**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held July 14, 2011

Commissioners Present:

Robert F. Powelson, Chairman

John F. Coleman, Jr., Vice Chairman

Wayne E. Gardner

James H. Cawley

Pamela A. Witmer; Statement

Application of UGI Penn Natural Gas, Inc. for Docket No. A-2010-2213893

approval of the Transfer by Sale of a 9.0 Mile

Natural Gas Pipeline, Appurtenant Facilities

and Right of Way located in Mehoopany,

Pennsylvania.

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

Gas, Inc.

Table of Contents

[I. History of the Proceeding 2](#_Toc299088225)

[II. Background 3](#_Toc299088226)

[**A.**  **Operational Information** 3](#_Toc299088227)

[**B.** **Settlement** 5](#_Toc299088228)

[**C.** **Affiliated Interest Agreement** 7](#_Toc299088229)

[III. Discussion 8](#_Toc299088230)

[**A.** **Legal Standards** 8](#_Toc299088231)

[**B.** **Post-Transaction Jurisdiction** 10](#_Toc299088232)

[**C.** **Burden of Proof** 12](#_Toc299088233)

[1. ALJ’s Recommendation 12](#_Toc299088234)

[2. Exceptions 12](#_Toc299088235)

[3. Disposition 13](#_Toc299088236)

[**D.** **Unjust Enrichment of UGIES** 14](#_Toc299088237)

[1. Positions of the Parties 14](#_Toc299088238)

[2. The ALJ’s Recommendation 15](#_Toc299088239)

[3. Exceptions 16](#_Toc299088240)

[4. Disposition 18](#_Toc299088241)

[**E.** **Whether the Proposed Transaction Will Facilitate the Development of and Access to Marcellus Shale Natural Gas** 20](#_Toc299088242)

[1. ALJ’s Recommendation 20](#_Toc299088243)

[2. Exceptions 20](#_Toc299088244)

[3. Disposition 22](#_Toc299088245)

[**F.** **Precedential Effect** 23](#_Toc299088246)

[1. ALJ’s Recommendation 23](#_Toc299088247)

[2. Exceptions 24](#_Toc299088248)

[3. Disposition 25](#_Toc299088249)

[**G.** **Approval of the Settlement** 25](#_Toc299088250)

[1. Statements in Support 26](#_Toc299088251)

[2. ALJ’s Recommendation 27](#_Toc299088252)

[3. Disposition 27](#_Toc299088253)

[**H.** **Approval of the Application** 28](#_Toc299088254)

[IV. Conclusion 31](#_Toc299088255)

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of the Office of Small Business Advocate (OSBA), filed on May 23, 2011, to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Dennis J. Buckley, issued on May 12, 2011 in the above-captioned matter. By of the Recommended Decision, the ALJ recommended that the Commission approve the Joint Stipulation in Settlement (Settlement) which was filed in this case on March 23, 2011, and dismiss the Protest of the OSBA to the Application and Affiliated Interest Filing of UGI Penn Natural Gas, Inc., (PNG). PNG filed Replies to Exceptions on May 31, 2011.

This Opinion and Order reflects our action at our July 14, 2011 Public Meeting to adopt the ALJ’s Recommended Decision to approve the Settlement, as modified, and subject to certain conditions as fully delineated herein. Because of the modifications, we would usually provide the Stipulating Parties with the opportunity to file comments in opposition to our action, and if no adverse comments were received, then our decision would become final. However, on July 20, 2011, PNG, on behalf of itself and the Stipulating Parties, filed a letter with the Commission stating that they did not object to any of the modifications and conditions which we adopted at our July 14, 2011 Public Meeting. The letter additionally stated that the Stipulating Parties do not intend to file comments in opposition to the changes, and, as a result, a comment period would not be necessary. We agree, and this Opinion and Order will be issued in final form.

# **I. History of the Proceeding**

On December 1, 2010, PNG filed an Application with the 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 Mehoopany, Pennsylvania (the Auburn Line) 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. The OSBA filed an Intervention and Protest to the Application on December 21, 2010. On January 3, 2011, the Pennsylvania Office of Consumer Advocate (OCA) filed an Intervention and public statement.

An evidentiary hearing was held on March 16, 2011. PNG, the OTS, the OSBA, and the OCA presented testimony and exhibits, which were received into the record, as well as a Sealed Highly Confidential Stipulation from PNG and the OSBA. The record consists of the Parties’ Statements and Exhibits, as well as the nineteen-page transcript of the January 7, 2011 prehearing conference and the fifty five-page transcript of the March 16, 2011 evidentiary hearing.

On March 23, 2011, all of the Parties, except the OSBA, filed a Joint Stipulation in Settlement (Settlement). The OSBA 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?” PNG, the OCA, and the OTS (the Stipulating Parties) each filed Statements in Support of the Settlement.

On March 30, 2011, the OSBA and PNG filed Main Briefs regarding the “market value sale” issue, and, thereafter, on April 8, 2011, the OSBA and PNG filed Reply Briefs regarding the “market value sale” issue.[[1]](#footnote-1) The record was closed on April 12, 2011.

ALJ Buckley’s Recommended Decision was issued on May 12, 2011. The ALJ recommended that the Commission approve the Settlement, grant PNG’s Application, approve PNG’s Affiliated Interest Filing, and dismiss the Protests of the OTS and the OSBA.

As previously stated, the OSBA filed Exceptions to the Recommended Decision on May 23, 2011. PNG filed Replies to Exceptions on May 31, 2011.

# **II. Background**

## **A. Operational Information**

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 end point near the Procter & Gamble Paper Products Company (Procter & Gamble) plant outside of Mehoopany, Pennsylvania. Tr. at 38; ALJ Exhibit 1. The natural gas flow on the Auburn Line is currently from north to south, specifically from the interconnection of the Auburn Line with the Tennessee Gas (interstate) Pipeline[[2]](#footnote-2) south to the Manning Regulator Station located north of Procter & Gamble’s facility. Along the Auburn Line, thirteen distribution customers, in addition to Procter & Gamble, take natural gas through interconnection lines that branch off from the Auburn Line to their meters. Tr. at 47, PNG St. 1 at 5-6. PNG will retain ownership in the Auburn City Gate Station, the Manning Station, all pipeline and appurtenant facilities downstream of Manning used to serve Procter & Gamble, and the metering and regulation equipment and related service lines used to serve PNG's fourteen retail distribution customers currently receiving service along the Auburn Line. Application at 4, fn 2.

