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December 15, 2009

VIA ELECTRONIC FILING

James J. McNulty
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
P. O. Box 3265
Harrisburg, PA 17105-3265

In re: Docket No. M-2009-1505395
Pennsylvania Public Utility Commission v.
Equitable Gas Company, LLC

Dear Secretary McNulty:

Enclosed for filing on behalf of Equitable Gas Company, LLC is the original of its Comments to the Public Utility Commission's Opinion and Order entered November 25, 2009 in the above matter.

Very truly yours,

THOMAS, LONG, NIESEN & KENNARD

By


Charles E. Thomas, Jr.

Encl.

cc: Certificate of Service (w/encl.)
Daniel L. Frutchey, Esq. (w/encl.)

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	M-2009-1505395
	:	
v.	:	
	:	
Equitable Gas Company, LLC	:	

**COMMENTS OF
EQUITABLE GAS COMPANY, LLC
TO THE OPINION AND ORDER OF THE
PUBLIC UTILITY COMMISSION ENTERED NOVEMBER 25, 2009**

AND NOW, comes Equitable Gas Company, LLC ("Equitable" or "Company"), by its attorneys, and submits the following Comments to the Opinion and Order of the Public Utility Commission ("Commission") entered in the above matter on November 25, 2009 ("Order entered November 25"):

I. INTRODUCTION

1. This proceeding concerns an Informal Investigation by the Commission's Law Bureau Prosecutory Staff ("LBPS") concerning certain natural gas pipeline safety matters. On May 11, 2009, the LBPS and Equitable submitted a Settlement Agreement to the Commission proposing a complete resolution of the Informal Investigation including a contribution of \$65,000 by Equitable to its Hardship Repair Fund.¹ A History of the Proceeding is presented at pages 2 through 6 of the Order entered November 25.

¹ The Settlement Agreement included a Joint Statement in Support signed by both Equitable and LBPS. The Joint Statement in Support addressed specifically and at length each and every of the *Rosi* standards, *Joseph A. Rosi v. BA – PA, Inc. & Sprint Communications Co., L.P.*, C-00992409, Order entered March 16, 2000, and the Commission's Policy Statement criteria for evaluating settlements at 52 Pa. Code § 69.1201. A copy of the Joint Statement in Support is included as part of the Settlement Agreement attached to the Order entered November 25.

2. Upon review of the Settlement Agreement, the Commission, in its Order entered November 25, made certain specific findings and modified the Settlement Agreement to provide that Equitable pay an additional \$65,000 as a civil penalty pursuant to Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, an effective doubling of the settlement payment negotiated between Equitable and LBPS.²

3. Particularly troublesome is the Commission's finding without evidentiary basis that Equitable has demonstrated a lack of adherence to safety regulations.³ This finding is insupportable and Equitable vigorously objects to it. Equitable's damage prevention program was recognized by the Commission's Gas Safety Division as one of the best in the Commonwealth in 2008. At the request of the Gas Safety Division, Equitable's safety personnel made a presentation to the industry and Commission representatives at the annual 2008 Gas Safety Division Seminar at State College. Additionally, in 2008, Equitable's Damage Prevention Program achieved a top quartile industry ranking by the American Gas Association.⁴ To the extent that Equitable agreed to damage prevention program modifications as part of the Settlement Agreement, it has moved forward and implemented the modifications without waiting for Commission order and directive.

4. Equitable disagrees with the Order entered November 25 and opposes the Commission's modification of the Settlement Agreement. As explained herein, Equitable supports the reasoning and analysis in the Joint Dissenting Statement of Vice Chairman Christy and Commissioner Pizzingrilli. If, however, the Commission affirms the

² A similar doubling of a settlement penalty was directed by the Commission in *Law Bureau Prosecutory Staff v. UGI Utilities*, Docket No. M-2009-2031571, Opinion and Order entered October 1, 2009. Similar to Equitable's Comments here, UGI filed Comments at Docket No. M-2009-2031571 in support of its original settlement.

³ Order entered November 25 at 10.

⁴ See 2008 Accomplishments Damage Prevention attached to these Comments as Appendix A.

November 25 Order and modification of the Settlement Agreement, it should explain its reasons for doubling the original negotiated settlement payment and also explain why other negotiated settlement payments have not been doubled in other circumstances particularly in those other circumstances unlike the matter at issue here that may have involved death or property damage greater than what occurred in this case. It is Equitable's intention to pay the additional civil penalty in the event the settlement modification is affirmed and ask the Commonwealth Court to review the Commission's Order.

