**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of UGI Penn Natural Gas Inc. for :

approval of the Transfer by Sale of a 9.0 Mile :

Natural Gas Pipeline, Appurtenant Facilities : Docket No. A-2010-2213893

and Right of Way located in Mehoopany, :

Pennsylvania. :

:

:

Affiliated Interest Filing of UGI Penn Natural : Docket No. G-2010-2213894

Gas, Inc. :

**RECOMMENDED DECISION**

Before

Dennis J. Buckley

Administrative Law Judge

This Decision recommends that the Commission approve the Joint Stipulation in Settlement which was filed in this case on March 23, 2011, and dismiss the Protest of the Pennsylvania Office of Small Business Advocate (OSBA) to the Application and Affiliated Interest Filing of UGI Penn Natural Gas, Inc., (PNG).

HISTORY OF THE PROCEEDING

On December 1, 2010, PNG filed an Application with the Pennsylvania Public Utility Commission (Commission) for expedited review and approval of the transfer by sale of a 9.0 mile natural gas pipeline, appurtenant facilities and right of way located in the vicinity of Mehoopany, Pennsylvania to an affiliated company, UGI Energy Services, Inc. (UGIES). Notice of the Application was published in the *Pennsylvania Bulletin* and newspapers of general circulation.

On December 20, 2010, the Commission’s Office of Trial Staff (OTS) filed an Intervention and Protest to the Application.

On December 21, 2010, the OSBA filed an Intervention and Protest to the Application.

On January 3, 2011, the Pennsylvania Office of Consumer Advocate (OCA) filed an Intervention and public statement.

This matter was assigned to the undersigned as Presiding Officer on December 29, 2010.

On January 7, 2011, a prehearing conference was held at the Commission’s offices in Harrisburg, Pennsylvania.

On March 16, 2011, an evidentiary hearing was held at the Commission’s offices in Harrisburg, Pennsylvania. At that hearing, direct testimony was presented by Robert F. Beard, Jr., P.E. on behalf of PNG. This was in addition to his prepared direct testimony (PNG Statement No. 1), prepared rebuttal testimony (PNG Statement No. 1-R), and prepared rejoinder testimony (PNG Statement No. 1-RJ), all of which were received into the record. Also received into the record were: Office of Trial Staff Statement No. 1 (Direct Testimony of Michael Gruber), Office of Trial Staff Exhibit No. 1 (Exhibit to accompany the Direct Testimony of Michael Gruber), Office of Trial Staff Statement No. 1-SR (Surrebuttal Testimony of Michael Gruber), Office of Small Business Advocate Statement No. 1 (Direct Testimony and Exhibits of Robert D. Knecht), Office of Small Business Advocate Statement No. 2 (Non-Proprietary Version Surrebuttal Testimony of Robert D. Knecht), Office of Small Business Advocate Statement No. 2 (Proprietary Version Surrebuttal Testimony of Robert D. Knecht), Office of Consumer Advocate Statement No. 1 (Direct Testimony of Jerome D. Mierzwa), Office of Consumer Advocate Statement No. 1-S (Surrebuttal Testimony of Jerome D. Mierzwa), Penn Natural Gas-Office of Small Business Advocate Exhibit No. 1 (Sealed Highly Confidential Stipulation). Also included among the exhibits and received into the record was ALJ Exhibit No. 1, a “blow up” of a map, annotated at the hearing of March 16, 2011, but originally provided as Exhibit C to PNG’s original Application, used by the parties and by the presiding ALJ to more fully detail the physical characteristics of the Auburn Line post-transfer. The foregoing Statements and Exhibits, together with the transcript of the prehearing conference of January 7, 2011 (consisting of 19 pages) and the transcript of the evidentiary hearing of March 16, 2011 (consisting of 55 pages) comprise the record in this case.

On March 23, 2011, a Joint Stipulation in Settlement was filed by all of the parties with the exception of the OSBA. The OSBA had reserved the right to litigate the following issue: “Is the sale of the Auburn Line by PNG to an affiliated interest at less than fair market value permitted under the Public Utility Code?” Statements in Support of the Joint Stipulation in Settlement were filed by PNG, the OCA and the OTS.

On March 30, 2011, the OSBA and PNG filed Main Briefs with respect to the “market value sale” issue. On April 8, 2011, the OSBA and PNG filed Reply Briefs with respect to the “market value sale” issue.[[1]](#footnote-1)

On April 12, 2011, the record in this matter closed. At that time, the proposed corrections to the hearing transcript submitted by PNG on March 23, 2011, being unopposed by any Party, were granted pursuant to 52 Pa. Code § 5.253(f)(2).

DISCUSSION

A. OPERATIONAL AND JURISDICTIONAL BACKGROUND

Physically and operationally, the Auburn Line is an existing 9.0 mile long natural gas distribution pipeline, appurtenant facilities and right of way that runs from Auburn Four Corners, Pennsylvania to its terminus near the Proctor & Gamble Paper Products Company (Procter & Gamble) plant outside of Mehoopany, Pennsylvania. N.T. 38; ALJ Exhibit 1. The flow of natural gas on the Auburn Line is currently from north to south; in other words, from the interconnection of the Auburn Line with the Tennessee Gas (interstate) Pipeline[[2]](#footnote-2) south to the Manning Regulator Station which is located north of Proctor & Gamble’s facility.[[3]](#footnote-3) Along the Auburn Line, 13 additional distribution customers take natural gas through interconnection lines that branch off from the Auburn Line to their meters. The Auburn Line is currently owned and operated by PNG.

The proposal before the Commission is to permit the transfer by sale of the Auburn Line to UGIES, which transfer is set forth in the Application and in the Affiliated Interest filing at Docket No. G-2010-2213894. PNG will transfer the Auburn Line and related facilities at net depreciated original cost, currently valued at $239,464. Joint Stipulation in Settlement at 3; ¶ 16(a). If the transfer is allowed, the flow of natural gas on the line will be reversed to become south to north. This is because the natural gas in the Auburn Line will no longer come from the Tennessee Gas Pipeline. The natural gas in the Auburn Line will come from Marcellus Shale natural gas wells on and around the property of Proctor & Gamble, though all of the natural gas production will enter the line upstream of Proctor & Gamble’s plant. The gas will be produced by an entity known as Citrus Energy Corporation (Citrus Energy). PNG Statement No 1, at 5. All Marcellus Shale gas production will enter the Auburn Line upstream of Proctor & Gamble at the regulator station. Some of the gas will go south to Proctor & Gamble, but most of the gas will go north to a new interconnection that will have to be established with the Tennessee Pipeline. N.T. 40-41.

