COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

March 12, 2020

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

Re: Pennsylvania Public Utility Commission v.
Valley Energy, Inc. –
Supplement No. 49 to Tariff Electric – Pa. PUC No. 2
Docket No. R-2019-3008209
I&E Exceptions

Dear Secretary Chiavetta,

Enclosed please find the Bureau of Investigation and Enforcement's (I&E) **Exceptions** for the above-captioned proceeding.

Copies are being served on parties of record as identified in the attached Certificate of Service. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

John M. Coogan
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 313920
(717) 783-6151
jcoogan@pa.gov

JMC/ac
Enclosure

cc: Honorable Steven K. Haas (*ALJ, PUC Harrisburg*)
Honorable Benjamin J. Myers (*ALJ, PUC Harrisburg*)
Office of Special Assistants (*via E-Mail only RA-OSA@pa.gov*)
Per Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	
v.	:	Docket No. R-2019-3008209
Valley Energy, Inc.	:	

EXCEPTIONS
OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT

John M. Coogan
Prosecutor
PA Attorney ID No. 313920

Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, Pennsylvania 17120

Dated: March 12, 2020

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I. INTRODUCTION

The Bureau of Investigation and Enforcement ("I&E") files the following Exceptions to the Recommended Decision of Administrative Law Judges Steven K. Haas and Benjamin J. Myers ("ALJs") issued on February 28, 2020 in the above-captioned proceeding. I&E respectfully requests that its Exceptions be granted and that the referenced portions of the Recommended Decision be reversed or modified consistent with these Exceptions and the arguments made in I&E's pre-served testimony and exhibits, Main Brief, and Reply Brief.

A. Procedural Background

On July 1, 2019, Valley Energy, Inc. ("Valley" or "Company"), filed Supplement No. 49 to Tariff Electric Pa. P.U.C. No. 2 which proposed an annual distribution revenue increase of $1,034,186 (20.6%), to become effective August 30, 2019. Valley used the Fully Projected Future Test Year ("FPFTY") ending December 31, 2020 as the basis for its rate increase request.[1] Also on July 1, 2019, Valley filed a Petition for Waiver of Filing Requirements Under 52 Pa. Code § 53.53 ("Petition"), requesting waiver of the informational requirements for general rate increase requests in excess of $1,000,000 as set forth in 52 Pa. Code § 53.53 of the Commission's regulations. I&E, the Office of Consumer Advocate ("OCA"), and the Office of Small Business Advocate ("OSBA") filed both a Joint Answer in opposition to Valley's Petition, as well as a Motion of the Joint Statutory Advocates to Reject the Base Rate Filing ("Joint Motion to Reject") on July 22, 2019.[2] On July 29, 2019, Valley withdrew its Petition. On July 29, 2019, Valley also filed replacement schedules and tariff pages that updated the proposed annual distribution revenue increase to $834,546 (16.6%).

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1 The company used the following test years in its filing: FPFTY ends December 31, 2020, the future test year ended December 31, 2019, and the historic test year ended December 31, 2018. Valley Statement No. 1, p. 2.

2 I&E and OSBA entered their appearances in this proceeding on July 19, 2019 and July 22, 2019, respectively. OCA filed a Formal Complaint on August 5, 2019.

On August 29, 2019, pursuant to 66 Pa. C.S. § 1308(d), the Commission ordered suspension of the proposed tariff changes until March 30, 2020, unless permitted by Commission Order to become effective at an earlier date. The Commission directed that the case be assigned to the Office of Administrative Law Judge for Alternative Dispute Resolution, if possible, and scheduling of hearings as may be necessary for the Administrative Law Judge to render a Recommended Decision. On September 9, 2019, the Company filed a tariff suspension, voluntarily suspending its proposed tariff to April 29, 2020. A Prehearing Conference was held on September 13, 2019 at 10:00 a.m., before ALJs Steven K. Haas and Benjamin J. Myers. On October 2, 2019, the Company filed an additional tariff suspension, further voluntarily suspending its proposed tariff to May 1, 2020.

