore, UGI-PNG is on track for replacement of its cast iron mains within 14 years and its bare steel mains within 30 years at the capped DSIC rate of 5%. UGI-PNG Exhibit WJM-4; OCA Stmt. 1 at 6 citing OCA Set I-1 response. PGW received a waiver of the DSIC cap to reduce the replacement time of cast iron mains from 86 years to 48 years. *PGW Waiver Order,* Docket No. P-2015-2501500 at 10, 14. Consequently, OCA argues to grant a waiver to UGI-PNG of the same magnitude of PGW when the risk and replacement times are by no means as distressed is illogical.

UGI-PNG did not show that it is unable to fund the expenditures necessary to ensure and maintain adequate, efficient, safe, reliable and reasonable service without a waiver of the capped 5% DSIC rate. OCA M.B. at 8.

UGI-PNG states that failure to grant a waiver to the capped DSIC will not allow the Company to delay filing a base rate case. OCA states that UGI-PNG has not filed a base rate case since 2008. OCA M.B. at 8, citing *Pa. Pub. Util. Comm’n v. UGI Penn Natural Gas, Inc.,* Docket No. R-2008-2079660 (Order entered August 27, 2009). OCA argues that nothing in the statute for waiver of the DSIC addresses the time between base rate cases or the reduction of the expenses of a base rate case. OCA contends the arguments that the waiver may reduce the Company’s base rate case expenses or prolong the length of time the Company will not need to file a base rate case fail to meet the standard for a Commission waiver of the capped DSIC rate. OCA M.B. at 9.

Furthermore, the statutory 5% cap “reflects the General Assembly’s determination of the appropriate balance between [the] utility’s opportunity to automatically recover DSIC-eligible costs between base rate cases and the customer protections of base rate review.” *Id,* citing OCA Stmt. 1 at 6; OSBA Stmt. 1 at 9-10; 66 Pa.C.S. § 1358(a). OCA argues that UGI-PNG has not used a fully forecasted rate year to reflect projected plant in service, including DSIC-eligible plant additions in base rates. The record shows UGI-PNG has made progress reducing risk with the capped DSIC rate at 5%. OCA M.B. at 6 citing OCA Stmt. 1R at 2. A base rate proceeding covers categories of expenses that are not covered by the DSIC and therefore, even if the DSIC waiver were granted there is no guarantee that the granting will stave off a rate base proceeding. OCA M.B. at 9-10. Thus, to delay a base rate proceeding as rationale to grant a waiver to the capped DSIC rate is not logical or prudent and fails to meet the standard to waive the 5% cap. There must be more to establish that an increase in the capped DSIC rate is just and reasonable. OCA M.B. at 9.

OCA states there is “no specific or concrete benefit to customers from authorizing a 100[%] increase to the DSIC charge on their distribution bills.” OCA M.B. at 11. The request for the cap waiver is on a tenuous claim at best by UGI-PNG that it would extend the time between base rate case filing and reduce rate case expenses. The Company concedes that a higher DSIC cap may have no impact on the timing of a rate case filing and the Company has not committed to refrain from filing a base rate case for a specific time period. OCA M.B. at 12, citing UGI-PNG Stmt. 1-R at 12; see OCA Stmt. 1 at 8.

 OCA also addresses UGI-PNG’s claim that it would forego approximately $15 million of DSIC revenue without the requested 5% increase in the DSIC cap. UGI-PNG Stmt. 1 at 9, UGI-PNG Exhibit WJM-3. OCA argues that the Company will only forego the depreciation and return on its $15 million that it would obtain above the 5% DSIC cap if the waiver as requested is granted – not the full $15 million. OCA M.B. at 12. OCA contends this is not a persuasive reason to grant the requested waiver because the purpose of the DSIC is not to eliminate regulatory lag, but rather to provide an additional tool to reduce regulatory lag. OCA M.B. at 12-13, citations and note omitted. OCA states that regulatory lag affords incentives to utilities to control costs between rate cases. OCA M.B. at 13, citing OCA Stmt. 1S at 4-5.

 OCA affirms that the UGI-PNG has failed to show that it is just and reasonable to increase the capped DSIC rate up to 10%. OCA M.B. at 13. OCA argues that the capped DSIC rate should not be increased.

* 1. OSBA

Like OCA, OSBA stated that the Company must show that the waiver is necessary for the utility to provide reasonable service. The OSBA goes further to argue that there must be no other options other than the DSIC for providing the necessary service. OSBA M.B. at 5.

The OSBA disagrees that the same analysis that applies to granting a DSIC is the analysis that applies to granting a waiver of the capped 5% DSIC rate because such reasoning is inconsistent with the legislative history. OSBA M.B. at 5-6. OSBA argues that the phrase, “to repair, improve or replace eligible property in order to ensure and maintain adequate, efficient, safe, reliable and reasonable service,” in Section 1353(a) of the Code (the standard for granting the initial DSIC) goes to the types of costs that may be recovered in the DSIC rather than the criteria to be used to determine whether the DSIC should be approved. 66 Pa.C.S. § 1353(a).

