**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held November 19, 2010

Commissioners Present:

 James H. Cawley, Chairman

 Tyrone J. Christy, Vice Chairman, Statement

 John F. Coleman, Jr., Statement

 Wayne E. Gardner

 Robert F. Powelson

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| Pennsylvania Public Utility CommissionLaw Bureau Prosecutory Staff v.UGI Utilities, Inc. |  |   C-2009-2120601 |

#

# OPINION AND ORDER

**BY THE COMMISSION:**

 Before the Commission for consideration and disposition is a Settlement Agreement (Settlement or Settlement Agreement) filed on July 30, 2010, by UGI Utilities, Inc. (UGI) and the Commission’s Law Bureau Prosecutory Staff (Prosecutory Staff) collectively, “the Parties,” with respect to a formal Complaint filed by the Prosecutory Staff on September 11, 2009.

**History**

 The proposed Settlement Agreement has been brought before the Commission by the Parties in order to resolve allegations of multiple violations of the Code of Federal Regulations and the rules and regulations of the Commission relative to natural gas pipeline safety. The specific incident that is the subject of the proposed Settlement Agreement occurred on April 24, 2009.

 On April 24, 2009, the Commission’s Gas Safety Division was notified by the United States Department of Transportation, Pipeline and Hazardous Material and Safety Administration that an inspector for the Occupational Safety and Health Administration (OSHA) had seen a pipeline excavation site in Bethlehem, Pennsylvania and was concerned about the lack of shoring at the excavation site.[[1]](#footnote-1) The Commission’s Gas Safety Division immediately dispatched a Gas Safety Inspector to the site. While at the site, the Commission’s Gas Safety Inspector observed three holes at the site and confirmed that UGI had not used any shoring. The Gas Safety Inspector believed that two of the three holes required shoring. The Gas Safety Inspector confirmed that crews had been working in the holes during the period of April 23, 2009, through April 24, 2009. After a review of the size and depth of the holes, UGI agreed that shoring was required at the site. Settlement Agreement at 3-4.

 On September 11, 2009, Prosecutory Staff filed a formal Complaint against UGI. Through its Complaint, Prosecutory Staff alleged that, by failing to use shoring at the Bethlehem excavation site, UGI committed the following violations:

* UGI failed to maintain, modify and follow the required plans, procedures and programs for operating pipelines. If proven at hearing, this allegation would constitute a violation of 49 CFR § 192.13(b) and 52 Pa. Code § 59.33.
* UGI failed to ensure through evaluation that individuals performing covered tasks are qualified. If proven at hearing, this allegation would constitute a violation of 49 CFR 192.805(b) and 52 Pa. Code § 59.33.
* UGI did not follow its own safety procedures with respect to employee safety and shoring practices. If proven at hearing, this allegation would constitute a violation of 49 CFR § 192(b) and 52 Pa. Code § 59.33.

Settlement Agreement at 5.

 UGI filed a timely Answer and New Matter to the Complaint. In its New Matter, UGI challenged the jurisdiction of the Commission over the allegations regarding employee safety and the shoring issue. UGI also raised the issue of whether the Commission’s jurisdiction has been preempted by OSHA. Settlement Agreement at 6.

**Terms of the Settlement Agreement**

 In order to settle the Complaint proceeding, UGI has agreed to the following:

1. To pay a civil penalty in the amount of ten thousand dollars ($10,000) pursuant to 66 Pa. C.S. § 3301(c).
2. To spend twenty thousand dollars ($20,000) to utilize the services of an outside contractor to retrain their work crews regarding excavation shoring safety.
3. To cease and desist from committing any violations of gas safety and other Commission regulations.
4. Not to claim or include the amounts noted above as a recoverable expense in any future rate proceeding.

Settlement Agreement at 7.

 In consideration of UGI’s agreement set forth above, Prosecutory Staff agreed to withdraw, with prejudice, the formal Complaint in this matter. The Parties further agreed that nothing in the Settlement Agreement will affect the ability of the Commission to receive and resolve any informal or formal complaint(s) filed by any other affected person. In addition, the terms and conditions of the Settlement Agreement cannot be used in any future proceeding relating to the described incident or any other matter as proof of unlawful behavior, or as an admission of unlawful behavior by UGI. Settlement Agreement at 7.

 The Settlement Agreement also provides that it is conditioned upon adoption without modification. In the event the Settlement is rejected or modified, either Party may elect to withdraw from the Settlement Agreement within twenty (20) days of the Commission Order which rejects or modifies the Settlement. Settlement Agreement at 14.

**Discussion**

Pursuant to our Regulations at 52 Pa. Code § 5.231, it is the Commission’s policy to promote settlements. The Commission must review proposed settlements to determine whether the terms are in the public interest. *Pa. PUC v. Philadelphia Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004).

The Parties submit that the proposed Settlement Agreement is in the public interest and complies with the Commission’s *Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations*, 52 Pa. Code § 69.1201 (*Policy Statement*). Settlement Agreement at 8-9, 12. Further, the proposed Settlement is submitted as contingent on the Commission’s approval without any modification. *Id.* at 13. If the Commission does not approve the Settlement without modification, either party may elect to withdraw from the Settlement. *Id.* at 13-14.

We have set forth ten factors to be considered in the evaluation of a settlement in these types of proceedings in our *Policy Statement*. The Parties provided a thorough discussion of those factors as they relate to the terms of the Settlement Agreement. Settlement Agreement at 8-11.