A "Smart Hearing" was held at 1:00 p.m., November 4, 2019, in Harrisburg during which two witnesses provided testimony about the proposed rate increase. Pursuant to the procedural schedule agreed to at the Prehearing Conference, the parties exchanged direct, rebuttal, and surrebuttal testimony, as well as oral rejoinder outlines. I&E served the following testimony and exhibits:

- I&E Statement No. 1, I&E Exhibit No. 1, I&E Statement No. 1-SR – Errata Version, and I&E Exhibit No. 1-SR, the prepared direct and surrebuttal testimony and exhibits of I&E witness Brenton Grab, who addressed the Company's operating and maintenance expenses, and overall revenue requirement;

- I&E Statement No. 2, I&E Exhibit No. 2, I&E Statement No. 2-SR, and I&E Exhibit No. 2-SR, the prepared direct and surrebuttal testimony and exhibits of I&E witness Christopher Henkel, who addressed the Company's rate of return request;

- I&E Statement No. 3, I&E Exhibit No. 3, and I&E Statement No. 3-SR, the prepared direct and surrebuttal testimony and exhibit of I&E witness Ethan Cline, who addressed the Company's rate base and rate structure requests.

Full evidentiary hearings were held December 16 and 17, 2019, in Harrisburg. I&E filed its Main Brief on January 8, 2020 and its Reply Brief on January 22, 2020 pursuant to the procedural schedule and ALJs' direction in this case.[3] Valley, OCA, and OSBA also filed their Main Briefs and Reply Briefs on January 8, 2020 and January 22, 2020, respectively. On February 28, 2020, the ALJs issued their Recommended Decision permitting an annual distribution revenue increase of $497,080. Pursuant to the Secretarial Letter filed March 6, 2020, I&E files these timely Exceptions.[4]

B. Summary of I&E Exceptions

Regarding Valley's rate filing, I&E recommended certain downward adjustments to operating and maintenance ("O&M") expenses, rejection of adjustments to return on equity ("ROE") for size and performance, and reporting on certain accounting forecasts. Although the ALJs recommended rejection of I&E's position on these issues,[5] I&E avers the ALJs erred because Valley did not meet its burden of proof by producing substantial evidence regarding the Company's O&M claims[6] and an adjustment to ROE for size and performance.[7] Additionally, the ALJs erred as a matter of law by approving an O&M claim for C&T Allocation Expense

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3 The ALJs' original procedural schedule set January 6, 2020 as the due date for Main Briefs and January 17, 2020 as the due date for Reply Briefs. *Pa. P.U.C. v. Valley Energy, Inc.*, Docket No. R-2019-3008209, Scheduling Order, p. 4 (September 16, 2019). Due to extensive errors with the hearing transcript requiring parties' review and submission of errata, the ALJs agreed to postpone the Main Brief due date to January 8, 2020 and Reply Brief due date to January 22, 2020. E-mail from ALJs to parties, December 31, 2019.

4 By Secretarial Letter dated February 28, 2020, the Commission set the Exceptions due date as March 11, 2020 and the Reply Exceptions due date as March 18, 2020. On March 2, 2020, I&E filed a Petition for Extension of Time to File Exceptions and Reply Exceptions. The March 6, 2020 Secretarial Letter granted I&E's petition and extended the due date of Exceptions to March 13, 2020 and Reply Exceptions to March 23, 2020.

5 The ALJs did accept some downward O&M adjustments recommended by I&E. These exceptions only discuss certain O&M adjustments recommended by I&E rejected by the ALJs.

6 I&E notes its exceptions may need to be further adjusted if the Commission accepts the ALJs rejection of the Company's inflation adjustment. However, because I&E did not challenge the Company's inflation adjustment during the proceeding, I&E does not reflect removal of the inflation adjustment herein.

7 To meet its burden of proof, Valley must produce substantial evidence. Recommended Decision, p. 4 (citing *Lower Frederick Twp. Water Co. v. Pa. P.U.C.*, 48 Pa. Cmwlth. 222, 226-227, 409 A.2d 505, 507 (1980); *Brockway Glass Co. v. Pa. P.U.C.*, 63 Pa. Cmwlth. 238, 437 A.2d 1067 (1981)).

based on assertions introduced for the first time in the Company's Main Brief, thereby depriving parties due process to fully examine this claim. Finally, the ALJs erred by rejecting modest reporting requirements fully within the Commission's authority to mandate, which would provide important information the Commission has expressed interest in obtaining and many utilities have agreed to provide. Therefore, for the reasons explained fully below, I&E respectfully requests the Commission approve the following Exceptions.