The proposal before the Commission is to permit the transfer by sale of the Auburn Line from PNG to UGIES. PNG will transfer the Auburn Line and related facilities at net depreciated original cost, currently valued at $239,464. Settlement at 3, ¶ 16(a). If the transfer is allowed, the flow of natural gas on the line will be reversed to become predominantly south to north. This is because the natural gas in the Auburn Line will come from Marcellus Shale natural gas wells on and around the property of Procter & Gamble and not from the Tennessee Gas Pipeline. The gas will be produced by Citrus Energy Corporation (Citrus Energy). PNG St. 1 at 5. All Marcellus Shale gas production will enter the Auburn Line upstream of Procter & Gamble at the regulator station. Some of the gas will go south to Procter & Gamble, but most of the gas will go north to a new interconnection that will have to be established with the Tennessee Pipeline. Tr. at 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. Tr. at 42.

Existing service lines branching from the Auburn Line to serve the fourteen current customers of PNG will maintain those customers as PNG distribution customers, and PNG will continue to have an obligation to serve those customers. Tr. at 48, 49, 51. PNG’s position is that approval of the transfer will not impact the ability of the fourteen existing distribution customers to shop for their natural gas supply under the Natural Gas Choice and Competition Act, 66 Pa. C.S. §§ 2201, *et seq.,* 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.”[[3]](#footnote-3) Tr. at 53‑55.

## **B. Settlement**

On March 23, 2011, the OTS, the OCA, and PNG (collectively, the Stipulating Parties) filed a Settlement which resolved all of their respective issues in this proceeding. The specific terms of the Settlement provide as follows:

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;

(e) 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;

(f) 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;

(g) 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.

Settlement at 3-5.

## **C. Affiliated Interest Agreement**

On December 1, 2010, in order to carry out the proposed transaction set forth in its Application, PNG filed an Affiliated Interest Agreement requesting Commission approval of the Pipeline Interconnection, Operating and Emergency Services Agreement between PNG and UGIES (the PNG-UGIES Agreement). Pursuant to the terms of the PNG-UGIES Agreement, UGIES will have the following obligations, among others: (1) to operate and maintain the Auburn Line and Penn Virginia Resource Partners, L.P. (PVR) Interconnection facilities according to applicable federal and state standards, and (2) to deliver natural gas to PNG at the Manning Regulator and other PNG meter and regulator facilities used to serve customers from the Auburn Line, including Procter & Gamble, the farm tap distribution customers, and other customers who elect from time to time to take service from PNG that requires use of the Auburn Line. Specifically, UGIES is obligated to deliver locally produced natural gas from the Auburn Line to PNG on a firm, first priority basis, and, in case of an emergency shortage of locally produced natural gas, to accept natural gas delivered from the Tennessee line through PNG’s Auburn Line. PNG St. 1 at 5-6; PNG Exhibit RFB-2. Additionally, if the PNG-UGIES Agreement is terminated for any reason, PNG shall have the option to re-acquire portions of the Auburn Line that PNG requires to assure the continuity of its retail distribution service. PNG may re-acquire portions of the Auburn Line at the then depreciated original cost of the facilities originally transferred from PNG to UGIES. PNG St. 1-R at 12; PNG Exhibit RFB-2.

# **III. Discussion**

ALJ Buckley reached six Conclusions of Law. R.D. at 23-24. The Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

Before addressing the Exceptions, we note that any issue or Exception that we do not specifically address shall be deemed to have been duly considered and will be denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. [Consolidated Rail Corp. v. Pa. PUC, 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also* see, generally, [University of Pennsylvania v. Pa. PUC, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

## **A. Legal Standards**

In Commission proceedings, the proponent of a rule or order bears the burden of proof. 66 Pa. C.S. § 332(a). To satisfy that burden, the proponent of a rule or order must prove each element of its case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990). A preponderance of the evidence is established by presenting evidence that is more convincing, by even the smallest amount, than that presented by the other parties in the case. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission’s decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC,* 489 Pa. 109, 413 A.2d 1037 (1980).

In this case, PNG is asking the Commission for approval of the Application to Transfer by Sale a 9.0 Mile Natural Gas Pipeline, Appurtenant Facilities and Right of Way, referred to herein as the Auburn Line, located in Mehoopany, Pennsylvania. PNG, therefore, bears the burden of proving, by a preponderance of the evidence, that the proposed transfer will be in the public interest and that the requirements in Sections 1102, 1103, and 2102 of the Public Utility Code (Code), 66 Pa. C.S. §§ 1102, 1103, and 2102 have been satisfied.

Pursuant to Section 1102(a)(3) of the Code, public utilities are required to obtain a Certificate of Public Convenience (Certificate) from the Commission prior to transferring “the title to, or the possession or use of, any tangible or intangible property used or useful in the public service.” 66 Pa. C.S. § 1102(a)(3). The Commission will grant a Certificate only if it finds that granting the Certificate is “necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa. C.S. § 1103(a).

Additionally, since the proposed transfer involves the sale of the Auburn Line between PNG and an affiliated interest, the transaction must comply with Section 2102 of the Code, which requires Commission approval of contracts between a public utility and any affiliated interest. The Commission will approve such affiliated interest agreements “only if it shall clearly appear and be established upon investigation that it is reasonable and consistent with the public interest.” 66 Pa. C.S. § 2102(b). The Commission also has continuing supervision and jurisdiction over the terms and conditions of affiliated interest agreements “so far as necessary to protect and promote the public interest.” 66 Pa. C.S. § 2103.

Furthermore, we note that the Commission’s standards for reviewing a non-unanimous settlement, as proposed here, are the same as those for deciding a fully contested case. *Application of PECO Energy Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code and Joint Petition for Partial Settlement*, Docket Nos. R-00973953 and P-00971265, 1997 Pa. PUC LEXIS 51 (Order entered December 23, 1997). Accordingly, substantial evidence consistent with statutory requirements must support the proposed Settlement. *Popowsky v. Pa. PUC*, 792 A.2d 636 (Pa. Cmwlth. 2002).

