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January 13, 2012

VIA HAND-DELIVERY

Rosemary Chiavetta, Esq., Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, Pennsylvania 17120

**RE: Natural Gas Pipeline Replacement and Performance Plans
(Docket No. M-2011-2271982)**

Dear Secretary Chiavetta:

Enclosed for filing please find the Energy Association of Pennsylvania's Comments to the Tentative Order in the above-referenced proceeding.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Terrance J. Fitzpatrick".

Terrance J. Fitzpatrick
President & CEO

CC: Robert F. Powelson, Chairman
John F. Coleman, Vice Chairman
Pamela A. Witmer, Commissioner
Wayne E. Gardner, Commissioner
James H. Cawley, Commissioner
Paul Metro, Chief, Gas Safety Division (pmetro@pa.gov)
Robert Young, Deputy Chief Counsel (ryoung@pa.gov)

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behalf of the following natural gas distribution company (NGDC) members that would be subject to these provisions.¹

The Tentative Order proposes (at pages 5 – 7) to establish a new regulatory program under which NGDCs would be required to obtain Commission approval of PRP plans. The plans would address pipe replacement timeframes and the means by which NGDCs would recover the costs of replacement. The Tentative Order states that the Commission does not favor a “one size fits all” approach, and will consider “each utility’s total amount of risky pipe, customer rate stability, utility financial health, and the amount of time that the utility estimates to replace the failing infrastructure.”

The Tentative Order proposes to establish performance metrics for pipeline replacement. Under the metrics, NGDCs would be required to replace pipes “. . . at the average rate of pipeline replacement during the ten years prior to the filing of the establishment of the Metric; or the rate that will result in the replacement of all high risk pipe within twenty years unless the company demonstrates that a lower rate of replacement is in the public interest.” In addition, the Tentative Order states that NGDCs “will be required to replace bare or coated steel and cast iron pipe based upon their DIMP plan for risk assessment and the rate of replacement must be equal to or exceed their Metric.” The Tentative Order goes on to state that NGDCs shall propose performance metrics addressing damage prevention, corrosion control and distribution system leaks, emergency response times, and critical valve determination; and that the Commission will consider other performance metrics suggested by NGDCs or other stakeholders in their comments. Finally, the Tentative Order proposes a staggered schedule for filing PRP plans in March, May, and July 2012; with final orders in November 2012 and January and March 2013.

¹ Philadelphia Gas Works; Columbia Gas of PA; Peoples TWP; Peoples Natural Gas Company; Equitable Gas Company, LLC; UGI Utilities, Inc.; UGI Penn Natural Gas, Inc.; UGI Central Penn Gas, Inc.; PECO Energy Company; and National Fuel Gas Distribution Corp. For purposes of these comments “NGDC” is intended to include PGW unless otherwise stated, even though PGW is a “city natural gas distribution operation”.

II. General Comments and Summary of Position

EAP supports the Commission's emphasis on the importance of gas safety issues, and welcomes the opportunity to comment on the ideas to advance safety proposed in the Tentative Order. NGDCs have been working closely and cooperatively with the Commission to promote the safety and reliability of natural gas service. These joint efforts include:

- Vigorous and active support for passage of House Bill 1294, which would authorize the Commission to approve alternative ratemaking mechanisms to allow more timely recovery of costs utilities incur to improve distribution and collection system infrastructure.
- Meeting with Commissioners and staff to provide detailed information and share views regarding each NGDC's distribution infrastructure and its historical and planned rates of pipe replacement.
- Facilitating and attending meetings with the Commission's gas safety staff to exchange information and perspectives. These meetings take place at both EAP's annual gas transmission and distribution conference and at the Commission's annual gas safety conference.

EAP and its members are committed to continuing to work with the Commission and its staff responsible for gas safety.

The fundamental questions raised by the Tentative Order are how best to mitigate risks within an NGDC's system, who is primarily responsible and best suited for making those decisions and, to the extent pipeline replacement is the most appropriate mitigation step, how to balance the decision to replace certain pipeline with the overall operational and financial management of the NGDC. As drafted, the Tentative Order addresses those complicated decisions by first requiring a determination of what parts of the gas distribution infrastructure are "high risk," (without defining that term), which in turn controls how quickly NGDCs should replace such infrastructure. As the Commission acknowledges, there are a host of factors that must be considered and balanced in making these determinations. As the Commission also recognizes, each NGDC faces different circumstances regarding the age of its system, the *types of pipes in use, the nature of the service area (rural, urban, or suburban), the financial condition of the utility, the ability of the utility's customers to pay higher rates to pay for*

accelerating the rate of infrastructure replacement, and other factors. As a result, a “one size fits all” approach to addressing these issues is not feasible. (Tentative Order, p. 6)

It is also important to note that the Commission does not find fault with the past and present pipe replacement practices followed by NGDCs in Pennsylvania. The Tentative Order states expressly that, “Pennsylvania’s natural gas utilities have been providing safe and reliable service for many years.” During this time, Pennsylvania’s NGDCs have been exercising their managerial discretion over capital investments in a manner that satisfies their statutory obligation to provide safe and reliable service and that considers other relevant factors, such as the environment for raising capital, competing investment needs, and the interests of customers and (for investor-owned utilities) shareholders.

