

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

DIGITAL 833 CHESTNUT, LLC	:	
	:	
V.	:	
	:	DOCKET NO.C-2008-2076610, <i>et al.</i>
PECO ENERGY COMPANY	:	
PHILADELPHIA GAS WORKS AND	:	
UGI ENERGY SERVICES, INC.	:	

**REPLY OF UGI ENERGY SERVICES, INC.  
TO THE EXCEPTIONS OF DIGITAL 833 CHESTNUT, LLC**

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UGI Energy Services, Inc. (“UGIES”), in accordance with the provisions of 52 Pa. Code §5.535, hereby respectfully submits its reply to the exceptions of Digital 833 Chestnut, LLC (“Complainant”) filed with the Commission in the above-captioned proceeding (the “Complaint”). UGIES states as follows:

**BACKGROUND**

On November 19, 2008, Digital 833 Chestnut, LLC (“Complainant”) filed a Complaint with the Pennsylvania Public Utility Commission (“Commission”) against PECO Energy Company, Philadelphia Gas Works and UGIES. As pertains to UGIES, Complainant alleged that UGIES had breached a “duty” to notify Complainant that Celeren Corporation (“Celeren”), the agent Complainant had expressly authorized for the receipt and payment of billing invoices, had failed to pay UGIES for amounts owed. Complainant seeks reimbursement for all monies paid to UGIES that Complainant had already paid to Celeren.

On May 26, 2009, UGI filed a Motion to Dismiss the Complaint (the “Motion”). The Motion stated that UGI is not a public utility, but a licensed natural gas supplier (“NGS”) and is governed by the Commission’s regulations governing natural gas suppliers. UGIES maintained

regulations but rather are governed by the private contract between the parties. The Motion requested that the Commission dismiss the Complaint with respect to UGI Energy Services, Inc.

Administrative Law Judge Koster issued an “Initial Decision Granting UGI’s Motion to Dismiss Complaint” (the “Initial Decision”) on July 7, 2009. The ALJ found that the statute at 66 Pa. C.S. §2208 and the Commission’s regulations at 52 Pa. Code §§62.101-62.142 indicate that the Commission regulates natural gas suppliers to a lesser extent than it regulates natural gas distribution companies. The ALJ carefully examined the various statutory provisions applicable to NGSs and determined that UGIES neither owed nor had violated any statutory or regulatory duty in providing its contractual natural gas supply service to Complainant. The ALJ concluded that, Section 2208(e) limits the Commission’s power to interpret and enforce private contracts between suppliers and customers generally and that Complainant failed to establish any non-contractual basis for relief. Complaint’s exceptions follow from the Initial Decision.

### **REPLY TO EXCEPTIONS**

The reality of this case is this: In 2005, Complainant freely and unilaterally contracted with Celeren for energy management and consulting services. Complainant failed to properly manage and control Celeren in the performance of its duties under the Celeren contract, despite the fact that Complainant was in direct contractual privity with Celeren and was in the best position to enforce Celeren's contractual performance. Complainant now seeks to avoid financial responsibility for its own mistakes by asking the Commission to fashion an unprecedented and anti-competitive regulatory remedy against UGIES – an NGS that fully performed its obligations under its Master Natural Gas Sales Agreement (“MNGSA”) with Complainant, followed Complainant’s billing instructions and seeks only to be compensated for the undisputed contractual value of the services it performed.

Complainant states repeatedly that UGIES “violated Commission precedent, rules and regulations” regarding the customer services and protections that NGSs owe their customers yet Complainant fails to identify any specific regulatory duty that UGIES violated. Complainant attempts to bootstrap the Commission’s Chapter 56 standards and billing practices for residential utility service as applying to the contractual relationship between UGIES and Complainant (Exceptions at p. 8) -- simply ignoring the fact that Complainant is not a residential customer. Moreover, the specific regulation that Complainant cites, 52 Pa. Code §56.41, pertains to procedures for customer deposits and has no factual relevance to this proceeding, a conclusion reached by the ALJ in the Initial Decision. The Commission has never applied Chapter 56 in the over-reaching manner suggested by Complainant, and there is no basis for doing so here.