## **B. Post-Transaction Jurisdiction**

The ALJ found that although the end result of this proposed 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 transaction because the Auburn Line is presently a distribution line over which Commission jurisdiction is unquestioned. R.D. at 8. As such, the ALJ stated that this case has prospective implications with respect to any pronouncement the Commission may make regarding its jurisdiction over gathering lines. R.D. at 7. The ALJ noted that under the terms of the Settlement, the Application, and the related Affiliated Interest Agreement, the “primary function” of the Auburn Line as reconfigured will be as a gathering line. R.D. at 7.

The ALJ further noted that while this configuration is unusual, in at least one other case a natural gas distribution company served distribution customers through gathering lines owned by a third party. *Id.* (citing *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; Initial Decision Upon Remand issued November 1, 2010). In that case, twenty-three distribution customers received Equitable residential natural gas service from field gathering pipelines owned by an affiliated interstate pipeline company.[[4]](#footnote-4)

The Parties in this proceeding have briefly acknowledged the issue of our jurisdiction over gathering lines and have stated that our jurisdiction over gathering lines is currently pending before the Commission. *See Application of Laser Northeast Gathering Company, LLC for Approval to Begin to Offer, Render, Furnish or Supply Natural Gas Gathering and Transporting or Conveying Service by Pipeline to the Public in Certain Townships of Susquehanna County, Pennsylvania,* Docket No. A-2010-2153371(Order entered June 14, 2011)*.*[[5]](#footnote-5)The Stipulating Parties also addressed this issue in the Settlement. The Settlement “does not address, nor shall it be cited, regarding the question 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.” Settlement at 5, ¶ 16(g). Consequently, the Parties did not fully brief or argue this jurisdictional issue or provide evidence on this issue during the hearing in this Application proceeding.

Based on the record in this proceeding, we have determined that it is not necessary for us to address the nature of the Auburn Line post-transaction, specifically, whether it is a gathering pipeline or a distribution pipeline. We note that UGIES has not filed an application requesting public utility status and that the record is devoid of evidence regarding whether UGIES is offering service “for the public.”[[6]](#footnote-6) Accordingly, there is also no need, at this juncture, for us to address our jurisdiction over UGIES’ operation of the Auburn Line. Therefore, the discussion of these issues in the Recommended Decision is modified, consistent with our determination herein.

## **C. Burden of Proof**

### 1. ALJ’s Recommendation

The ALJ agreed with PNG that the OSBA failed to present any probative evidence to demonstrate that the market value of the Auburn Line exceeds its depreciated original cost, and that if the OSBA believed that the Auburn Line had value in excess of the depreciated original cost, it had the burden to introduce such evidence. Additionally, the ALJ found that the OSBA failed to meet its burden of proof and that the OSBA’s approach went “far beyond the limited facts and applicable law in this proceeding.”

R.D. at 16.

### 2. Exceptions

In its second Exception, the OSBA claims that the ALJ erred when he concluded that the OSBA has the burden of proving that the transfer of the Auburn Line to UGIES should not be at the depreciated original cost but, instead, should be at its fair market value. Exc. at 12. The OSBA believes that PNG has the burden of proof because PNG is the moving party seeking approval of the transfer of the Auburn Line to UGIES at the depreciated original cost. Exc. at 12-13. The OSBA asserts that PNG did not carry its burden of proof, pursuant to Section 2102(b) of the Code, because PNG did not present evidence (1) that the transaction is only feasible if the depreciated original cost is used as the sale price; 2) that UGIES is the only entity interested in or capable of effectuating the transaction; and 3) that flow reversal of the Auburn Line is the only economic alternative for transporting gas from Citrus Energy’s wells to the Tennessee Pipeline. Exc. at 15, 16. The OSBA further avers that even if it did have the burden of proof regarding the fair market value of the line, it introduced at least enough evidence on that issue to shift the burden of production to PNG. Exc. at 17.

In reply, PNG states that the ALJ correctly applied the burden of proof standard by placing it on the OSBA with respect to its market value proposal. R.Exc. at 15. Specifically, PNG states that, as the Applicant, it bears the burden to prove that the proposed transaction is in the public interest, however, because the OSBA is proposing an issue that was not included in PNG’s proposal, it bears the burden of proof with regard to that issue. In support of its position, PNG cites to the Commission’s decision in *Pa. PUC v. Metropolitan Edison Co*., Docket Nos. R-00061366, *et al*. (Order entered January 11, 2007) and *Joint Default Service Plan for Citizens’ Electric Co. of Lewisburg and Wellsboro Electric Co*., Docket Nos. P-2009-2110798, *et al*. (Order entered February 25, 2010) (the companies had the burden of proof as to the proposed plan, but other parties that had submitted their own proposals bore the burden of proof with respect to their proposals). R.Exc. at 15. PNG further states that the OSBA has failed to support its argument that the three items it posits above are required by law to achieve Commission approval of the instant transaction. R.Exc. at 16.

### 3. Disposition

In reviewing this issue, we view the OSBA’s argument regarding the fair market value of the line differently from the viewpoint expressed by the ALJ and PNG. We do not see this as an instance in which the OSBA is submitting its own proposal and must, therefore, bear the burden of proof with respect to that proposal. Rather, we view the OSBA as arguing that the proposed transaction, including the affiliated interest filing, does not comply with Section 2102(b) of the Code because it is not in the public interest. The OSBA’s market value argument is its attempt to produce some credible evidence in response to the evidence PNG has presented.