In contrast, the Section 1358(a) of the Code language, “to ensure and maintain adequate, efficient, safe, reliable and reasonable service” applies to the requirements to grant the waiver of the 5% DSIC capped rate. 66 Pa.C.S. § 1358(a). Under this interpretation of the statute, OSBA states that the cap on the DSIC can only be waived under extraordinary circumstances. OSBA M.B. at 6. OSBA argues that “the legislature’s use of an explicit numerical cap for the DSIC, combined with the legislative history, imply that the granting of a waiver to the DSIC cap should be a relatively rare occurrence.” OSBA M.B. at 8.

In the alternative, the OSBA argues that there are three options to interpret the language of the DSIC waiver found in Section 1358(a) of the Code—“to ensure and maintain adequate, efficient, safe, reliable and, reasonable service,” which are:

1. identical to implementing DSIC originally, which OSBA suggests eliminates the consumer protection or requires a reevaluation of the DSIC programs and whether they are to be approved to grant the waiver;
2. criteria applies to the waiver but not the initial granting of the DSIC, which OSBA suggests requires the utility to be unable financially or otherwise to meet its service obligations but for implementing the waiver of the capped rate; and
3. Commission discretion for standard to approve the DSIC and different reasonable standard to grant a waiver to the capped rate; which OSBA suggests lets the Commission develop its own standards with little legislative guidance.

OSBA M.B. at 7. OSBA suggests that the most sensible option of the three above is option 2, because the other options are illogical considering statutory construction and legislative history.

 OSBA states that UGI-PNG claimed it is seeking the increase in the DSIC to ensure that customers continue to receive safe and reliable service in the future and to maintain its accelerated replacement program of at-risk piping and DSIC-eligible infrastructure. OSBA M.B. at 13. OSBA argues that the acceleration to replace the Company’s infrastructure has occurred under the capped DSIC rate and UGI-PNG has admitted that it will maintain the accelerated replacement regardless of whether the requested waiver of the capped DSIC rate is granted. OSBA M.B. at 14.

 OSBA refutes UGI-PNG’s argument that without the requested waiver its base rate cases would be too frequent as rationale for granting its request. OSBA states that the “DSIC is an *additional* mechanism for UGI-PNG to recover …costs, not the only mechanism.” OSBA M.B. at 15 (emphasis in original). Furthermore, OSBA observes that there is no standard for what is “too frequent” and the Company fails to offer any standard for it. OSBA M.B. at 15. The fact remains that the Company failed to provide any substantial evidence to support this claim and, therefore, it cannot justify that the Company sustained its burden to prove its request.

OSBA contends that I&E has failed to provide any explanation or analysis as to why waiving the DSIC cap and setting it at 7.5% is reasonable. Although the I&E witness concluded that UGI-PNG’s higher risk justifies a DSIC waiver, OSBA suggests that such conclusions did not mean that the Company’s systems are unsafe. OSBA M.B. at 17, citing OSBA Stmt. 1-R at 2. OSBA states that the I&E witness fails to state whether the improvements being made by the Company are reasonable. Regarding the location of meters, the OSBA observed that the I&E witness provided data but failed to compare the number of inside meters as a percentage of total meters for each NGDC in the Commonwealth. OSBA M.B. at 19. Thus, OSBA states the data and assessments made based on the data presented by the I&E witness is unreliable regarding the relative riskiness of UGI-PNG. *Id.* OSBA submits that since UGI-PNG’s infrastructure investment programs are not affected by the determination of this proceeding, then this proceeding will not affect public safety and, therefore, cannot meet the standard set for granting the waiver of the capped DSIC rate. OSBA M.B. at 19-20.

OSBA refutes the notion offered by the I&E witness that there is a statutory upper bound of 10% for the DSIC rate. OSBA M.B. at 20 note 1. Rather, the Company’s witness states that the Commission could consider a cap higher than 10% where the facts and circumstances justify it as reasonable. OSBA M.B. at 20 citing UGI-PNG Stmt. 1-R at 4-5.

 OSBA requests that Commission deny the requested increase to the DSIC capped rate because the Company failed to sustain its burden of proof.

1. Disposition

A waiver to increase the 5% DSIC rate cap imposed by statute may be granted when a utility shows that the initial 5% DSIC rate cap is not sufficient to support its planned levels of plant replacement and DSIC-eligible spending corresponding to the utility’s LTIIP. 66 Pa.C.S. § 1358(a); see also *Pa. Pub. Util. Comm’n v. Aqua Pennsylvania, Inc.,* Docket No. R-2008-2079310 (Order entered July 23, 2009)(a DSIC cap is not in 1307(g) but the Commission increased the DSIC when the utility showed its planned investment levels for DSIC-eligible spending as warranted by LTIIP were not met by capped DSIC).

