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File #: 159332

November 16, 2017

***VIA ELECTRONIC FILING***

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor North  
P.O. Box 3265  
Harrisburg, PA 17105-3265

**Re: Crescent Hotel - Plymouth Meeting, LP v. PECO Energy Company  
Docket No. C-2008-2068258**

**Crescent Hotel - Plymouth Meeting, LP v. UGI Corporation  
Docket No. C-2008-2068267**

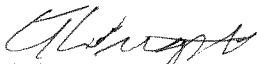
**Crescent Hotel - Plymouth Meeting, LP v. Celeren Corporation  
Docket No. C-2009-2089563**

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Dear Secretary Chiavetta:

Enclosed for filing is the Motion of UGI Energy Services, LLC to Vacate and Clarify the Order Entered October 26, 2017, in the above-referenced proceedings. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

  
Christopher T. Wright

CTW/jl  
Enclosures

cc: Honorable Marta Guhl  
Certificate of Service

**CERTIFICATE OF SERVICE**

(Docket Nos. C-2008-2068-258, C-2008-2068267 and C-2009-2089563)

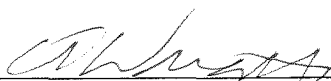
I hereby certify that a true and correct copy of the foregoing document has been served upon the following persons, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

**VIA E-MAIL & FIRST CLASS MAIL**

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Date: November 16, 2017

  
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Christopher T. Wright

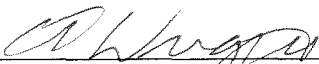
**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Crescent Hotel – Plymouth Meeting, LP	:	
v.	:	Docket No. C-2008-2068258
PECO Energy Company	:	
Crescent Hotel – Plymouth Meeting, LP	:	
v.	:	Docket No. C-2008-2068267
UGI Corporation	:	
Crescent Hotel – Plymouth Meeting LP	:	
v.	:	Docket No. C-2009-2089563
Celeren Corporation	:	

**NOTICE TO PLEAD**

YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE § 5.103(c), YOU MAY ANSWER THE ENCLOSED MOTION WITHIN TWENTY (20) DAYS AFTER THE DATE OF SERVICE. YOUR ANSWER SHOULD BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265. A COPY SHOULD ALSO BE SERVED ON THE UNDERSIGNED COUNSEL.

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Of Counsel:

Post & Schell, P.C.

Date: November 16, 2017

*Counsel for UGI Energy Services, LLC*

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Crescent Hotel – Plymouth Meeting, LP	:	
v.	:	Docket No. C-2008-2068258
PECO Energy Company	:	
	:	
Crescent Hotel – Plymouth Meeting, LP	:	
v.	:	Docket No. C-2008-2068267
UGI Corporation	:	
	:	
Crescent Hotel – Plymouth Meeting LP	:	
v.	:	Docket No. C-2009-2089563
Celeren Corporation	:	

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**MOTION OF UGI ENERGY SERVICES, LLC  
TO VACATE AND CLARIFY THE ORDER ENTERED OCTOBER 26, 2017**

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UGI Energy Services, LLC (“UGIES”) files this Motion to Vacate and Clarify the Order issued by Administrative Law Judge Marta Guhl (the “ALJ”) on October 26, 2017. In the October 26, 2017 Order, the ALJ denied UGIES’ request that Count II of the Second Amended Formal Complaint of Crescent Hotel – Plymouth Meeting, LP (“Crescent Hotel” or the “Complainant”) be dismissed for lack of subject matter jurisdiction. The October 26, 2017 Order concluded that the issue of proper notice of its agent’s non-payment asserted by Crescent Hotel in Count II of the Second Amended Complaint is a utility service issue over which the Pennsylvania Public Utility Commission (“Commission”) has jurisdiction pursuant to Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501. UGIES respectfully requests that the October 26, 2017 Order be vacated and clarified for several important reasons that were overlooked by the Order.

First, although Section 1501 grants the Commission broad jurisdiction over public utility service-related issues, the October 26, 2017 Order overlooks that UGIES is **not** a public utility.

Rather, UGIES is a licensed natural gas supplier (“NGS”). Section 1501 of the Public Utility Code does not apply to NGSs, such as UGIES, because they are not “public utilities” under the Public Utility Code. Therefore, contrary to the October 26, 2017, the Commission does not have jurisdiction over the alleged notice issue between Crescent Hotel and UGIES pursuant to Section 1501 of the Public Utility Code.

