



COMMONWEALTH OF PENNSYLVANIA

January 4, 2017

E-FILED

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

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

Dear Secretary Chiavetta:

Enclosed for filing are the Exceptions to the Recommended Decision, on behalf of the Office of Small Business Advocate ("OSBA"), in the above-docketed proceeding. As evidenced by the enclosed Certificate of Service, copies will be served on all known parties in this case.

If you have any questions, please contact me.

Sincerely,

Steven C. Gray
Assistant Small Business Advocate
Attorney ID No. 77538

Enclosures

cc: Parties of Record
Mr. Robert D. Knecht

**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 Distribution Revenues and : **Docket No. P-2016-2537594**
Approval to Increase the Maximum :
Allowable DSIC to 10% of Billed :
Distribution Revenues :

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, via email and US Mail (*unless otherwise indicated*), in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

The Honorable Angela T. Jones
Administrative Law Judge
Pennsylvania Public Utility Commission
801 Market Street, Suite 4063
Philadelphia, PA 19107
Angeljones@pa.gov

Jessica R. Rogers, Esquire
David B. MacGregor, Esquire
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601
jrogers@postschell.com
dmacgregor@postschell.com

Carrie B. Wright, Esquire
Bureau of Investigation & Enforcement
400 North Street, 2nd Floor West
Harrisburg, PA 17120
carwright@pa.gov
(Email and Hand Delivery)


Commission's Office of Special
Assistants(OSA)
ra-OSA@pa.gov
(E-mail ONLY)

Date: January 4, 2017

Danielle Jouenne, Esquire
UGI Corporation
460 North Gulph Road
King of Prussia, PA 19406
JouenneD@ugicorp.com

Erin L. Gannon, Esquire
Darryl A. Lawrence, Esquire
Office of Consumer Advocate
555 Walnut Street, Forum Place, 5th Floor
Harrisburg, PA 17101
egannon@paoca.org
dlawrence@paoca.org
(Email and Hand Delivery)

Alessandra L. Hylander, Esquire
Pamela C. Polacek, Esquire
Vasiliki Karandrikas, Esquire
McNees Wallace & Nurick LLC
100 Pine Street
PO Box 1166
Harrisburg, PA 17108-1166
ahylander@mcneeslaw.com
ppolacek@mcneeslaw.com
vkandrikas@mcneeslaw.com


Steven C. Gray
Assistant Small Business Advocate
Attorney ID No. 77538

**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 : P-2016-2537594
Distribution Revenues and Approval to Increase :
the Maximum Allowable DSIC to 10% of Billed :
Distribution Revenues :**

**EXCEPTIONS
ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE**

**Steven C. Gray
Assistant Small Business Advocate
Attorney ID No. 77538**

**For: John R. Evans
Small Business Advocate**

**Office of Small Business Advocate
300 North Second Street, Suite 202
Harrisburg, PA 17101**

Dated: January 4, 2017

I. Introduction

On March 31, 2016, UGI Penn Natural Gas, Inc. (“UGI PNG” or the “Company”) filed a Petition for a Waiver of the Distribution System Improvement Charge (“DSIC”) Cap of 5% of Billed Distribution Revenues and Approval to Increase the Maximum Allowable DSIC to 10% of Billed Distribution Revenues (“*Petition*”) with the Pennsylvania Public Utility Commission (“Commission”).

On April 19, 2016, the Office of Small Business Advocate (“OSBA”) filed a Notice of Intervention and Answer to the *Petition*.

On June 17, 2016, a Prehearing Conference was held before Administrative Law Judge (“ALJ”) Angela T. Jones. On June 21, 2016, ALJ Jones issued Prehearing Order # 2 setting forth the procedural schedule in this case.

On July 21, 2016, the OSBA served the Direct Testimony of Robert D. Knecht. On August 19, 2016, the OSBA served the Rebuttal Testimony of Mr. Knecht. On August 29, 2016, the OSBA served the Surrebuttal Testimony of Mr. Knecht.

On September 8, 2016, an Evidentiary Hearing was held before ALJ Jones.

On September 16, 2016, the OSBA served the redacted Rebuttal Testimony of Mr. Knecht.

On September 22, 2016, the OSBA served its Main Brief.

On September 30, 2016, the OSBA served its Reply Brief.

On December 1, 2016, ALJ Jones issued her Recommended Decision (“RD”).