The Commission through regulation planned for the instance where an initial LTIIP may need to be revised through Section 121.5 of Title 52 of the Pennsylvania Code (PUC regulations). 52 Pa.Code § 121.5. 52 Pa.Code § 121.5(a) states, in part, “If a utility elects to modify a Commission-approved LTIIP during its term to incorporate a major modification to any of the elements in Section 121.3(a)(relating to LTIIP), the utility shall file a separate petition for modification.” A “major modification” is defined as,

A change to a utility’s previously approved LTIIP which meets at least one of the following criteria:

1. Eliminated a category of eligible property from the LTIIP.
2. Extends the schedule for repair, improvement or replacement of a category of eligible property by more than 2 years.
3. **Increases the total estimated cost of the LTIIP by more than 20%.**
4. Otherwise reflects a substantial change to the current Commission-approved LTIIP.

52 Pa.Code § 121.2 (emphasis added).

 It is quite possible that a major modified LTIIP could result in projection of expenditures under the 5% capped distribution revenues for the DSIC rate that was in place for DSIC-eligible plant, or that the projection for overtaking the capped 5% of distribution revenues would not be realized until late in the term (perhaps the fifth year) of the LTIIP (the lateness of eclipsing the capped rate may cause the Commission to determine that a rate base case filing may be needed). In such cases the Commission would likely state that any petition for waiver of the 5% cap on distribution revenues for the DSIC would be denied. That is not the case in this proceeding.

Of note, the Commission used its discretion to state that an increase in total estimated costs of the LTIIP should be more than 20% of the original LTIIP. If the 20% threshold is not met, there is no need to file a modified LTIIP and modifications are addressed in Commission staff reviews of the utility’s Annual Asset Optimization Plan (AAO) where applicable. See 52 Pa.Code § 121.5(b). Thus, it appears that the Commission used its discretion to provide a gauge as to whether it needed to marshal its approval through a process that may involve a contested proceeding of measuring the standard for approval of a modification or not.

It is also noted, that the standards advocated by the OCA and OSBA that make it necessary for service and invoke the waiver only under extraordinary circumstances fail to consider the Commission regulations for the LTIIP and its modification in concert with the statutory language for the DSIC and the waiver of the capped DSIC-rate. The regulations for modification of the LTIIP do not require that there be extraordinary circumstances or no other alternative means to ensure and maintain adequate, efficient, safe, reliable and reasonable service.

In this proceeding, the Company’s modified LTIIP increased the total estimated cost of the original LTIIP by 24.5% over the remaining three years of the plan; and thus, qualified as a major modification by regulation. 52 Pa.Code § 121.2(iii), see also, UGI-PNG M.B. at 20. No party disputed that the modified LTIIP yielded an increase in planned spending for DSIC-eligible plant by 24.5%. Imbedded in the approved modified LTIIP is that the expenditures ensure and maintain adequate, efficient, safe, reliable, and reasonable service. Otherwise, the modifications would not have been approved and the Commission would have ordered a new or revised plan to be filed. 66 Pa.C.S. § 1352(a)(6)&(7).

No party disputed the calculation that the spending by the Company on DSIC-eligible plant has gone beyond 5% of distribution revenues. No party challenged the spending as being inaccurate or unreasonable expenses. The modified LTIIP accelerates infrastructure improvements in UGI-PNG to enhance system resiliency and reliability leading to safe, reliable and reasonable service. The Commission acknowledged the Company’s actions for improvements were warranted by approving the modified LTIIP. By approving the modified LTIIP the Commission acknowledged that an increased amount of DSIC-eligible plant needed to be addressed. Thus, the Company has provided substantial evidence for the 5% cap on distribution revenues for the DSIC rate to be waived, because the modified LTIIP is approved for “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.” 66 Pa.C.S. § 1352(a)(6).

OSBA’s rebuttal to the increase in spending for DSIC-eligible plant was that the Company changed its criteria to what is DSIC-eligible plant and so the increase is merely statistical and not realistic or relevant to assess safety. OSBA M.B. at 18-19.

The Company does not deny that it changed its criteria to what is DSIC-eligible plant. Tr. 80-81. If the change in criteria used to identify DSIC-eligible plant is not genuine, then the rebuttal should state it is not genuine and provide substantial evidence showing that it is not. No substantial evidence was provided by the opposition to show how the change in characterizing DSIC-eligible plant was disingenuous. Furthermore, such information would have been pivotal in disputing the modified LTIIP which went through muster to be approved by the Commission. I simply do not find this rebuttal compelling, because there is no substantial evidence to sustain it.

It is noted that the Commission approved the modified LTIIP with the changed criteria to identify DSIC-eligible plant. Any challenge to the change in the criteria to identify DSIC-eligible plant as proposed by UGI-PNG should have been raised and addressed in the *UGI-PNG Modified LTIIP* proceeding. OSBA was a party to that proceeding. Any challenge to the criteria used to identify DSIC-eligible plant as proposed in the modified LTIIP by OSBA is untimely.

