



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

November 30, 2012

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

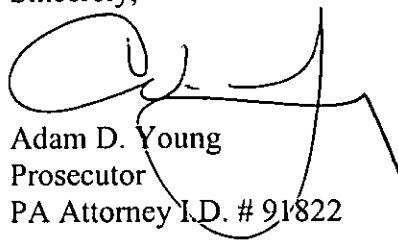
Re: Pennsylvania Public Utility Commission, Bureau of Investigation and
Enforcement v. UGI Utilities, Inc.
Docket No. C-2012-2308997

Dear Secretary Chiavetta:

Enclosed for filing is an original copy of the Reply of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission to the Exceptions of Manuel E. Cruz in the above-captioned proceeding.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please contact me at (717) 772-8582.

Sincerely,



Adam D. Young
Prosecutor
PA Attorney I.D. # 91822

Enclosure

cc: As per certificate of service

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SECRETARY'S BUREAU

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement, Complainant	:	
	:	
v.	:	Docket No. C-2012-2308997
	:	
UGI Utilities, Inc., Respondent	:	

**REPLY OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT
TO THE EXCEPTIONS OF MANUEL E. CRUZ**

In accordance with the Pennsylvania Public Utility Commission's (Commission) regulations at 52 Pa. Code §5.535, the Bureau of Investigation and Enforcement (I&E) files the following Reply to the Exceptions of Manuel E. Cruz (Reply Exceptions) in connection with the Initial Decision of Administrative Law Judge (ALJ) David A. Salapa that was issued on October 31, 2012 (Initial Decision).

I. INTRODUCTION

Manuel E. Cruz (Cruz) suffered a traumatic loss on the night of February 9, 2011, and I&E sympathizes with his sorrow. For the reasons set forth herein, however, I&E must respectfully request that the Commission deny Cruz's exceptions.

In the Initial Decision, the ALJ approved the joint settlement petition of I&E and UGI as being reasonable and in the public interest. The ALJ also granted Cruz's petition to intervene. In granting Cruz's intervention, the ALJ properly noted that "Cruz takes the record as it exists at the time of the order granting his petition to intervene." Initial Decision at 12, ¶ 4. In addition,

the ALJ correctly found that the admission of Cruz as an intervenor should not be construed as recognition by the Commission that he has a direct interest or might be aggrieved by an order of the Commission in the proceeding. Initial Decision at 27, Ordering ¶ 3. *See also* 52 Pa. Code §5.75(c) (relating to rights upon the granting of a petition to intervene).

II. FACTUAL BACKGROUND

I&E is the entity established by statute to prosecute complaints against public utilities in order to protect the public interest pursuant to 66 Pa. C.S. §308(b). The Commission has delegated its authority to initiate proceedings that are prosecutory in nature to I&E and other bureaus with enforcement responsibilities. *See Implementation of Act 129 of 2008: Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).

On June 11, 2012, I&E filed a complaint with the Commission against UGI Utilities, Inc. (UGI) concerning a natural gas explosion and fire that occurred on February 9, 2011, at 542 and 544 North 13th Street, Allentown, PA. The Gas Safety Division of I&E conducted an investigation and concluded that the source of gas that led to the explosion and fire was a circumferential fracture on a 12-inch cast iron main on West Allen Street, Allentown, PA. The 12-inch cast iron main was owned and operated by UGI Utilities, Inc. – Gas Division (UGI Gas).

I&E's complaint alleged that UGI violated the Public Utility Code, Commission regulations and federal regulations multiple times. I&E alleged as follows:

(1) UGI failed to maintain an odorant sampling program, violating 52 Pa. Code §59.33(a), 66 Pa. C.S. §1501 and 49 CFR §§192.625(a) and (f);

(2) UGI failed to furnish and maintain adequate, safe and reasonable service by failing to respond to warning signs regarding the integrity of its cast iron mains in the Allentown area and failing to replace cast iron mains in a timely fashion, violating 52 Pa. Code §59.33(a), 66 Pa. C.S. §1501 and 49 CFR §192.489;

(3) UGI failed to follow its emergency procedures by failing to perform odorant tests in the immediate affected area and at the closest delivery point, violating 52 Pa. Code §59.33(a), 66 Pa. C.S. §1501 and 49 CFR §192.605(a);

(4) UGI failed to continually survey its facilities located in the area of the explosion and respond to indications that the structural integrity of the 12-inch cast iron main was being compromised, violating 52 Pa. Code §59.33(a), 66 Pa. C.S. §1501, 49 CFR §192.605(a), 49 CFR §192.615(a)(3)(i) and (iii), and 49 CFR §192.615(a)(6) and (7);

(5) UGI failed to comply with emergency procedures that require it to make safe any hazard to life or property by failing to close curb valves for residences at 530-540 North 13th Street, violating 52 Pa. Code §59.33(a), 66 Pa. C.S. §1501, 49 CFR §192.605(a), 49 CFR §§192.615(a)(3)(i) and (iii), and 49 CFR §§ 192.615(a)(6) and (7);

(6) UGI failed to comply with its emergency procedures that require prompt and effective response to a notice of gas detected or explosion occurring by failing to diminish the flow of gas for approximately five hours after the explosion, violating 52 Pa. Code §59.33(a), 66 Pa. C.S. §1501, 49 CFR §192.605(a), 49 CFR §192.615(a)(3)(i) and (iii) and 49 CFR §192.615(a)(6) and (7).