Although the gas that currently flows from the Tennessee Pipeline will be replaced by Marcellus Shale gas, the existing interconnection that feeds “Tennessee” gas into the Auburn Line will remain in place, thus maintaining the ability of end use customers to take Tennessee gas, if necessary. N.T. at 42. This is an important operational component of the Joint Stipulation in Settlement in the event that, for whatever reason or reasons, Marcellus Shale gas is no longer available.

Existing service lines branching from the Auburn Line to serve the 14 current customers of PNG will maintain those customers as PNG distribution customers, and PNG will continue to have an obligation to serve those customers. N.T. 48-49, 51. Further, PNG’s position is that approval of the transfer will not impact the ability of the 14 existing distribution customers to shop for their natural gas supply under the Natural Gas Choice and Competition Act,[[4]](#footnote-4) because although those customers will receive Marcellus Shale gas from Citrus Energy, they may contract with a different Natural Gas Supplier (NGS) for “displacement gas.”[[5]](#footnote-5) N.T. 53‑55.

However, before entering into a discussion of the Joint Stipulation in Settlement and the OSBA’s outstanding issue relative to whether the transfer by sale is or must be a “market value sale,” it is also vital to understand the jurisdictional context of this transaction. The reason why this understanding is so important is because on the face of the Application, PNG clearly viewed the transfer by sale of the Auburn Line as changing the line’s essential character from a distribution line, which is unquestionably Commission jurisdictional, to a gathering line, which PNG unequivocally stated is *not* Commission jurisdictional, but which the Commission has not yet decided:

It is recognized that the non-utility status of gathering lines that operate within Pennsylvania is an issue currently under review by the Commission and the Pennsylvania General Assembly. *It is Transferee's view that the Auburn Line, if operated as a non-jurisdictional gathering line, would not be subject to Commission regulatory oversight unless and until the Pennsylvania General Assembly enacts new legislation that expressly provides the Commission with such authority*. Upon transfer to UGIES, pipeline safety of the Auburn Line would continue to be subject to regulatory oversight by the United States Department of Transportation's Office of Pipeline Safety pursuant to regulations applicable to gathering lines. See 49 C.F.R. Part 392.

Application at page 2; fn 1. (emphasis added)

However, and despite the clear language of the Application, PNG’s jurisdictional position was re-defined somewhat at hearing by the testimony of PNG’s witness, Robert F. Beard, Jr., P.E. with respect to the nature of the Auburn Line post-transfer:

JUDGE: So what is this line; is it a distribution line or is it a gathering line or can you enlighten me a little bit; is it both, is it dependent upon a particular use?

MR. MACGREGOR: Just a minute.

JUDGE BUCKLEY: Sure, take your time.

THE WITNESS [MR. BEARD]: Your Honor, it will be classified on the sale as a gathering line. The function of distribution will still be retained by PNG. And that really is one of the nuances of this situation that’s interesting, in that we will retain—PNG will retain all of the commercial benefit of the distribution customers that are connected with that line. And those customers will still be guaranteed under PNG’s rate schedule. So while this line, itself, will be classified on the federal definition as a gathering line, we will have distribution service offered from it.

Setting aside for the moment the limited precedential effect the Parties seek to impose under Paragraph 22 of the Joint Stipulation in Settlement, and whether the Federal Energy Regulatory Commission (FERC) would acquiesce in what appears to be concurrent jurisdiction, the classification of the Auburn Line post-transfer is as (simultaneously) a gathering line and a distribution line.[[6]](#footnote-6) Thus this case has prospective implications with respect to any pronouncement the Commission might make as to jurisdiction over gathering lines.

Under the terms of the Joint Stipulation, the Application filed in this case, and the related Affiliated Interest agreement, the “primary function” of the Auburn Line as reconfigured will be as a gathering line:

[T]o enable delivery into Tennessee Gas Pipeline of volumes of gas greatly in excess of the volumes needed to serve P&G and the retail customers by March, 2011 [sic]. UGIES currently contemplates increasing the capacity on the section of the Auburn Line to a level potentially exceeding 120,000 Mcf per day, or 43.8 Bcf per year. Gas delivered into the Auburn Line from the currently interconnected gathering system would be more than sufficient to serve P&G demand (approximately 45,000 Mcf per day and 9 Bcf per year) and the retail customers (approximately 20 Mcf per day and 3,700 Mcf per year) presently served from the Auburn Line. Receipt of gas into Tennessee Gas Pipeline will enable UGI PNG and other gas purchases in Pennsylvania to purchase gas for downstream markets and for upstream Pennsylvania markets through a westerly flow on the Tennessee system.

Application at 4-5; fn3.

However, to give effect to the Joint Stipulation in Settlement, we must accept the change in character of the Auburn Line from a distribution line to a gathering line over which neither the Commission nor the FERC has rate-making jurisdiction but which will continue to serve distribution customers. While this configuration is unusual, in at least one other case a natural gas distribution company (NGDC) served distribution customers through gathering lines owned by a third party. See *Application for approval of abandonment of service by Equitable Gas Company to twenty-three (23) field gathering line customers in Washington County, Pennsylvania*, (*Equitable Gas*) Docket No. A‑2009-2089152, Initial Decision issued January 8, 2010, at 3-4, Findings of Fact Nos. 3, 6-8; Initial Decision Upon Remand issued November 1, 2010 at 3, Finding of Fact No. 51. In that case, twenty-three Equitable distribution customers received Equitable residential natural gas service from field gathering pipelines owned by an affiliated interstate pipeline company, Equitrans, L.P.[[7]](#footnote-7)

Although I find that the end result of the transaction will be a change in the basic character of the Auburn Line from a distribution line to a gathering line, over which Commission jurisdiction is uncertain, the Commission has jurisdiction over this matter because the Auburn Line is presently a distribution line over which Commission jurisdiction is unquestioned.

