

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Green Hills Manor and the
Heritage of Green Hills

v.

UGI Energy Services, LLC

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Docket No. C-2014-2420911

**MAIN BRIEF OF
UGI ENERGY SERVICES, LLC**

Frank H. Markle (I.D. No. 66367)
Senior Counsel
UGI Corporation
460 North Gulph Road
King of Prussia, PA 19406
Phone: 610-768-3625
Fax: 610-992-3258
E-mail: marklef@ugicorp.com

Date: January 22, 2015

Attorney for UGI Energy Services, LLC

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I. INTRODUCTION

This proceeding was initiated on July 11, 2014, when UGI Energy Services, LLC (“UGIES” or the “Company”) was served with a Complaint filed by Green Hills Manor and the Heritage of Green Hills (“Green Hills”) alleging that service for its four accounts under its contract with UGIES for competitive electric generation supply should have commenced on December 20, 2013, instead of January 20, 2014. Green Hills requests that the Pennsylvania Public Utility Commission (“Commission”) reform its contract with UGIES to change the start date to December 20, 2013, and direct UGIES to pay Green Hills \$27,759.50 for the increased expenses for electric generation supply service that it incurred for the billing period at issue.

In a Post Hearing Order¹ issued by Administrative Law Judge Dennis J. Buckley (the “ALJ”) on December 22, 2014, the ALJ directed the parties to submit briefs on the limited issue of whether the Commission has jurisdiction over the relief requested by Green Hills. UGIES herein submits this Main Brief on the limited question raised by the ALJ. For the reasons explained below, the Commission lacks subject matter jurisdiction over the relief requested by Green Hills.

II. STATEMENT OF THE CASE

On August 13, 2013, UGIES and Green Hills entered into a Master Power Sales Agreement (“MPSA”), under which Green Hills would receive competitive electric generation supply from UGIES for four different accounts. The MPSA includes four confirmation agreements, which were executed contemporaneously by the parties. The customer confirmation agreements are highly specific about the start dates for electric generation supply; the confirmation agreements for three accounts specified a start date of January 23, 2014, while the

¹ *Green Hills Manor v. UGI Energy Services, LLC*, Docket No. C-2014-2420911 (Dec. 22, 2014) (“Post Hearing Order”).

customer confirmation agreement for one account indicated a start date of January 19, 2014. Further, the customer confirmation agreements stated that the billing period would begin on the date of the meter read scheduled on or about either January 23, 2014, or January 19, 2014, depending on the account referenced. These customer confirmation agreements were expressly incorporated into the MPSA. *See* “Answer and New Matter of UGI Energy Services, LLC to the Complaint of Green Hills Manor and the Heritage of Green Hills,” Exhibit A (“UGIES Exhibit A”) (containing the MPSA and customer confirmation agreements).²

Prior to receiving service from UGIES, Green Hills received competitive electric generation supply from Liberty Power Holdings, LLC (“Liberty”). At the expiration of the fixed-price contract with Liberty, Green Hills continued to receive electric generation supply service from Liberty subject to a variable rate from at least December 20, 2013, to January 20, 2014.³ Green Hills paid Liberty for the electric generation supply service it received from Liberty for that billing period. Thereafter, pursuant to the express terms of the MPSA, Green Hills began receiving competitive electric generation supply service from UGIES starting January 20, 2014.

On July 11, 2014, UGIES was served with a Complaint filed by Green Hills alleging that service under its contract with UGIES for competitive electric generation supply should have commenced on December 20, 2013, instead of January 20, 2014. On July 31, 2014, UGIES filed its Answer and New Matter to the Complaint. Attached to the Answer and New Matter was a true and correct copy of the MPSA. *See* UGIES Exhibit A.

² The MPSA’s opening paragraph states that “[t]his Contract incorporates all transaction-specific Confirmation Agreements executed by the Parties in the future.” UGIES Exhibit A. Further, each customer confirmation agreement provides that “[t]his Confirmation Agreement . . . shall be incorporated into and subject to the terms and conditions of a certain Master Power Sales Agreement.” *Id.*

³ Green Hills’ contract with Liberty, which was admitted as an exhibit at the hearing on December 4, 2014, suggests that its fixed rate agreement with Liberty ended with the October 2013 billing cycle and that Green Hills also received electric generation supply service from Liberty subject to a variable rate during November 2013.