In the complaint, I&E requested that the Commission direct UGI to pay a \$386,000 civil penalty, monitor the level of odorant throughout its distribution system, modify its procedures on odorant testing, conduct continuing surveillance on its mains, commence a pipeline replacement program for its cast iron mains to be completed within 10 years and commence a pipeline replacement program for its bare steel mains to be completed within 13 years.

On July 2, 2012, UGI filed an answer generally admitting that a natural gas explosion occurred on February 9, 2011, at 542 and 544 North 13th Street and that UGI supplied natural gas to those locations. UGI specifically denied I&E's allegations in the complaint.

By notice dated July 18, 2012, the Commission scheduled a prehearing conference on September 25, 2012. On July 19, 2012, the ALJ issued a prehearing conference order setting forth the matters to be addressed at the prehearing conference.

Cruz did not file a petition to intervene until September 21, 2012 – four days prior to the prehearing conference.¹ Despite being filed on September 21, 2012, no party was aware of the petition to intervene until after the prehearing conference concluded. In fact, during the prehearing conference, the ALJ asked those present in the hearing room if there were any petitions to intervene. Cruz’s counsel or a representative from his attorney’s law firm was in attendance at the prehearing conference, but did not respond to the ALJ’s inquiry.

On October 9, 2012, I&E filed an answer opposing Cruz’s petition to intervene, contending that Cruz lacked standing to intervene. I&E also argued that Cruz’s petition to intervene was untimely filed, pursuant to 52 Pa. Code §5.74(b).

On October 3, 2012, UGI filed a joint settlement petition, including statements in support of the joint petition from I&E and UGI. In addition, the joint settlement petition included UGI Central Penn Gas, Inc. (UGI Central Penn) and UGI Penn Natural Gas, Inc. (UGI Penn Natural) as parties and signatories. Also on October 3, 2012, UGI Central Penn and UGI Penn Natural Gas filed a petition to intervene for the purposes of being parties to the joint settlement petition.

Notably, in the joint settlement petition, UGI agreed to pay the entire civil penalty that I&E sought – or \$386,000, and UGI Gas, UGI Central Penn and UGI Penn Natural Gas agreed to retire or replace all cast iron mains in its three regulated service territories over a period of 14 years.

¹ Cruz waited nearly four months from the filing of I&E’s complaint to petition to intervene. Counsel for Cruz was aware of I&E’s complaint, as he obtained a copy of it from I&E prosecutors shortly after the complaint was filed. Further, before I&E’s complaint was filed, counsel for Cruz filed a subpoena and Right-to-Know request on the Commission seeking its investigatory files on the Allentown incident. Thus, Cruz has been carefully observing this formal proceeding, even prior to its inception, and waited until the eleventh-hour to participate.

On October 31, 2012, ALJ Salapa's Initial Decision was issued by Secretarial Letter. The Initial Decision granted the interventions of UGI Central Penn and UGI Penn Natural Gas for the purposes of being parties to the joint settlement, granted the intervention of Cruz and approved the joint settlement petition as being in the public interest.

Cruz filed exceptions to the Initial Decision on November 20, 2012, complaining that he was not involved in the settlement negotiations, arguing that UGI should replace its cast iron pipeline in 10 years as opposed to 14 years, alleging the ALJ concluded that Cruz should be bound by the instant proceeding in the action that he filed in the Northampton County Court of Common Pleas, and asserting that he has the right to obtain discovery in this proceeding as a formal participant.

III. I&E's REPLY TO EXCEPTIONS

A. I&E Acted Reasonably and Appropriately in Negotiating a Settlement with UGI

In his exceptions, Cruz complains that he was not involved or consulted in connection with any settlement negotiations that occurred between I&E and UGI. Exceptions at 1, ¶ 3.² I&E respectfully submits that it was under no obligation to include Cruz in its settlement discussions with UGI for two reasons.

First, Cruz has no direct interest in this proceeding. In filing the complaint, I&E acted in its prosecutory function – a statutory duty that is designed to protect the public interest and deter public utilities from committing violations of the Public Utility Code, Commission regulations and orders, and other applicable law. When considering litigated or settled enforcement actions, the Commission has the authority to grant relief that is provided under the Public Utility Code,

² In crafting its reply, I&E attempted to discern the major points conveyed by Cruz in his exceptions, since Cruz failed to number and identify the finding of fact or conclusion of law to which he took exception as required by 52 Pa. Code §5.333(b).

Commission regulations and Commission orders. This relief may include the imposition of civil penalties, pursuant to 66 Pa. C.S. §§3301, and directing public utilities to make alterations and improvements of their service and facilities that are necessary or proper for the accommodation, convenience and safety of the public, pursuant to 66 Pa. C.S. §1501, as well as other remedies. Given that the Commission can only grant relief that rests under its statutory authority, I&E's enforcement action was between the bureau and public utility.