The first factor we consider is whether the conduct at issue is of a serious nature. 52 Pa. Code § 69.1201(c)(1). “When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.” *Id*. In this instance, the Parties submit that the conduct in this proceeding involved the failure to use shoring equipment and follow required plans, procedures and programs for operating pipelines. According to the Parties, while “these would be significant errors if proven, they do not rise to the level of serious misconduct that endangers the general public.” Settlement Agreement at 9. While the alleged conduct at issue may not have endangered the general public, the proposed Settlement, as well as UGI’s own unilateral actions, indicate that the alleged conduct, if proven, would be considered serious.  Accordingly, while we will find that the terms of the proposed Settlement and UGI’s actions in response are in the public interest, we disagree with the Parties’ assessment of this factor.

The second factor we may consider is whether the resulting consequences of the conduct are of a serious nature. 52 Pa. Code § 69.1201(c)(2). “When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.” *Id.* With regard to this factor, the Parties state that the conduct at issue did not result in any injury or damage to facilities or equipment. However, the Parties also observed that the potential for serious injury exists in situations when shoring equipment is not used when required. Settlement Agreement at 9-10.

The third factor is not applicable here because it pertains only to litigated proceedings. 52 Pa. Code § 69.1201(c)(3).

The fourth factor we may consider is whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered. 52 Pa. Code § 69.1201(c)(4). The Parties assert that UGI has taken several actions in response to the alleged violations. Those actions include: (1) suspended all eight employees involved in the incident; (2) fired one employee; and (3) required all affected employees to be re-trained in trenching safety before they were allowed to return to the field. UGI has also held safety meetings with field employees and issued a safety bulletin relating to trench safety. Further, UGI has agreed to retain a third party to review and revise as necessary UGI’s excavation safety program and re-train UGI’s employees on modified trenching standards in an effort to minimize safety violations in the future. Settlement Agreement at 10. We agree that UGI’s efforts are substantial and meet the standard set forth in this fourth factor in the context of this proceeding.

The fifth factor we may consider is the number of customers affected and the duration of the violation. 52 Pa. Code § 69.1201(c)(5). The Parties note that no customers were affected by the alleged conduct. Settlement Agreement at 10.

The sixth factor relates to UGI’s compliance history with the Commission. “An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.” 52 Pa. Code § 69.1201(c)(6). The Parties indicate that they are unaware of any other incidents involving shoring by UGI. Settlement Agreement at 10.

The seventh factor relates to whether the utility cooperated with a Commission investigation. 52 Pa. Code § 69.1201(c)(7). The Parties state that UGI has cooperated with the investigation throughout all phases. Settlement Agreement at 11.

The eighth factor involves consideration of whether the penalty amount is sufficient to help deter future violations. 52 Pa. Code § 69.1201(c)(8). The Parties state that we should consider both the civil penalty of $10,000 and the stated amount of $20,000 for the retention of a third party to retrain UGI’s workforce on excavation safety. The Parties also comment that these amounts will not be recoverable through rates. Settlement Agreement at 11. We agree with the Parties. Both the civil penalty and the specific dollar figure for retraining are important in discussing this factor, as is the fact that UGI will not recover these sums through rates. We find that both sums should act as a sufficient deterrence of future violations.

The ninth factor examines whether the results in this proposed Settlement Agreement are consistent with past Commission decisions in similar situations. 52 Pa. Code § 69.1201(c)(9). Prosecutory Staff states that it is unaware of any prior Commission decisions involving excavation shoring. However, when all relevant factors are taken into account, the Parties state that this Settlement is not inconsistent with past Commission actions. Settlement Agreement at 11. We agree with the Parties’ statements regarding this factor.

The tenth factor provides that we may consider other relevant factors in assessing a penalty. 52 Pa. Code § 69.1201(c)(10). The Parties submit that the fact that this is a settlement which avoided litigation and produced positive results is a relevant factor for our consideration. Settlement Agreement at 11.

**Conclusion**

 Based upon our review of the record in this matter, including the proposed Settlement Agreement, we agree with the Parties that the proposed Settlement Agreement meets the standards of our *Policy Statement*, is in the public interest and should be approved without modification; **THEREFORE,**

 **IT IS ORDERED:**

 1. That the Settlement Agreement filed on July 30, 2010, at this docket is approved as filed.

 2. That UGI Utilities, Inc. shall pay a civil penalty of Ten Thousand Dollars ($10,000.00) within thirty (30) days of the entry of this Opinion and Order by sending a certified check or money order payable to the Pennsylvania Public Utility Commission addressed to:

Pennsylvania Public Utility Commission

P.O. Box 3265

Harrisburg, PA 17105-3265

 3. That UGI Utilities, Inc. shall retain the services of a third party for the purposes of retraining its employees regarding excavation shoring safety. UGI Utilities, Inc. shall file a report at the conclusion of its training program identifying the contracted party, describing the training activities completed and documenting the amount expended. The report shall be filed at this docket and a copy of that report shall be provided to the Law Bureau Prosecutory Staff.

 4. That the sums paid by UGI Utilities, Inc., as directed in Ordering paragraphs 2 and 3 above, shall not be recoverable through rates.

 5. That a copy of this Opinion and Order shall be served on the Commission’s Office of Administrative Services, Financial and Assessment Section.

 6. That upon payment of the civil penalty required by Paragraph 2 above, and filing of the report required by Paragraph 3 above, the Law Bureau Prosecutory Staff shall withdraw its Complaint in this proceeding, with prejudice, and the Secretary of the Commission shall mark this proceeding closed.

 **BY THE COMMISSION,**



 Rosemary Chiavetta

 Secretary

(SEAL)

ORDER ADOPTED: November 19, 2010

ORDER ENTERED: November 19, 2010

1. Shoring is a system that consists of cross-braces used in conjunction with vertical rails (uprights) or horizontal rails (walers). The system is designed to specifically support the sidewalls of an excavation and prevent cave-ins. Settlement Agreement at 4. [↑](#footnote-ref-1)