On October 17, 2014, the ALJ issued a Prehearing Order scheduling an initial telephonic hearing for October 27, 2014. On October 22, 2014, the ALJ issued an Order rescheduling the hearing for December 4, 2014. On November 21, 2014, Charles E. Thomas, III and Thomas T. Niesen filed a Notice of Appearance on behalf of Green Hills.

An telephonic evidentiary hearing was held on December 4, 2014. At the hearing, Green Hills requested that the Commission find that Green Hills' contract with UGIES for competitive electric generation supply should have commenced on December 20, 2013, instead of January 20, 2014, and that UGIES should pay Green Hills \$27,759.50 for the difference in the fixed rate under the contract with UGIES and the variable rate paid to Liberty during the period from December 20, 2013, through January 20, 2014. Green Hills characterized this relief as a "contract reformation" under 66 Pa. C.S. § 508.

On December 22, 2014, the ALJ issued a Post Hearing Order instructing the parties to brief the limited issue the ALJ raised at hearing, namely: whether this Complaint and its requested relief is properly before the Commission, or whether the Complaint is, in essence, a claim for damages that should properly be brought before a Court of Common Pleas. Post Hearing Order, at p. 2.

Pursuant to the Post Hearing Order, UGIES herein submits this Main Brief on the limited issues raised by the ALJ. For the reasons explained below, the ALJ should find that the Complaint and its requested relief are not properly before the Commission.

III. SUMMARY OF ARGUMENT

The Commission is without subject matter jurisdiction to grant the relief requested by Green Hills for several reasons. First, the Commission generally lacks subject matter jurisdiction over the terms and rates set forth in the contracts of electric generation suppliers ("EGSs"). The Commission's jurisdiction over EGS contracts is very limited. It is well-settled that the

Commission does not have the authority to interpret the terms and conditions of an EGS contract: (1) to determine whether a breach of an EGS contract occurred; or (2) to evaluate the rates charged by an EGS. Rather, the Commission can only review the contract terms to determine whether the EGS provided the necessary terms in the disclosure statement and whether the EGS charged rates in accordance with the disclosure statement. However, none of these are at issue in this proceeding.

Second, the Commission has no jurisdiction to award the relief requested. Section 508 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 508, empowers the Commission to reform contracts involving public utilities. UGIES is not a public utility; it is an EGS that is minimally regulated by the PUC under separate regulations. Therefore, the Commission cannot reform the contract entered into by and between UGIES and Green Hills. Moreover, the reformation remedy that Green Hills asserts is totally unfeasible; the Commission cannot retroactively change the start date of an EGS' contract with a customer to include a delivery period where the customer has already taken (and presumably paid for) service from another supplier.

Green Hills may attempt to characterize its remedy as an equitable remedy; however, the relief requested by Green Hills is truly and solely a request for monetary damages under the MPSA. It is well-established that the Commission does not have jurisdiction to award monetary damages. Green Hills attempts to avoid this clear precedent by characterizing its relief as only contract reformation. In reality, however, Green Hills is seeking to reform the contract and to recover monetary damages for the breach of the reformed contract. Green Hills should not be permitted to circumvent the limits of the Commission's jurisdiction simply by re-characterizing the relief it is truly seeking in this matter.

Finally, the Complaint must be dismissed for Green Hills' failure to join all the necessary and indispensable parties. During the time period in question (i.e., December 20, 2013 through January 20, 2014), Green Hills received and paid for competitive generation supply from Liberty at a variable rate. It is entirely unclear on this record whether the Commission could grant relief to Green Hills without impacting the rights of Liberty. Because the outcome of this proceeding may affect Liberty, Liberty is a necessary and indispensable party to this proceeding. Failure to join indispensable parties is a fatal flaw that deprives the Commission of subject matter jurisdiction and may be raised at any time. Thus, for these reasons and for those discussed in more detail below, the ALJ should find that the Complaint and its requested relief are not properly before the Commission.