By further explanation, PNG has the burden to prove that the proposed transfer will be in the public interest and that the requirements in Sections 1102, 1103, and 2102 of the Code have been satisfied. In meeting this burden, PNG must initially produce sufficient credible evidence to establish a prima facie case. *Morrissey v. Dep’t of Highways*, 424 Pa. 87, 225 A.2d 895 (1967). If PNG does so, the burden of going forward with evidence shifts to respondent to produce credible evidence of at least co-equal weight. This burden of going forward with evidence may shift back and forth between the parties, but the ultimate burden of persuasion remains with PNG. *Milkie v. Pa. Public Utility Comm’n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

In evaluating the evidence, we find that PNG has met its burden of proof with respect to the proposed transaction, and the transaction will result in many public benefits, including continued safe and reliable distribution service to customers at reduced distribution rates. On the other hand, the OSBA did not produce credible evidence of co-equal weight to that of PNG through any of its arguments, particularly given that PNG is not required to establish the fair market value of the line under Sections 1102, 1103, and 2102 of the Code in order for us to approve this transaction. For these reasons, we will grant the OSBA’s Exception, in part, and modify the ALJ’s Recommended Decision only to the extent of finding that the burden of proof to show that the proposed transaction complied with Sections 1102, 1103, and 2102 of the Code remained with PNG. We reject the OSBA’s position that PNG did not carry this burden.

## **D. Unjust Enrichment of UGIES**

### 1. Positions of the Parties

The OSBA’s position is that the difference between the fair market value and the depreciated original cost of the Auburn Line belongs to PNG and PNG’s ratepayers or some combination thereof and that it does not belong to UGIES. OSBA M.B. at 11. In support of its position, the OSBA states that since PNG’s ratepayers financed the Auburn Line, providing both a return of and return on the capital invested and since PNG failed to provide evidence that the book value and fair market value of the line are approximately the same, the sale is not permitted under Section 1103(a) of the Code. OSBA M.B. at 6-9. The OSBA also avers that the benefits to the public from the sale of the Auburn Line are minimal in comparison to the potential windfall profit to UGIES. OSBA R.B. at 9*.*

PNG explains that its objective is not to make a profit by selling the Auburn Line and that UGIES is not shopping to buy a distribution line. PNG M.B. at 3, 4. PNG states that the transaction allows PNG to keep the current economic value of the line by retaining ownership of the distribution taps serving Procter & Gamble and the farm tap customers. Additionally, PNG’s largest distribution service customer, Procter & Gamble, plans to fully replace its gas supply with Marcellus Shale natural gas, which it will deliver via the Auburn Line. PNG M.B. at 13. Further, according to PNG, 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 M.B. at 6.

PNG further avers that the OSBA’s position, which it deems to be speculation, about market value is moot. PNG asserts that this proceeding is limited to PNG’s asset transfer proposal to an affiliate, at depreciated original cost, 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. Most importantly, PNGs ratepayers are not being asked to contribute to this investment or to undertake any of the concomitant risks. PNG M.B. at 5.

### 2. The ALJ’s Recommendation

The ALJ stated that the OSBA’s position is an attempt to re-cast the nature of the proposed transaction in an effort to create the appearance of a gain upon the sale of the Auburn Line. R.D. at 14. By focusing on what the OSBA termed an “unjust enrichment,” the ALJ rejected the OSBA’s position because it drastically minimized the potential benefits related to sale of the Auburn Line that are set forth in the Settlement and in the Parties’ Supporting Statements. R.D. at 18.

The ALJ also found that the OSBA failed to present any probative evidence that the market value of the Auburn Line exceeds its depreciated original cost. The ALJ characterized the OSBA’s presentation of evidence at hearing as speculative and concluded that the OSBA did not meet its burden of proof regarding its “unjust enrichment” issue. R.D. at 16.

Furthermore, the ALJ fully supported the “reversion requirement” at Paragraph 16(f) of the Settlement, and agreed with PNG that it would be unlikely that an unaffiliated third party would be willing to enter into an asset sale agreement based upon the net book value at the time of purchase and the subsequent net book value at the time of reacquisition by the original seller, at an amount not to exceed the original transfer value. The ALJ further found that the likely unwillingness of an unaffiliated third party to participate in such a transaction disposed of the OSBA’s assertion that PNG should have put the sale of the Auburn Line out for bid. R.D. at 17.[[7]](#footnote-7)

### 3. Exceptions

In its first Exception, the OSBA asserts that the ALJ erred in concluding that the potential unjust enrichment of UGIES is not relevant to adjudication of the Application. Exc. at 6, 7. The OSBA avers that the Auburn Line must be transferred at the fair market value since the ratepayers financed the Auburn Line and that any gain realized by PNG should be allocated to all ratepayers. The OSBA contends that the total investment cost of the project to UGIES, which would include the purchase price of the Auburn Line plus the costs needed to reverse the flow and expand the capacity, would be less than it would be for UGIES to pay the fair market value for the line. Exc. at 7. The OSBA asserts that the Commission must reject the sale at the depreciated original cost because PNG has taken no action to determine the fair market value of the Auburn Line. Exc. at 10. As such, the OBSA believes that the proposed transaction is not reasonable and consistent with the public interest as required by Section 2102(b) of the Code. Exc. at 9. Further, since UGIES is not subject to the Commission's ratemaking jurisdiction, the OSBA asserts that there is no obvious future proceeding in which it will be able to challenge, or seek disgorgement of, any unjust enrichment which does occur. Therefore, by declaring the potential unjust enrichment of UGIES to be irrelevant to the instant proceeding, the ALJ has guaranteed that UGIES will be never be forced to share any windfall with ratepayers. Exc. at 10.

In reply to the OSBA’s first Exception, PNG avers that the OSBA’s Exception is based on its unsupported view that the public interest standard in Section 2102(b) requires any sale of a utility asset to an affiliated interest to be at fair market value. PNG asserts that there is no statutory requirement or case law support for this “novel and unduly narrow interpretation of Section 2102(b).” PNG further asserts that the language of Section 2102(b) does not suggest the Commission must focus solely on the market value of the assets transferred to affiliates to the exclusion of any and all other potential benefits in finding that a transaction is in the public interest. R.Exc. at 7. PNG notes that pursuant to relevant precedent, the market value of the transferred Auburn Line is not necessary to determine whether the proposed transaction is consistent with the public interest. *Id.* (citing *Middletown Twp. v. Pa.* PUC, 482 A.2d 674, 682 (Pa. Cmwlth. 1984)).