Complainant next argues (Exceptions at p. 9) that the fact that UGIES sought payment for gas supply service from Complainant instead of Celeren constitutes a change in condition of service under 52 Pa. Code §62.114(2). Complainant’s assertion defies both common sense and the basic tenets of agency law. Section 8 of the MNGSA between UGIES and Complainant required Complainant to pay all of UGIES’ billing invoices in a timely fashion. At Complainant’s instruction, UGIES agreed to send all invoices to Celeren, Complainant’s designated billing agent, for processing. However, this agency arrangement never altered Complainant’s responsibility, as contractual principal, to pay all invoices. When Celeren failed to pay UGIES was fully within its legal right to seek payment from Celeren. This wasn’t a change in any condition of service; it was enforcement of pre-existing contract rights. The requirement that Complainant pay the amount owing had no impact on any element of the services Complainant had received or received thereafter.

Finally, Complainant cites Kunkin v. Mack Oil Co., Inc.<sup>1</sup> as support for the financial relief that it seeks. The Kunkin case addressed whether proper termination notice was provided to customer under a natural gas supplier's contract. Contractual termination notice is specifically mentioned in Section 2208(e) as a consumer protection of Commission concern and the Commission has separately established guidelines regarding customer notifications by NGSs<sup>2</sup> -- manifesting the Commission's intention to regulate in this area. Termination notice is not implicated in the facts presented herein, as UGIES never sought to terminate Complainant's contract. Thus, Kunkin is not a valid precedent for the Commission's assertion of jurisdiction over the contractual relationship between Complainant and UGIES. In contrast, the Initial Decision issued in Rama Construction, Inc. t/a Ramada Inn v. Hess Corporation<sup>3</sup> is directly on point and represents a proper application of the Commission's regulatory authority with respect to a private contract between an NGS and its customer.

In the final analysis, the issue is not *whether* the Commission is empowered to regulate NGSs in the manner advocated by Complainant but whether the Commission *should*, given the facts presented here. In enacting The Natural Gas Choice and Competition Act (the "Act") the General Assembly empowered the Commission with authority to regulate specific activities of natural gas suppliers -- not as public utilities, but as key participants in a unique and developed competitive market. Section 2208(e) acknowledges the legislative intent of the Act and allows the Commission to defer to the expressed intentions of natural gas suppliers and their customers in defining their rights and duties to one another in private contracts.

Complainant and UGIES, freely and at arms length, negotiated the price, terms and conditions on which Complainant would receive natural gas supply service. Complainant chose to involve Celeren in the transaction. It is uncontroverted that UGIES performed fully under its

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<sup>1</sup> Docket No. C-00015302 (Order entered October 11, 2002); 2002 WL 31677272.

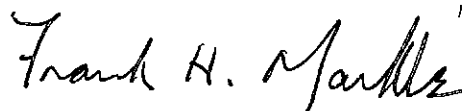
<sup>2</sup> Docket No. M-00001343 (Issued July 20, 2000); 2000 WL 1336482.

<sup>3</sup> Docket No. C-2008-2058200 (Issued October 16, 2008).

contract with Complainant and seeks only payment for the gas actually delivered and received by Complainant. If the Commission requires UGIES to bear a financial loss as a result of contractual performance failures under Complainant's contract with Celeren on a regulatory notification theory that is not memorialized in the Commission's statutes or regulations it will be substituting its judgment for the contractual intentions of the parties and undermining the freedom of contract that was intended in the Act. Under Section 2208(e) the Commission should forebear from asserting jurisdiction over the transactions between UGIES and Complainant and hold affirmatively that any relief to which Complainant may be entitled is subject to the exclusive jurisdiction of the civil courts.

WHEREFORE, for all of the reasons set forth herein, UGIES respectfully requests that the Commission reject the Exceptions filed by Digital 833 Chestnut, LLC and uphold the dismissal of this proceeding as against UGI Energy Services, as ordered in Initial Decision.

Respectfully submitted,



Frank H. Markle  
Senior Counsel  
UGI Corporation

**Counsel for UGI Energy Services, Inc.**

Dated: August 17, 2009

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

DIGITAL 833 CHESTNUT, LLC	:	
	:	
V.	:	
	:	
PECO ENERGY COMPANY	:	DOCKET NO.C-2008-2076623
PHILADELPHIA GAS WORKS AND	:	
UGI ENERGY SERVICES, INC.	:	

**CERTIFICATE OF SERVICE**

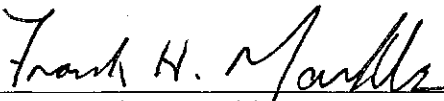
I hereby certify that I have, this 17<sup>th</sup> day of August 2009 served a true and correct copy of the foregoing document in the manner and upon the persons listed below in accordance with requirements of 52 Pa. Code §1.54 (relating to service by a participant):

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Frank H. Markle