IV. ARGUMENT

In this proceeding, Green Hills has asked the Commission to "reform" the existing contract by and between Green Hills and UGIES to essentially back-date the contract so that competitive electric generation supply from UGIES should have commenced on December 20, 2013, instead of January 20, 2014. However, pursuant to the express and unambiguous terms of the MPSA and customer confirmation agreements, Green Hills did not begin receiving competitive electric generation supply service from UGIES -- and UGIES had no obligation to provide such service -- until January 20, 2014. *See* UGIES Exhibit A. For this reason alone, the Complaint should be dismissed.

Notwithstanding, even if the Commission were to sustain the Complaint, the Commission is without subject matter jurisdiction to grant the relief requested by Green Hills. A challenge to subject matter jurisdiction may be raised at any time and cannot be waived. *See Commonwealth v. Little*, 314 A.2d 270, 272 (Pa. 1974) (citing *Daly v. School Dist. of Darby Twp.*, 252 A.2d 638 (Pa. 1969)). It is well-settled that the Commission is a "creature of statute" and, therefore, only

possesses “those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication.” *Feingold v. Bell of Pa.*, 383 A.2d 791, 794 (Pa. 1977) (citations omitted). As explained below, the Commission has very limited jurisdiction over EGS contracts. Thus, the relief requested by Green Hills in this case is beyond the Commission’s jurisdiction.

A. THE COMMISSION DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THE CONTRACT

Green Hills has characterized its requested relief as contract reformation. However, Green Hills overlooks the limited nature of the Commission’s jurisdiction over EGS contracts. For the reasons that follow, the Commission is without subject matter jurisdiction to grant the relief requested by Green Hills.

The Public Utility Code provides the Commission with very limited jurisdiction over EGSs. *See* 66 Pa. C.S. §§ 2807, 2809, 2810. In general, the legislature “did not intend for EGSs to be characterized as public utilities” and regulated as such by the Commission, except for the “limited purposes” outlined in Sections 2809 and 2810 of the Pennsylvania Public Utility Code, 66 Pa. C.S. §§ 2809-2810. *Delmarva Power & Light Co. v. Commonwealth*, 870 A.2d 901, 910 (Pa. 2005) (citing 66 Pa. C.S. § 102); *see also* 66 Pa. C.S. § 2806(a) (“The generation of electricity shall no longer be regulated as a public utility service or function except as otherwise provided for in this chapter.”). Sections 2809 and 2810 provide requirements for EGSs regarding licensure, posting of bond, payment of taxes, transfer of licenses, and complying with Commission regulations, including those pertaining to standards and billing practices. 66 Pa. C.S. §§ 2809-2810. The Commission’s relevant regulations address EGSs’ bill format, disclosure statements, marketing and sales activities, and contract expiration notices. *See* 52 Pa. Code §§ 54.3-54.7.

Although the Commission has limited jurisdiction over certain EGS activities, the Commission lacks jurisdiction over the terms and conditions of EGSs' contracts, except to ensure that the terms listed in 52 Pa. Code § 54.5 are provided in the disclosure statement. Nowhere in the Pennsylvania Public Utility Code is the Commission empowered to review and interpret other provisions of such contracts. Indeed, the Commission recently declared that it "does not have subject matter jurisdiction to interpret the terms and conditions of a contract between an EGS and a customer to determine whether a breach of contract has occurred." *Commonwealth v. IDT Energy, Inc.*, Docket No. C-2014-2427657, at p. 24 (Order Entered Dec. 18, 2014) ("*IDT Energy*") (citing *Allport Water Auth. V. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. 1978)). Similarly, the Commission does not have jurisdiction over the rates outlined in EGSs' contracts. *IDT Energy*, at p. 24. The Commission only has jurisdiction to ensure that the prices charged by an EGS conform to its disclosure statement. *Id.* at p. 25. In short, when a complaint involves the terms and conditions of an EGS contract, the Commission generally lacks subject matter jurisdiction.

In this case, the Commission does not have subject matter jurisdiction over Green Hills' allegations regarding the contract at issue in this case. The contract was entered into by and between Green Hills and UGIES, which is an EGS. As explained above, Pennsylvania law generally does not confer jurisdiction to the Commission for the review of EGSs' contract terms and conditions. The Commission only has limited power to review the terms provided in the disclosure statement, which is not at issue here. Moreover, it is inconsequential whether the EGS contract provision at issue concerns the EGS rates or the date that service begins. The Commission entirely lacks jurisdiction to interpret the terms and conditions of the contract at issue. That jurisdiction solely rests in a court of general jurisdiction. Furthermore, even if the

Commission had the power to reform the contract as requested, which for reasons discussed in Section IV.B it does not, the Commission would not have subject matter jurisdiction to review and interpret the contract terms and conditions to determine whether there was a breach of the reformed contract. *See IDT Energy*, at p. 24 (citing *Allport Water Auth. V. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. 1978)). Hence, the Complaint is not properly before the Commission.