With this background, we proceed to consideration of the Joint Stipulation in Support of Settlement.

B. SETTLEMENT TERMS

Commission policy promotes settlements. 52 Pa. Code §5.231. Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve administrative hearing resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code §69.401. Many proceedings are expensive to litigate, and the cost of such litigation at a reasonable level is an operating expense recovered in the rates approved by the Commission. This means that a settlement, which allows the parties to avoid the substantial costs of preparing and serving testimony and the cross-examination of witnesses in lengthy hearings, the preparation and service of briefs, reply briefs, exceptions and reply exceptions, together with the briefs and reply briefs necessitated by any appeal of the Commission’s decision, yields significant expense savings for the company’s customers. That is one reason why settlements are encouraged by long-standing Commission policy.

Although this is not a unanimous settlement, in order to accept any settlement, the Commission must determine that the proposed terms and conditions are in the public interest. *Pa. Pub. Util. Comm’n v. C S Water and Sewer Assoc.*, 74 Pa. PUC 767 (1991); *Pa. Pub. Util. Comm’n v. Philadelphia Electric Co.*, 60 Pa. PUC 1 (1985).

The specific terms of the Settlement begin at numbered paragraph 16 of the Joint Stipulation in Settlement. That numbering sequence is maintained here for ease of reference to the Joint Stipulation itself.

16. In order to fully resolve their issues in this proceeding, the Stipulating Parties stipulate and agree to the following terms and conditions, which they will adopt and support as their respective litigation positions throughout the remainder of this proceeding:

1. PNG shall be permitted to transfer ownership of the Auburn Line and related facilities described in PNG’s December 1, 2010 Application to UGIES at net depreciated original cost; currently valued at an amount of $239,464.
2. PNG shall be permitted to enter into the PNG-UGIES Interconnection Agreement, set forth in Exhibit E of the Application and as revised by this Stipulation, in accordance with Chapter 21 of the Pennsylvania Public Utility Code;
3. The PNG-UGIES Interconnection Agreement will be revised to remove the $60,000 annual fee originally proposed in the Application to be paid by PNG to UGIES. This revision does not affect or otherwise alter UGIES’ obligation to provide interconnection service to PNG under the PNG-UGIES Interconnection Agreement;
4. PNG and UGIES agree that the Commission may continue to conduct safety inspections of the Auburn Line after the transfer of ownership to UGIES. To the extent that there is a separate assessment on PNG by the Commission to recover the costs of these inspections, UGIES will reimburse PNG for said inspection costs;[[8]](#footnote-8)
5. On the day after the Auburn Line is transferred from PNG to UGIES, UGI PNG will file with the Commission a tariff supplement to be effective on one day’s notice that reduces PNG’s rates to reflect the removal of the Auburn Line from rate base and the removal of all associated expenses, including depreciation and operating and maintenance expenses. The parties stipulate and agree that said aggregate amount to be removed from base rates is $154,000;
6. The PNG-UGIES Interconnection Agreement will be revised to provide for the reversion of ownership of the subject pipeline to PNG in the event that UGIES for any reason ceases to operate the line in a manner that allows PNG to continue to provide distribution service to its customers. The transfer price upon any such reversion of ownership will be at the then depreciated original cost of the facilities originally transferred from PNG to UGIES, but in no event will the transfer price upon reversion exceed the original transfer price referenced in Paragraph 16(a). In the event of such reversion of ownership, PNG shall not seek to recover from ratepayers any costs incurred to alter, reconfigure, reverse, or otherwise change the subject pipeline in response to alterations made by UGIES;
7. This Stipulation is intended to fully resolve all claims of OTS, OCA, and PNG, real or potential, for economic value of any kind that may be in any way related to the transfer of the Auburn Line from PNG and UGIES. This Stipulation does not address, nor shall it be cited, regarding the question of whether UGIES is required to file an Application for a Certificate of Public Convenience with the Commission to own and operate the subject nine (9) miles of gas pipeline.

C. STATEMENTS IN SUPPORT

In its Statement in Support of the Joint Stipulation in Settlement, PNG contends that the Joint Stipulation, if approved, will resolve all of the issues raised by the Stipulating Parties in this proceeding. PNG Statement in Support at 1. PNG points to the extensive discovery, settlement discussions and negotiations that led to the Joint Stipulation in Settlement as reflective of a carefully balanced compromise that led to a proposed Settlement that is just, reasonable and in the public interest. PNG Statement in Support at 2, 3.

Specifically, PNG argues that the Joint Stipulation in Settlement is in the public interest given certain revisions to the proposed PNG-UGIES Interconnection Agreement, including: (1) transfer of ownership of the Auburn Line at net depreciated cost, currently valued at $239,464; (2) the removal of the $60,000 annual fee originally proposed in the Application to be paid by PNG to UGIES; (3) the provision in the proposed PNG-UGIES Interconnection Agreement that provides for reversion of ownership of the Auburn Line to PNG if UGIES, for any reason, ceases to operate the line in a manner that allows continued distribution service to PNG’s customers, which reversion would be at the then depreciated annual cost of the facilities originally transferred to UGIES, but in no event in excess of the original transfer price; (4) no recovery of costs from ratepayers by PNG for any costs incurred in altering the pipeline; (5) agreement that the Commission may continue safety inspections of the line after the transfer of ownership with reimbursement from UGIES to PNG for any assessed costs relative to such inspections; (6) a reduction in distribution rates associated with the removal of the Auburn Line from rate base; (7) insulation of customers from the investment risk of converting the Auburn line to a gathering line. PNG Statement in Support at 4-6.

PNG also contends that the proposed transaction will have a positive impact on the local economy and the environment. The local economic benefits are described as: (1) a lower cost source of natural gas supply for Proctor & Gamble’s plant, thus making the plant more competitive, which in turn will benefit employees and local businesses that supply the plant and the plant’s employees; (2) royalty revenue for gas produced on the land or local landowners; and (3) a source of income opportunity for production and gathering field workers that otherwise would not be employed in the area. PNG Statement in Support at 8.