Nonetheless, the Tentative Order suggests that the Commission is considering asserting regulatory control over capital investment decisions, and perhaps even mandating increased levels of investment. Enhancing investment in utility infrastructure is a worthy goal, but how that goal should be pursued is the critical question raised by the Tentative Order. A new regulatory requirement for filing and approval of PRP plans is unnecessary to ensure safe and reliable service, and could infringe upon the discretion of NGDCs’ management to make decisions regarding capital investments.² This concern is heightened by the fact that, as of the date of these comments, the General Assembly has not approved alternative ratemaking legislation such as House Bill 1294 that would allow utilities to recover investments in infrastructure on a timely basis. As a result, the assertion of regulatory control over capital investment decisions poses the risk of financial harm to NGDCs and has the potential of adversely impacting service, as NGDCs are forced to reallocate resources.³

² Public utilities have a right to self-management provided their actions are consistent with the Public Utility Code. See, Metropolitan Edison Co. v. Pa. PUC, 437 A.2d 76 (Pa. Cmwlth. 1981).

³ While the Tentative Order suggests that NGDCs include a proposal for addressing the cost of the pipeline replacement program in rates, absent passage of House Bill 1294, the only option will be to file base rate cases.

Imposing a major new regulatory program for pre-approval of pipe replacement plans is not the best way to achieve the results sought by the Commission. Instead the focus should be on implementing NGDC DIMPs in a manner which serves to further refine and develop the effectiveness and efficiency of ongoing replacement activities. The passage and effective implementation of legislation authorizing alternative ratemaking mechanisms, which would remove the financial disincentive for accelerated infrastructure replacement programs, would enhance such effectiveness and efficiency. As experience in the water industry in Pennsylvania has shown, approval of such mechanisms is likely to spur accelerated investment without the need for new regulatory requirements. In addition, the Commission could continue to monitor and collect information on pipe replacement practices to assure that NGDCs are providing safe and reliable service in accord with Section 1501 of the Public Utility Code, and use its *enforcement powers to address any problems.*

To the extent the Commission determines that more structure is needed surrounding pipeline replacement, an alternative approach the Commission may consider would be to establish a statement of policy setting forth principles regarding pipeline replacement and performance that the Commission believes are necessary to ensure reasonable and safe service under Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501. A statement of policy would provide more flexibility since it does not have the force of law. However, it will be difficult even in a statement of policy to define general principles that apply to all NGDCs given the different circumstances they face.

To summarize its other specific comments below, if the Commission decides to move ahead and establish a new, mandatory regulatory program for approval of PRP plans, this approach will require promulgating regulations rather than using a Tentative Order process. The courts of Pennsylvania have held that an agency may only create “binding norms” of conduct through adjudication or rulemaking, and the Tentative Order process does not fit in either category of administrative action. In the event “binding norms” are ultimately established

in the appropriate rulemaking process, all interested parties would have an opportunity to help develop standards and terminology that address the lack of clarity in the Tentative Order. For instance, the proposed standards for evaluating PRP plans, referred to as “performance metrics” in the Tentative Order, are vague. It is unclear how the Commission is defining “high risk” pipe, and whether this definition is consistent with the relative risk analysis within the DIMP plans of the utilities and whether that determination is static or changes over time. It is also unclear whether the general rule or baseline for evaluating PRP plans is compliance with the ten year historical average for pipe replacement, or replacement of all “high risk” pipes within twenty years. With regard to the latter standard, while the proposal contains a “public interest” exception to the twenty year replacement timeframe, there is no express mention in the metric of cost considerations or how they will be weighed.

III. The Tentative Order Process is not an Appropriate Vehicle to Implement a New Regulatory Program Requiring Filing and Approval of Pipeline Replacement and Performance Plans.

It is plain on the face of the Tentative Order that the Commission is contemplating a new mandatory program under which NGDCs would “be required to file Pipeline Replacement and Performance Plans (‘PRP Plans’) for Commission review and approval.” (Tentative Order, p. 6) (footnote omitted). The Tentative Order also proposes performance metrics that the Commission would use in evaluating PRP plans, and signals an intent to adopt other metrics raised by NGDCs and other interested parties. Additionally, the Tentative Order proposes a staggered schedule for filing of plans in March, May, and July of 2012.