OSBA also stated that the data presented by I&E is defective to show risk because there is no comparison to other Pennsylvania NGDCs. The question is risk in comparison to what? OSBA M.B. at 18. OSBA also contended that there is no actual risk reduction associated with the granting of the waiver, and therefore, the risk criterion should not warrant a decision on the waiver of the capped DSIC rate. OSBA M.B. at 17. The OSBA questioned whether granting a waiver based on increased risk rewards a utility for lapses in safety performance. *Id.*

A leak of gas is a serious safety issue and should be addressed as aggressively as possible. If leaks exist, whether or not the percentage of leaks in UGI-PNG’s infrastructure is compared to other NGDCs, the leaks should be repaired in the interest of public safety. I&E M.B. at 11. The best way to curtail leaks in the distribution system of an NGDC is to accelerate the replacement of at risk piping. *Id.*

It is not true that I&E failed to show risk in comparison to other Pennsylvania NGDCs. I&E witness stated, “Compared to other NGDCs, [UGI-PNG] has the highest number of total leaks per mile.” I&E Stmt. 1 at 11-12. I&E reported that UGI-PNG averages 1.65 leaks per mil while the statewide average leaks per mile is at 0.95. UGI-PNG did not dispute the data presented by I&E regarding leaks per mile. Tr. 80. No other party disputed the data presented by I&E regarding leaks per mile. The leaks per mile data is substantial evidence that risks to infrastructure safety exists in leakage in the Company’s piping system. The Company’s modified LTIIP is aggressively addressing this safety issue. Consequently, this data is substantial evidence for the rationale that a waiver of the capped DSIC rate and should be considered.

I simply do not find the challenges by OSBA to the I&E data convincing. The leaks detected in the DSIC-eligible plant of UGI-PNG are a safety risk, and thus, can be used as criteria to modify its original LTIIP to aggressively address safety. Establishing the leaks as a safety issue, I disagree that it is not then substantial evidence to waive the capped DSIC rate for UGI-PNG.

Furthermore, UGI-PNG filed a modified LTIIP **before** it petitioned for the waiver of the 5% DSIC capped rate. In *PGW DSIC Waiver,* the utility did not file a modified LTIIP before it petitioned for the waiver of the 5% DSIC capped rate. Consequently, the Commission relied upon other substantial evidence on the record because a modified LTIIP was not available. See, *PGW DSIC Waiver*, Docket No. P-2015-2501500 at 45, note 10 where the Commission reasoned that a revised LTIIP prior to waiver of a DSIC capped rate is statutorily correct procedure. Nevertheless, the Commission needed substantial evidence to waive the cap that would justify accelerating replacement of aging infrastructure and how the repair, improvement or replacement would ensure and maintain adequate, efficient, safe, reliable and reasonable service.

More elements of substantial evidence in this proceeding are the modified LTIIP and the projections presented by UGI-PNG that it has reached the capped 5% DSIC rate and will go beyond it through the remaining 3 year term of its modified LTIIP. The Commission’s regulations state, “The LTIIP must show the acceleration of the replacement of aging infrastructure by the utility and be sufficient to ensure and maintain adequate, efficient, safe, reliable and reasonable service to customers.” 52 Pa.Code § 121.1. The modified LTIIP is approved by the Commission. That is substantial evidence that the modified LTIIP’s contents meet the statutory standard.

The record does not provide substantial evidence that the modified LTIIP is flawed, or that the expenditures to implement the modified LTIIP as presented in this proceeding are flawed, incorrect, inaccurate or otherwise in error. The record does not provide substantial evidence to show that the projections of expenditure beyond the capped 5% DSIC are duplicative, inaccurate or flawed. The opposition has failed to rebut it.

I agree with the premise that the standard for the modification of the LTIIP is the same standard for the waiver of the capped DSIC rate. Any other interpretation of the Code does not comport with the plain language written, fails to be consistent with the requirement that rates be “just and reasonable” and makes the Commission regulations illogical. 1 Pa.C.S. § 1932.

The Commission stated that an increase is proper when the current state of a utility’s distribution infrastructure improvements, repairs or replacements to maintain safe, adequate and reasonable service requires spending for DSIC-eligible plant that exceeds the current 5% cap. See *PGW DSIC Waiver,* Docket No. P-2015-2501500 at 41. The DSIC spending was greater than 5% as of April 1, 2016. See UGI-PNG Exhibit WJM-3. No party challenged this event or found the data erroneous. Significant in *PGW DSIC Waiver,* was whether PGW’s plans for remediation of DSIC-eligible plant were shown to provide adequate, efficient, safe, reliable and reasonable service and the corresponding expenditures exceed the levels of its current 5% capped DSIC rate. In this proceeding the Commission has approved the Company’s modified LTIIP, which was vetted as to whether the changes proposed in the modifications ensure and maintain efficient, safe, adequate, reliable and reasonable service to ratepayers.