PNG states that the Commission’s jurisdiction in this matter is limited to reviewing the proposal to determine if it provides some substantial public benefit. PNG opines that there is no legal requirement that PNG sell the Auburn Line to an independent third party or that the Line is sold at any particular price. PNG believes that it has shown the proposed transaction is reasonable and consistent with the public interest. R.Exc. at 11. Further, PNG states, and the OSBA concedes, that only one customer, Procter & Gamble, would receive any off-setting revenue from a market value transaction because the entire cost of the Auburn Line has been allocated to and recovered from Procter & Gamble. PNG notes that Procter & Gamble fully supports the transaction at net book value. R.Exc. at 12.

Moreover, PNG states that the OSBA has disregarded important aspects of the proposed Settlement that would not likely be attractive to an independent, third party. These aspects include the limited capacity of the line, the larger amount of investment necessary for compression due to the operating pressure limitations of the pipeline, and the significant obligations and conditions set forth in the PNG-UGIES Agreement. Significantly, under the Settlement, PNG is keeping the economic value of the line through its retention of ownership of the distribution taps serving the fourteen customers currently served by the Auburn Line. R.Exc. at 14.

### 4. Disposition

The OSBA's argument that the Commission must reject the proposed transaction at depreciated original cost because PNG has taken no action to determine the fair market value of the Auburn Line is without merit. The express language in Sections 1102, 1103, and 2102 of the Code does not require that the Auburn Line must be transferred at the fair market value. Moreover, the Commission has previously approved the sale of utility assets to affiliates at depreciated original cost. In *Pa. PUC* *v. T.W. Phillips Gas & Oil Co*., Docket No. R-00051178, at 16 (Order adopting the R.D. entered August 22, 2006), the Commission approved the application of T.W. Phillips Gas & Oil Co. (TWP) for approval of (1) the transfer of TWP’s production plant assets and related liabilities to its subsidiary and (2) an affiliated interest contract for the purchase of gas by TWP from its subsidiary. The transaction involved the removal from TWP’s books of account of the original cost of the transferred assets and the amount of depreciation reserve applicable to the original cost as of the transfer date. We find that the proposed transaction in this proceeding is factually similar to the transaction in *Pa. PUC v. T.W. Phillips Gas & Oil Co*. and should, therefore, be approved consistent with the public interest.

Additionally, we agree with PNG that a utility seeking Commission approval under Section 1102 of the Code is not required to consider all available alternatives and, as such, is not required to consider the OSBA’s proposal that the Auburn Line be transferred at some unstated market price. The utility has the discretion to consider the risks and benefits of available alternative business transactions and then to decide which transaction to ultimately present to the Commission for consideration and approval. It is well-established that the Commission’s authority to interfere with the internal management of a utility is limited and “[t]he Commission is not empowered to act as a super board of directors for the public utility companies of this state.” *See Metropolitan Edison Co. v. Pa. PUC*, 437 A.2d 76, 80 (Pa. Cmwlth. 1981). We further note that in this proceeding, the record supports a market value of the Auburn Line as being negligible because it is not currently configured to deliver natural gas into the Tennessee system without the estimated $15 million investment contemplated by UGIES.

Based on the record, PNG has shown that the use of the Auburn Line’s net original cost is a reasonable valuation of the asset and that this valuation method is in the public interest, consistent with Section 2102(b) of the Code. Moreover, we agree with the ALJ’s conclusion that the OSBA presented speculative evidence on this issue. We also find it significant that Procter & Gamble, the only customer that has invested in the Auburn Line, has agreed to the proposed transaction. As such, the OSBA’s first Exception is denied.

## **E. Whether the Proposed Transaction Will Facilitate the Development of and Access to Marcellus Shale Natural Gas**

### 1. ALJ’s Recommendation

In his Initial Decision, ALJ Buckley stated, “[t]he 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.” R.D. at 18. The ALJ also stated that, in addition to other benefits, the proposed transaction will promote the development of Marcellus Shale natural gas resources, along with related benefits to the local economy. R.D. at 22.

### 2. Exceptions

The OSBA first avers that there is no evidentiary support for concluding that the future of Citrus Energy’s Marcellus Shale production on and around Procter & Gamble’s property requires the approval of the proposed transaction, particularly because PNG has conceded that the construction of a new line is a viable option. Exc. at 21. Additionally, the OSBA states that there is no evidence that UGIES intends to base its charges to Citrus Energy on anything other than an assessment of what the market will bear, and, as such, there is no basis for concluding that approval of the transaction between PNG and UGIES is necessary to make the development of Citrus Energy wells economic. Exc. at 22.

Additionally, the OSBA maintains that there is no credible basis for concluding that approval of the proposed transaction is necessary to forestall the bypass of PNG’s distribution system because the twenty-year agreement between PNG and Procter and Gamble is not contingent upon the conversion of the Auburn Line to a gathering line. Exc. at 23. Finally, the OSBA asserts that there is no basis to support a conclusion that the transfer to UGIES is the only viable option for using the Auburn Line to benefit the development of Citrus Energy’s Marcellus Shale gas wells because PNG did not solicit bids or make any informal inquiries regarding the terms, if any, under which an independent third party would have been willing to take on the project.

Exc. at 24.

In response to the OSBA’s Exception, PNG asserts that the proposed transaction will help facilitate the development of the Marcellus Shale gas market in the area, produce many benefits to the local economy and environment, and otherwise help constrain the wholesale market price for gas for the ultimate benefit of consumers. PNG states that under current configurations no gas can be delivered into the Tennessee line from the Auburn Line. The proposed transaction will provide a cost effective way to transport Marcellus Shale gas to the market, resulting in positive benefits to gas customers. R.Exc. at 20. PNG avers that although there may be other alternatives to the development of Citrus Energy’s Marcellus Shale natural gas wells that could be more costly than converting and using the existing line, the OSBA disregards the fact that there is an overall transaction which is acceptable to PNG, UGIES, Procter & Gamble, and Citrus and is beneficial to PNG’s customers. PNG asserts that unlike the siting of high voltage transmission lines during which the utility is required by Commission Regulations to consider and present all reasonably available alternatives, a utility seeking Commission approval under Sections 1102 and 2102 is not required to consider all available alternatives. In complex and multiple party transactions, such as this one, the risks and benefits of alternative structures of business transactions are for the parties of the transaction to consider and to ultimately determine which transaction to present to the Commission for approval. R.Exc. at 21.