Second, the October 26, 2017 Order overlooks that the terms and conditions of the natural gas supply service provided by UGIES to Crescent Hotel, including any notice obligation or duty, are governed exclusively by the private contract that was in place between the NGS and customer. It is well-established that the Commission does not have subject matter jurisdiction to interpret the terms and conditions of a contract between an NGS and its customers, to determine whether a breach of the contract has occurred, or to award monetary damages for an alleged breach of contract.

Third, while the ALJ confirmed the prior ruling in this proceeding that monetary damages will not be awarded in this proceeding, the October 26, 2017 Order failed to make it clear that the Commission lacks jurisdiction to grant Crescent Hotel’s request for a refund of natural gas charges paid to UGIES. As noted by the ALJ, Crescent Hotel paid UGIES in full -- nearly a decade ago -- for all gas sold and delivered during the disputed period. *See* October 26, 2017 Order, p. 7. Crescent Hotel’s request for a refund is essentially a request for monetary damages for an alleged breach of contract. It is well-established that the Commission lacks lacks the authority to grant Crescent Hotel’s request for a refund of natural gas charges paid to UGIES because: (i) UGIES is not a public utility; (ii) Crescent Hotel has not alleged any facts under which the Commission has authority to order a supplier to issue a refund; and (iii) the only relief that could be granted, assuming the Commission has subject matter jurisdiction and Crescent

Hotel is able to meet its burden of proof by a preponderance of evidence, is a civil penalty that would be paid directly to the Commonwealth, not Crescent Hotel. Therefore, the ALJ should clarify that the Commission does not have authority to grant the relief requested in this case.

For these reasons, as further explained below, UGIES respectfully requests that the October 29, 2017 Order be vacated and clarified to conclude that the Commission lacks subject matter jurisdiction over the claim and relief requested in Count II of Crescent Hotel's Second Amended Complaint against UGIES. In the alternative, UGIES respectfully requests that the issue of the Commission's jurisdiction over the claim and relief requested in Count II of the Second Amended Complaint be immediately certified to the Commission for interlocutory review pursuant to 52 Pa. Code § 5.305. In support thereof, UGIES states as follows:

## **I. PROCEDURAL HISTORY**

1. This matter was initiated on October 1, 2008 (*i.e.*, more than nine years ago), when Crescent Hotel filed its initial Formal Complaints with the Commission.

2. In its initial Formal Complaints, Crescent Hotel named PECO Energy Company/Exelon Corporation ("PECO"), Celeren, and UGI Energy Services, Inc.<sup>1</sup> as respondents.

3. The initial Formal Complaint against UGIES was served via a Secretarial Letter dated October 9, 2008. UGIES filed an Answer to the Formal Complaint on October 29, 2008.

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<sup>1</sup> UGI Energy Services, Inc. was an NGS licensed by the Commission, at Docket No. A-12508, to provide competitive natural gas supplies in Pennsylvania. The NGS license of UGI Energy Services, Inc. was transferred to UGIES on September 12, 2013. See *Petition to Transfer Natural Gas Supplier License from UGI Energy Services, Inc. to UGI Newco, LLC, Natural Gas Supplier License Application of UGI Newco, LLC and Abandonment of the Natural Gas Supplier License of UGI Energy Services, Inc.*, Docket Numbers: A-125018 and A-2013-2369286 (Order entered Sept. 12, 2013).

4. On or about April 1, 2009, Celeren filed for bankruptcy. As a result, the above-captioned proceedings were stayed by Order issued on April 2, 2009, until the disposition of Celeren's bankruptcy.

5. On February 18, 2014, the Bankruptcy Court issued a Final Decree closing the Celeren bankruptcy proceeding.

6. On March 12, 2014, the above-captioned proceedings were reassigned to Administrative Law Judge Cynthia W. Fordham.

7. On April 22, 2014, PECO filed a Motion to Lift Stay and Re-Activate the above-captioned proceedings. PECO noted that the Celeren bankruptcy proceeding was completed and that there was no longer any reason to stay the instant proceeding. On May 12, 2014, UGIES filed a letter indicating that it had no objection to PECO's Motion to Lift Stay and Re-Activate the Proceeding.