Also compelling for an increase in the capped DSIC rate is that the only witness that went through training in the Pipeline and Hazardous Materials Safety Administration (PHMSA) and is employed by the Commission as a gas safety engineer recommended that UGI-PNG receive a waiver to increase its capped DSIC rate above 5%. I&E Stmt. 1 at 12; Tr. 73. The training in PHMSA includes mandatory courses to conduct inspections on gas distribution systems. Tr. 74. While it is true that the issue here is to ensure safe service, an element to ensure safe service is whether pipelines are safe. Pipeline safety is especially important with gas service where an occurrence can be catastrophic if safety of pipelines is not maintained. The I&E witness has the expertise to make an assessment on the safety pipelines. Neither Mr. Mierzwa, the witness for OCA, nor Mr. Knecht, the witness for OSBA, has this expertise. OCA Stmt. 1 at 1; OSBA Exhibit IEc-1.

The standard of whether the DSIC capped rate should be waived includes safe service. If the only rationale to waive the DSIC capped rate is because of safety issues, the I&E witness can make such assessments but the OCA and OSBA witnesses are not qualified to make safety assessments because gas safety is outside of their area of expertise. The testimony of the I&E witness included safety assessments in the gas piping and locations of meters to support an increase in the capped DSIC rate above 5%. I&E Stmt. 1 at 9-12. This evidence sustained the burden to prove that the DSIC capped rate should be increased above 5%.

The record contains substantial evidence to increase the capped DSIC rate of UGI-PNG above 5%. Based on the record the Company has satisfied its burden of proof to waive the existing DSIC capped rate because the record has failed to show the expenditures approved by the DSIC are flawed, duplicative, or otherwise unwarranted and do not cause the Company to eclipse the existing capped DSIC rate. The next issue is what percentage of distribution revenues should the DSIC rate be capped in compliance with 66 Pa.C.S. § 1358(d)(3).

The opposition also stated that UGI-PNG is committed to the modified LTIIP whether or not the waiver of the capped DSIC-rate at 5% is approved. Consequently, the opposition contends the waiver is not needed to justify accelerating the replacement of infrastructure and how the repair, improvement or replacement would ensure and maintain adequate, efficient, safe, reliable and reasonable service. OSBA M.B. 14; OCA M.B. 5-6.

Of course the Company is committed to the modified LTIIP. There is a Commission Order approving the plan. If the Company does not abide by the plan, then they would not be abiding by a Commission order. A Commission-approved LTIIP may be subject to complaints. 52 Pa.Code § 121.8. Thus, it is expected that the Company would state that it plans to abide by the plan whether or not the waiver is granted. To state otherwise, would open UGI-PNG up to prosecution by the Commission.

The issue is not whether UGI-PNG is committed to the modified LTIIP. The issue is whether implementation of the modified LTIIP and the status of the current DSIC and any other substantial evidence require an adjustment to the capped DSIC-rate at 5%. Whether or not the Company plans to implement the modified LTIIP to ensure and maintain adequate, efficient, safe, reliable and reasonable service was addressed in the proceeding approving the modified LTIIP and is not an issue for this proceeding.

The opposition also contends that the waiver is only to be used when it is necessary or in extraordinary circumstances when there are no alternatives, to ensure and maintain adequate, efficient, safe, reliable and reasonable service. The opposition points to the intent of the legislation through the legislative history to justify this interpretation. Yet, the instance where the Commission has adjusted the DSIC after the legislation was enacted, the Commission has not been so limiting. See *PGW DSIC Waiver,* Docket No. P-2015-2501500 at 43 (alternative funding sources consideration in analysis of waiver of DSIC cap but not limited to no other recourse where waiver is most efficient and effective resource). Based on precedent set by the Commission, I do not find this argument convincing.

UGI-PNG has shown that up to 14.09% of the distribution revenues is needed for the implementation of the Commission-approved modified LTIIP. See UGI-PNG Exhibit WJM-3. The Company has stated that without a waiver to the capped DSIC-rate, it may be forced to undertake a base rate proceeding and spend significate amounts to ensure its financial health. UGI-PNG Stmt. 1-SR at 1-2. UGI-PNG stated in its not recent base rate case that went into effect in August 2009, “[r]esidential heating customers’ bills increased on average by $10.33 per month as a result of the base rate proceeding.” UGI-PNG Stmt 1-R at 5. The increase through the waiver of the DSIC is substantially less. The opposition did not challenge the accuracy of these statements. Rather, the opposition chose to challenge whether the implementation of the Commission-approved modified LTIIP is needed to ensure and maintain adequate, efficient, safe, reliable and reasonable service.

Based on the arguments above I find the contentions of UGI-PNG and I&E persuasive. I find that UGI-PNG has satisfied its burden of proof. It is found that the record holds substantial evidence to grant UGI-PNG’s request to waive the capped DSIC rate at 5% and increase the DSIC rate above the 5% cap.

1. New Percentage of the distribution revenues of UGI-PNG for DSIC rate

Two parties to this proceeding, UGI-PNG and I&E, advocate that the capped DSIC rate should be waived and increased. While I&E argued for the DSIC cap to be increased to 7.5% over the remaining term of the Company’s LTIIP, it provided very little substance as to why the rate should be increased to 7.5%.