II. I&E EXCEPTIONS

A. I&E Exception No. 1: The ALJs erred by recommending rejection of I&E's adjustment for Rate Case Expense

Recommended Decision: Pages 26-29
I&E Main Brief: Pages 20-22
I&E Reply Brief: Pages 10-11

The ALJs recommend that Valley's request to normalize $271,000 for Rate Case Expense over 36 months be approved.[8] I&E avers the ALJs erred because substantial evidence does not exist to support deviation from the Commission's practice of setting a normalization period for Rate Case Expense based on historic filing frequency. If a historic filing frequency is used, the normalization period should be set at 60 months.[9] Although the ALJs recognize the Commission's practice is to set a normalization period based on historic filing frequency, they believe a shorter normalization period is justified because they state the 110 month period between Citizens' present and prior rate case filings is an outlier.[10]

I&E avers this factor does not constitute substantial evidence to merit deviating from the Commission's endorsed practice of reviewing historical filing frequency. I&E's recommendation appropriately incorporates the 110-month period as one of three data points

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8 Recommended Decision, p. 29.

9 I&E Main Brief, pp. 20-22.

10 Recommended Decision, p. 28.

resulting in a historic average.[11] Although Valley witness Edward Rogers claims the circumstances allowing 110 months to elapse between the last and present rate case will likely not occur again, Valley provides no specificity why a 36-month period is appropriate. It is precisely because it is unknown how long it will be until a future filing will occur that a historical average should be used.

The ALJs cite the Commission in *Pa. P.U.C. v. UGI Utilities, Inc. – Electric Division*[12] to support a normalization period based on future expectations.[13] However, the record justifying deviation from historic filing frequency was much more specific in *UGI Utilities, Inc. – Electric Division* than presented here. In *UGI Utilities, Inc. – Electric Division*, the Commission specifically found reference to $8 million in annual spending for capital projects following the FPFTY would cause a $3 million shortfall at the end of a three-year period.[14] By contrast, Valley has provided no quantifiable or otherwise specific bases or projections why its proposed normalization period of 36 months is appropriate. I&E therefore continues to recommend the Commission approve normalization of Valley's Rate Case Expense with reference to its historical filing frequency only, i.e., a 60-month average, resulting in a $36,133 reduction to Rate Case Expense.[15]

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11 I&E Main Brief, p. 21. The time elapsed between Valley's last four rate cases is 33 months, 36 months, and 110 months.

12 Docket No. R-2017-2640058, (Order Entered October 25, 2018) ("*UGI Utilities, Inc. – Electric Division*").

13 Recommended Decision, p. 43.

14 *UGI Utilities, Inc. – Electric Division*, p. 60.

15 I&E Statement No. 1, pp. 4-8.

B. I&E Exception No. 2: The ALJs erred by recommending rejection of I&E's adjustment for C&T Allocation Expense

Recommended Decision: Pages 43-45
I&E Main Brief: Pages 18-19
I&E Reply Brief: Pages 8-10

The ALJs recommend that the Commission approve a total claim of $233,704 for C&T Allocation Expense.[16] I&E avers the ALJs erred as a matter of law by allowing Valley to present new evidence in the briefing stage. Specifically, the ALJs state Valley provided sufficient evidence to justify its claim because the Company references its East Athens Main Extension project ("East Athens project"). However, Valley raises the claim that the East Athens project impacts C&T Allocation Expense for the first time in Main Brief. As explained in Reply Brief, I&E objects to introduction of this late-brought rationale.[17] Commission regulations and due process principles clearly disallow presentation of new evidence in rebuttal testimony.[18] It is an even more egregious violation of due process principles to allow introduction of Valley's East Athens project rationale for the first time at the briefing stage.[19] I&E was deprived of its ability to respond or examine Valley's claim in testimony, during hearings, and in Main Brief. Even if such error was allowed, substantial evidence does not exist to support an expense claim of more than $189,179. Valley provides absolutely no quantifiable analysis to support its claim. Accepting I&E's recommendation would already provide Valley $16,212 above what

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16 Recommended Decision, pp. 44-45.