8. On April 24, 2014, PECO filed a Motion to Require the Filing of an Amended and More Specific Complaint. On May 12, 2014, UGIES filed a letter indicating that it took no position on PECO's request, but reserved the right to file an answer, new matter and/or motions to any such amended complaint.

9. On June 20, 2014, Crescent Hotel filed and served an Amended Complaint.

10. On July 9, 2014, PECO filed Preliminary Objections to the Amended Complaint.

11. On July 10, 2014, UGIES filed an Answer and New Matter in response to the Amended Complaint.

12. On July 29, 2014, Crescent Hotel filed a Second Amended Formal Complaint. In its Second Amended Complaint, Crescent Hotel asserted the following counts: Count I was against PECO, Exelon Corporation, and Celeren (Second Amended Complaint, ¶¶ 31-46); Count

II was against UGIES (Second Amended Complaint, ¶¶47-59); Counts III through V were against Celeren (Second Amended Complaint, ¶¶ 60-86); and Count VI was against PECO and Exelon Corporation (Second Amended Complaint, ¶¶ 87-100).

13. On August 18, 2014, UGIES filed an Answer and New Matter to the Second Amended Complaint. Crescent Hotel did not file any response or answer to UGIES' New Matter.

14. On August 18, 2014, PECO filed Preliminary Objections to the Second Amended Complaint.

15. On August 29, 2014, Crescent filed an Answer to the Preliminary Objections to the Second Amended Complaint.

16. On September 8, 2016, Administrative Law Judge Cynthia W. Fordham issued Order #4, which granted in part and denied in part PECO's Preliminary Objections. Specifically, Order #4 granted Preliminary Objections and dismissed the following:

Paragraphs 11-17, 30, and 40 of Count I were stricken from the Second Amended Complaint;

The attorney fee claim in Paragraph 46(d) of Count I of the Second Amended Complaint was dismissed;

Count III of the Second Amended Complaint was dismissed and struck in its entirety, including the claim that the defendants violated the Commission's regulations at 52 Pa. Code § 62.102(d) and (f); and

Paragraph 93 of Count IV was stricken from the Second Amended Complaint because it pertains to a breach of contract claim.

*See Order #4*, p. 20. Consequently, the only remaining claim against UGIES is Count II of the Second Amended Complaint.

17. Count II of the Second Amended Complaint alleges that UGIES breached its duty by failing to notify Crescent Hotel when its authorized billing agent, Celeren, failed to pay for



the natural gas supply provided by UGIES and received by Crescent Hotel. (See Second Amended Complaint ¶¶ 54-55)

18. On September 28, 2016, PECO filed an Answer to the Second Amended Complaint.

19. The matter was reassigned to Administrative Law Judge Marta Guhl on or about March 16, 2017.

20. A prehearing conference was held on July 12, 2017. A procedural schedule was adopted and issued in Order #5.

21. On August 17, 2017, UGIES filed a Motion for Summary Judgment requesting that Count II of the Second Amended Complaint be dismissed in its entirety and with prejudice for the following reasons:

- A. There is nothing in the Public Utility Code, Commission regulations or Commission orders that requires a licensed NGS to notify a large commercial and industrial customer when the customer's authorized billing agent or representative -- who was designated solely by the customer -- fails to remit timely payment for the natural gas supply received by the large commercial and industrial customer.
- B. Count II of the Second Amended Formal Complaint is a claim for breach of the private natural gas supply contract between Crescent Hotel and UGIES, which the Commission lacks jurisdiction to adjudicate.
- C. The relief requested in Count II of the Second Amended Complaint is beyond the Commission's jurisdiction.

22. On September 6, 2017, Crescent Hotel filed its Answer to the Motion for Summary Judgment, together with a New Matter. On September 18, 2017, UGIES filed an Answer to the New Matter.

23. On October 26, 2017, the ALJ issued an Order denying UGIES' Motion for Summary Judgment. Therein, the ALJ concluded that the notice issue asserted in Count II of the

Second Amended Complaint is public utility-related service subject to the Commission's jurisdiction pursuant to Section 1501 of the Public Utility Code, 66 Pa.C.S. § 1501. *See* October 26, 2017 Order, pp. 11-12.<sup>2</sup>

24. UGIES herein files this Motion to Vacate and Clarify the October 26, 2017 Order.

## II. ARGUMENT

### A. **The October 26, 2017 Order Overlooks that UGIES Is Not a Public Utility.**

25. UGIES incorporates paragraphs 1 through 24 as if fully set forth herein.

26. The October 26, 2017 Order should be vacated and clarified because UGIES is **not** a public utility subject to the Commission's jurisdiction under 66 Pa. C.S. § 1501.