PNG concludes by stating that approval of the PNG-UGIES Agreement as an affiliated interest agreement provides additional benefits in that UGIES is obligated to, among other things, connect and service new customers and sell, exchange, or transport natural gas for PNG in the event of an emergency. Further, in the event that the PNG-UGIES Interconnection Agreement is terminated for any reason, PNG has the option to re-acquire such portions of the Auburn Line as PNG may require to assure the continuity of its retail distribution service. PNG Statement in Support at 9, citing PNG Statement No. 1-R, at 12. Finally, the Commission will continue to have jurisdiction over the PNG-UGIES Interconnection Agreement “so far as necessary to protect the public interest” and may take remedial action if necessary. PNG Statement in Support at 9, citing 66 Pa.C.S. § 2103.

In its Statement in Support of the Joint Stipulation in Settlement, the OCA points to four areas that address the OCA’s concerns and render the Joint Stipulation in Settlement as in the public interest: (1) the annual reduction in distribution base rates by $154,000; OCA Statement in Support at 4; (2) reversion of the Auburn Line to PNG in the event that UGIES for any reason ceases to operate the line in a manner that allows PNG to provide distribution service to its customers, with cost protection for the ratepayers as set forth in the Joint Stipulation in Settlement; OCA Statement in Support at 5-6; (3) acknowledgment that costs resulting from eventual gas purchase agreement are subject to future review (and possible disallowance) in the context of a Section 1307(f) proceeding; OCA Statement in Support at 6; and (4) the agreement that the Commission may continue safety inspections of the Auburn Line after the transfer of ownership. OCA Statement in Support at 6.

In its Statement in Support of the Joint Stipulation in Settlement, the OTS identifies seven areas that support approval: (1) the continuation of gas safety inspections of pipeline by the Commission following approval of the ownership transfer; (2) the immediate reduction of PNG’s rates at an identified amount to remove the subject pipeline from rate base and which reflects the removal of all associated expenses, including depreciation and operating and maintenance expenses; (3) elimination of the $60,000 interconnection fee that PNG would have been required to pay UGIES on an annual basis; (4) the clear and unequivocal reversion of ownership of the pipeline back to PNG in the event that UGIES operates the line so as to prohibit PNG from continuing to provide distribution service to its jurisdictional customers with a cap on the transfer price upon any such reversion of ownership; (5) a guarantee that, upon any such reversion of ownership, PNG cannot recover from ratepayers any costs incurred to alter, reconfigure, reverse, or otherwise change the pipeline in response to any alterations made by UGIES; (6) the absence of a provision or authorization for UGIES to impose any future fees upon PNG for use of the pipeline segment; and (7) the enhancement of the development of Marcellus shale gas fields in northeastern Pennsylvania to the benefit of the local and state economies, in part by the conversion of an existing pipeline rather than through the costly construction of a new gathering line. OTS Statement in Support at 5-7; ¶¶12 (a)-(g).

D. THE “MARKET VALUE SALE” ISSUE

This is not a unanimous Settlement in that the OSBA is not a signatory to the Joint Stipulation in Settlement. The OSBA has maintained its Protest and submitted the following issue on brief in opposition to the transaction:

Is the sale of the Auburn Line by PNG to an affiliated interest at less than fair market value permitted under the Public Utility Code?

Suggested Answer: No.

I note, however, that embedded in this issue is a sub-issue with respect to the possible precedential effect of this case if the transfer of the Auburn Line is approved. Before proceeding to a recommendation with respect to the Joint Stipulation in Settlement, it is necessary to resolve these issues.

The first matter we must determine is whether the OSBA’s core issue is properly raised in this proceeding. In this respect, I agree with PNG that the issue of the ratemaking treatment of any gain on the sale of a utility asset was not effectively presented in this proceeding by PNG (PNG Main Brief at 3, 30). As will be explained below, the transfer by sale is not intended by either PNG or UGIES as a sale for “gain,” and no profit in that sense will be changing hands. If such was the case, then the OSBA might have a relevant issue, but what the OSBA is seeking to do is to re-cast the very nature of the transaction so as to create the appearance of “gain” which the OSBA argues ratepayers have a claim to. However, and as noted by PNG, the OSBA did not put on such a case but only advanced a series of unsupported assumptions. The presentation of evidence in the form of testimony or exhibits at hearing by the OSBA relative to this issue was, at best, speculative, and I agree with PNG that the OSBA did not meet its burden of proof. PNG Reply Brief at 6.

However, and assuming *arguendo* that we must consider and resolve the issue, the OSBA’s position still fails on multiple grounds as will be explained, below.

The OSBA filed both Proprietary and Non-Proprietary versions of its Main Brief and Reply Brief in support of its suggested answer to the issue.[[9]](#footnote-9) What the OSBA terms the “potential unjust enrichment” of UGIES is the OSBA’s declared, primary argument against the transaction. OSBA Main Brief at 5; 10-11. In this sense, the OSBA states that PNG’s ratepayers financed the Auburn Line, providing both a return of and return on the capital invested in the line by PNG. OSBA Main Brief at 6. The OSBA therefore argues that in this proceeding, PNG was required to demonstrate both the depreciated value of the Auburn Line *and* the fair market value of the line but failed to provide evidence that the book value and fair market value of the line are approximately the same, and therefore the sale is not permitted under the Code. OSBA Main Brief at 7-9. This is the main thrust of the OSBA’s argument, though the OSBA also raises other concerns on brief.

The OSBA contends that PNG has failed to satisfy the legal standards that would allow the sale of the Auburn Line to PNG’s affiliate, UGIES. In essence, the OSBA argues that the sale of the Auburn Line to UGIES cannot take place unless the Commission approves the transaction *and* issues a certificate of public convenience pursuant to Sections 1102(a)(3) and 1103(a) of the Public Utility Code (Code), 66 Pa. C.S. §§ 1102(a)(3) and 1103(a); however, according to the OSBA, the Commission may not do so in this case because the benefits to the public from the sale of the Auburn Line are minimal in comparison to the potential windfall profit to UGIES. OSBA Reply Brief at 9.