I&E’s witness testified that UGI-PNG has the highest number of total leaks per mile. I&E Stmt. 1 at 11-12. The statewide average of leaks per mile is .95, yet UGI-PNG’s average is 1.65 leaks per mile. I&E M.B. at 10. I&E also stated that the corrosion related to leaks has increased from 2013 to 2015 by 64%. I&E M.B. at 10-11, citing Tr. at 80. These figures support the fact that an increase in the capped DSIC rate that has already reached 5% would be used to address the issues that as a whole ensure public safety. Thus, these figures are part of the substantial evidence that a waiver of the capped DSIC is warranted. However, I&E does not advocate that the record shows a 7.5% capped DSIC is reasonable and balanced versus a 6.5% or 8.5% capped DSIC rate. In fact, the 7.5% seems to be reached simply because that was the figure approved in the *PGW DSIC Waiver* for remediation of aging gas infrastructure. But, I&E does not show that the substantial evidence in the *PGW DSIC Waiver* proceeding is comparable to the percentage increase in the instant case.

I&E also stated, “the risks [in this proceeding] are not sufficient enough to justify a maximum DSIC cap of 10% and, therefore, recommends the DSIC be set at 7.5%.” I&E M.B. at 15. However, I&E doesn’t state why it should be 7.5% rather than some other percentage below 10%. Furthermore, I&E does not provide any basis for its rationale that the maximum percentage for a DSIC capped rate is at 10%.

I simply do not find substantial evidence to support that the DSIC capped rate should be increased to 7.5% as advocated by I&E.

UGI-PNG stated that its original LTIIP projected DSIC-eligible plant expenditures from 2014 through 2018 at $22.9 million per year or a total of $114.5 over the five year term of the plan. The Commission-approved modified LTIIP projected a total of $138.7 million spent on DSIC-eligible plant over the same term. In *Petition of UGI Penn Natural Gas, Inc. for Approval of their Modified Long-Term Infrastructure Improvement Plan,* Docket No. P-2013-2397056, at Appendix B, 25 of 43. In *UGI-PNG Modified LTIIP* the increase in expenditures from the original LTIIP to the modified LTIIP for the 2016 through 2018 is 24.5%. The Company states, “A 10% DSIC rate cap would support the Company’s DSIC-eligible replacement [of infrastructure], and would allow the Company to strike a balance between the use of the DSIC and base rate proceedings for cost recovery purposes.” UGI-PNG M.B. at 22. UGI-PNG states that the increase in the DSIC capped rate will decrease the need for frequent rate cases, enhance reasonable service, and save both the ratepayer and the Company the cost of a rate base case. UGI-PNG M.B. at 22-23.

UGI-PNG stated that every 1% DSIC increase is equivalent to an additional $0.48 per month for the typical residential heating customer. UGI-PNG Exhibit WJM-3. Consequently an increase of the cap up to 10% would amount to (5 x $0.48 = $2.40) $2.40[[2]](#footnote-2) per month once the proposed 10% capped DSIC rate is reached. According to the Company’s projections, that would be reached in July 2017. *Id.* An undercollection recovery charge would need to be implemented for monies that were not collected because of the capped DSIC at 5%. The capped 10% DSIC rate would provide UGI-PNG another approximately 15 months of full recovery of the expenditures used for DSIC-eligible plant and result in approximately $ 9.6 million of projected expenditures for DSIC-eligible plant not recovered through this mechanism. *Id*. With the capped DSIC rate at 5% the Company would fail to recover $15.6 million. However, what is not recovered through any capped DSIC rate can be recovered through the means of a rate base proceeding.

The Commission has stated, “approval of an increased DSIC recovery level must be balanced by the need to consider the impact on the Company’s ratepayers.” *PGW DSIC Waiver,* at 55. In *PGW DSIC Waiver* the Commission did not find it necessary to eliminate one-hundred percent of the risk to the utility.

In the *UGI-PNG Modified LTIIP* it is noted that UGI Penn Natural Gas, Inc. was granted a Commission-approved modified LTIIP for a percentage increase for spending on DSIC-eligible plant at 54.3% whereas for UGI-PNG the percentage increase for spending on DSIC-eligible plant was at 24.5%. *UGI-PNG Modified LTIIP,* at 5. Yet, both utilities are requesting an increase in the DSIC capped rate up to 10%. I do not find it reasonable to increase the DSIC capped rate to the same level when the rationale for the increase, the increase in spending on DSIC-eligible plant, is not the same magnitude.

It is noted that the last base rate case for UGI-PNG was in 2008. OCA M.B. at 9. The Company concedes that its proposed higher DSIC capped rate at 10% may not affect the timing of filing a base rate case and the Company does not commit to refrain from filing prior to the end of the term of its modified LTIIP. OCA M.B. at 12 citing UGI-PNG Stmt. 1R at 12; see OCA Stmt. 1 at 8. A reasonable balance must be achieved to protect the consumer and deter the utility from using an increase in the DSIC mechanism as an end-run around a base rate proceeding.