27. The only remaining cause of action alleged against UGIES in the Second Amended Complaint is that UGIES "breached its duty by failing to notify" Crescent Hotel when its authorized billing agent, Celeren, failed to pay for the natural gas supply provided by UGIES and received by Crescent Hotel. (*See* Second Amended Complaint, ¶¶ 54-55)

28. The pending matter is a formal complaint brought pursuant to the statutory authority granted in Section 701 of the Public Utility Code, 66 Pa.C.S. § 701. Pursuant to Section 701, the sole issue to be decided in this case is simple and straightforward -- whether UGIES violated "any law which the [C]ommission has jurisdiction to administer" or violated "any regulation or order of the [C]ommission." *Id.*; *see also*, 52 Pa. Code § 5.21(a) (a person may file a formal complaint claiming a violation of a statute the Commission has jurisdiction to administer).

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<sup>2</sup> The ALJ also found that there is a factual dispute between the parties regarding when notice was given to Crescent Hotel regarding its account delinquencies. *See* October 26, 2017 Order, p. 11.

29. As in every case coming before this forum, the Commission must first decide whether it has jurisdiction over both the parties and the subject matter of the dispute. As a creature of legislation, the Commission possesses only the authority that the state legislature has specifically granted to it in the Public Utility Code. The Commission's jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pa.*, 383 A.2d 791, 794 (Pa. 1977) (citing *Allegheny Cnty. Port Auth. v. Pa. PUC*, 237 A.2d 602 (Pa. 1967); *Del. River Port Auth. v. Pa. PUC*, 145 A.2d 172 (Pa. 1958)).

30. The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348, 350 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602, 604 (Pa. 1967) (citation omitted). Neither silence nor agreement of the parties will confer jurisdiction where it otherwise would not exist, *Commonwealth v. Van Buskirk*, 449 A.2d 621, 622 n.1 (Pa. Super. 1982) (citation omitted), nor can jurisdiction be obtained by waiver or estoppel, *In Re Borough of Valley-Hi*, 420 A.2d 15, 17 (Pa. Cmwlt. 1980) (citations omitted).

31. Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390, 393 (Pa. Cmwlt. 1992) (citations omitted), *alloc. den.*, 637 A.2d 293 (Pa. 1993).

32. The Second Amended Complaint generally avers that “[p]ursuant to the PUC regulations and the applicable statute, Title 66 of the Pennsylvania Consolidated Statutes, [UGIES] owed a duty to [Crescent Hotel] to inform it of the alleged delinquency so that [Crescent Hotel] could take appropriate action to enforce its rights against Celeren and mitigate the alleged delinquency.” (See Second Amended Complaint, ¶ 54)

33. Other than generally averring that UGIES had a duty under the Public Utility Code and the Commission's regulations to notify Crescent Hotel of Celeren's failure to pay for the natural gas supply received by Crescent Hotel, Crescent Hotel has failed to identify any specific provision of either the Public Utility Code or the Commission's regulations that creates or otherwise imposes the alleged duty.

34. In its Motion for Summary Judgment, UGIES argued that the Commission lacked jurisdiction over Count II of the Second Amended Complaint because nothing in the Public Utility Code, Commission regulations or Commission orders created or imposed a duty or obligation on UGIES to notify Crescent Hotel when its authorized billing agent, Celeren, failed to remit timely payment for the natural gas supply provided to and received by Crescent Hotel. (See UGIES Motion for Summary Judgment, pp. 16-20)

35. The October 26, 2017 Order denied UGIES' Motion for Summary Judgment, concluding that the notice issues asserted in in Count II of the Second Amended Complaint are public utility-related service issues subject to the Commission's jurisdiction under Section 1501 of the Public Utility Code. Specifically, the October 26, 2017 Order held:

Under Section 1501 of the Public Utility Code, the Commission has jurisdiction related to issues regarding whether a utility has provided adequate, efficient, safe and reasonable service. 66 Pa.C.S. § 1501

\* \* \*

The undersigned agrees that the notice issues as they relate to Section 1501 of the Public Utility Code should be addressed and heard at hearing.