On December 13, 2016, UGI PNG sent a Letter to the Commission requesting a change in the due dates for Exceptions and Reply Exceptions because of the upcoming holidays.

On December 19, 2016, UGI PNG informed all parties via email that the Commission had granted the change in due dates for both the Exceptions and Reply Exceptions, but would not be issuing a formal notice of the scheduling change.

The OSBA submits the following Exceptions in response to the RD.

II. Exceptions

Exception No. 1: The ALJ erred when she stated as fact that UGI PNG had accelerated its expenditures and accelerated its repairs in the RD's Findings of Fact. (RD, at 7)

In her Findings of Fact in her RD, the ALJ stated the following two "facts," as follows:

9. The accelerated infrastructure expenditures over the five year term of the UGI-PNG modified LTIP 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

10. The accelerated repair and improvements of the infrastructure contained in the modified LTIP 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.

RD, at 7 (citations omitted).

The OSBA respectfully submits that the ALJ's use of the term "accelerated" is misplaced. The expenditures are increased, but not "accelerated." Acceleration is defined as "speeding something up," and the table set forth in Fact 9 does not demonstrate that.

Furthermore, the Commission, in its approval of UGI PNG's modified LTIP, stated:

Each of the UGI Companies' modified LTIPs are five-year plans, spanning the years 2014-2018. The LTIPs detail accelerated infrastructure improvements that are intended to enhance system resiliency and reliability on an aging infrastructure. *The instant petitions do not propose to change or extend the term of the current LTIPs.* Rather, the instant petitions propose to increase the amount of infrastructure spending over that of the currently effective LTIPs by more than 20%, which is considered a Major Modification. The UGI Companies as a group propose spending more than 50% additional capital in the final three years of their LTIPs compared to the original projections.

* * *

The UGI Companies' current LTIPs planned to remove all cast iron distribution main from their systems in 14 years (by 2027) and all bare steel distribution mains from their systems in 28 years (by 2041). *The UGI Companies are not proposing to change these timelines for the removal of legacy materials.* Instead, UGI is proposing to spend additional capital on projects to improve the reliability of its distribution systems. These projects include increasing system pressures to higher volume demand areas, regulator station improvements and installations, corrosion control and weatherization of facilities, and PennDOT mandated facility relocations.

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), at 3-4 and 6 (emphasis added).

First, the Commission itself acknowledges that there will be no “acceleration” of system improvements by UGI PNG, as the Company proposed no changes to its LTIP schedule when it filed its modified LTIP.

Second, as clearly stated in the Commission’s decision set forth above, the modifications were made for system reliability reasons. Significantly, there was no proposed acceleration of the replacement of cast iron and/or unprotected steel mains. Thus, Fact 10 is materially incorrect. There is no acceleration of repairs of leaks or other “safety mechanisms” in UGI PNG’s modified LTIP.

Consequently, the OSBA respectfully submits that the ALJ’s use of the word “accelerated” should be disregarded by the Commission.

Exception No. 2: The ALJ erred when she stated an incorrect legal standard for evaluating whether UGI PNG should be granted a waiver to the DSIC rate cap. (RD, at 19)

In her RD, the ALJ stated, as follows:

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 LTIP.

RD, at 19.

In support of her legal conclusion, the ALJ cites to 66 Pa. C.S. § 1358(a) and to *Pennsylvania Public Utility Commission v. Aqua Pennsylvania, Inc.*, Docket No. R-2008-2079310 (Order entered July 23, 2009) ("*Aqua*"). RD, at 19.

First, the ALJ's proposed legal standard, based upon a utility's long term infrastructure improvement plan ("LTIP"), does not find any legal support in the plain language of Section 1358(a):

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 wastewater utility or distribution rates of the electric distribution company, 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.***

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

Contrary to the ALJ's legal theory, Section 1358(a) does not permit a waiver of a 5% rate cap if that cap "is not sufficient to support [the utility's] planned levels of plant replacement and DSIC-eligible spending corresponding to the utility's LTIP." In fact, Section 1358(a) does not take into consideration a utility's LTIP whatsoever.