The OSBA objects to the proposed transfer, contending that PNG has failed to prove that the transaction meets the public interest standard in Section 2102 of the Code, 66 Pa. C.S. § 2102.[[10]](#footnote-10) OSBA Main Brief at 3-4, 7; OSBA Reply Brief at 10.

The OSBA argues that PNG established no evidence that UGIES is the only entity interested in acquiring or making the necessary changes to the Auburn Line to accomplish the change of the line to a gathering line. OSBA Main Brief at 6; OSBA Reply Brief at 11.

The OSBA contends that there is no evidence of record in this case that establishes that the project contemplated will only be feasible if the Auburn Line is sold at the line’s depreciated original cost rather than fair market value. OSBA Main Brief at 6; OSBA Reply Brief at 11.

Finally, the OSBA argues that there is no evidence in the record that the only economic alternative for transporting gas from Citrus Energy’s Marcellus Shale wells is the Auburn Line. OSBA Main Brief at 6; OSBA Reply Brief at 11.

PNG anticipated the arguments of the OSBA and responded to them in PNG’s Main Brief. PNG’s position, in sum, is that the OSBA has posed an argument that the Auburn Line must be sold at market value, but that the argument is based entirely on speculation as to that value of the line by the OSBA, which then claims that the theoretical proceeds from the transaction must be shared with ratepayers. PNG Main Brief at 32-33; PNG Reply Brief at 16. PNG correctly states that the OSBA failed to present any probative evidence in this proceeding that the market value of the Auburn Line exceeds its depreciated original cost, and that to the extent that the OSBA believes that the Auburn line has value in excess of the depreciated original cost, it had the burden to introduce such evidence. PNG Main Brief at 4, 32-33; PNG Reply Brief at 13, fn 6. I agree with PNG that the OSBA has not met its burden of proof in this respect, and that the OSBA’s approach goes far beyond the limited facts and applicable law in this proceeding.

PNG convincingly argues that the OSBA’s speculation about the market value of the Auburn Line is moot, because this proceeding is limited to PNG’s proposal to transfer an asset at depreciated original cost to an affiliate in order to shift risk away from itself (and its ratepayers) while at the same time facilitating the development of a new source of natural gas which will benefit all parties. As PNG states:

OSBA’s argument that ratepayers should share in the value of the line as a gathering line ignores the basic facts that conversion of the line requires a very substantial ($l5 million) investment and involves very substantial risks of failure. *Ratepayers are not being asked to make this investment and are not being asked to undertake the risks of this investment*.

PNG Main Brief at 5. (emphasis added)

PNG’s objective is not to make a profit by “selling” the Auburn Line at market value, and UGIES is not shopping to “buy” a distribution line at market cost. There is no “gain” to share with ratepayers. PNG Main Brief at 3-4. Indeed, PNG contends that it is not “selling” the distribution value of the Auburn Line at all. PNG Main Brief at 5. As PNG states:

The proposal before the Commission is more than just a straight asset sale because it allows PNG to keep the current economic value of the line through the retention of ownership of the distribution taps serving P&G and the farm tap customers. Moreover, the transaction is part of a broader arrangement involving P&G and Citrus. PNG Statement No. 1-R, p. 12. P&G plans to fully replace its gas supply with competitively priced and reliable Marcellus Shale natural gas produced by Citrus on or near P&G’s property. PNG Statement No. 1, at. 9; PNG Exhibit RFB‑3.

PNG Main Brief at 13.

This explanation also disposes of the OSBA’s assertion that PNG should be looking for a competitive third-party buyer for the line.[[11]](#footnote-11) As PNG states, the proposal before the Commission imposes significant conditions and limitations that are not likely to be attractive to a third party purchaser. PNG Main Brief at 34. Given the “reversion requirement” of Paragraph 16(f) of the Joint Stipulation in Settlement, it is hard to imagine that an unaffiliated third party would be willing to enter into such an arrangement. Further, the “reversion requirement,” if implemented, maintains the even-handedness of the Agreement through the provision that:

*The transfer price upon any such reversion of ownership will be at the then depreciated original cost of the facilities originally transferred from PNG to UGIES, but in no event will the transfer price upon reversion exceed the original transfer price referenced in Paragraph 16(a)*. In the event of such reversion of ownership, PNG shall not seek to recover from ratepayers any costs incurred to alter, reconfigure, reverse, or otherwise change the subject pipeline in response to alterations made by UGIES.

Joint Stipulation in Settlement at 4; ¶ 16(f) (emphasis added).

The essential nature of this transaction is to facilitate the development of and access to Marcellus Shale natural gas, not to sell a distribution pipeline at a profit. PNG Main Brief at 6. By focusing on what it terms the “unjust enrichment” of UGIES, the OSBA is drastically minimizing the potential benefits related to this transaction which are set forth in the Joint Stipulation in Settlement and in the Parties’ Supporting Statements.

**Precedential Effect**

The OSBA worries that, the restrictive provision of Paragraph 22 of the Joint Stipulation in Settlement notwithstanding, this case is likely to set a precedent that would allow the affiliated interests of natural gas distribution companies (NGDCs) to profit from the development of Marcellus Shale gas by acquiring assets from NGDCs at less than fair market value. OSBA Main Brief at 11.

First, and as noted above, the Joint Stipulation in Settlement expressly limits the precedential effect of this case:

The Stipulating Parties agree that the Stipulation shall not constitute or be cited as precedent, and shall be without prejudice to any of Stipulating Parties’ positions, in any other proceeding, except to the extent required to implement the explicit terms of this Stipulation.

Joint Stipulation in Settlement at 6; ¶ 22.

This provision of the Joint Stipulation in Settlement is further commented upon in PNG’s Main Brief:

The Joint Stipulation provides that the approval of PNG’s application does not address and has no precedential value regarding Commission jurisdiction over gathering facilities. If the Commission ultimately determines that it has general jurisdiction over gathering facilities, then the question would arise as to whether the specific gathering services provided by UGIES from the Auburn line are “to or for the public.” This issue would be addressed in a future proceeding.