Additionally, PNG states that if the proposed transaction is not approved, Citrus Energy and Procter & Gamble could bypass PNG to transport Marcellus Shale gas to market. The existing long-term distribution agreement between PNG and Procter & Gamble is not contingent upon the conversion of the Auburn Line to a gathering line and does not prevent the real threat that Citrus Energy and Procter & Gamble will seek alternative ways to transport Marcellus Shale gas to the market if this transaction is not approved. Citrus Energy and Procter & Gamble have already analyzed and expressed their full support for the proposed transaction. If the Auburn Line is bypassed, the substantial public benefits from the transaction will also be lost, including the benefit of avoiding the environmental impact of building a second pipeline to bypass the Auburn Line. R.Exc. at 22.

Furthermore, in response to the OSBA’s argument that an independent, third party might be willing to pay more for the Auburn Line than the depreciated original cost¸ PNG avers that the proposed transaction is more than a straight asset sale as it allows PNG to retain the current economic value of the line by maintaining ownership of the distribution taps serving Procter & Gamble and the farm tap customers. Due to the unique and continuing interaction between PNG and the proposed operation of the Auburn Line as a gathering line, PNG determined it was more comfortable dealing with an affiliate and considered and rejected transferring the Auburn Line to an unaffiliated entity for valid reasons. R.Exc. at 23.

### 3. Disposition

We agree with the ALJ that in addition to other benefits, the proposed transaction will promote the development of Marcellus Shale natural gas resources, along with related benefits to the local economy. Both common sense and the record in this proceeding support this conclusion. PNG has enumerated some of the specific local benefits associated with the transaction, including the following:

(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 M.B. at 21-22; PNG St. 1 at 17.

Moreover, we concur with PNG’s position that although there may be other alternatives to the development of Citrus Energy’s Marcellus Shale natural gas wells, PNG has presented us with an overall transaction which is acceptable to PNG, UGIES, Procter & Gamble, and Citrus Energy and is also beneficial to PNG’s customers. We see the promotion of Marcellus Shale development and enhanced access to Marcellus Shale natural gas as one significant public benefit of the proposed transaction, among the other significant benefits addressed by the Parties in this proceeding. The OSBA has not provided us with any compelling reasons to find otherwise. As such, we will deny the OSBA’s third Exception.

## 

## **F. Precedential Effect**

### 1. ALJ’s Recommendation

The ALJ notes that the Settlement expressly limits the precedential effect of this case as follows:

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

R.D. at 18 (citing Settlement at 6, ¶ 22).

### 2. Exceptions

In its fourth Exception, the OSBA avers that the ALJ erred in concluding that approval of the transfer of the Auburn Line to UGIES at the depreciated original cost would not set a precedent for other transfers to affiliated interests. Exc. at 24. The OSBA states that the ALJ’s reliance on the provision of the Settlement which limits the precedential effect of this case is misplaced because that Settlement provision is only binding on the parties to the Settlement and will not prevent other natural gas distribution companies from citing Commission approval of this transaction as authority for Commission approval of some other transfer of a rate-payer funded asset to an affiliated interest without having to prove that the transfer is at fair market value.

In response to the OSBA’s Exception, PNG avers that OSBA’s concerns are misplaced. PNG states that the OSBA’s concerns are based on its erroneous interpretation of Section 2102(b) of the Code because the OSBA focuses solely on the value of the asset to the exclusion of the many other potential benefits of a transaction. R.Exc. at 23. Moreover, in the event that another utility wishes to transfer assets to an affiliated interest, the utility will still have the burden to show that the transaction is in the public interest. Such a showing is not dependent on a single factor, but is a balancing of all factors. R.Exc. at 24 (citing *Popowsky v. Pa. PUC*, 594 Pa. 583, 612, 937 A.2d 1040, 1057-58 ( 2007).

PNG further relies on the provision in the Settlement which states that the Settlement is not precedential for its assertion that any precedential value of the transaction, if approved, will be limited. PNG also states that it is well-established that the Commission is not bound by strict principles of stare decisis. R.Exc. at 24 (citing *Pa. PUC v. UGI Utilities, Inc. (Electric Division)*, Docket No.R-00932862, 1994 Pa. PUC LEXIS 136 (September 23, 1994)). Finally, the OSBA’s concern is immaterial since the Commission has previously approved the sale of utility assets to affiliates at depreciated original costs. R. Exc. at 24.

### 3. Disposition

TheOSBA’s concern that other natural gas distribution companies will cite to Commission approval of this transaction as authority for Commission approval of some other transfer of a rate-payer funded asset to an affiliated interest without having to prove that the transfer is at fair market value is misplaced. In any future transaction in which autility proposes to transfer its assets to an affiliate, we will evaluate the specific facts of that proceeding as well as the terms of the affiliated interest agreement to determine if the affiliated interest agreement is “reasonable and consistent with the public interest” as we are required to do under Section 2102(b) of the Code. We do not see any reason in this proceeding to set forth a precedent that would require a utility to prove that a transfer is at fair market value when such a requirement is not contained in the Code.

## **G. Approval of the Settlement**

Having addressed the merits of the Exceptions, we will now address the Settlement. We note that Commission policy promotes settlements. 52 Pa. Code

§ 5.231. Settlements lessen the time and expense the parties must expend in litigating a contested proceeding and, at the same time, conserve administrative hearing resources. As such, 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. 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. PUC v. C S Water and Sewer Assoc.*, 74 Pa. P.U.C. 767 (1991); *Pa. PUC v. Philadelphia Electric Co.*, 60 Pa. P.U.C. 1 (1985). We have previously summarized the major terms and conditions of the Settlement.

### 1. Statements in Support

PNG, the OCA and the OTS have submitted individual Statements in Support of the Settlement. In its Statement in Support of the Settlement, PNG states that if approved, the Settlement will resolve all of the issues raised by the Stipulating Parties in this proceeding. PNG also points to the extensive discovery, settlement discussions and negotiations that led to the 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 2-6.