B. THE COMMISSION DOES NOT HAVE THE ABILITY TO REFORM A CONTRACT BETWEEN AN EGS AND A CUSTOMER UNDER 66 PA. C.S. § 508

Green Hills alleges that it is not seeking damages; rather, it contends that it is only seeking contract reformation under 66 Pa. C.S. § 508. However, even if that characterization were true, the Commission does not have the power to reform the contract between UGIES and Green Hills because UGIES is not a public utility.

Section 508 of the Pennsylvania Public Utility Code provides the following, in pertinent part:

The commission shall have power and authority to vary, reform, or revise, upon a fair, reasonable, and equitable basis, any obligations, terms, or conditions of any contract heretofore or hereafter entered into between any public utility and any person, corporation, or municipal corporation, which embrace or concern a public right, benefit, privilege, duty, or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well-being of this Commonwealth.

66 Pa. C.S. § 508 (emphasis added). Importantly, the plain language of Section 508 provides that the contract at issue must involve a “public utility” for the Commission to have the power and authority reform the contract.

It is clear that UGIES is not a “public utility.” UGIES is a licensed EGS that provides competitive electric generation supply to customers in Pennsylvania. As defined in the Pennsylvania Public Utility Code, the term “public utility” does not include “[e]lectric generation supplier companies, except for the limited purposes as described in sections 2809 . . .

and 2810.” 66 Pa. C.S. § 102; *see also* *IDT Energy, Inc.*, at p. 16 (stating that “EGSs are not ‘public utilities’ under the Code except for the limited purposes of 66 Pa. C.S. § 2809 and § 2810”). Neither Section 2809 (relating to requirements for electric generation suppliers) nor 2810 (relating to revenue-neutral reconciliations) is applicable here. Indeed, this case does not concern licensure, posting of bond, payment of taxes, transfer of licenses, or compliance with the Commission’s regulations on bill format, disclosure statements, marketing and sales activities, or contract expiration notices. *See* 66 Pa. C.S. §§ 2809-2810; 52 Pa. Code §§ 54.3-54.7.

Further, the Supreme Court of Pennsylvania previously held that Section 510 of the Pennsylvania Public Utility Code, which concerns assessments, was inapplicable to an EGS because the statute was specifically limited to “public utilities.” *Delmarva Power & Light Co. v. Commonwealth*, 870 A.2d 901, 909-12 (Pa. 2005). Likewise, Section 508 only applies to contracts involving a “public utility.” Therefore, Section 508 is wholly inapplicable to the issues raised in the Complaint. Thus, the Commission does not have the power to reform the contract entered into by and between UGIES and Green Hills, and the requested relief is not properly before the Commission. Even if such reformation power existed, there is no way for the Commission to retroactively change the ownership of natural gas supply that was already delivered by another EGS and consumed by Green Hills short of calculating monetary damages.

C. THE REQUESTED RELIEF IS A CLAIM FOR DAMAGES OVER WHICH THE COMMISSION HAS NO JURISDICTION

Green Hills’ requested relief is essentially a claim for damages, and it is well-settled that the Commission does not have the power to award damages. As stated by the Supreme Court of Pennsylvania, “It is clear that the remedial and enforcement powers vested in the PUC by the Public Utility Law were designed to allow the PUC to enforce its orders and regulations but not to empower the PUC to award damages.” *Feingold v. Bell of Pa.*, 383 A.2d 791, 795 (Pa. 1977).