II. THE SETTLEMENT AGREEMENT SHOULD BE APPROVED

5. The Commission should approve the Settlement Agreement in its entirety and without modification. The Settlement Agreement is the product of good faith negotiation between Equitable and the Commission's LBPS. Consistent with 52 Pa. Code § 3.113, the Settlement Agreement completely resolves the Informal Investigation without costly and time consuming on-the-record proceedings. If LBPS had deemed formal action warranted, it would have initiated a docketed on-the-record proceeding in accordance with Section 3.113(b)(2). LBPS, however, did not initiate such a proceeding. Instead, it negotiated a comprehensive resolution with Equitable - - a resolution that warrants Commission approval.

6. The Commission encourages settlement and the good faith effort of parties to resolve their disagreements short of formal litigation. 52 Pa. Code § 5.231. This policy of encouraging settlement applies to litigation with the LBPS in no less fashion than it applies to other litigants before the Commission. It is reflected in the reasoning and analysis of Vice Chairman Christy and Commissioner Pizzingrilli in their Joint Dissenting Statement where they explained as follows:

Gas safety and compliance with PA One Call requirements are a primary concern of this Commission. We acknowledge that the alleged

violations are serious, and if proven, would have warranted a significant penalty. However, it cannot be known with certainty whether Prosecutory Staff would have prevailed if the matter had been litigated to the conclusion. Equitable would have incurred additional costs through litigation, and reasonable and prudently incurred legal costs may be recovered from ratepayers. The uncertainty created by the trend of Commission modification of these settlements may also result in more protracted litigation and delayed implementation of remedial measures. While we value the deterrent effect of sanctions, the greatest benefits achieved through these investigations are the permanent modifications to safety practices negotiated by our staff.

Prosecutory Staff with the advice of our Gas Safety Division, appears to have carefully weighted the cost of litigation, the likelihood of success, and the seriousness of the alleged violations in reaching this Settlement. We are unable to conclude that the proposed agreement is contrary to our Policy Statement, and would support issuing it for comment without modification.

7. More significantly, the Joint Dissenting Statement appropriately acknowledges that the LBPS alleged pipeline safety violations have not been proven. Indeed, there has not even been a Complaint filed presenting alleged pipeline safety violations that Equitable might answer. There has been no hearing. The due process deficiencies of the Order entered November 25 are obvious.⁵ In place of due process, the Commission has made findings and conclusions, issued what amounts to a final decision and directed a substantial civil penalty based on unproven -- and unasserted -- allegations.

8. Additionally, while Section 331 of the Public Utility Code, 66 Pa. C.S. § 331,⁶ allows the Commission to investigate a public utility, either with or without hearing, it also specifically provides that the Commission “shall make **no** order without affording

⁵ Due process is a requirement of Commission proceedings. *West Penn Power Co. v. Pa. P.U.C.*, 174 Pa. Super. 123, 100 A.2d 110 (1953); *City of Pittsburgh v. Pa. P.U.C.*, 171 Pa. Super. 391, 395, 90 A.2d 850 (1952). In addition, Section 504 of the Administrative Agency Law, 2 Pa. C.S. § 504, provides that “[n]o adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard.”

⁶ See Order entered November 25 at 6 where the Commission explains that the LBPS Informal Investigation was conducted pursuant to Section 331(a) of the Public Utility Code, 66 Pa. C.S. § 331(a).

the parties affected thereby a hearing.” Here, in contravention of Section 331, the Commission has afforded no hearing prior to its rendering of specific findings.⁷ Its findings are not based on any record evidence as no record exists. Instead, without citing any standard other than its own discretion, the Commission by a 3-2 vote doubled the settlement payment.⁸

9. In the absence of the Settlement Agreement, had LBPS filed a formal Complaint, Equitable was fully prepared to defend itself against the LBPS allegations, which were summarized by Commissioner Gardner in his Motion and form the basis for the modification of the Settlement Agreement. At hearing, Equitable would have established and proved the following:

- (a) In regard to the excavation of Pennsylvania American Water Company (“PAWC”) at Baldwin Road and Lighthill Road, it was PAWC, not Equitable, which was responsible for the pipeline damage. Equitable filed a claim under the PA One-Call law against PAWC for improper excavation around Equitable’s lines and PAWC paid the entire claim in the amount of \$41,000. Equitable was in communication with PAWC and monitoring that company’s excavation around Equitable’s transmission line. The damage to Equitable’s transmission line caused by PAWC occurred during a time when Equitable’s inspector was on vacation, but **only** after the inspector was told by PAWC that there would be no activity around the pipeline during his absence. It was, in fact, Equitable that discovered PAWC’s excavation and it was Equitable that was in the midst of repairing the pipeline damage when the Commission’s Gas Safety Inspector arrived. The timeline surrounding Equitable’s excavations of these pipelines was clearly laid out in a letter from Equitable’s counsel to the LBPS. In that June 12, 2008 letter, Equitable demonstrated that at the time of the Gas Safety Inspector’s review of Equitable’s records on August 16, 2007 the following had already taken place:

⁷ The Commission in this proceeding has jumped directly from an Informal Investigation pursuant to Section 331 to civil penalties under Section 3301, 66 Pa. C.S. § 3301. We submit that this abbreviated process is not permitted or contemplated under the Code. No Complaint has been presented formally challenging Equitable’s practices. If it had been, Equitable would have answered and defended itself against the formal charges.

⁸ See Order entered November 25 at 10. A similar concern is raised by UGI at page 2 of its Comments to the Commission’s Opinion and Order entered October 1, 2009 at M-2009-2031571.

- (i) The Equitable employee went on vacation. He had gone on vacation having been assured by PAWC that no further excavations were planned in his absence. Upon returning, the Equitable employee returned to the site and noticed new patches of asphalt. Immediately thereafter, on July 31, 2007, Equitable made a one-call request to mark PAWC's pipelines for excavation of seven potential crossings and surveyed the area for potential gas leaks. Finding no such leaks, and considering the significant amount of equipment in the area still being used by the water company, Equitable agreed to delay excavation until PAWC's work was completed on August 14, 2007. During that time, Equitable had an inspector on-site while PAWC made five additional crossings.
 - (ii) Beginning on August 14, 2007, Equitable exposed two areas where our pipelines had previously been crossed. In each instance no change was found.
 - (iii) On August 15, 2007, Equitable exposed a third pipeline location without finding damage.
 - (iv) On August 16, 2007, before the Inspector's visit, Equitable had exposed a fourth pipeline location without finding damage. It was at this time, while excavations had been proceeding for more than two days, and the Company had been actively involved in securing the site for more than two weeks, that the inspection by the Gas Safety employee occurred. While it is indeed true that subsequent excavations did find damage to our pipelines, the excavation that exposed the damage had been initiated on July 31, 2007 and was part of an ongoing excavation program at the time of the Inspector's visit. In fact, the two subsequent excavations would have taken place even if the Inspector had not reviewed our records. In short, the Commission's suggestion in the November 25 Order that, but for the Inspector's review of our records, the damaged pipelines would not have been discovered is simply wrong. Equitable was aware that PAWC had, despite advising us otherwise, continued its excavation work without an Equitable inspector on-site. Immediately upon discovering PAWC's actions, Equitable stabilized the area and began an orderly process of excavating the locations where possible damage had occurred. Equitable took this corrective action long before the Inspector's visit.
- (b) In regard to the matter at Mahoning Road (the Templeton incident), the allegation against Equitable was that it did not have appropriate written procedures. However, Equitable's tie-in procedures most certainly did contain a written procedure for

blocking and anchoring coupling assemblies. Additionally, contrary to allegations that Equitable employees failed to take pressure off the line, Equitable employees quickly shut off the flow of gas, thereby reducing the pressure to 0 psig and preventing further damage to property. This was accomplished by utilizing predetermined shut off valves.

- (c) Contrary to the allegations, Equitable did not place public safety at risk on an ongoing basis. Equitable's actions were consistent with early mitigation of problems. In the case of PAWC, Equitable discovered the excavations and was again in the midst of correcting the damages to its pipeline, thereby mitigating future corrosion of the steel pipe. In the case of the tie-in fire, Equitable's crews moved quickly to close the predetermined shut off valves and mitigate any additional property damage.⁹

10. Although Equitable supports the Settlement Agreement, it is not asking for a hearing if the Commission decides to affirm the proposed modification and additional \$65,000 civil penalty. The Commission has already made several specific findings in the Discussion Section, pages 9 and 10, of its Order entered November 25 including the finding on page 10 addressed above that "Equitable has demonstrated a lack of adherence to safety regulations which resulted in damage to property." The prospect of a fair and impartial hearing in light of these specific findings is illusory. A presiding administrative law judge could not be unaffected by the Commission's specific findings. Even if a judge were unaffected, the Commission itself has already made its decision.