17 I&E Reply Brief, pp. 9-10.

18 52 Pa. Code §§ 5.243(e)(2)-(3); *Pa. P.U.C. v. City of Lancaster – Sewer Fund*, 2007 WL 517134 (Pa. P.U.C. 2007) (Commission agreed with ALJ "new claims brought in on rebuttal are improper, unfair and a violation of due process").

19 Valley's East Athens project rationale in part relies on a discovery response it provided to I&E, which I&E included as an Exhibit to its direct testimony. I&E Exhibit No. 1, Schedule 1. However, no party included any testimony as to the relationship of the East Athens project to C&T Allocation expense.

annualizing and inflating its current FTY C&T Allocation data supports.[20] Therefore, the Commission should reject Valley's inadequate justifications, and accept I&E's recommended downward adjustment of $44,429 to this expense.

C. I&E Exception No. 3: The ALJs erred by recommending rejection of I&E's adjustment for General Advertising/Miscellaneous General Expense

Recommended Decision: Pages 42-43
I&E Main Brief: Pages 15-16
I&E Reply Brief: Page 7

The ALJs recommend that the Commission approve a total claim of $69,484 for General Advertising/Miscellaneous General Expense.[21] I&E avers the ALJs erred because substantial evidence does not exist to support an expense claim greater than $58,958. I&E's recommended reduction of $14,415 to Valley's original claim of $73,373 includes two components.[22] The first component reflects the $7,351 downward adjustment Valley made to Miscellaneous General Expense in rebuttal testimony.[23] I&E accepted this adjustment in surrebuttal testimony,[24] and Valley did not claim a further adjustment to its rebuttal testimony at any subsequent stage of the proceeding. Therefore, this $7,351 downward adjustment is uncontested and should be approved. Second, the ALJ agreed with I&E and OCA that volunteer labor expenses are not necessary for Valley's provision of gas service to its customers.[25] However, the ALJs adopted OCA's downward adjustment of $3,889 to remove this expense, rather than I&E's recommended

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20 See I&E Reply Brief, pp. 8-10 (annualizing and inflating FTY claim produces FPFTY claim of $172,967; I&E recommends approval of $189,179 for claim).

21 The ALJs accepted OCA's recommended $3,889 downward adjustment to Valley's original claim of $73,373. Recommended Decision, p. 42-43.

22 *See* I&E Main Brief, pp. 15-16.

23 Valley Errata Statement No. 1-R, p. 5.

24 I&E Statement No. 1-SR (Errata Version), p. 20.

25 Recommended Decision, pp. 42-43.

$7,064.[26] I&E asserts the ALJs erred by accepting the OCA's adjustment, which is Valley's accounting of volunteer expense for 2019. Instead, the Commission should accept I&E's downward adjustment, which reflects volunteer expense for 2020, i.e., the FPFTY.[27] Accordingly, I&E respectfully requests the Commission not approve Valley's General Advertising/Miscellaneous General Expense claim in an amount greater than $58,958.

D. I&E Exception No. 4: The ALJs erred by accepting a size adjustment and basing the Company's ROE on the higher end of the DCF range

Recommended Decision: Pages 68-75
I&E Main Brief: Pages 45-48
I&E Reply Brief: Pages 16-17

Although the ALJs agreed with I&E that use of the Discounted Cash Flow ("DCF") and Capital Asset Pricing Model ("CAPM") models are the appropriate methods to determine return on equity ("ROE"),[28] the ALJs erred by finding substantial evidence exists to merit a size adjustment and award Valley an ROE at the highest point of a standard deviation range for the DCF analysis.[29] After review of the parties' positions, the ALJs state they cannot conclude that size is or is not a risk for utilities.[30] Because the ALJs did not find utility-specific evidence exists to support a size adjustment, I&E avers Valley has failed to meet its burden of proof justifying a size adjustment, and the Commission should reject a size adjustment inflating the results of a DCF analysis.

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26 Recommended Decision, pp. 42-43.