The OCA states that each of its issues are resolved by the Settlement, and, in its opinion, the Settlement is in the public interest. The OCA cites the reduction in rates, the reversion provision, the future review of the gas purchase agreement, and the provision for continuation of the Commission’s gas safety inspections. OCA Statement in Support at 4-6.

In its Statement in Support, the OTS identifies several areas that it believes support the ultimate approval of the Settlement. For example, the OTS comments on the immediate rate reduction, the elimination of the interconnection fee without diminution of all necessary access rights to the Auburn Line, the fact that any reversion costs incurred by PNG may not be recovered from its ratepayers, and the enhancement of Marcellus Shale gas fields. OTS Statement in Support at 6-7, ¶¶ 12 (a)-(g).

### 2. ALJ’s Recommendation

In reviewing the terms of the Settlement, the ALJ agreed with the Stipulating Parties that the 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. Accordingly, the ALJ determined that the Settlement should be approved without modification.

R.D. at 23.

### 3. Disposition

In reviewing the Settlement, we agree with the ALJ that the Settlement is in the public interest, and we shall approve the Settlement, with certain conditions which will be explained in further detail below. The public interest aspects of the instant settlement include the following: 1) the assurance of continued safe and reliable distribution service at reduced distribution rates; 2) the protection of customers from any investment risks associated with converting the Auburn Line to a gathering line; 3) the promotion of the development of Marcellus Shale gas; 4) the stipulation that current and any future customers along the Auburn Line will receive gas on a firm, first priority basis from PNG; 5) the fact that the addition of another delivery point to receive Marcellus Shale gas will elevate PNG’s gas supply reliability; 6) PNG’s right to re-acquire the Auburn Line, or portions thereof, at net depreciated original cost that does not exceed the instant transfer price in order to ensure continued distribution service to PNG’s customers; 7) the obligation that UGIES operate and maintain the Auburn Line to ensure the safety, integrity, and continuous operation of the Line; and 8) the transaction will contribute to PNG’s recovery of fixed costs of service and will avoid or defer the need for, and the amount of, future base rate increase requests. PNG Statement in Support at 4-6. Moreover, in addition to facilitating the development of Marcellus Shale gas, the proposed transaction will produce benefits to the local economy and environment and will otherwise help constrain the rise of wholesale market natural gas prices. The proposed transaction will also provide a means to have additional volumes of Marcellus Shale gas transported to the wholesale market. *Id.* at 8.

Based upon our review of the Settlement, we find that, for the reasons enumerated above, the Settlement is in the public interest. Accordingly, we shall adopt the ALJ’s recommendation and approve the Settlement, as modified by this Opinion and Order, finding that its terms foster, promote, and serve the public interest and represent a fair, just, and reasonable resolution of the issues in this proceeding.

## **H. Approval of the Application**

As noted, we have determined that we shall approve this Application, consistent with certain conditions, which we believe must be clarified because they have not been described in testimony. We are of the opinion that these conditions will ensure that the benefits of this Application will accrue to rate payers and current and future customers of the Auburn Line. Some minor changes to the Application are also necessary to ensure that the intent of the Application is carried out. Accordingly, five enumerated conditions, discussed below, must be satisfied as a condition of our approval of this transaction and the issuance of a Certificate of Public Convenience.

The first condition is that PNG distribution customers on the Auburn Line will continue to receive all consumer protections to which they are entitled, including, but not limited to, those under Chapter-14 of the Responsible Utility Customer Protection Act, 66 Pa.C.S. §§ 1401-1418, and our Regulations at 52 Pa. Code, Chapter 56, §§ 56.1‑56.231, as applicable for residential customers.

The second condition is that customers and their associated Natural Gas Suppliers (NGSs) participating in retail choice shall not be charged additional transportation fees under the backhaul (displacement of supply) arrangement. In rebuttal testimony, PNG’s witness explained that the farm tap customers served by the Auburn Line will be physically served by locally produced natural gas, except under emergency conditions. These customers may elect to shop for an alternative NGS to replace PNG’s commodity service in an emergency situation. If the customers make this election, the NGSs’ volumes delivered on behalf of the customers shall be treated as “displacement gas.” PNG Rebuttal Testimony at 17.

During the proceeding PNG stated:

[t]his transaction will have no effect on any customer’s ability to shop for competitively priced natural gas supply. PNG will continue to operate its distribution system in a non-discriminatory fashion to receive gas supplies from licensed natural gas suppliers in accordance with the terms and conditions of its Choice Supplier tariff and the Commission’s regulations.”

PNG St. 1 at 16. We concur with this statement. However, we are concerned that when NGS arrangements are handled by the displacement of supply method, additional charges imposed by either PNG or UGIES to transport the displacement gas may be passed onto ratepayers or their NGSs. We believe that clarification of this issue is necessary to ensure the public interest aspect of this transaction.

The third condition concerns those assets located on the Auburn Line that will be either retained by PNG or transferred to UGIES. PNG has provided a description of the Auburn Line assets to be transferred to UGIES in Exhibit D of its Application. Exhibit D indicates that that the assets include a twelve inch cathodically protected steel pipeline, approximately 9.18 miles in length, and an interconnection with locally produced gas, related appurtenances, and instrumentation and devices. We believe that the assets to be transferred should be identified more clearly. More specifically, we shall require PNG to submit a revised Exhibit D that details, by reference to relevant balance sheet accounts, the assets transferred to UGIES, including right of way, all interconnection assets, related appurtenances, instrumentation and devices. Additionally, we shall require PNG to submit detailed information regarding the assets that will be retained by PNG that are located on the Auburn Line, as reflected in PNG’s testimony and in the PNG-UGIES Agreement. The detailed information provided with respect to the assets to be transferred and those assets to be retained by PNG should include the in-service date, original cost, and the accumulated depreciation for each asset. In order to implement this condition, PNG shall submit, within thirty days of the entry date of this Opinion and Order, a revised Exhibit D (“Listing of Assets to be Transferred”) to the Settlement Agreement that more accurately reflects the Auburn Line assets to be transferred to UGIES, as well as the assets to be retained by PNG.