I find that the DSIC capped rate should be increased to 6.89% for the following reasons. UGI-PNG proposed a 10% increase although it projected an increase to 14.02% through the remaining three-years of the term of the modified LTIIP. It is noted that this 14.02% corresponds to the modified LTIIP that was approved by the Commission in *UGI-PNG Modified LTIIP*. The percentage increase to spending levels of the modified LTIIP as compared with the original LTIIP is 21%.[[3]](#footnote-3) An increase from 5% to 14.02% is 9 percentage points of an increase. 21% of a 9 percentage point increase is a 1.89 percentage point increase yielding an increase from 5% up 1.89 percentage points to 6.89%. In viewing the data provided in the record, a DSIC rate of 6.89% occurs before July 2016. UGI-PNG Exhibit WJM-3.

This 6.89% figure is a tad less than half of the 14.02% that the Company has projected necessary for full recovery of projected DSIC eligible spending for accelerating its repair, replacement and improvement of its infrastructure to ensure and maintain adequate, efficient, safe, reliable and reasonable service through its modified LTIIP. In contrast, the Company’s proposed 10% capped DSIC rate is about 70% of the projected DSIC rate of 14.02% needed for full recovery of the projected spending corresponding to the modified LTIIP. I find this 6.89% figure for the DSIC capped rate reasonable and supported by the evidence. I find this figure balances the interests of UGI-PNG and its ratepayers.

The result of a 6.89% capped DSIC rate for UGI-PNG is that the rates will be capped before July 2016. Residential heating gas customer’s bills will have an added (1.89 x $0.48 = $0.91) $0.91 per month from July 2016 to the end of the term of the LTIIP (end of year 2018). UGI-PNG Exhibit WJM-3. UGI-PNG will obtain approximately $933,940[[4]](#footnote-4) that was not collected because the DSIC was capped at 5% and the Company would fail to recover approximately $14,671,552.[[5]](#footnote-5) *Id.*

The record evidence supports granting in part and denying in part the Petition of UGI-PNG .

# VI. CONCLUSIONS OF LAW

* 1. The Commission has jurisdiction over the parties and subject matter of this proceeding, pursuant to 66 Pa.C.S. §§ 1350-1360.
	2. The Petition is granted regarding the request to waive the DSIC-capped rate of 5% of billed distribution revenues.
	3. The Petition is denied regarding the request to increase the DSIC rate up to 10% of billed distribution revenues.
	4. The record evidence supports a DSIC-capped rate up to 6.89% as sufficient and in the public interest.
	5. In any proceeding upon the motion of the Commission, involving any proposed or existing rate of any public utility, or in any proceedings upon complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable is upon the public utility. 66 Pa.C.S. § 315(a).
	6. Any proponent of a rule or order has the burden of proof. 66 Pa.C.S. § 332(a).
	7. The proponent in the proceeding must persuade the Commission by a preponderance of the substantial evidence that the relief sought is proper and justified under the circumstances. *Se-Ling Hosiery, Inc. v. Margulies,* 70 A.2d 854, 855-56 (Pa. 1950).
	8. A preponderance of the evidence is that which is more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery,* 70 A.2d 854 (1950); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n,* 578 A.2d 600 (Pa.Cmwlth. 1990) *alloc. den.*, 602 A.2d 863 (Pa. 1992).
	9. The Commission’s decision must be supported by “substantial evidence,” which consists of evidence that a reasonable mind might accept as adequate to support a conclusion. *Dutchland Tours, Inc. v. Pa. Pub. Util. Comm’n*, 337 A.2d 922 (Pa.Cmwlth. 1975).
	10. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm’n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).
	11. UGI-PNG has the burden of proving the justness and reasonableness of its DSIC, its application to the various customer classes, and all inputs to its calculation. 66 Pa.C.S. §§ 315(a), 332(a), 1301.
	12. It is well-established that the evidence adduced by a utility to meet its burden of proof must be substantial. *Lower Frederick Twp. v. Pa. Pub. Util. Comm’n*, 409 A.2d 505, 507 (Pa.Cmwlth. 1980).
	13. Sections 1350 and 1351 of the Code, 66 Pa.C.S. §§ 1350, 1351, permit NGDCs and various other utilities to recover, through a DSIC, the reasonable and prudent costs incurred to repair, improve and replace certain eligible property that is part of a utility’s distribution system.
	14. The DSIC is intended to ensure and maintain adequate, efficient, safe, reliable and reasonable service. 66 Pa.C.S. § 1353(a).
	15. A waiver to increase the 5% DSIC rate cap imposed by statute may be granted when a utility shows that the initial 5% DSIC rate cap is not sufficient to support is planned levels of plant replacement and DSIC-eligible spending corresponding to the utility’s LTIIP. 66 Pa.C.S. § 1358(a); see also *Pa. Pub. Util. Comm’n v. Aqua Pennsylvania, Inc.,* Docket No. R-2008-2079310 (Order entered July 23, 2009)(A DSIC cap is not in 1307(g) but the Commission increased the DSIC when the utility showed its planned investment levels for DSIC-eligible spending as warranted by LTIIP were not met by capped DSIC.).
	16. The Commission has the statutory authority to grant a waiver of the 5% limit of a NGDCs DSIC in order to ensure and maintain adequate, efficient, safe, reliable and reasonable service. 66 Pa.C.S. § 1358(a).
	17. Section 1358(a) of the Code, 66 Pa.C.S. § 1358(a), must be interpreted consistent with the requirement that rates be “just and reasonable.” 1 Pa.C.S. § 1932.
	18. The burden of proving that a waiver of the 5% capped DSIC rate in order to ensure and maintain adequate, efficient, safe, reliable and reasonable service is warranted in on UGI-PNG. 66 Pa.C.S. § 1358(a)(1).
	19. The Commission has provided regulations to instruct the utilities regarding LTIIPs, modifications of LTIIPs, enforcement of LTIIPs and interrelation with LTIIP with DSIC. 52 Pa.Code § 121.1 *et seq.*
	20. The LTIIP must show the acceleration of the replacement of aging infrastructure by the utility and be sufficient to ensure and maintain adequate, efficient, safe, reliable and reasonable service. 52 Pa.Code § 121.1.
	21. UGI-PNG has met its burden of proof as to the justness and reasonableness of its DSIC rate to be increased above the capped 5% because the current capped DSIC rate is insufficient to support the Company’s Commission-approved modified LTIIP and its expenditures for infrastructure replacement have been shown to be above 5% of its distribution revenues. 66 Pa.C.S. §§ 315(a), 1301, 1358(a).
	22. UGI-PNG has not met its burden to prove that the capped DSIC rate should be increase up to 10%.
	23. Substantial evidence shows it is just, reasonable and in the public interest to increase the UGI-PNG capped DSIC rate from 5% to 6.89%.