27 I&E Exhibit No. 1-SR, Schedule 1 (Valley response to I&E-RE-70). Valley's 2020 expenses for this claim include $6,603 for Labor (Account 930.21) and $461 for Volunteer Expense (Account 930.23), totaling I&E's recommended reduction of $7,064. Valley response to I&E-RE-70(A1). OCA's recommended $3,889 reduction to this claim reflects $4,808 in 2019 expenses for Labor (Account 930.21), reduced by $919 for Director Travel/Training (Account 930.45). Valley response to I&E-RE-70(B2); OCA Statement No. 1-SR (Revised), p. 12. I&E notes there is no expense for Director Travel/Training for 2020. Valley response to I&E-RE-70(A1).

28 Recommended Decision, p. 56.

29 Recommended Decision, p. 75.

30 Recommended Decision, pp. 73-74.

Although the ALJs did not find evidence of size risk for utilities, they did state "generally…size does seem to be a risk factor for companies".[31] The ALJs credit such general size risk as justification to award a higher ROE for Valley.[32] However, I&E asserts any support for size risk generally should not constitute evidence for utility-specific size risk. The ALJs have already found they are unable to conclude whether size is a risk for utilities. Although the ALJs also state they cannot conclude size is <u>not</u> a risk for utilities, I&E avers, because Valley is the party with the burden of proof, the dispositive factor is that size risk for utilities has not been established. Additionally, the Commission in *UGI Utilities, Inc. – Electric Division* rejected a size adjustment and use of technical literature not specific to the regulated utility industry to support such adjustment.[33]

Besides Commission precedent, there are sound reasons to reject non-utility specific size adjustment analysis in utility rate making. Monopoly utilities are not subject to the same market-based risks facing competitive companies included in a general size adjustment analysis. Most utilities have a captive customer base, and if Valley faces difficulties or unforeseen risks, they may request higher rates to offset increased expenses. As demonstrated in the discussion regarding Rate Case Expenses, Valley already anticipates various challenges that it claims merit its return in approximately three years. Additionally, Valley's rate filing is made on a FPFTY basis, and therefore certain forecasted expenses are already included in its request. Accordingly, I&E maintains size adjustment analysis for companies generally does not apply to utilities. Because Valley has not met its burden of proof to provide evidence a size adjustment exists for utility companies, a size adjustment to ROE should be rejected.

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31 Recommended Decision, p. 74.

32 Recommended Decision, pp. 74-75.

33 *UGI Utilities, Inc. – Electric Division*, p. 100.

E. I&E Exception No. 5: The ALJs erred by awarding the Company a 25-basis point upward adjustment for management effectiveness

Recommended Decision: Pages 75-78
I&E Main Brief: Pages 48-49
I&E Reply Brief: Page 17

The ALJs recommend that Valley receive a 25-basis point upward adjustment for management effectiveness.[34] Underlying its rationale, the ALJs state 66 Pa. C.S. § 523(a) "merely requires that the Commission consider a utility's efficiency, effectiveness and adequacy of service", and no particular remarkable or extraordinary level of operations or service is required to award an adjustment of management effectiveness.[35] Although Section 523 contains no mandate to award additional points, I&E avers the ALJs erred by finding substantial evidence exists to award Valley a 25 point increase to ROE. To the extent awarding ROE basis points is found appropriate, consistent with the Commission's decision in *UGI Utilities, Inc. – Electric Division*, the Commission should award no more than five basis points.[36] Although the Commission in *UGI Utilities, Inc. – Electric Division* found substantial evidence existed to award an upward adjustment to ROE for management effectiveness, it reduced the ALJs award from 20 points to 5 points, noting such adjustment is "reasonable, appropriate, and conservative based on Section 523 of the Code and better serves the public interest".[37] Valley has provided no evidence why specifically a 25 basis point upward adjustment is appropriate. Accordingly, I&E avers the Commission should reject a 25-basis point upward adjustment for Valley and, if the Commission finds evidence merits an adjustment, the same rationale in *UGI Utilities, Inc. – Electric Division* should apply here to reduce the ALJs' management effectiveness award.

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34 Recommended Decision, p. 78.

35 Recommended Decision, p. 78.

36 *See* I&E Statement No. 2-SR, p. 25.

37 *UGI Utilities, Inc. – Electric Division*, p. 115.