Green Hills has attempted to side-step this clear precedent by characterizing its requested relief as “contract reformation.”⁴ Although the contract and the incorporated customer confirmation agreements explicitly provide start dates of the meter read date on or about January 23, 2014, and January 19, 2014, depending on the account, Green Hills wants the contract reformed to provide a start date of December 20, 2013. Notably, Green Hills is not seeking a refund from Liberty for the moneys paid to Liberty for the billing period of December 20, 2013, to January 20, 2014, even though it is undisputed that Liberty provided Green Hills with electric generation supply service during the period in question and that Liberty presumably received payment from Green Hills for that service. Rather, Green Hills wishes to force UGIES to pay \$27,759.50⁵ to Green Hills for electric generation supply that UGIES did not provide under its contract. This is a cause of action ultimately seeking damages for the alleged actions or inactions of UGIES, which is beyond the jurisdiction of the Commission.

Green Hills seeks damages from UGIES to compensate it for the expenses that it did not expect to incur during the December 20, 2013, to January 20, 2014 billing period based upon the alleged actions or inactions of UGIES.⁶ By definition, Green Hills seeks expectation damages. As explained by the Supreme Court of Pennsylvania, one of the remedies for breach of contract

⁴ As discussed in Section IV.B, however, the Commission lacks the authority even to reform the contract between UGIES and Green Hills because UGIES is not a public utility.

⁵ The \$27,759.50 claimed is the purported difference between the amount billed by Liberty for providing competitive electric generation supply during the December 20, 2013, to January 20, 2014 billing period and the amount UGIES would have charged during that same period based on the fixed contract prices stated in the confirmation agreements.

⁶ Assuming for the sake of argument that the allegations in the Complaint are true, and the contract was reformed, Green Hills’ theory of the case is properly restated as follows: (1) Green Hills and UGIES entered into a contract that would begin, as reformed, immediately after the term of the Liberty contract ended; (2) UGIES failed to begin providing service to Green Hills on December 20, 2013 (*i.e.*, when Green Hills intended for the Liberty contract to end); (3) as a result, Green Hills incurred expenses in excess of what it expected to pay for electric generation supply during the December 20, 2013, to January 20, 2014 billing period; and (4) Green Hills seeks to recover those increased expenses, *i.e.*, damages from UGIES.

is intended to protect “a party’s expectation interest ‘by attempting to put him in as good a position as he would have been had the contract been performed, that is, had there been no breach.’” *Trosky v. Civil Serv. Comm’n*, 652 A.2d 813, 817 (Pa. 1995) (quoting Restatement (Second) of Contracts § 344 cmt. a). Here, Green Hills seeks to reform the explicit start dates in the contract so that UGIES should have commenced service on December 20, 2013, which it did not. The rates charged by Liberty during that billing period exceeded what Green Hills presumably expected to pay under its contract with UGIES. Green Hills seeks to be compensated for paying these increased expenses so that it can be in as good of a position had the contract (as reformed) been performed by UGIES. Therefore, Green Hills seeks expectation damages from UGIES. However, the Commission lacks the power to award monetary damages. Thus, Green Hills’ requested relief is not properly before the Commission.

Moreover, Green Hills’ claim that it is seeking only contract reformation is a red herring. Green Hills is attempting to disguise its claim for damages as a claim for contract reformation. This attempt by Green Hills to transform its requested relief into solely reformation should be rejected. In actuality, Green Hills is seeking to reform the contract and then recover damages for an alleged breach of that reformed contract. *See Rempel v. Nationwide Life Ins. Co.*, 370 A.2d 366, 371 (Pa. 1977) (noting that the plaintiff “sought both to reform the contract and to recover as damages the total sum she was entitled to receive once the contract was reformed”); *see also Voracek v. Crown Castle USA, Inc.*, 907 A.2d 1105, 1109 (Pa. Super. 2006) (observing that the trial court “reformed the contract to include the severance payment” and that the plaintiff “was forced to bring a breach of contract claim to collect that payment”), *appeal denied*, 919 A.2d 958 (Pa. 2007) (per curiam). Since it is well-established that the Commission is not empowered to award the legal remedy of damages, a party cannot sidestep this precedent by bootstrapping a

claim for damages to a contract reformation claim and having the Commission decide it. To do so would strip away the jurisdiction of the Courts of Common Pleas, enlarge the Commission's jurisdiction without legislative approval, and enable parties to obtain damages under reformed contracts from the Commission. Therefore, despite Green Hills stating that it only seeks contract reformation, the Commission lacks jurisdiction over this cause of action because it seeks damages.⁷ Green Hills remedy, if any, is to seek damages for breach of contract with the Court of Common Pleas.