Similar to a criminal proceeding in which a district attorney represents the people in the prosecution of criminal offenses, I&E represents the public interest in the prosecution of regulatory violations and violations of the Public Utility Code. As in a criminal proceeding, the victim of the criminal offense does not intervene. The same holds true in Commission proceedings – I&E represents the safety of the public at large and not an individual “victim”.

For this reason, I&E's complaint was not intended to include private parties that have other ways to redress potential civil causes of action. The Commission is not authorized to award monetary damages to a private party. Therefore, Cruz's interest in this matter is no more substantial or direct than the entire public's interest in safety, which is adequately represented by I&E. However, Cruz can pursue, and in fact has filed, a civil cause of action. *See Cruz v. UGI Corp.*, C-48-CV-2012-0454 (Northampton County Ct. Comm. Pl., January 17, 2012).

Secondly, Cruz did not file a petition to intervene until September 21, 2012, and the parties were not aware of the petition until September 25, 2012 – less than ten (10) days before the joint settlement petition was filed in this matter. Further, Cruz's status as an intervenor was not granted until October 31, 2012, which was twenty-eight (28) days after the joint settlement petition was filed. *Even if Cruz has a direct interest in this proceeding, which is doubtful, Cruz's delay in filing his petition to intervene hampered his ability to substantially participate in the*

case. For the above reasons, I&E was not obligated to include Cruz in its settlement negotiations with UGI.

B. UGI's Replacement of Its Cast Iron Mains During a Fourteen Year Period Is in the Public Interest and Should Not Be Disturbed

Cruz next objects to a 14 year period to replace cast iron mains in the UGI Gas, UGI Central Penn and UGI Penn Natural Gas service territories, and asserts that a 10 year time-frame to replace these pipes is preferable. Cruz provides no legal or factual basis for his argument, other than his opinion that the cast iron mains in Allentown are unsafe. In fact, I&E submits that Cruz may be completely unaware of the potentially high additional cost to ratepayers.

In response, I&E notes that the current time-frame for retirement or replacement of cast iron mains owned and operated by UGI is 20 years. In the joint settlement petition, UGI agreed to accelerate this time period to 14 years. In doing so, UGI agreed to include not only UGI Gas, but also two other service territories - UGI Central Penn and UGI Penn Natural Gas.

The 14 year time period was a carefully negotiated term in the settlement. It reflects the necessary time that UGI needs to train its construction crews to become operator qualified and coordinate infrastructure projects with municipalities. There is no indication that Cruz is even remotely aware of these factors. Further, UGI estimates that it will spend approximately \$18 million per year to implement the accelerated pipeline replacement program, which is a cost that UGI is entitled to recover from ratepayers. However, UGI waived any right to seek rate relief through a Distribution System Improvement Charge (DSIC) mechanism for 24 months. A 10 year replacement period could be costlier to the ratepayers.

In addition, it is possible that the cast iron mains in Allentown will be retired or replaced at the forefront of this 14 year period, rather than at the end. The classification of the cast iron

mains in UGI's Distribution Integrity Management Program (DIMP) will determine how quickly the mains are replaced.

C. Cruz's Argument that the Commission's Proceeding Binds the Outcome of His Civil Case Lacks Merit

Cruz misinterprets the ALJ's conclusion that he "may be bound by the Commission's determinations regarding UGI's violation of the Public Utility Code, Commission regulations and federal regulations." Initial Decision at 10-11, ¶ 4. In the Initial Decision, the ALJ did not state that the Commission's proceeding would have a binding effect on Cruz's civil action, as Cruz now argues. In fact, the ALJ specifically stated that "Cruz will not be bound by the actions of the Commission in this proceeding to the extent that the Commission will not determine whether UGI was negligent with regard to the February 9, 2011 explosion." *Id.* at 10.

In determining whether Cruz had standing to participate in the Commission's proceeding, the ALJ was required to analyze whether there was a possibility that the Commission's proceeding could impact his civil case. The ALJ decided this question in the affirmative, noting that it would "be difficult for Cruz to argue in his civil action against UGI in the Court of Common Pleas of Northampton County that UGI violated its duty of care by violating the Public Utility Code, Commission regulations and federal regulations if the Commission has concluded otherwise." *Id.* However, there were no findings or conclusions drawn, as to whether UGI violated the Public Utility Code, Commission regulations and/or federal regulations. In fact, in the joint settlement petition, the parties specifically provided that it was not their intention for the settlement agreement to be admitted as evidence or construed as a concession or admission of fact in any civil proceeding related to this incident. *See Joint Settlement Petition p. 13, ¶ 42.* In the Initial Decision, the ALJ adopted the parties' entire joint settlement petition, including this

term. Therefore, Cruz's insistence that this proceeding binds his civil action lacks merit and this exception should be denied.

D. Cruz Should Not Be Permitted to Engage in Discovery at this Late Hour

As noted above, despite being aware of this proceeding, Cruz chose to petition to intervene several months after I&E filed its complaint. The ALJ correctly noted that a late intervenor must accept the status of a proceeding as it stands. Cruz should not be permitted to use late intervention as a tool to disrupt or delay Commission action by now engaging in discovery.