F. I&E Exception No. 6: The ALJs erred by denying I&E's recommendation Valley by required to provide certain accounting reports

Recommended Decision: Pages 85-86
I&E Main Brief: Pages 52-54
I&E Reply Brief: Pages 18-19

The ALJs rejected I&E's recommendation that Valley be required to provide to the Commission's Bureaus of Technical Utility Services ("TUS") and I&E with an update to Valley Exhibit_(HSG-1), Schedule C3(R) no later than April 1, 2020, including actual capital expenditures, plant additions, and retirements by month for the twelve months ending December 31, 2019, followed by an additional update for actuals through December 31, 2020, no later than April 1, 2021.[38] Although the Commission has accepted this reporting requirement in many other rate proceedings,[39] the ALJs distinguish the current proceeding, stating previous occasions only reflect settlements, i.e., the utility voluntarily agreeing to the reporting requirement.[40]

Although Valley has not agreed to this reporting requirement recommendation, I&E asserts it is within the public interest and the Commission's discretion to require such reporting. The Public Utility Code provides the Commission broad power to require informational filings from utilities.[41] The ALJs agree with Valley that the Commission may include such requirements at such time it adopts comprehensive FPFTY regulations, but should not do so in this single instance.[42] I&E maintains the fact that there are no current regulations regarding the FPFTY does not preclude the Company from filing the requested updates. If anything, it demonstrates that this type of reporting is needed until such regulations are implemented.

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38 Recommended Decision, pp. 85-86.

39 *See* I&E Main Brief, p. 67, fn. 212.

40 Recommended Decision, p. 86.

41 66 Pa. C.S. § 505.

42 Recommended Decision, pp. 85-86.

Indeed, the Commission has indicated the need to ascertain the accuracy of the FPFTY projections, stating "Section 315(e) of the Code… authorizes a Commission audit of the FPFTY results after the fact to determine whether they were accurate…".[43] I&E's recommendation will provide an apples-to-apples comparison in a form directly corresponding to a schedule provided in the rate filing of what the Company is projecting and what actually will be in plant. Therefore, by adopting I&E's recommendation, TUS and I&E will have the information and opportunity required to review the accuracy of the Company's projections. Accordingly, I&E respectfully requests the Commission find the ALJs erred and require Valley provide reports as outlined in I&E's recommendation.

III. CONCLUSION

For the reasons discussed herein, and as supported by the record in this proceeding, I&E respectfully requests that the Commission grant its Exceptions to the ALJs' Recommended Decision regarding adjustments to certain O&M expenses, ROE for size and performance, and reporting on certain accounting forecasts.

Respectfully submitted,

John M. Coogan
Prosecutor
PA Attorney ID No. 313920

Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Dated: March 12, 2020

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43 *UGI Utilities, Inc. – Electric Division*, p. 26.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2019-3008209
	:	
Valley Energy, Inc. –	:	
Supplement No. 49 to Tariff Electric – Pa.	:	
PUC No. 2	:	

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Exceptions** dated March 12, 2020, in the manner and upon the persons listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

Served via First Class and Electronic Mail

Adeolu A. Bakare, Esq.
Matthew L. Garber, Esq.
Pamela C. Polacek, Esq.
McNees Wallace & Nurick
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108
abakare@mcneeslaw.com
mgarber@mcneeslaw.com
ppolacek@mcneeslaw.com
Counsel for Wellsboro Electric Company

Sharon Webb, Esq.
Daniel G. Asmus, Esq.
Office of Small Business Advocate
Forum Place
555 Walnut Street, 1st Floor
Harrisburg, PA 17101
swebb@pa.gov
dasmus@pa.gov

Christy M. Appleby, Esq.
Darryl A. Lawrence, Esq.
Aron J. Beatty, Esq.
Santo G. Spataro, Esq.
Office of Consumer Advocate
Forum Place
555 Walnut Street, 5th Floor
Harrisburg, PA 17101
cwv2019@paoca.org

Jonathan P. Foster, Sr., Esq.
Foster Law Office
303 South Keystone Avenue
Sayre, PA 18840
Jonathan.Sr@fosterslawfirm.com
Solicitor for South Waverly Borough
Solicitor for Borough of Athens

Larry E. Cole
74 E. Laurel Street
Bradford, PA 18832
Larryc41@frontier.com

Brian Kalcic
Excel Consulting
225 South Meramec Avenue, Suite 720
St. Louis, MO 63105
excel.consulting@sbcglobal.net
Consultant for OSBA

John M. Coogan
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 313920