VII. ORDER

 THEREFORE,

 IT IS RECOMMENDED:

1. That the Petition of UGI Penn Natural Gas, Inc. at Docket No. P-2016-2537594 be granted in part and denied in part.
2. That the request of UGI Penn Natural Gas, Inc. in the Petition for a waiver of the distribution system improvement charge cap of 5% of billed distribution revenues is granted.
3. That the request of UGI Penn Natural Gas, Inc. in the Petition for approval to increase the maximum allowable distribution system improvement charge up to 10% of billed distribution revenues is denied.
4. That UGI Penn Natural Gas, Inc. is approved to increase the maximum allowable distribution system improvement charge up to 6.89% of billed distribution revenues.
5. That the following transcript corrections proposed by Penn Natural Gas, Inc. by written request dated September 21, 2016, are accepted:

Page Line Correction

* 1. 25 12 Change “to” into “and”.
	2. 26 11 Strike “the”.
	3. 33 2 Strike “our”.
	4. 37 10 Change “Columbia” to “Columbia’s”.
	5. 48 9 Change “1RS” to “1SR”.
	6. 48 19 Strike “we”.
	7. 51 2 Change “Exhibit WJM-1SR” to “Exhibit WJM-1S”.
	8. 57 19 Change “Not that many” to “I don’t have any”.

Page Line Correction

* 1. 67 23 Strike “as”.
	2. 67 24 Strike “filed with the Public Utility Commission and approved”.
	3. 69 13 Strike “to increase out proceeding”.
	4. 86 4 Change “has order” to “has an order”.
	5. 102 18 Change “investor of a” to “investor-owned”.
	6. 115 17 Change “there no” to “there are no”.
1. That the proceeding at Docket No. P-2016-2537594 is to be marked closed.

Date: November 7, 2016 /s/

 Angela T. Jones

 Administrative Law Judge

1. An oral Motion by I&E to delete some of the testimony of Mr. Knecht was granted, which resulted in the redacted rebuttal testimony of Mr. Knecht. [↑](#footnote-ref-1)
2. The Company shows the increase in the DSIC capped rate at 10% corresponds to an addition $2.39 per month for a residential heating gas customer. See UGI-PNG Exhibit WJM-3. [↑](#footnote-ref-2)
3. The original LTIIP projected expenditures at $22.9 million annually or ($22.9 million x 5 = $114.5 million) $114.5 million. The modified LTIIP has a schedule of spending from 2014 – 2018 as ($26.1 million + $27.1 million + $35.9 million + $24.8 million + $24.8 million = $138.7 million) $138.7 million. The change in spending is (($138.7 million - $114.5 million)/ $114.5 million = 21%) 21%. [↑](#footnote-ref-3)
4. UGI-PNG Exhibit WJM-3 has cumulative through July 2016 not recovered at $933,940. [↑](#footnote-ref-4)
5. UGI-PNG Exhibit WJM-3 has $15,605,492 was not collected because of the capped DSIC rate at 5%. Take $15,605,492 and subtract $933,940 that would be collected under the 6.89% DSIC capped rate, which yields ($15,605,492 - $933,940 = $14,671,552. [↑](#footnote-ref-5)