See October 26, 2017 Order, pp. 11-12 (emphasis added).

36. In support of the conclusion that the Commission has jurisdiction over Crescent Hotel's notice claim, the October 26, 2017 Order cited to the Commission's decision in *Digital*

*833 Chestnut, LLC v. PECO Energy Co.*, Docket No. C-2008-2076610 (Order entered Mar. 26, 2010). In *Digital 833*, the Commission reversed an Initial Decision dismissing a claim that PECO failed to notify the customer of delinquent accounts. Specifically, the Commission held that “without further development of the record, we are not in a position to determine if Digital 833 may have a colorable claim over whether PECO, **a regulated utility**, provided unreasonable service in violation of Section 1501....” See *Digital 833*, p. 5 (emphasis added).

37. The fundamental problem with the conclusion reached by the October 26, 2017 Order is that UGIES is **not** a public utility subject to Section 1501 of the Public Utility Code. Rather, UGIES is a licensed NGS.

38. Although Section 1501 grants the Commission with jurisdiction over the services provided by public utilities, Section 1501 does not apply to suppliers, such as NGSs, because they are not “public utilities” under the Public Utility Code. See 66 Pa. C.S. § 1501 (requiring a “public utility” to “furnish adequate, efficient, safe, and reasonable service and facilities”); *id.* § 2202 (“Notwithstanding any other provision of this title, a natural gas supplier that is not a natural gas distribution company is not a public utility as defined in section 102 . . . .”); see also *id.* § 102 (defining “public utility”). Therefore, UGIES is not and cannot be subject to the Commission’s jurisdiction under Section 1501 of the Public Utility Code.

39. Unlike public utilities, the Commission has limited jurisdiction over NGSs. See 66 Pa.C.S. § 2208(e) (licensing, bonding, and reliability, as well as the residential consumer services and protections in Chapter 56 of the Commission’s regulations); 52 Pa. Code §§ 62.1, *et seq.* (pertaining to natural gas supply customer choice).<sup>3</sup>

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<sup>3</sup> In its Answer to the UGIES Motion for Summary Judgment, Crescent Hotel repeatedly asserted that the Commission has jurisdiction over its claim because UGIES is responsible for the actions of nontraditional marketers and nonselling marketers pursuant to 52 Pa. Code § 62.102(d) and (f). However, it is undisputed in this case that Celeren was not a licensee, employee, agent or representative of UGIES, and that UGIES had absolutely no

40. Here, as explained in UGIES' Motion for Summary Judgment, nothing in the Public Utility Code, the Commission's orders, or the Commission's regulations required UGIES, **as an NGS**, to notify Crescent Hotel when Celeren, Crescent Hotel's authorized billing agent, failed to remit timely payment of the natural gas supply provided to and received by Crescent Hotel. (See UGIES Motion for Summary Judgment, p. 19) Indeed, the Commission previously ruled in multiple cases that **suppliers** did not have a duty to notify customers when the very same billing agent, Celeren, failed to pay their bills.<sup>4</sup>

41. Based on the foregoing, the October 26, 2017 Order erred in concluding that the notice issues asserted in in Count II of the Second Amended Complaint are public utility-related service issues subject to the Commission's jurisdiction under Section 1501 of the Public Utility Code. UGIES is **not a public utility** and, therefore, is not subject to the Commission's jurisdiction under Section 1501 of the Public Utility Code. To hold otherwise is to impose public utility regulation on NGSs in a way that is clearly contrary to the grant of authority by the legislature in enacting customer choice regulation.

WHEREFORE, UGIES respectfully requests that the October 26, 2017 Order be vacated and clarified to dismiss Count II of the Second Amended Complaint for lack of subject matter jurisdiction because UGIES is not a public utility subject to the Commission's jurisdiction under 66 Pa. C.S. § 1501.

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contractual or implied relationship with Celeren. Rather, Celeren was Crescent Hotel's "Authorized Bill Agent," which was exclusively selected by and contracted with Crescent Hotel. (See UGIES Motion for Summary Judgment, Appendix A-2; UGIES New Matter, ¶ 20-21) Moreover, as the October 26, 2017 Order noted, this claim was already dismissed and struck in its entirety by Order #4. See October 26, 2017 Order, pp. 9-10.