PNG Main Brief at 27.

Though PNG is correct that the Joint Stipulation in Settlement is expressly proposed as without precedential value, the foregoing quotation is a bit of an overstatement given the plain language of Paragraph 22 of the Joint Stipulation. Nevertheless, the basic point that the Commission has yet to make a definitive jurisdictional pronouncement with respect to jurisdiction over gathering and the unknown prospective effect of such a pronouncement is part of the context of the Joint Stipulation in Settlement and this Recommended Decision.

E. RECOMMENDATION

The record in this proceeding consists of the transcript of the prehearing conference of January 7, 2011, the transcript of the hearing of March 16, 2011; the stipulations and the statements and exhibits listed in it; the Joint Stipulation in Settlement.

Commission policy promotes settlements, 52 Pa. Code §5.231. Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve precious administrative hearing resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code §69.401. However, in order to accept a settlement, the Commission must first determine that the proposed terms and conditions are in the public interest. *Dominion Peoples’ Universal Service and Energy Conservation Plan and Pa. P.U.C. v. The Peoples Natural Gas Co.*, Opinion and Order, entered December 5, 2006, at Docket Nos. M‑00051880; R‑00051093; R-00051093C0001 (Slip Op. at 12); *Pa. P.U.C. v. C S Water and Sewer Assoc*., 74 Pa. PUC 767 (1991).

The Commission's standards for reviewing a non-unanimous settlement, as is proposed here, are the same as those for deciding a fully contested case. *Pa. PUC v. PECO Energy Company,* Docket Nos. R-00973953 and P-00971265, (Order entered December 23, 1997). Accordingly, substantial evidence consistent with statutory requirements must support the proposed settlement. *Popowsky v. Pa. PUC,* 805 A.2d 637 (Pa. Cmwlth. 2002); and *ARIPPA v. Pa. PUC,* 792 A.2d 636 (Pa. Cmwlth. 2001).

The determination of whether a transaction provides substantial public benefits is not dependent on a single factor but is a balancing of factors. *Popowsky v. Pennsylvania Public Utility Commission*, 594 Pa. 583, 937 A.2d 1040 (2007). I offer the following analysis in support of this Recommendation.

First, the PNG-UGIES Interconnection Agreement has been revised to remove the $60,000 annual fee, payable by PNG to UGIES, that was proposed in the original Application for Transfer by Sale. Joint Stipulation in Settlement at 3; ¶ 16(c). As the justification for this fee was problematic to begin with, the removal of the annual fee eliminates one of the more controversial aspects of the original proposal.

Second, the Joint Stipulation in Settlement sets forth the Parties’ agreement that the Commission may continue to conduct safety inspections of the Auburn Line after the transfer of ownership to UGIES, and UGIES will reimburse PNG for any inspection costs. Joint Stipulation in Settlement at 3; ¶ 16(d). Here, I agree with the OTS which, in its Supporting Statement commented that the extreme importance of this provision cannot be overstated. Supporting Statement of the OTS at 6; fn 7.

Given that the proposal contemplates reversing the gas flow on a line that has operated in one direction for over fifty years, PNG’s witness, Mr. Beard, was asked if he could conceive of any potential problems that might result in the changed configuration of the line. Mr. Beard testified that there would be no effect. N.T. 43. With respect to safety issues associated with the reconfiguration of the line, Mr. Beard testified as follows:

Q. All right. So there should be no safety issues?

A. No safety issues whatsoever. And the history of the line, and I checked, it is a line with a good operating history and it doesn’t cause any pause, whatsoever, as far as its condition.

N.T. 43

While I accept PNG witness Beard’s unequivocal testimony at hearing with respect to the history of the line and the present lack of safety issues, the inclusion of the explicit provision at Paragraph 16(d) in the Joint Stipulation in Settlement is essential to a recommendation for approval.

Third, on the day after the Auburn Line is transferred from PNG to UGIES, PNG’s base rates will be reduced by $154,000 to reflect the removal of the Auburn Line from rate base and the removal of all associated expenses, including depreciation and operating and maintenance costs. Joint Stipulation in Settlement at 3; ¶ 16(e). The amount was agreed to by all of the Parties, with the exception of the OSBA, and I accept the Parties’ resolution of the proper amount for the reduction of PNG’s rate base.

Fourth, the PNG-UGIES Interconnection Agreement will be revised to provide for the reversion of ownership of the subject pipeline to PNG in the event that UGIES for *any reason* ceases to operate the line in a manner that allows PNG to continue to provide distribution service to its customers. PNG Main Brief at 24-25; Joint Stipulation in Settlement at 3; ¶ 16(f) (emphasis added). As with the Parties’ agreement that the Commission may continue to conduct safety inspections of the Auburn Line after the transfer of ownership, this is an essential provision that protects PNG’s distribution customers that take natural gas service from the line. Paragraph 16(f) of the Joint Stipulation in Settlement also provides that the transfer price upon any such reversion of ownership will be at the then depreciated original cost of the facilities originally transferred from PNG to UGIES, but in no event will the transfer price upon reversion exceed the original transfer price referenced in Paragraph 16(a). Again, this is an essential provision that protects PNG’s ratepayers. Likewise, Paragraph 16(f) protects the ratepayers with its assurance that in the event of such reversion of ownership, PNG shall not seek to recover from ratepayers any costs incurred to alter, reconfigure, reverse, or otherwise change the subject pipeline in response to alterations made by UGIES.

Fifth, the Parties agree that the acceptance of the Joint Stipulation in Settlement will negate the need for any exceptions on their part, though they reserve the right to file reply exceptions to any exceptions that may be filed. The avoidance of any further expense by settlement of this proceeding serves the interest of PNG and its customers. Thus, acceptance of the proposed Joint Stipulation in Settlement is in the public interest because resolution of this case, to the extent possible, by settlement rather than litigation will avoid substantial time and expense involved in formally pursuing all issues in this proceeding. In summary, I find the provisions of the Joint Stipulation in Settlement are fair, just and reasonable and recommend that the Joint Stipulation in Settlement be adopted without modification. Because I am recommending that the Settlement terms be adopted without modification, the Parties have agreed to waive exceptions. Joint Stipulation in Settlement at ¶ 19.