I&E notes that Cruz has already attempted to gain access to the Gas Safety Division's records with respect to this incident. First, Cruz filed a subpoena for the production of certain documents, which was denied. The subpoena and resulting decision to deny the request is attached as Appendix A. Secondly, after Cruz's subpoena was unsuccessful, an attorney from the law firm that represents Cruz filed a Right to Know request with the Commission, which the Commission denied. The Office of Open Records affirmed the Commission's decision to deny Cruz's request for records. This decision is attached as Appendix B. Commonwealth Court has held that Gas Safety investigative records are not subject to disclosure under the Right-to-Know Law. *Pa. PUC v. Gilbert*, 40 A. 3d 755 (Pa. Cmwlth. 2012).³ Cruz is trying to use discovery in this proceeding as a way to circumvent the law and receive information to which he is not entitled.

Further, Cruz will not be harmed if the Commission disallows him to engage in discovery in this proceeding because he still has all the rights to discovery in his civil case. Moreover,

³ It is not until after the Commission makes a decision, enters into a settlement with a public utility or takes any other official action that investigative materials can be made public. 66 Pa. C.S. §335(d). The joint settlement petition in this matter has not been approved by the Commission. Therefore, the Gas Safety investigative records remain confidential.

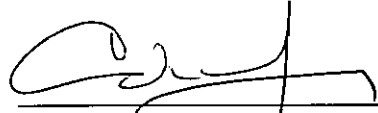
nothing that Cruz would discover could be used in the case before the Commission because there can be no award of civil damages by the Commission. In fact, I&E understands that Cruz has already discovered voluminous amounts of material from UGI in his civil case and may continue to do so. Moreover, upon subpoena, Cruz will be entitled to much of the Commission's file in this case once a final determination by the Commission is made.

I&E contends that to grant Cruz's exceptions would cause an unwarranted and potentially dangerous delay in this proceeding for the sole purpose of aiding Cruz in his civil case. While Cruz may not be harmed by such a delay, the public interest will be if Cruz is permitted to further delay this matter. For example, should the Commission approve the joint settlement petition, the public will begin to realize many benefits, including the acceleration of cast iron main replacement, once the settlement is approved. In summary, Cruz should not be permitted to delay or halt this proceeding to engage in discovery.

IV. CONCLUSION

For all of the foregoing reasons, I&E requests that the Exceptions of Manuel E. Cruz be denied and the Initial Decision of Administrative Law Judge David A. Salapa be approved in its entirety.

Respectfully submitted,



Adam D. Young
Prosecutor
PA Attorney I.D. No. 91822

Stephanie M. Wimer
Prosecutor
PA Attorney I.D. No. 207522

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

Dated: November 30, 2012

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APPENDIX A

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COMMONWEALTH OF PENNSYLVANIA
COUNTY OF NORTHAMPTON

Manuel E. Cruz, et als

v

UGI Corporation, et als

FILE NO. C-48-CV-2012-0454

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AUG 24 2012

SUBPOENA TO PRODUCE DOCUMENTS OR THINGS
FOR DISCOVERY PURSUANT TO RULE 4009.22

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

TO: Pennsylvania Public Utility Commission

(Name of Person or Entity)

Within twenty (20) days after service of this subpoena, you are ordered by the court to produce the following documents or things: with regard to a natural gas explosion

on February 9, 2012. SEE ATTACHED Page 2 for further explanation.

at Florio, Perrucci, Steinhardt & Fader, 60 W Broad St Ste 102 Bethlehem PA 18018
(Address)

You may deliver or mail legible copies of the documents or produce things requested by this subpoena, together with the certificate of compliance, to the party making this request at the address listed above. You have the right to seek in advance the reasonable cost of preparing the copies or producing the things sought.

If you fail to produce the documents or things required by this subpoena within twenty (20) days after its service, the party serving this subpoena may seek a court order compelling you to comply with it.

THIS SUBPOENA WAS ISSUED AT THE REQUEST OF THE FOLLOWING PERSON:

NAME: Christian M. Perrucci, Esquire

ADDRESS: Florio, Perrucci, Steinhardt & Fader

60 W Broad St Ste 102, Bethlehem PA 18018

TELEPHONE: (610) 691-7900 x1114

SUPREME COURT ID # 90408

ATTORNEY FOR: Plaintiffs

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LAW BUREAU

BY THE COURT:

Holly Ruggiero

Prothonotary/Clerk, Civil Division

Maire Cunningham

Deputy

DATE: _____

Seal of the Court

PA P.U.C.
SECRETARY'S BUREAU

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(EFF. 7/97)

Subpoena to Produce Documents or Things:

FROM: Christian M. Perrucci, Esq.

TO: Pennsylvania Public Utility Commission ("Pa PUC")

Page 2 of 2:

RECORDS REQUESTED:

All material obtained relating to a fatal gas explosion in Allentown, PA on February 9, 2011, which killed Ofelia A. Ben and Katherine Cruz, whose Estates the requester represents. The PA PUC filed a formal complaint against UGI Utilities, Inc. arising from this event at Docket No. C-2012-2308997.