<sup>4</sup> See *Philadelphia HGI, Assocs., LP v. Hess Corp.*, Docket No. C-2008-2069141, 2009 Pa. PUC LEXIS 1616 (Order entered Aug. 28, 2009) (adopting Initial Decision, 2009 Pa. PUC LEXIS 938 (Feb. 5, 2005)); *Rama Constr., Inc. t/a Ramada Int'l Airport v. Hess Corp.*, Docket No. C-2008-2058200 (Order entered Feb. 19, 2009) (adopting Initial Decision, 2008 Pa. PUC LEXIS 958 (Oct. 16, 2008)). These cases were cited on page 22 of UGIES's Motion for Summary Judgment.

**B. The October 26, 2017 Order Overlooks that the Terms and Conditions of the Service Provided by UGIES to Crescent Hotel Are Governed by a Private Contract.**

42. UGIES incorporates paragraphs 1 through 41 as if fully set forth herein.

43. The October 26, 2017 Order should be vacated and clarified because it overlooks that the terms and conditions of the natural gas supply service provided by UGIES to Crescent Hotel are governed by a private contract between the parties.

44. In Count II of its Second Amended Complaint, Crescent Hotel alleges that UGIES “breached its duty by failing to notify” notify Crescent Hotel when its authorized billing agent, Celeren, failed to remit timely payment for the natural gas supply provided to and received by Crescent Hotel.

45. In its Motion for Summary Judgment, UGIES argued that Count II is a breach of contract claim over which the Commission lacks jurisdiction. To the extent there was any alleged duty for UGIES to notify Crescent Hotel, such duty arose from the Master Natural Gas Sales Agreement between UGIES and Crescent Hotel. (*See* UGIES Motion for Summary Judgment, pp. 20-24)

46. The October 26, 2017 Order held that although “the Commission lacks jurisdiction over issues arising solely out of the breach of a private contract,” the Commission has jurisdiction under Section 1501 of the Public Utility Code over issues relating to whether a public utility has provided adequate, efficient, safe and reasonable service. *See* October 26, 2017 Order, p. 11.

47. As explained above, Section 1501 of the Public Utility Code does not apply to UGIES because it is an NGS and **not** a public utility under the Public Utility Code. Furthermore, the October 26, 2017 Order overlooks that the terms and conditions of the natural gas supply

service provided by UGIES to Crescent Hotel, including the obligation to provide notice, are strictly governed by a private contract.

48. On or about June 6, 2007, UGIES and Crescent Hotel entered into a Master Natural Gas Sales Agreement. Under the terms of the Master Natural Gas Sales Agreement, UGIES agreed to provide and Crescent Hotel agreed to purchase natural gas supply. (See UGIES Motion for Summary Judgment, Appendix A-1)

49. The Master Natural Gas Sales Agreement is not a contract between a public utility and a customer. Rather, the Master Natural Gas Sales Agreement is a private agreement between UGIES, **as an NGS**, and Crescent Hotel, as a large commercial natural gas customer.

50. Absent this private contract between UGIES and Crescent Hotel, there would be **no** service provided by UGIES to Crescent Hotel – including any notice to Crescent Hotel. Therefore, to the extent that UGIES owed any alleged duty to notify Crescent Hotel, such duty arose **solely** from the Master Natural Gas Sales Agreement between UGIES and Crescent Hotel.

51. Thus, Crescent Hotel’s entire claim that UGIES “breached its duty by failing to notify” Crescent Hotel of Celeren’s failure to pay for the natural gas service is clearly an action for breach of contract. See *Valentino v. Dominion Retail, Inc. t/a Peoples Plus*, Docket No. C-20055447, 2006 Pa. PUC LEXIS 27, at \*1, 8-10 (Order entered Jan. 12, 2006) (adopting as final the Initial Decision finding that a contract between a customer and a NGS for the supply of natural gas is a private contractual matter).

