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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

CENTRE PARK HISTORIC DISTRICT, :  
INC. :  
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 :  
 vs. : Docket No. C-2015-2516051  
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 UGI UTILITIES, INC. :

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City of Reading, :  
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 v. : Docket No. C-2016-2530475  
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 :  
 UGI Utilities, Inc. :

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**SUPPLEMENTAL PREHEARING MEMORANDUM OF  
CENTRE PARK HISTORIC DISTRICT, INC. AND CITY OF READING**

**BEFORE ADMINISTRATIVE LAW JUDGE MARY D. LONG:**

Centre Park Historic District, Inc. (“CPHD”) and the City of Reading (“City”), by and through their attorneys, Eastburn and Gray, P.C. and Michael J. Savona, Esquire, Michael E. Peters, Esquire, and Michael T. Pidgeon, Esquire, hereby submit the following Supplemental

Prehearing Memorandum as requested by the March 13, 2017 e-mail of the Honorable Mary D.

Long to respond to the following issues:

1. *The Complainants shall identify by interrogatory or document request number which interrogatories and document production requests identified in its motion to compel filed on September 8, 2016, require a ruling and were not withdrawn or otherwise resolved.*
2. *The parties shall be prepared to provide legal argument regarding the application of 52 Pa.Code § 5.323(c) to the discovery of drafts to the Meter and Regulator Placement Guidelines requested in the Complainants' Interrogatory No. 34. Would UGI's objection permit any party to shield documents from discovery simply by identifying them as potential hearing exhibits? Should drafts generated before the formal complaints were filed be treated differently than the drafts generated after the complaints were filed?*

**I. DISCOVERY REQUIRING A RULING**

The parties have conferred, and UGI will be providing supplemental discovery responses. The City and CPHD reserve the right, following review of that supplemental production, to identify additional discovery disputes requiring resolution. Furthermore, the City and CPHD have requested that UGI provide a Privilege Log. The City and CPHD reserve the right to challenge the propriety of claimed privilege for withheld documents upon receipt and review of the Privilege Log.

At this time the only discovery requests requiring a ruling by the Administrative Law Judge are those requests relating to UGI's Meter and Regulator Placement Guidelines—City Interrogatory No. 34 and Request for Production of Documents No. 31:

**Interrogatory No. 34.** Describe in detail the procedure UGI followed in formulating, drafting, and adopting the Meter and Regulator Placement Guidelines, including, but not limited to, identifying all individuals who participated in the drafting and editing of the guidelines, and the information used to produce the guidelines. Please also consider this a request to produce any documents, notes, memoranda, correspondence, writings, etc. related to the same, including, but not limited to, the final adopted

version of the Meter and Regulator Placement Guidelines and all drafts.

**Request for Production of Documents No. 31.** The final adopted Meter and Regulator Placement Guidelines and all drafts created prior to adoption.

These are the same requests UGI objected to on the basis that Section 5.323(a) of the PUC's regulations protects drafts of the Guidelines from production. Section 5.323(a) is addressed in Section II, *infra*.

## II. SECTION 5.323(a)

Section 5.323(a) of the PUC's regulations states:

(a) *Generally*. Subject to this subchapter and consistent with Pa. R.C.P. 4003.3 (relating to scope of discovery trial preparation material generally), a party may obtain discovery of any matter discoverable under § 5.321(b) (relating to scope) **even though prepared in anticipation of litigation or hearing** by or for another party or by or for that other party's representative, including his attorney, consultant, surety, indemnitor, insurer or agent. The discovery may not include disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes, summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery may not include disclosure of his mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy, tactics or preliminary or draft versions of written testimony or exhibits, whether or not final versions of the testimony or exhibits are offered into evidence.

52 Pa.Code § 5.323(a) (emphasis added). UGI relies on Section 5.323(a) in withholding drafts of the Meter and Regulator Placement guidelines, on the basis that it intends to utilize the adopted Meter and Regulator Placement Guidelines as an exhibit at the hearing in this matter. In essence, UGI argues that once a document is identified as an exhibit to be used in a PUC hearing, any drafts of that document, regardless of whether the document was specifically prepared for

use as an exhibit, are not discoverable. Although UGI cherry-picks language from section 5.323(a) in making its argument, the regulation speaks for itself, and belies UGI's argument.

Sentence 1 of Section 5.323(a) limits the applicability of the regulation. Sentence 1 limits the discovery covered by the regulation to discovery of materials, "even though prepared in anticipation of litigation or hearing". 52 Pa.Code § 5.323(a). UGI interprets Section 5.323(a) as if the first sentence does not exist, and that instead the third sentence of the regulation should be read on its own. UGI's interpretation of Section 5.323(a) is untenable under even the most basic principles of interpretation.