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FPSF FLORIO PERRUCCI
STEINHARDT & FADER

Attorneys at Law

LLC

60 WEST BROAD STREET SUITE 102 BETHLEHEM, PA 18018
PHONE: (610) 691-7900 FAX: (610) 691-0841

Christian M. Perrucci
Extension 1114
cperrucci@florioperrucci.com

August 24, 2012

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AUG 24 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Via FedEx Overnight

Pennsylvania Public Utility Commission
ATTN: Rosemary Chiavetta
400 North Street, 2nd Floor
Commonwealth Keystone Bldg
Harrisburg, PA 17105

Re: **Manuel E. Cruz, et als v. UGI Corporation, et als**
Docket No. C-48-CV-2012-0454
Date of Incident: February 9, 2011

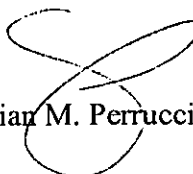
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LAW BUREAU

Dear Ms. Chiavetta:

Please be advised that this firm represents the Plaintiffs in reference to the above-captioned matter. In follow up to your telephone conversation this afternoon with my assistant, Kerri, please find enclosed a Subpoena to Produce Documents or Things with regard to our open civil litigation matter.

Should you have any questions or concerns, please do not hesitate to contact our office.

Very truly yours,


Christian M. Perrucci

CMP/kaf
Enclosures
cc: Joseph A. Holko, Esq (reg. mail)

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New York, NY 10005
(212) 792-9070 phone

FLORIO, PERRUCCI, STEINHARDT & FADER, LLC
By: Christian M. Perrucci, Esquire
60 West Broad Street, Suite 102
Bethlehem, Pennsylvania 18018
(610) 691-7900
cperrucci@fpslawfirm.com
Attorneys for Plaintiffs

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

MANUEL E. CRUZ, AS ADM. OF THE ESTATE OF
OFELIA A. BEN, MANUEL E. CRUZ, AS ADM. OF
THE ESTATE OF KATHERINE CRUZ, MANUEL E.
CRUZ, IN HIS OWN RIGHT,

Plaintiffs,

vs.

UGI CORPORATION, UGI UTILITIES, INC., UGI
PENN NATURAL GAS, INC., and UGI CENTRAL
PENN GAS, INC.,

Defendants.

COUNTY OF NORTHAMPTON
COURT OF COMMON PLEAS

CIVIL TRIAL DIVISION

No.: C-48-CV-2012-0454

PA P.U.C.
LAW BUREAU

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TO: *Pennsylvania Public Utilities Commission*
ATTN: Office of Secretary

You are required to complete the following Certificate of Compliance with producing documents or things pursuant to the Subpoena. Send the documents or things, along with this Certificate of Compliance (with your original signature), to the person at whose request the subpoena was issued (see address above – Florio, Perrucci, Steinhardt & Fader, LLC).

Do not send the documents or things, or the Certificate of Compliance, to the Prothonotary's Office.

**CERTIFICATE OF COMPLIANCE WITH SUBPOENA TO PRODUCE DOCUMENTS OR THINGS
PURSUANT TO RULE 4009.23**

I, _____
certify to the best of my knowledge, information and belief that all documents or things required
to be produced to the subpoena issued on _____ (date of Subpoena)
have been produced.

Dated: _____, 2012

(Signature of Person Served with Subpoena)

PA P.U.C.
SECRETARY'S BUREAU

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From: (484) 626-4039
Elizabeth Sabol
Florio Perrucci Steinhardt & F
60 W. Broad Street, Suite 102

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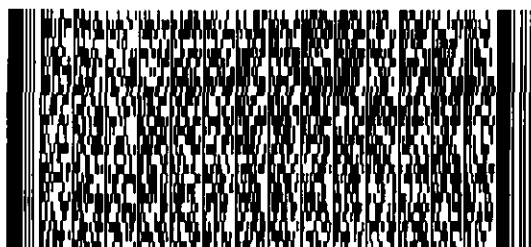
BILL SENDER

Rosemary Chiavetta
PA Public Utility Commission
400 North Street - Second Floor
Commonwealth Keystone Bldg
Harrisburg, PA 17105

Ref # 54492.0001 (CMP)
Invoice #
PO #
Dept #

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September 13, 2012

Christian M. Perrucci, Esq.
Florio, Perrucci, Steinhardt & Fader
60 West Broad Street
Suite 102
Bethlehem, PA 18018

Dear Mr. Perrucci:

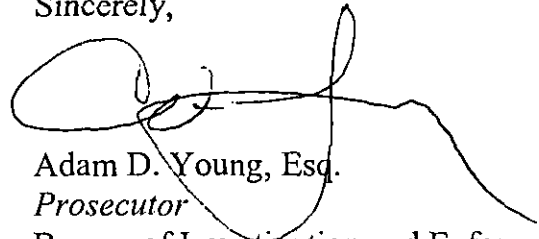
We are in receipt of the subpoena mailed to us on or about August 24, 2012 regarding the natural gas explosion occurring in Allentown, Pennsylvania. The Subpoena requests "all material obtained relating to a fatal gas explosion in Allentown, PA on February 9, 2011." At this point in time, these records reflect internal, pre-decisional deliberations of the PUC, and cannot be disclosed. Under Section 335(d) of the Public Utility Code, 66 Pa. C.S. 335(d), the Commission must make a decision, enter into a settlement, or take any other official action before the records of the investigation can be released. And under no circumstances, except upon Order of the PUC, will UGI's accident report be released, and under no circumstances may it be used in your civil suit. *See* 66 Pa. C.S. 1508. Under the provisions of this section, the investigative report "shall not be open for public inspection, except by order of the Commission, *and shall not be admitted in evidence for any purpose in any suit or action for damages growing out of any matter or thing mentioned in such report.*"