Furthermore, if the ALJ's legal reasoning were correct, there would be no need for the Commission to hear DSIC cap waiver petitions, as the waiver could simply be granted with the LTIP. The OSBA respectfully submits that the legislature clearly intended for the DSIC rate

cap to represent an important consumer protection, a position with which the Commission agrees. *See Petition of Columbia Gas of Pennsylvania, Inc. for a Waiver of the Distribution System Improvement Charge (DSIC) Cap of 5% of Billed Distribution Revenues and Approval to Increase the Maximum Allowable DSIC to 10% of Billed Distribution Revenues*, Docket No. P-2016-2521993 (Order entered December 22, 2016) (“*Columbia DSIC Waiver Order*”), at 48 (“We note that Section 1358 particularly emphasizes a customer protection limitation on the amount that can be recovered as reflected in the 5% DSIC cap.”). A utility that merely demonstrates the costs approved in the LTIP or modified LTIP exceed the costs that can be recovered by a rate-capped 5% DSIC is not sufficient to override that protection.

It also must be pointed out that the ALJ’s legal reasoning reads Section 1358(a)(1) out of the statute. If the ALJ’s legal standard were adopted, any utility that files an LTIP or modified LTIP with costs that would exceed a 5% DSIC would automatically be granted a waiver to the 5% rate cap. This would effectively make Section 1358(a)(1) meaningless, in violation of 1 Pa. C.S. § 1922(2). *See OSBA Main Brief*, at 8-10.

The Commission came to the same legal conclusion in regards to an argument advanced by the Company in the *Columbia DSIC Waiver Order* case and by UGI PNG in this proceeding:

Columbia requests that the Commission use the same standard it applied in the approval of Columbia’s initial DSIC filing pursuant to Section 1353 for approval of the Company’s 5% DSIC cap waiver request pursuant to Section 1358.

Columbia DSIC Waiver Order, at 48. UGI PNG made this same legal argument. *See UGI PNG Main Brief*, at 10-11.¹

Ultimately, the Commission rejected Columbia’s legal argument:

Thus, Columbia requests that the Commission use the same standard it applied in the approval of Columbia’s initial DSIC

¹ The OSBA completely rejects this legal argument presented by UGI PNG. *See, e.g.*, OSBA Reply Brief, at 7-12.

filing pursuant to Section 1353 for approval of the Company's 5% DSIC cap waiver request pursuant to Section 1358. We note, however, that Section 1353 explains the process for requesting approval of a DSIC and allows an NGDC to petition the Commission for approval of a DSIC while Section 1358 provides various customer protections. While we acknowledge that both Sections 1353 and 1358 involve the timely recovery of reasonable and prudent DSIC-eligible investments, we disagree with Columbia's position as it pertains to their application.

..*

In this regard, we agree with the OCA's argument that the General Assembly intended that different evidence apply for granting a waiver of the 5% DSIC cap compared to the evidence that is required for the approval of a utility's initial DSIC filing.

Columbia DSIC Waiver Order, at 48.

This same legal reasoning applies to the ALJ's proposed legal standard for the waiving of a DSIC rate cap: no other section of the statute shall automatically grant a DSIC rate cap waiver; the waiver must be evaluated on its own merits. The General Assembly required a utility to develop a LTIP in order to be granted a DSIC. However, no statutory language exists which states that approving an LTIP automatically means that a DSIC rate cap waiver must be granted if the LTIP costs are sufficiently high. Thus, the General Assembly has provided no statutory support for the ALJ's proposed legal standard.

Second, the ALJ cites to the pre-Act 11 *Aqua* case. RD, at 19. The OSBA stated the following in its Reply Brief:

A decision that was entered prior to the passage of Act 11 is of no relevance to the granting of a waiver under Section 1358(a)(1), and has no probative value in the determination of the proper legal standard for that section of the Public Utility Code.

OSBA Reply Brief, at 8, footnote 1.

Thus, the ALJ's proposed legal standard finds no support in either the *Aqua* case or the statutory language of Section 1358(a)(1). Furthermore, the ALJ's proposed legal standard is not only legally defective, it is a violation of 1 Pa. C.S. § 1922(2) ("That the General Assembly intends the entire statute to be effective and certain.") and the plain language of 66 Pa. C.S. § 1358(a)(1).