Because the Commission acknowledges that it is proposing to establish a new, mandatory program, there is no question that a final order requiring filing and approval of PRP plans would impose “binding norms” of conduct on NGDCs. The Supreme Court of Pennsylvania has held that an administrative agency may only establish such “binding norms” through rulemaking or adjudication. See, *Pennsylvania Human Relations Commission v.*

Norristown Area School District, 374 A.2d 671 (Pa. 1977). This proceeding is not a rulemaking, as the Commission is not following the process set forth in the *Commonwealth Documents Law*⁴ and the *Regulatory Review Act*⁵ for promulgating regulations. This proceeding is also not an adjudication, such as a complaint case or other matter in which the Commission exercises its quasi-judicial powers to resolve a dispute. This proceeding was initiated by the Commission for the purpose of establishing a new policy and program binding on all major NGDCs in Pennsylvania, requiring the filing and approval of PRP plans. Efforts such as this to establish new policies for an entire industry are in the nature of regulations, and agencies may not avoid the process for promulgating regulations. See, *Dept. of Environmental Resources v. Rushton Mining Co.*, 591 A.2d 1168 (Pa. Cmwlth. 1991), *appeal denied*, 600 A.2d 541.

Accordingly, if the Commission decides to move forward and require filing and approval of PRP plans, it must do so by promulgating regulations.

IV. The Performance Metrics are Vague

The Tentative Order proposes “performance metrics” which appear to be the standards that the Commission will apply in ruling upon PRP plans. The Tentative Order provides that PRP plans “shall” demonstrate compliance with a metric of the NGDC’s average rate of pipe replacement during the previous ten years, or the rate that will result in replacement of all “high risk” pipe within twenty years unless the NGDC shows that a lower rate of replacement is in the public interest. The Tentative Order also states that NGDCs “will be required to replace unprotected bare or coated steel and cast iron pipe based upon their DIMP plan for risk assessment and the rate of replacement must be equal to or exceed their Metric.” Finally, the Tentative Order provides that each NGDC “shall” adopt other performance metrics addressing four specific subjects, and states that the Commission will consider other metrics proposed by

⁴ 45 P.S. §1102 *et seq.*

⁵ 71 P.S. §745.1 *et seq.*

NGDCs or interested parties. (Tentative Order, p. 6). Many of those other metrics that are identified in the Tentative Order have little, if any, relationship to pipeline replacement and should be left to each company's DIMP plan or dealt with elsewhere.

The performance metrics that are discussed are vague. First, it is unclear how the Commission is defining "high risk" pipe. Is the term defined consistent with each NGDC's DIMP plan that generally takes the approach of a relative risk analysis, or does the Commission consider broad categories of pipe to be high risk based solely upon their age or the material the pipe is constructed from? Moreover, any definition likely does not take into account that pipeline replacement may not be the most appropriate risk mitigation approach, once all factors are taken into consideration. In any event, EAP asserts that the phrase should be defined consistent with the NGDC's DIMP plan and in a way that does not unnecessarily deprive the NGDC of all discretion, but the intent is not clear in the Tentative Order. An NGDC's need and right to maintain flexibility to address risk within its system is a concept readily identifiable within the laws creating DIMP. To the extent the Commission is now considering eliminating such flexibility, clearly defined standards are needed.

Second, it is unclear how the Commission will determine whether the baseline standard for a particular NGDC is compliance with a ten year historic average for pipe replacement, or replacement of all "high risk" pipe within twenty years. If the intention is to utilize the ten year average where the NGDC is already on schedule to replace all "high risk" pipe within twenty years or less, that intention is not stated clearly. It is also unclear over what period of time the Commission will evaluate an NGDC's compliance – will the Commission evaluate a multi-year period or will it require an NGDC to meet these averages each and every year?

With respect to the metric of removing all "high risk" pipe within twenty years unless the NGDC proves that a different rate is in the public interest, it is unclear how the Commission determined that twenty years was an appropriate time period for this standard. Accordingly, the twenty year period appears to be arbitrary. It is also unclear what factors will be taken into

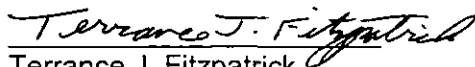
consideration in the public interest analysis. For instance, will the heightened level of competition for limited labor, materials and capital be a consideration and how so? Will the potential impact on businesses and neighborhoods as a result of broad scale replacement projects be a consideration and how so? Moreover, it is also unclear how much weight the Commission will give to financial considerations in determining what is in the public interest. In this regard, it should be specifically stated in the metric that the current lack of alternative rate mechanisms to allow timely recovery of infrastructure investments is an important and relevant consideration in determining replacement timeframes.

The vagueness and lack of an apparent factual basis for some of the performance standards is a particular concern given that these are the standards the Commission proposes for making decisions that are critically important to the financial well-being of NGDCs, and that in the past have been within the management discretion of the companies. For the reasons stated above, the performance standards stated in the Tentative Order are legally deficient.

V. Conclusion

EAP respectfully requests that the Commission consider these comments and not move forward with mandating the filing and approval of PRPs at this time.

Respectfully submitted,


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