Moreover, the records created by gas safety inspectors who work in the PUC's Bureau of Investigation and Enforcement are not public records under the state's Right-To-Know Law because they involve "noncriminal investigations." *Pa. PUC v. Daniel Gilbert and the Wall Street Journal*, 40 A.3d 755 (2012). Granting access to all records relating to probable violations, pipeline incidents reported by a pipeline operator or copies of communications from pipeline owners and operators is problematic because they can be quite broad and include investigative materials gathered by gas safety inspectors. Allowing access to these investigative materials, which may contain unsubstantiated statements or allegations about an owner, employee or utility, would be problematic, because releasing such materials publicly could lead pipeline owners and operators to be less likely to cooperate and provide information to inspectors out of fear of retaliation or public embarrassment. If utilities or individuals are less likely to cooperate in the inspections/investigations process, then the inspections/investigations will no longer be an effective means of monitoring the utilities compliance with statutory and regulatory requirements.

Accordingly, such inspections and investigations conducted by the PUC constitute a "noncriminal investigation" under the Right-to-Know Law and, as such, are not subject to public disclosure until the conclusion of our case. Upon conclusion of this case (after the PUC has taken some sort of official action resolving the matter) we will gladly provide to you the requested documents, allowing for the redaction of certain proprietary utility information, and any other exceptions allowed under the Right to Know law and the Sunshine Act.

Should you have any questions or if you need additional information, please contact me at 717-772-8582.

Sincerely,



Adam D. Young, Esq.
Prosecutor

Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission

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APPENDIX B

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FINAL DETERMINATION

IN THE MATTER OF

ROBERT A. FREEDBERG,
Complainant

v.

PENNSYLVANIA PUBLIC
UTILITY COMMISSION,
Respondent

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Docket No. AP 2012-1689

INTRODUCTION

Robert A. Freedberg ("Requester") submitted a request ("Request") to the Pennsylvania Utility Commission ("PUC") pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, ("RTKL"), seeking documents relating to a fatal gas explosion. The PUC timely responded and partially denied the request pursuant to 65 P.S. §67.708(b)(10) and (17). The Requester timely appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **denied** and the PUC is not required to take any further action.

FACTUAL BACKGROUND

On August 3, 2012, the Requester submitted a right-to-know request to the PUC seeking the following:

All material obtained relating to a fatal gas explosion in Allentown, PA on February 9, 2011[.] The PA PUC filed formal complaint against UGI utilities, Inc. arising from this event at Docket No. C-2012-2308997. This request is filed pursuant to the Right to Know law 65 P.S. §67.101, *et seq.* and 65 Pa.C.S.A. §335(d) which controls to the extent that it conflicts with any provision of the Right to Know law. *See* 65 P.S. §67.3101.1.

On that same date, the PUC, pursuant to Section 902 of the RTKL, invoked an extension of time to respond citing a need for legal review and the extent and nature of the request. On September 10, 2012, the PUC timely responded, granting the Request in part and denying it in part. The PUC provided Requester with the following records: the PUC's formal complaint, the notice of complaint served on UGI, the answer to the complaint filed by UGI, the prehearing conference notice and the prehearing order. The PUC denied the remainder of the Request for "all materials relating to the fatal gas explosion" based on Sections 708(b)(10) and (17) of the RTKL pertaining to exemptions for noncriminal investigations and internal, pre-decisional deliberations of an agency.

On October 1, 2012, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. As part of his argument, the Requester cites to the Public Utility Code, 66 Pa.C.S. §335(d), in support of his position. The OOR invited both parties to supplement the record. Requester submitted a letter stating that the PUC and UGI entered into a Joint Settlement Petition for submission to an Administrative Law Judge. Requester notes that, if approved, the proceedings between the PUC and UGI will be resolved and any claim that the information sought is confidential will no longer apply. PUC submitted legal argument for its denial to the OOR. Upon request of the OOR to clarify the record, PUC also submitted affidavits of Paul Metro, Chief Gas Safety Division of the PUC's Bureau of Investigation and Enforcement ("BIE"), Adam D. Young, Prosecutor within BIE, and Rosemary Chiavetta, Secretary of the PUC.

Mr. Metro attested that he directs and oversees non-criminal gas safety investigations conducted by the PUC's Gas Safety Investigators related to any gas safety incident in the Commonwealth, including the BIE investigation that was initiated in relation to the instant

matter. Mr. Metro states that he reviewed all of the information gathered by investigators, including investigative notes, correspondence, reports, statements and compliance history for the gas utility and that he recommended the matter for prosecution to the BIE's Chief Prosecutor. Mr. Metro attested that a formal complaint, consisting of allegations of violations of the PUC, was filed and is now pending before an administrative law judge. Mr. Metro stated that the BIE works to obtain voluntary compliance by the utility at each stage of the administrative process.