52. It is well-established that the Public Utility Code does not grant the Commission the authority to entertain an action for breach of contract or to award damages or grant any other form of relief in an action for breach of contract. See *Terminato v. Pa. Nat’l Ins. Co.*, 645 A.2d 1287, 1292 (Pa. 1994); *Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371, 375 (Pa. 1980); *Feingold v.*



*Bell of Pa.*, 383 A.2d 791, 794 (Pa. 1977); *Allport Water Auth. V. Winburne Water Co.*, 393 A.2d 673, 675 (Pa. Super. 1978) (citations omitted). Moreover, the Commission lacks jurisdiction to interpret the terms and conditions of a contract between a supplier and a customer to determine whether a breach of the contract has occurred. *See Commonwealth v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655, p. 19 (Order entered Dec. 11, 2014) (citing *Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. 1978)). Accordingly, the Commission lacks jurisdiction to (i) interpret the Master Natural Gas Sales Agreement between UGIES and Crescent Hotel to determine UGIES' notice/service obligations and (ii) determine whether UGIES breached those obligations.

53. Further, the October 26, 2017 Order overlooks that, under the terms of the Master Natural Gas Sales Agreement, UGIES and Crescent Hotel expressly agreed that Court of Common Pleas of Berks County and/or the United States District Court for the Eastern District of Pennsylvania would have exclusive jurisdiction over any disputes pertaining to the Master Natural Gas Sales Agreement. (*See* UGIES Motion for Summary Judgment, Appendix A-1, ¶ 14) The October 26, 2017 Order essentially revises the private contract between UGIES and Crescent Hotel to eliminate this mutually bargained and agreed upon remedy for any disputes pertaining to the Master Natural Gas Sales Agreement.<sup>5</sup>

54. In sum, Count II of Crescent Hotel's Second Amended Complaint is a breach of contract claim over which the Commission has no jurisdiction. Not only does the Commission lack jurisdiction to adjudicate private contractual disputes between an NGS and a private party, but UGIES and Crescent Hotel's contract specifically provides that the Court of Common Pleas

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<sup>5</sup> If the Commission lacks authority to interpret a private agreement between a supplier and a customer and determine a breach occurred, it clearly lacks authority to unilaterally modify such a private agreement.

of Berks County and/or the United States District Court for the Eastern District of Pennsylvania would resolve any contractual disputes.

55. Based on the foregoing, the October 26, 2017 Order erred in concluding that the Commission has jurisdiction over the Crescent Hotel's breach of contract claim because UGIES is **not a public utility** and, therefore, is not subject to the Commission's jurisdiction under Section 1501 of the Public Utility Code. Pursuant to both well-established case law and the Master Natural Gas Sales Agreement, Count II is a breach of contract claim over which the Commission lacks jurisdiction.

WHEREFORE, UGIES respectfully requests that the October 26, 2017 Order be vacated and clarified to dismiss Count II of the Second Amended Complaint because the issue of whether UGIES breached an alleged duty to notify Crescent Hotel is governed by the terms and conditions of the Master Natural Gas Sales Agreement, not Section 1501 of the Public Utility Code.

**C. The October 26, 2017 Order Overlooks that the Commission Does Not Have Authority to Grant the Relief Requested by Crescent Hotel.**

56. UGIES incorporates paragraphs 1 through 55 as if fully set forth herein.

57. Count II of the Second Amended Complaint requests that Crescent Hotel be given a full refund of natural gas charges paid to UGIES from August 1, 2007. (Second Amended Complaint, ¶ 59)

58. In the Motion for Summary Judgment, UGIES argued that Count II of the Second Amended Complaint should be dismissed as a matter of law because it requests relief that cannot be granted by the Commission. UGIES explained that the Commission has no power to grant any relief for an alleged breach of contract, including damages. Moreover, to the extent that

Crescent Hotel is entitled to any remedy, it is against Celeren, not UGIES. (See UGIES Motion for Summary Judgment, pp. 24-30)

59. The October 26, 2017 Order held that although the Commission lacks the authority to award damages or grant relief related to an alleged breach of contract, the Order found that issues related to whether UGIES violated Section 1501 of the Public Utility Code should proceed to hearing. See October 26, 2017 Order, pp. 11-12.

60. As explained above, Section 1501 of the Public Utility Code does not apply to UGIES because it is an NGS and **not** a public utility under the Public Utility Code. See Section II.A, *supra*. Rather, the issue of whether Crescent Hotel is entitled to damages for UGIES' alleged breach of a purported duty to notify Crescent Hotel is breach of contract claim between the supplier and a customer, which is a matter over which the Commission lacks jurisdiction as explained above. See Section II.B, *supra*.