⁹ The excavations at Baldwin Road and Lighthill Road were caused entirely by the actions of PAWC and Equitable would never have considered settling allegations against it involving those matters. Additionally, in regard to Mahoning Road, Equitable had appropriate written procedures in place and it would never have considered settling allegations against it involving an alleged lack of written procedures. Equitable recognized, however, that its employees did not fully follow the Company's written procedures at Mahoning Road. It was because of this, and because of this alone, that Equitable entered into the Settlement Agreement. The failure of employees to follow required written procedures does not justify the findings and conclusion of the Order entered November 25 and the doubling of the settlement payment.

Equitable is concerned, moreover, that a demand for hearing could expose it to even higher monetary penalties.¹⁰

11. As explained above, if, however, the Commission affirms the November 25 Order and modification of the Settlement Agreement, it also should explain its reasons for doubling the original negotiated settlement payment and also explain why other negotiated settlement payments have not been doubled in other circumstances particularly in those other circumstances that may have involved death or property damage greater than what occurred in this case. The Commission recently doubled a proposed settlement penalty in *Pa. P.U.C. Law Bureau Prosecutory Staff v. UGI Utilities, Inc.*, Docket No. M-2009-2031571, Opinion and Order entered October 1, 2009 (explosion; fire, property damage, minor injury). It, however, did not double a proposed settlement penalty in *Pa. P.U.C. Law Bureau Prosecutory Staff v. Columbia Gas of PA, Inc.*, Docket No. C-20077249, Opinion and Order entered December 7, 2009 (\$50,000 civil penalty; explosion, fire, second degree burns, 55 apartment residents evacuated along with 35 additional residents from 20 surrounding homes), *Pa. P.U.C. Law Bureau Prosecutory Staff v. Columbia Gas of Pennsylvania, Inc.*, Docket No. M-2009-1505396, Opinion and Order entered December 4, 2009 (\$10,000 civil penalty; unmarked service line), *Pa. P.U.C. Law Bureau Prosecutory Staff v. PPL Electric Utilities Corporation*, Docket No. M-2009-2058182, Opinion and Order entered November 23, 2009 (\$50,000 civil penalty and \$400,000 Contribution to PPL's Operation HELP; service termination, fire, death), *Pa. P.U.C. Law Bureau Prosecutory Staff v. PPL Electric Utilities Corporation*, Docket No. M-2009-2059414, Opinion and Order entered November 23, 2009 (\$1,000 civil penalty and \$20,000 Contribution to PPL's Operation HELP; service

¹⁰ Section 69.120(c)(7) of the Commission's Rules of Practice and Procedure, 52 Pa. Code § 69.120(c)(7), allows the Commission to consider the level of cooperation of the utility in a litigated proceeding involving alleged violations of the Public Utility Code.


termination, seven apartment fire), or *Pa. P.U.C. Law Bureau Prosecutory Staff v. Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company d/b/a First Energy*, Docket No. M-2009-2112849, Opinion and Order entered December 7, 2009 (\$175,000 Contribution to Dollar Energy Fund and \$25,000 Contribution to LIURP; 492 customer terminations, 113 customers without service for up to seven days, some longer). Pipeline and electric line safety are serious matters and inconsistent Orders without explanatory guidance and due process are not helpful to the interests of customers and utilities alike.

III. CONCLUSION

12. The Joint Dissenting Statement of Vice Chairman Christy and Commissioner Pizzigrilli follows the letter and spirit of the Public Utility Code and the Commission's Rules of Practice and Procedure. The close decision exhibited by the 3-2 vote in support of the Order entered November 25 should be reconsidered and the Settlement Agreement between Equitable and LBPS should be approved in its entirety and without modification. To do otherwise would be a violation of due process and basic principles of fundamental fairness and inconsistent with the Public Utility Code and the Commission's own Rules of Practice of Procedure. If the Commission affirms the November 25 Order and modification of the Settlement Agreement, it should explain its reasoning so that Equitable may seek appropriate appellate court review.

WHEREFORE, Equitable Gas Company, LLC requests that the Public Utility Commission approve, without modification, the Settlement Agreement between Equitable Gas Company, LLC and the Law Bureau Prosecutory Staff at Docket No. M-2009-1505395.