Attorney Young attests, in part, that he advised Requester that access to the requested records will be provided, with the appropriate redactions of confidential or proprietary information, upon conclusion of the case, *i.e.* after official action of the PUC to resolve the case.

Secretary Chiavetta attests that she conducted a thorough and exhaustive search of all PUC files related to this matter, and that the PUC's files contained records related to the ongoing prosecution of the matter before an administrative law judge, and investigative file records generated and housed by the Gas Safety Division and Prosecution staff of the BIE. Secretary Chiavetta further states that PUC investigative records are not subject to disclosure while a prosecution of a formal complaint is ongoing, except for the pleadings, which are publicly available.

On the same date PUC submitted its affidavits, Requester submitted correspondence further detailing his legal argument for disclosure of the records. Requester asserted that because the PUC took official action, via the filing of its complaint against UGI, the PUC is required to disclose all of the records requested. The Requester also asserts that because there is a pending settlement agreement before an administrative law judge and that the PUC has indicated that it would ultimately provide the records at the conclusion of the case, the RTKL's non-criminal

investigation exemption does not apply. Requester also argues that the PUC has offered no evidence that the internal, predecisional deliberations exemption applies here.

On October 31, 2012, the OOR requested an extension for the issuance of its Final Determination given closure of its office due to severe weather events. The Requester agreed and the deadline for issuance of the Final Determination was extended to November 12, 2012, a legal holiday.

LEGAL ANALYSIS

The RTKL is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010) *appeal granted* 15 A.3d 427 (Pa. 2011). The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. §67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.* Here, the PUC requested a hearing should it be determined that it did not meet its burden. The OOR has determined that it has the necessary, requisite information and evidence before it to properly adjudicate the matter without a hearing.

The PUC is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five

business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The records requested are exempt from disclosure pursuant to Section 708(b)(17)

The PUC asserts that the requested records are exempt from disclosure under Section 708(b)(17) of the RTKL, related to noncriminal investigations of an agency and Section 708(b)(10) of the RTKL, concerning internal, pre-decisional deliberations of an agency.¹

Section 708(b)(17) of the RTKL exempts a record from public disclosure if it is a record relating to a noncriminal investigation, including, in pertinent part:

- (i) Complaints submitted to an agency.
- (ii) Investigative materials, notes, correspondence and reports.
- ...
- (iv) A record that includes information made confidential by law.
-
- (vi) A record that, if disclosed, would do any of the following:
 - (A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an

¹ To the extent that Requester sought provision of the formal complaint filed by the PUC against UGI, the PUC provided a copy of the Complaint thereby rendering that part of the Request moot.

executed settlement agreement unless the agreement is determined to be confidential by a court.

- (B) Deprive a person of the right to an impartial adjudication.
- (C) Constitute an unwarranted invasion of privacy.
- (D) Hinder an agency's ability to secure an administrative or civil sanction.
- (E) Endanger the life or physical safety of an individual.

65 P.S. §67.708(b)(17).

The terms "noncriminal" and "investigation" are not defined by the RTKL. However, the Commonwealth Court has interpreted the term "noncriminal" to signal the exemption of investigations other than those that are criminal in nature. *PUC v. Gilbert*, 40 A.3d 755, 759 (Pa. Commw. Ct. 2012) citing *Department of Health v. Office of Open Records*, 4 A.3d 803, 810 (Pa. Cmmw. Ct. 2010). The term "investigation" has been determined to mean "a systematic or searching inquiry, a detailed examination, or an official probe." *Id.*

In the instant matter, facts attested to by the PUC demonstrate that an investigation was initiated by the PUC's BIE concerning the fatal gas explosion incident that occurred on February 9, 2011 in Allentown. According to Secretary Chiavetta, a review of PUC's files revealed records related to the ongoing prosecution of the matter before an administrative law judge, and investigative file records generated and housed by the Gas Safety Division and Prosecution staff of the BIE. According to PUC's Gas Safety Division's Chief, Mr. Metro, the records in question include, but are not limited to, investigative notes, correspondence, reports, statements and compliance history for UGI. Under Section 708(b)(17)(ii) of the RTKL, investigative materials, notes, correspondence and reports are exempt from disclosure. The filing of the complaint in this matter did not change the "investigatory" nature of the records sought. Thus, the records sought here are exempt from disclosure.

Additionally, the PUC correctly points out that the accident report in this case is specifically exempt from disclosure and confidential by law pursuant to 66 Pa.C.S. §1508.² Because the accident report is exempt under state law, it does not meet the definition of a “public record” under the RTKL, and is therefore not subject to release. 65 P.S. §67.102.