61. Even assuming, *arguendo*, that the Commission had jurisdiction over Crescent Hotel's breach of contract claim, which it does not, the October 26, 2017 Order overlooks that the Commission lacks the authority to grant Crescent Hotel's request for a full refund of natural gas charges paid to UGIES. Refunds are a form of monetary damages, and Crescent Hotel neither cites nor suggests any precedent that supports the Commission's authority to grant such relief to an NGS' customer.

62. Although Section 1312 of the Public Utility Code affirms the Commission's authority to direct **public utility** refunds to customers in certain circumstances, Section 1312 does not apply to UGIES because NGSs are not public utilities under the Code. See 66 Pa.C.S. § 1312 (authorizing suits for refunds against a "public utility"); *id.* § 2202 ("Notwithstanding any

other provision of this title, a natural gas supplier that is not a natural gas distribution company is not a public utility as defined in section 102 . . . .”); *see also id.* § 102 (defining “public utility”).

63. Indeed, the Commission has explained that it can only direct suppliers, such as NGSs, to refund charges when (i) a customer has been switched to a supplier without the customer’s consent or (ii) the supplier overbills a customer by failing to bill the customer in accordance with its disclosure statement. *See Commonwealth of Pennsylvania, by Attorney General, Kathleen G. Kane, through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered Dec. 18, 2014) Here, Crescent Hotel has not alleged that UGIES switched it to another supplier without consent, nor has Crescent Hotel alleged that UGIES overbilled it by failing to bill in accordance with its disclosure statement.

64. Even assuming, *arguendo*, that UGIES violated some alleged duty under the Public Utility Code, Commission regulations or Commission orders, which it cannot, Crescent Hotel still would not be entitled to any damages or refund as requested. Indeed, under these circumstances the **only** relief that could be granted, again assuming that Crescent Hotel could prove UGIES violated the Public Utility Code, Commission regulations or Commission orders, is a civil penalty. *See* 66 Pa. C.S. § 3301. Importantly, such a civil penalty would be paid to the Commonwealth’s General Fund, **not** Crescent Hotel. *See id.* § 3315.

65. Based on the foregoing, the ALJ should clarify that the Commission lacks the authority to grant Crescent Hotel’s request for a full refund of natural gas charges paid to UGIES because: (i) UGIES is not a public utility; (ii) Crescent Hotel has not alleged any facts under which the Commission has authority to order UGIES, as a supplier, to issue a refund; and (iii) the only relief that could be granted, assuming the Commission has subject matter jurisdiction

and Crescent Hotel is able to meet its burden of proof by a preponderance of evidence, is a civil penalty that would be paid to the, not Crescent Hotel.

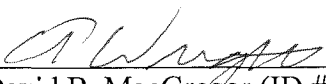
WHEREFORE, UGIES respectfully requests that the October 26, 2017 Order be vacated and clarified to dismiss Count II of the Second Amended Complaint because the Commission does not have the authority to grant the relief requested.

### III. CONCLUSION

WHEREFORE, UGIES respectfully requests that Administrative Law Judge Marta Guhl vacate and clarify the October 26, 2017 Order to dismiss Count II of the Second Amended Complaint because: (i) UGIES is not a public utility subject to Section 1501 of the Public Utility Code, (ii) Count II of the Second Amended Complaint is a breach of contract claim over which the Commission has no jurisdiction, and (iii) the Commission cannot grant Crescent Hotel's request for relief. In the alternative, UGIES respectfully requests that the issue of the Commission's jurisdiction over the claim and relief requested in Count II of the Second Amended Complaint be immediately certified to the Commission for interlocutory review pursuant to 52 Pa. Code § 5.305.

Respectfully submitted,

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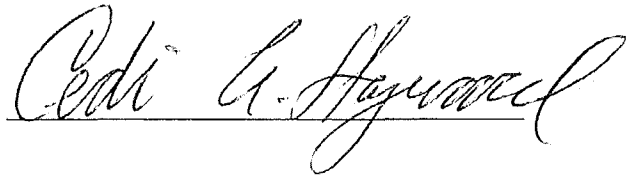
Date: November 16, 2017

*Counsel for UGI Energy Services, LLC*

## VERIFICATION

I, Cedric Haywood, being the Director of Collections at UGI Energy Services, LLC., hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that I expect UGI Energy Services, LLC to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: November 15, 2017

A handwritten signature in cursive script, reading "Cedric G. Haywood", written over a horizontal line.