It is black-letter law of statutory construction that that Courts must interpret statutes to give effect to all of their provisions and with reference to other sections of the statute. 1 Pa.C.S.A. ¶ 1921(a); *Com. v. Poncala*, 915 A.2d 97, 104 (2006) ("Courts must read and evaluate each section of a statute in the context of, and with reference to, the other sections of the statute, because there is a presumption that the legislature intended the entire statute to be operative and effective.").<sup>1</sup>

Read in conjunction with Sentence 1, Sentence 2 (which applies to attorney work product) and Sentence 3 (which applies to the work product of a party's non-attorney representative) only apply if the materials requested were prepared in anticipation of litigation or a hearing. This limitation of the applicability of Section 5.323(a) is ignored by UGI.

Because UGI ignores the requirement that materials to be excluded under Section 5.323(a) must have been prepared in anticipation of litigation or hearing, UGI interprets Sentence 3 of Section 5.323(a) as exempting drafts of any document prepared by a party's non-attorney representative, as long as the document is ultimately identified as an exhibit to the

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<sup>1</sup> Statutory construction rules apply equally to the interpretation of administrative regulations. *Bayada Nurses, Inc. v. Dept. of Labor and Indus.*, 958 A.2d 1050, 1054 (Pa. Commw. Ct. 2008).

litigation/hearing—regardless of whether the document was prepared *as an exhibit for the litigation/hearing*. This is not how Section 5.323(a) operates.

There is a difference between exempting from discovery drafts of an exhibit prepared specifically for a hearing/litigation and exempting drafts of documents prepared, *e.g.*, in the ordinary course of business just because the final version is identified as an exhibit. The former is work-product—whether by an attorney or by a party’s representative. The latter is not protected nor exempted from discovery. This interpretation of Section 5.323(a) is consistent with Pa.R.C.P. 4003.3<sup>2</sup> and the general rule that documents produced during the ordinary course of business are not protected by the work-product doctrine. *See, e.g., Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000) (“Work product prepared in the ordinary course of business is not immune from discovery.”).<sup>3</sup>

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<sup>2</sup> PA.R.C.P. 4003.3 provides:

Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa.R.C.P. No. 4003.3.

<sup>3</sup> The Third Circuit in *Holmes* applied Federal Rule of Civil Procedure 26(b)(4), which provides, in pertinent part: “Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation or litigation or for trial...” F.R.C.P. 26(b)(4).

There is a dearth of cases interpreting Section 5.323(a). In *Pennsylvania Public Utility Commission v. Breezewood Telephone Company*, 74 Pa.P.U.C. 431 (1991), a tariff case, the PUC, among a myriad of other issues, considered whether the Office of Consumer Advocate could withhold drafts of “proposals to consult and/or testify in [the] proceeding” under Section 5.323(a). The PUC ultimately concluded that the drafts could not be withheld, but that the Office of Consumer Advocate could, as necessary, redact the drafts to protect privileged information.

The PUC in *Breezewood*, did not consider whether drafts could be withheld based solely on identification of the final product as an exhibit. *Breezewood* is instructive, however, to practical resolution of this dispute. To the extent UGI has a genuine basis for protecting work product, *e.g.*, notes on the draft containing the mental impressions of a reviewing attorney or party representative, UGI can redact the protected material, produce the redacted documents, and provide a Privilege Log.

Here, UGI attempts to withhold drafts of the Meter and Regulator Placement Guidelines. The Guidelines constitute UGI’s internal regulations for meter and regulator placement. The Guidelines were not created in anticipation of litigation. Instead, the Guidelines were created in the ordinary course of UGI’s provision of natural gas service. The Meter and Regulator Placement Guidelines are part of UGI’s *Gas Operations Manual*. The Guidelines and Manual existed before this litigation was commenced, will exist after this litigation is concluded, and—although this litigation may have drawn UGI’s attention to needed revisions to the Guidelines—exist independent of the litigation. There is no basis for withholding drafts of the meter and Regulator Placement Guidelines.

To answer the Administrative Law Judge’s pointed questions:

*Would UGI's objection permit any party to shield documents from discovery simply by identifying them as potential hearing exhibits?*

Yes. This is precisely what UGI's interpretation of Section 5.323(a) would do. This is not, however, how Section 5.323(a) was intended to operate.

*Should drafts generated before the formal complaints were filed be treated differently than the drafts generated after the complaints were filed?*

No. The issue is whether the drafts at issue are drafts of exhibits created in anticipation of litigation or a hearing. While it may be more likely that a party will prepare exhibits, and therefore drafts of exhibits, after litigation has commenced, it is the purpose for which the document was created, not the timing of its creation, that controls.

In summary, there is no basis under Section 5.323(a) for UGI's refusal to produce drafts of the Meter and Regulator Placement Guidelines. To the extent the drafts contain mental impressions, opinions, notes, etc. that UGI asserts are entitled to protection under Section 5.323(a), then UGI must produce the drafts, with redaction.

**EASTBURN AND GRAY, P.C.**

/s/ Michael J. Savona, Esquire

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Dated: 16 March 2017

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**CERTIFICATE OF SERVICE**

It is hereby certified that on March 16, 2017, Michael E. Peters, Esquire served, by electronic mail a true and correct copy of the foregoing prehearing memorandum on the following:

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/s/ Michael E. Peters

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