As a fourth condition, we shall require that PNG remove $154,000 from base rates, as provided for in the Settlement, to the benefit of all PNG customers. PNG has stated that it will avoid approximately $154,000 of owning and operating costs relative to the Auburn Line. PNG St. 1 at 13; Settlement at 4, ¶ 16(e). While the Stipulating Parties have agreed to remove this amount from base rates, they have not clarified how this will be accomplished and how customers will be impacted. We believe that all distribution ratepayers should benefit from this reduction to base rates. Accordingly, we shall modify Paragraph 16(e) of the Settlement to provide for an across the board reduction in base rates to be reflected in PNG’s distribution rates.

The fifth and final condition concerns Article V(E) of the PNG-UGIES Agreement. Article V(E) of the PNG-UGIES Agreement states, “Emergency Natural Gas Transactions resulting from any single Emergency Event shall not continue for more than sixty consecutive days, except that such transaction may continue for an additional sixty consecutive days if Interconnecting Party seeks and receives appropriate regulatory approvals for such continuation.” PNG-UGIES Agreement at 13, Article V(E). We believe that the potential of an Emergency Transaction to extend to 120 days is unreasonable and is not in the public interest. We are of the opinion that Article V(E) of the PNG-UGIES Agreement should be modified to establish a ceiling of sixty consecutive days or sixty days within a twelve-month period, whichever condition applies first. Accordingly, we shall require PNG to file, within thirty days of entry of this Opinion and Order, a revised PNG-UGIES Agreement, which caps the duration of Emergency Transactions at either sixty consecutive days or sixty days within a twelve-month period.

As stated previously, the Stipulating Parties have agreed to these five conditions, stating that a comment period is no longer necessary. As such, the Stipulating Parties have requested that our Order reflect that they do not object to the conditions contained herein, and adopted at our July 14, 2011 Public Meeting. Because the Stipulating Parties have already agreed to the conditions, we conclude that a comment period is no longer necessary. Accordingly, this Opinion and Order is issued in final form.

# **IV. Conclusion**

We have reviewed the record as developed in this proceeding, as well as the Settlement, the Affiliated Interest Agreement, the ALJ’s Recommended Decision, and the Exceptions and Replies to Exceptions filed thereto. Based upon our review, evaluation and analysis of the record evidence, we shall modify the ALJ’s Recommended Decision, consistent with this Opinion and Order. Additionally, we shall grant PNG’s Application and approve the related Affiliated Interest Agreement and the Settlement, subject to the modifications set forth herein. Further, we shall grant the OSBA’s second Exception, in part, and deny its remaining Exceptions, consistent with the discussion in this Opinion and Order; **THEREFORE**,

**IT IS ORDERED:**

1. That the Office of Small Business Advocate’s Exceptions are granted, only to the limited extent that UGI Penn Natural Gas, Inc. had the burden of proof to show that the proposed transaction complied with Sections 1102, 1103, and 2102 of the Code, consistent with the discussion in this Opinion and Order; and denied in all other respects.

2. That the Recommended Decision of Administrative Law Judge Dennis J. Buckley, issued by the Commission on May 12, 2011, is modified consistent with this Opinion and Order.

3. That the Joint Stipulation in Settlement at Docket Nos. A-2010-2213893 and G-2010-2213894, submitted by UGI Penn Natural Gas, Inc., the Office of Trial Staff, and the Office of Consumer Advocate, is approved and adopted as modified by this Opinion and Order.

4. 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, subject to the modifications in this Opinion and Order, and consistent with the Joint Stipulation in Settlement filed on March 23, 2011.

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

6. That UGI Penn Natural Gas, Inc. shall file a revised Affiliated Interest Filing, at Docket No. G-2010-2213894, consistent with this Opinion and Order, within thirty (30) days of the entry date of this Opinion and Order.

7. That UGI Penn Natural Gas, Inc. shall file a revised Exhibit D, “Listing of Assets to be Transferred,” of its Application, consistent with this Opinion and Order, within thirty (30) days of the entry date of this Opinion and Order.

8. That Commission approval and adoption of the Joint Stipulation in Settlement at Docket Nos. A-2010-2213893 and G-2010-2213894, the Application of UGI Penn Natural Gas Inc. at Docket No. A-2010-2213893, and the Affiliated Interest Filing of UGI Penn Natural Gas, Inc. at Docket No. G-2010-2213894 is contingent upon satisfaction of the five modifications set forth in this Opinion and Order.

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

10. That the Protest of the Office of Small Business Advocate at Docket Nos. A-2010-2213893 and G-2010-2213894 is dismissed.

11. 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 base 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.

12. That upon compliance with the conditions set forth herein, 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., this proceeding at Docket Nos. A-2010-2213893 and G-2010-2213894 shall be marked closed.

**BY THE COMMISSION**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: July 14, 2011

ORDER ENTERED: July 25, 2011

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. [↑](#footnote-ref-2)
3. “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-3)
4. The ALJ 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. [↑](#footnote-ref-4)
5. In that case, we determined that Laser had satisfied the threshold issue of whether its proposed service met the definition of “public utility” service, and we remanded the case to the Office of Administrative Law Judge to determine whether the granting of a Certificate of Public Convenience is “necessary or proper for the service, accommodation, convenience, or safety of the public” under Section 1103(a) of the Code, 66 Pa. C.S. § 1103(a), and for further development of the record in order to address certain questions. *Id*. at 48. [↑](#footnote-ref-5)
6. Pursuant to Paragraph (1)(v) of Section 102 of the Code,

   66 Pa.C.S. § 102(1)(v), a company qualifies as a public utility if it is “[t]ransporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, materials for refrigeration, or oxygen or nitrogen, or other fluid substance, by pipeline or conduit, for the public for compensation.” [↑](#footnote-ref-6)
7. The ALJ agreed with PNG that the Commission does not have the authority to compel PNG to sell any asset to any particular entity at any particular price. *See* *Metropolitan Edison Co. v. Pa. PUC*, 437 A.2d 76 (Pa. Cmwlth. 1981). [↑](#footnote-ref-7)