Beyond the terms of the Joint Stipulation in Settlement, the proposed transaction insulates customers from risk attendant to converting the Auburn Line from a distribution line to a gathering line. The project will also promote the development of Marcellus Shale natural gas resources with related benefits to the local economy. PNG Main Brief at 19, 21; PNG Statement No. 1-R at 3. PNG will continue to have the ability to draw gas from the Auburn Line on a firm, first priority basis. PNG Main Brief at 19; PNG Statement No. 1at 5-6. The proposed transaction will also provide an additional point of delivery which will help prevent interruption of service in the event of a curtailment on the Tennessee Line. PNG Main Brief at 19, N.T. at 56-57.

PNG enumerates specific local benefits associated with the transaction as follows:

(1) P&G’s plant will benefit from a lower cost source of supply, thus making the plant more competitive; (2) a more competitive P&G plant will benefit P&G employees and local businesses that supply the plant and the plant’s employees; (3) local landowners leasing their land for natural gas production will benefit from royalty revenue for gas produced on their land; and (4) Citrus’ production and related gathering services will be a source of income for production and gathering field workers that otherwise would not be employed in the area. Further, the proposed transaction provides an important environmental benefit because use of the existing Auburn line as a gathering line will avoid the environmental impact of building a second pipeline to bypass the Auburn Line.

PNG Main Brief at 21-22; PNG Statement No. 1 at 17.

The final point, above, that “the proposed transaction provides an important environmental benefit because use of the existing Auburn line as a gathering line will avoid the environmental impact of building a second pipeline to bypass the Auburn Line,” is a significant factor in this recommendation. Given the proposed volumes of through-put and the primary function of the reconfigured line, the Auburn Line will function as a gathering line. While no environmental impact assessment has been completed with respect to the alternative of constructing an entirely new line, the *minimal* environmental impact associated with this project is in reconfiguring the line.

F. CONCLUSION

With the exception of the OSBA, the Parties’ position is that the proposed Joint Stipulation in Settlement provides a fair, just and reasonable resolution of the issues, is consistent with the Commission’s policy of promoting negotiated settlements, is supported by the record and is in the public interest. I agree. The Settlement terms are a fair and reasonable resolution of the various issues, appropriately balance the interests of the company and its customers and are supported by substantial evidence of record. Therefore, the Joint Stipulation in Settlement should be approved without modification by the Commission as expeditiously as possible.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa. C.S. §§ 1102; 1103(a); 2102.

2. The proponent of a rule or order in any Commission proceeding has the burden of proof. 66 Pa.C.S.A. § 332.

3. The transfer by sale of the Auburn Line from UGI Penn Natural Gas, Inc., to UGI Energy Services, Inc., and the filing of a related Affiliated Interest Agreement are actions governed by the Pennsylvania Public Utility Code. 66 Pa. C.S. § 2102; 2103.

4. To determine whether a Settlement should be approved, the Commission must decide whether the Settlement promotes the public interest. *Pennsylvania Public Utility Comm’n v. C.S. Water and Sewer Associates*, 74 Pa. PUC 767 (1991); *Pennsylvania Public Utility Comm’n v. Philadelphia Electric Company,* 60 Pa. PUC 1 (1985).

5. The Commission's standards for reviewing a non-unanimous settlement are the same as those for deciding a fully contested case. *Pa. PUC v. PECO Energy Company,* Docket Nos. R-00973953 and P-00971265, (Order entered December 23, 1997). Accordingly, substantial evidence consistent with statutory requirements must support the proposed settlement. *Popowsky v. Pa. PUC,* 805 A.2d 637 (Pa. Cmwlth. 2002); and *ARIPPA v. Pa. PUC,* 792 A.2d 636 (Pa. Cmwlth. 2001).

6. The provisions of the Joint Stipulation in Settlement at Docket No. A-2010-2213893 and Docket No. G-2010-2213894 submitted by UGI Penn Natural Gas, Inc., the Office of Trial Staff, and the Office of Consumer Advocate, are supported by substantial evidence, just, reasonable and in the public interest.

ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the terms and conditions contained in the Joint Petition for Settlement at Docket No. A-2010-2213893 and at Docket No. G-2010-2213894 submitted by UGI Penn Natural Gas, Inc., the Office of Trial Staff, and the Office of Consumer Advocate, are approved and adopted without modification.

2. That the Application of UGI Penn Natural Gas Inc. for approval of the Transfer by Sale of a 9.0 Mile Natural Gas Pipeline, Appurtenant Facilities and Right of Way located in Mehoopany, Pennsylvania at Docket No. A-2010-2213893 is granted consistent with the terms of this Order and the Joint Stipulation in Settlement filed on March 23, 2011.

3. That the Affiliated Interest Filing of UGI Penn Natural Gas, Inc., at Docket No. G-2010-2213894 is approved consistent with the terms of this Order and the Joint Stipulation in Settlement filed on March 23, 2011.

4. That Commission approval and adoption of the Joint Stipulation in Settlement filed on March 23, 2011 shall not be construed to represent approval of any party’s position on any issue herein.

5. That the Protest of the Office of Trial Staff at Docket No. A-2010-2213893 and Docket No. G-2010-2213894 is dismissed.

6. That the Protest of the Office of Small Business Advocate at Docket No. A-2010-2213893 and Docket No. G-2010-2213894 is dismissed.

7. That on the day after the Auburn Line is transferred from UGI Penn Natural Gas, Inc. to UGI Energy Services, Inc., UGI Penn Natural Gas, Inc. will file with the Commission a tariff supplement to be effective on one day’s notice that reduces UGI Penn Natural Gas, Inc.’s rates to reflect the removal of the Auburn Line from rate base and the removal of all associated expenses, including depreciation and operating and maintenance expenses.