While it is true that UGI PNG has filed an LTIP with the Commission, even the ALJ admits that is simply "a precondition to the implementation of a DSIC." RD, at 1. Moreover, nothing in the Commission's regulations regarding the LTIP even mentions the DSIC rate cap waiver. See 52 Pa. Code Chapter 121, *et seq.* Simply put, an approved LTIP is a necessary condition for granting a DSIC in the first place and is thus logically necessary for a DSIC cap waiver, but it is not sufficient for granting that waiver. Similarly, the approval of an LTIP does not automatically grant a DSIC rate cap waiver if the LTIP costs are sufficiently high. The ALJ's legal standard must be rejected.

Exception No. 3: The ALJ erred by equating the approval of a modified LTIP with the granting of a DSIC rate cap waiver. (RD, at 19-22)

In her RD, the ALJ equates the granting of a modified LTIP under 52 Pa. Code § 121.5(a) with the automatic grant of a DSIC rate cap waiver under 66 Pa. C.S. § 1358(a)(1) if the modified LTIP results in expenditures above the 5% cap. The OSBA respectfully submits that the ALJ's legal reasoning should be rejected.

The ALJ begins by citing to Section 121.5(a), which requires that a utility file a separate petition for a "major modification" to that utility's LTIP. Then the ALJ cites to the definition of a "major modification" as set forth in Section 121.2. See RD, at 19.

The ALJ then states, as follows:

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 LTIP 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 LTIP do not require that there be extraordinary circumstances or no other alternative means to ensure and maintain adequate, efficient, safe, reliable and reasonable service.

RD, at 20. The ALJ then concludes:

Thus, the Company has provided substantial evidence for the 5% cap on distribution revenues for the DSIC rate to be waived, ***because the modified LTIP 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).

RD, at 21 (emphasis added). The ALJ concludes, as follows:

I agree with the premise that the standard for the modification of the LTIP is the same standard for the waiver of the capped DSIC rate.

RD, at 23.

The RD’s reliance on the requirements for a modified LTIP is misplaced. The regulations for the modification of an LTIP have nothing to do with the granting of a waiver of the 5% DSIC rate cap. The Commission’s requirement that a utility’s LTIP be revised when costs change by more than 20 percent is nothing more than a sensible rule to ensure that the LTIP is accurate, and that the DSIC itself is justified, pursuant to the Commission’s obligation under 66 Pa. C.S. § 1352(a)(7). If the ALJ’s legal reasoning were correct, once again there would be no need for the Commission to hear DSIC cap waiver petitions, as the waiver could simply be granted with the approval of the modified LTIP.

The legislature clearly intended that the DSIC rate cap be an important consumer protection. Thus, merely demonstrating that the costs approved in an LTIP, or even a modified, “major revision” LTIP, exceed that DSIC rate cap is not sufficient or relevant to grant a waiver to the 5% cap.

Exception No. 4: The ALJ erred by appearing to conclude that if any risks are reduced through an LTIP, the DSIC rate cap waiver must be granted. (RD, at 21-25)

In her RD, the ALJ appears to conclude that if any risks are reduced through the LTIP, the cap waiver must be granted. The ALJ states, as follows:

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 are compared to other NGDCs [natural gas distribution companies], the leaks should be repaired in the interest of public safety. The best way to curtail leaks in the distribution system of an NGDC is to accelerate the replacement of at risk piping.

RD, at 22 (citations omitted).

The ALJ also observes:

Pipeline safety is especially important with gas service where an occurrence can be catastrophic if safety of pipelines is not maintained.

RD, at 24.

The Commission is well aware that all NGDCs have leaks, and all have obsolete cast iron and unprotected steel mains that must be replaced. The RD’s logic appears to suggest that the mere existence of these conditions is sufficient to grant a waiver to the rate cap, and the possibility of a “catastrophic” event ends all discussion. However, the ALJ’s reasoning

eliminates any credible consumer protection for natural gas customers afforded by the legislated DSIC rate cap, since these conditions apply to *all* natural gas utilities.

The OSBA would understand the ALJ's concern about safety if there was evidence that the risks for UGI PNG were substantially higher than those at other NGDCs, and if a cap waiver would actually accelerate safety-related investments. However, the RD generally fails to address the issue of the relative riskiness of UGI PNG's distribution system, but also dismisses the idea of comparing UGI PNG risks against industry norms. RD, at 22.