Respectfully submitted,

By  _____

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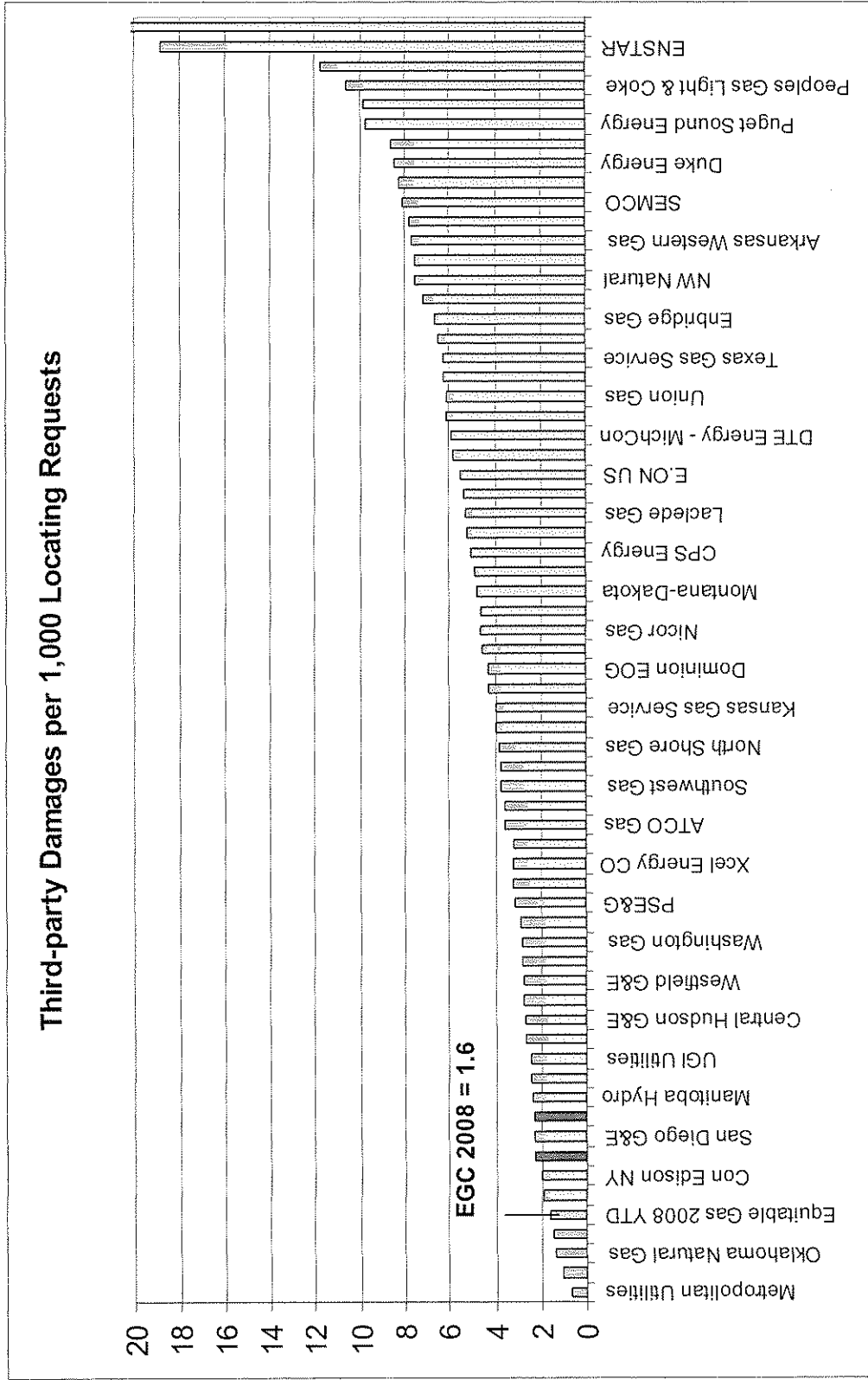
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DATE: December 15, 2009

APPENDIX A

2008 Accomplishments Damage Prevention



**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	M-2009-1505395
	:	
	:	
v.	:	
	:	
Equitable Gas Company, LLC	:	


CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of December 2009, served a true and correct copy of the Comments of Equitable Gas Company, LLC, upon the persons and in the manner set forth below:

BY EMAIL AND FIRST CLASS MAIL

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