8. That upon the issuance of the requisite Certificate of Public Convenience authorizing the transfer by UGI Penn Natural Gas, Inc. to UGI Energy Services, Inc. of the Auburn Line and related assets as described in the Application, the filing of the related Affiliated Interest Agreement with the Commission, and acceptance and approval by the Commission of the tariff supplement filed by UGI Penn Natural Gas, Inc., consistent with this Order, this proceeding at Docket No. A-2010-2213893 and at Docket No. G-2010-2213894 shall be marked closed.

Date: May 11, 2011

Dennis J. Buckley

Administrative Law Judge

1. The OSBA filed both Proprietary and Non-Proprietary versions of its Main and Reply Briefs. [↑](#footnote-ref-1)
2. The Tennessee Gas Pipeline (Tennessee) is one of the several interstate pipelines that make up El Paso Corporation’s Pipeline Group. Tennessee is comprised of approximately 14,000 miles of pipeline that stretches from the Mexican border to Canada. Tapping supply regions in the Gulf of Mexico, Texas, Appalachia, and Canada, the Tennessee system serves markets across the Midwest and mid-Atlantic regions, including major metropolitan centers such as Chicago, New York, and Boston. www.tennesseeadvantage.com [↑](#footnote-ref-2)
3. “UGI PNG will retain ownership in the Auburn City Gate Station, the Manning Station, all pipeline and appurtenant facilities downstream of Manning used to serve P&G, and the metering and regulation equipment and related service lines used to serve UGI PNG's retail customers.” Application at page 4; fn 2. [↑](#footnote-ref-3)
4. 66 Pa. C.S. §§ 2201, *et seq.* [↑](#footnote-ref-4)
5. “The method by which equivalent volumes of gas are delivered from one point on a pipeline’s system to another point without a continuous flow of molecules from the first point to the second.” *Glossary of Energy and Utility Terms*, (McGuire Woods LLP, 2002) at 18. [↑](#footnote-ref-5)
6. The FERC does provide a definition of “gathering” on its website:

   Gathering Line: Pipelines, generally small in diameter, used to transport oil or gas from the well to a processing facility or a mainline pipeline.

   <http://www.ferc.gov/help/glossary.asp#G>

   In *Amerada Hess Corp.*, 52 FERC ¶ 61,268, at 61,988 (1990), the FERC adopted a “primary function test” in determining whether a line is a gathering line:

   The "primary function" test is described in *Farmland Industries, Inc*. (*Farmland*), 23 FERC P61,063 (1983) where the Commission stated that: "[T]he Commission considers a number of factors in analyzing the Section 1(b) gathering test. Although a variety of labels has been applied to these factors, the ultimate test is whether the primary function of the facility can be classified as transportation or gathering." 23 FERCat p. 61,143.

   \* \* \*

   The criteria set out in *Farmland* are not meant to be all inclusive (See, e.g., *Williston Basin Interstate Pipeline Co*., 38 FERC P61,133, at p. 61,343 (1987)), and in other cases the Commission has considered nonphysical criteria such as the purpose, location and operation of the facility (See *Mid-Louisiana Gas Co*., 25 FERC P61,001 (1983)), the general business activity of the owner of the facility (*Superior Oil Co*., 13 FERC P61,218, at p. 61,496 (1980), *Beacon Gasoline Co*., 30 FERC P61,041, at p. 61,066 (1985), *Gulf Oil Corp*., supra, 59 FPC 1230, 1231 (1977)), and whether the jurisdictional determination is consistent with the objectives of the NGA and the NGPA (*Gulf Oil Corp. v. FERC*, 1 FERC P61,089, at p. 61,188, aff'd mem., 723 F.2d 97 (D.C. Cir. 1983)).

   *Amerada Hess Corp.*, 52 F.E.R.C. P61,268; 1990 FERC LEXIS 2205 at 3-4. [↑](#footnote-ref-6)
7. It should be noted that the configuration of the system in *Equitable Gas*, whereby distribution customers received their gas through gathering lines owned and operated by a non-jurisdictional third party, evolved historically rather than through direct Commission action. See *Equitable Gas*, Initial Decision at Docket No. A‑2009-2089152, issued January 8, 2010, at 3, Finding of Fact No. 4. [↑](#footnote-ref-7)
8. This is a change from the original language of the Application, which states:

   It is recognized that the non-utility status of gathering lines that operate within Pennsylvania is an issue currently under review by the Commission and the Pennsylvania General Assembly. It is Transferee's view that the Auburn

   Line, if operated as a non-jurisdictional gathering line, would not be subject to Commission regulatory oversight unless and until the Pennsylvania General Assembly enacts new legislation that expressly provides the Commission

   with such authority. *Upon transfer to UGIES, pipeline safety of the Auburn Line would continue to be subject to regulatory oversight by the United States Department of Transportation's Office of Pipeline Safety pursuant to*

   *regulations applicable to gathering lines.* See 49 C.F.R. Part 392.

   Application at page 2; fn 1. (emphasis added) [↑](#footnote-ref-8)
9. References in this Recommended Decision will be limited to the Non-Proprietary briefs filed by the OSBA. The OSBA’s references in its briefs to a Proprietary Stipulation entered into by PNG and the OSBA go to the argument that the contemplated transaction is necessary to prevent bypass of the PNG distribution system by Proctor & Gamble with a resultant dramatic rise in rates for remaining distribution customers. However, the whole “bypass argument” is so conjectural as to be of little to no weight in adjudicating this matter. OSBA Main Brief at 11-12. [↑](#footnote-ref-9)
10. For reasons that will be more fully set forth in the “Recommendation,” below, I agree with the Parties to the Joint Stipulation that the Settlement terms are a fair and reasonable resolution of the various issues, and appropriately balance the interests of the company and its customers and are supported by substantial evidence of record. [↑](#footnote-ref-10)
11. I also agree with PNG that the Commission does not have the authority to compel PNG to sell the Auburn Line to any particular entity and any particular price. Reply Brief of PNG at 10-11, fn 4 citing *Metropolitan Edison Co. v. Pennsylvania Public Utility Commission*, 437 A.2d 76 (Pa. Cmwlth.1981). [↑](#footnote-ref-11)