In contrast to her decision in the UGI CPG matter, the ALJ does address one aspect of the riskiness of UGI PNG's gas distribution system, namely leaks per mile. RD, at 22. The issue of the relative riskiness from an engineering perspective was raised by I&E in this proceeding. Regarding I&E's risk analysis, the OSBA addressed this issue in detail in its Main Brief. *See* OSBA Main Brief, at 17-19. Without repeating its Main Brief here, the OSBA observes that I&E's risk assessment is ultimately not relevant to this proceeding. Mr. Knecht explained, as follows:

Moreover, the Companies indicate that granting a waiver to the DSIC cap in this proceeding will have zero impact on public safety, since the Companies' proposed investment programs are not affected by approval or rejection of the waiver. Therefore, public safety considerations do not justify granting a waiver of the DSIC cap in this proceeding.

OSBA Statement No. 1-R (Redacted), at 3.

Furthermore, the ALJ inappropriately dismisses the fact that I&E presented very little in the way of comparative risk evidence, and the evidence that it did provide was deemed to be a statistical anomaly by the Company. Moreover, the OSBA notes that, like I&E witness Patel, the ALJ proposes to waive the DSIC cap for UGI PNG affiliate UGI Central Penn Gas, despite the fact that the leaks per mile for UGI CPG were actually the lowest of any NGDC in the

Commonwealth. As the ALJ clearly does not deem relative risk to be a concern in the UGI CPG matter, it must be concluded that her decision in this matter was similarly unaffected by relative risk.

The OSBA respectfully submits that every utility in the Commonwealth has safety concerns. The ALJ's reasoning that there exist safety concerns at UGI PNG is not alone a sufficient reason to waive a basic consumer protection that the DSIC rate cap represents. Furthermore, two things bear repeating. First, 66 Pa. C.S. § 1501 requires UGI PNG to provide and maintain adequate, efficient, safe, and reasonable service. Second, OSBA witness Robert D. Knecht stated, as follows:

Moreover, the Companies indicate that granting a waiver to the DSIC cap in this proceeding will have zero impact on public safety, since the Companies' proposed investment programs are not affected by approval or rejection of the waiver. Therefore, public safety considerations do not justify granting a waiver of the DSIC cap in this proceeding.

OSBA Statement No. 1-R (Redacted), at 3.

Mr. Knecht's testimony was not rebutted by any party.

Exception No. 5: The ALJ erred by calculating an 8.65 percent DSIC rate cap. (RD, at 26-29)

In her RD, the ALJ rejected the DSIC rate cap advocated by the Bureau of Investigation and Enforcement ("I&E"):

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.

RD, at 27.

Instead, the ALJ calculated her own DSIC rate cap. The ALJ's analysis is set forth below:

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 LTIP. It is noted that this 14.02% corresponds to the modified LTIP that was approved by the Commission in UGI-PNG Modified LTIP. The percentage increase to spending levels of the modified LTIP as compared with the original LTIP is 21%. 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.

RD, at 28-29 (footnote omitted) (citation omitted).

The ALJ's approach, however, suffers from the same logical and legal flaws as her recommendation to approve a waiver of the DSIC cap. Her alternative cap proposal is based on the idea that there is some natural linkage between the Company's original LTIP and the 5 percent cap, and that the new cap should be related to the magnitude of the increase in the revised LTIP. As set forth above, the need for a credible LTIP, original or modified, is a necessary condition for a utility to have a DSIC. However, as also set forth above, there is no logical, reasonable, or legal link between an original or modified LTIP and the waiving of the DSIC rate cap.

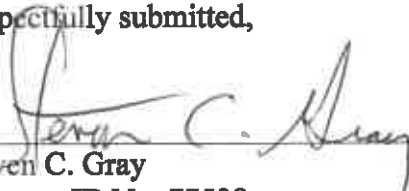
Respectfully, the premise underlying the ALJ's calculation of an alternative DSIC rate cap is simply wrong, and must be rejected.

IV. Conclusion

In view of the foregoing, the OSBA respectfully requests that the Commission:

1. Grant OSBA Exception No. 1;
2. Grant OSBA Exception No. 2;
3. Grant OSBA Exception No. 3;
4. Grant OSBA Exception No. 4;
5. Grant OSBA Exception No. 5; and
6. Grant such other relief as may be necessary.

Respectfully submitted,



Steven C. Gray

Attorney ID No. 77538
Assistant Small Business Advocate

For:
John R. Evans
Small Business Advocate

Office of Small Business Advocate
300 North Second Street, Suite 202
Harrisburg, PA 17101
(717) 783-2525

Dated: January 4, 2017