2. Section 335(d) of the Public Utility Code does not compel release of the requested records

Section 3101.1 of the RTKL provides that the provisions of the RTKL do not apply if they are in conflict with any other federal or state law. The Requester argues that the Public Utility Code requires disclosure of the requested records. Specifically, Section 335(d) of the Public Utility Code provides:

(d) *Release of documents.* --In addition to any other requirements imposed by law, including the act of June 21, 1957 (P.L.390, No.212), referred to as the Right-to-Know Law, and the act of July 3, 1986 (P.L.388, No.84), known as the Sunshine Act, whenever the commission conducts an investigation of an act or practice of a public utility and makes a decision, enters into a settlement with a public utility or takes any other official action, as defined in the Sunshine Act, with respect to its investigation, it shall make part of the public record and release publicly any documents relied upon by the commission in reaching its determination, whether prepared by consultants or commission employees, other than documents protected by legal privilege; provided, however, that if a document contains trade secrets or proprietary information and it has been determined by the commission that harm to the person claiming the privilege would be substantial or if a document required to be released under this section contains identifying information which would operate to the prejudice or impairment of a person's reputation or personal security, or information that would lead to the disclosure of a confidential source or subject a person to

² Section 1508 of the Public Utility Code provides: “Every public utility shall give immediate notice to the commission of the happening of any accident in or about, or in connection with, the operation of its service and facilities, wherein any person shall have been killed or injured, and furnish such full and detailed report of such accident, within such time and in such manner as the commission shall require. Such report shall not be open for public inspection, except by order of the commission, and shall not be admitted in evidence for any purpose in any suit or action for damages growing out of any matter or thing mentioned in such report.” 66 Pa.C.S. § 1508 (*emphasis added*).

potential economic retaliation as a result of their cooperation with a commission investigation, or information which, if disclosed to the public, could be used for criminal or terroristic purposes, the identifying information may be expurgated from the copy of the document made part of the public record. For the purposes of this section, "a document" means a report, memorandum or other document prepared for or used by the commission in the course of its investigation whether prepared by an adviser, consultant or other person who is not an employee of the commission or by an employee of the commission.

66 Pa.C.S. § 335(d) (emphasis added).

The Requester argues that the PUC took "official action" in this case by filing a Complaint against UGI. "Official action" as defined by the Sunshine Act constitutes:

- (1) Recommendations made by an agency pursuant to statute, ordinance or executive order.
- (2) The establishment of policy by an agency.
- (3) The decisions on agency business made by an agency.
- (4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

65 Pa.C.S. 703. "Agency business" is defined by the Sunshine Act as "the framing, preparation, making or enactment of laws, policy or regulations, the creation of liability by contract or otherwise or the adjudication of rights, duties and responsibilities, but not including administrative action."³ *Id.*

The OOR holds that the filing of a formal complaint does not equate to "official action" taken by the PUC. The filing of the complaint occurred at the discretion of the BIE's prosecutor, independent of the sitting Commissioners. Although its filing is a preliminary prerequisite to any formal adjudication of rights by the PUC, there has been no final order rendered by the administrative law judge. The filing of the complaint does not commit PUC to a particular course of conduct that is binding on the agency. Furthermore, BIE's allegations in a complaint do not constitute a finding of fact or conclusion of law, and the Commissioners may, upon

³ Under the Sunshine Act, "administrative action" is defined as "execution of policies relating to persons or things as previously authorized or required by official action of the agency adopted at an open meeting of the agency. The term does not, however, include the deliberation of agency business. 65 Pa.C.S. §703.

review, reject and dismiss a complaint as unfounded. Once a final resolution of the complaint is rendered by PUC, the records sought would be subject to disclosure under Section 335 of the Public Utility Code unless otherwise privileged or confidential.

The Requester argues that the Commonwealth Court's decision in *PUC v. Gilbert* compels the release of the requested records. In *PUC v. Gilbert*, 40 A.3d 755 (Pa. Commw. Ct. 2012), a requester sought gas safety records from the PUC, including records that related to probable violations identified by the PUC, and records related to pipeline incidents. The Commonwealth Court determined that the inspections/investigations conducted in that case constituted a noncriminal investigation for purposes of Section 708(b)(17) of the RTKL and that the records requested were exempt from disclosure. In its discussion, the Court recited Section 335 of the Public Utility Code and noted that, "[i]t is not until after the PUC's investigative materials are presented as part of a formal complaint, presented as part of a formal hearing, or presented as part of a settlement agreement that the materials are made public." *Id.* at 760. Requester relies on this statement by the Court to support his position that official action has been taken by the PUC. Because the language referenced by Requester is not the holding in *Gilbert*, and is *dicta* in that case, *Gilbert* is not dispositive to the instant case. Rather the plain language of the Public Utility Code and the Sunshine Act are controlling. Based on the rationale expressed above, Section 335(d) of the Public Utility Code does not compel disclosure of the records requested here.

CONCLUSION

For the foregoing reasons, the appeal is **denied** and the PUC is not required to take further action. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal or petition for review to the Commonwealth Court of Pennsylvania. 65 P.S. §

67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: November 9, 2012



**ANGELA EVELER, ESQ.
APPEALS OFFICER**

Sent to:
Robert A. Freedberg, Esquire
Elizabeth Januzzi, Esquire

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PA PUC
SECRETARY'S BUREAU

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing Reply Exceptions dated November 20, 2012, upon the persons listed below, in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a party).

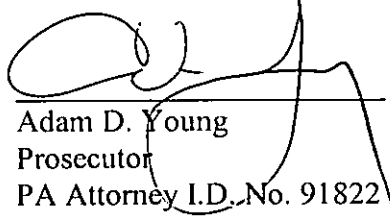
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Dated: November 30, 2012

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