D. THE COMPLAINT MUST BE DISMISSED FOR FAILURE TO JOIN ALL NECESSARY AND INDISPENSABLE PARTIES

The Complaint must be dismissed for Green Hills' failure to join Liberty, which is a necessary and indispensable party to this action. Green Hills' failure to join Liberty is a fatal flaw that deprives the Commission of jurisdiction. *See Polydyne, Inc. v. City of Philadelphia*, 795 A.2d 495 (Pa. Cmwlth. 2002).

An indispensable party is one whose rights are so directly connected with and affected by the litigation that it must be a party of record to protect such rights, and that party's absence renders any order or decree of court null and void for want of jurisdiction. *See Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975). Further, although this issue was not explicitly mentioned in the Post Hearing Order, "[w]hether a court lacks jurisdiction due to the failure to join an indispensable party may be raised at any time or *sua*

⁷ UGIES acknowledges that the Commission has recently indicated that it may direct an EGS to issue a refund in the cases of "slamming" by an EGS under 52 Pa. Code § 57.177(b) or over-billing by an EGS under 66 Pa. C.S. § 501. *See IDT Energy*, at pp. 16-18, 27. Here, however, Green Hills does not allege slamming or over-billing by UGIES. Further, UGIES never received payment from Green Hills for the billing period in question and, therefore, cannot "refund" what is has not been paid. *See IDT Energy*, at pp. 16-18, 27; *Hill v. PECO Energy Co.*, Docket No. C-2010-2154854, 2010 Pa. PUC LEXIS 859, at *6 n.2 (Apr. 29, 2010) (Initial Decision) (noting that "as no payment has been made, there is no issue of a possible refund"), *adopted by the Commission* (Order Entered Sept. 16, 2010). Clearly, the Commission's limited jurisdiction to order a refund from an EGS is not at issue in this case.

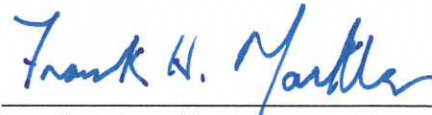
sponte.” *HYK Construction Co. v. Smithfield Township*, 8 A.3d 1009 (Pa. Cmwlth. 2010) (citations omitted).

Green Hills alleges that it was improperly charged by Liberty for the billing period December 20, 2013, to January 20, 2014, because UGIES should have provided service during that period instead. As discussed previously, the Complaint essentially seeks damages of \$27,759.50 from UGIES. UGIES submits that it is unclear on this record whether Green Hills, to the extent it is entitled to any relief, should be seeking relief from Liberty or UGIES. The outcome of this proceeding clearly could directly or indirectly impact Liberty, which provided competitive electric generation supply to and received payment from Green Hills during the period in question. To the extent that the Complaint involves questions surrounding either the service provided or rates charged by Liberty, Liberty is an indispensable party to the resolution of this Complaint. Liberty must be afforded the opportunity to protect its rights should the Commission determine that Green Hills is entitled to any relief in this proceeding. Therefore, because Green Hills failed to join Liberty as an indispensable party, the Commission lacks jurisdiction over this Complaint.

V. CONCLUSION

WHEREFORE, UGI Energy Services, LLC respectfully requests that Administrative Law Judge Dennis J. Buckley find that the Complaint and its requested relief are not properly before the Pennsylvania Public Utility Commission.

Respectfully submitted,



Frank H. Markle (I.D. No. 66367)
Senior Counsel
UGI Corporation
460 North Gulph Road
King of Prussia, PA 19406
Phone: 610-768-3625
Fax: 610-992-3258
E-mail: marklef@ugicorp.com

Date: January 22, 2015

Attorney for UGI Energy Services, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

VIA E-MAIL & FIRST CLASS MAIL

Honorable Dennis J. Buckley
Administrative Law Judge
PA Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor East
PO Box 3265
Harrisburg, PA 17105-3265
E-mail: debuckley@pa.gov

Thomas T. Niesen, Esquire
Thomas Niesen & Thomas LLC
212 Locust Street, Suite 600
Harrisburg, PA 17108-9500
E-mail: tniesen@tntlawfirm.com
Counsel for: Green Hills Manor and The Heritage of Green Hills

Date: January 22, 2015



Frank H. Markle