



December 6, 2018

Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission
400 North Street
Commonwealth Keystone Building
Harrisburg, PA 17120

RE: *City of Reading and Centre Park Historic District v. UGI Utilities, Inc.*
C-2015-2516051 and C-2016-2530475

Dear Secretary Chiavetta,

Please find the attached Reply Brief of Centre Park Historic District attached to this filing. Judge Mary Long and opposing counsel have received this brief as indicated on the Certificate of Service attached. Thank you.

Sincerely,

/s/ Rich Raiders

Rich Raiders, Esq.

cc: S. Hoh
Hon. J. Slifko
Hon. Mary Long
Counsel

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Centre Park Historic District	:	Docket C-2015-2516051
City of Reading,	:	C-2016-2530475
	:	
v.	:	
	:	
UGI Utilities, Inc.	:	

REPLY BRIEF OF CENTRE PARK HISTORIC DISTRICT

AND NOW, comes Centre Park Historic District (“District”), by and through its below-signed attorneys, and files pursuant to the Pennsylvania Public Utility Commission’s (“Commission”) regulations, this Reply Brief to the Brief of UGI Utilities, Inc. (“UGI”). The District incorporates by reference any contemporaneous reply brief filed by the City of Reading (“City”) as if fully recited therein.

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ARGUMENT

- I. **CPHD AND CITY OF READING HAVE MET THE EVIDENCARY BURDEN -- UGI HAS FAILED TO COMPLY WITH COMMISSION’S REGULATIONS AT § 59.18.**

In consideration of the extensive record, the City of Reading’s main brief, and UGI’s reply brief (CPHD incorporated by reference the City’s argument regarding the evidence, photos, surveys, etc.), the evidence in this case makes it abundantly clear that UGI has given little, if any, consideration to the preservation of historic properties in its placement of outside gas

meters. The parties have a very different reading and interpretation of the Commission's requirements under § 59.18. UGI's interpretation and position are made clear in UGI's reply brief:

It was UGI's view at the time, and continues to be UGI's view, that the Commission's decision not to establish specific standards for the inside meter placement in historic districts, its authorization of NGDCs to "consider" inside meter placements in such districts, its concerns expressed throughout its rulemaking about the dangers of inside meter and regulator installations, and its willingness to require NGDCs to replace such installations by a date certain at considerable cost, all suggested that UGI could exercise its Commission-granted discretion to require outside meter locations in all service locations, including historic districts. (UGI St. No. 1, p. 20, lines 2-9). Indeed, the Company's position has been that gas safety concerns should trump aesthetic concerns. (UGI St. No. 1, p. 20, lines 9-11) ..."

UGI Reply Brief, p. 20. In short, UGI's interpretation of § 59.18 regulations vests power solely with the Natural Gas Distribution Companies ("NGDC") and UGI, as a NGDC, has exclusive discretion regarding the location of gas infrastructure. This means that UGI believes that gas meters shall always be situated at an outside location, including for historic properties. The vagueness and lack of a definition regarding the meaning of "consideration" results in that consideration means whatever NGDCs desire it to mean.

In review of the final rulemaking order, CPHD does not believe the Commission has adopted the same definition or the no consideration is consideration rule that UGI advocates. CPHD believes the Commission intended and continues to intend that NGDCs evaluate historic properties. The Commission appears to suggest a reasonable balance in that unobtrusive regulators could be located at the outside of a property, and gas meters could be located inside. See, Amendment to 52 Pa. Code § 59.18 Meter Location, Doc. No. L-2009-2107155, 44 Pa. Bull. 5835 (Sep. 13, 2014); CHPD Direct Brief at *14. In the event of a gas pressure

emergency, the danger of an explosion will be isolated to the outside regulator, and the danger of an explosion at a low-psi inside gas meter is low. In light of the Constitutional provisions of Environmental Rights Amendment (“ERA”) detailed in CPHD’s main brief, the requirements for consideration and protection of historic resources has since increased. UGI’s proposed interpretation neither comports with the spirit nor the Commission’s commentary at the time the § 59.18 regulation was updated.

In sum, an extensive record has been developed in this case. In examining a preponderance of the evidence, CPHD does not believe that anyone could reasonably conclude that UGI has made a substantial effort or has given much, if any, consideration to the location of indoor gas meters within historic districts. CPHD understands UGI’s concern regarding safety. However, in light of the Commission’s own commentary and directives, UGI’s view that it has unfettered discretion and need not consider the value of historical resources, is perhaps excessive and high-handed and directly contrary to the Commission’s dicta it published in the § 59.18 rulemaking. After a complete review of the record, the City and CPHD have met their burden that UGI has failed to comply with the Commission’s regulations at § 59.18.

II. **UGI SEEKS TO REJECT CPHD’S CONSTITUTIONAL ARGUMENT REGARDING THE ERA AMENDMENT AND FIDUCIARY TRUSTEE DUTIES TO PROTECT HISTORIC RESOURCES. THE COMMISSION CANNOT IGNORE PENNSYLVANIA’S NEWEST CASE LAW.**

CPHD’S main brief is exclusively a legal argument. This brief focuses on the very recent appellate decisions, issued after this case was initiated, which now impose a new fiduciary duty on the Commonwealth and its instrumentalities, including the Commission, the City and the District, to fulfill a trustee obligation to protect historic assets. UGI attempts to assail this new

case law by apparently arguing that, because CPHD does not dispute that the Commission has the power to adopt rules and regulations, it is a legal impossibility to raise Constitutional arguments pertaining to § 59.18. UGI's argument widely misses the mark and misconstrues CPHD's argument.

Obviously, CPHD concurs with Judge Colins that the Commission regulates UGI, including meter placement. *See, UGI Utilities, Inc. v. City of Reading ("City of Reading")*, 179 A.3d 624 (Pa. Commw. 2017). However, historic preservation is no longer merely an aspirational goal, but a real obligation for the Commission, the City and the District. For the first time, Pennsylvania's appellate courts have interpreted the Constitution to impose an affirmative fiduciary duty on the Commonwealth and its agencies to take meaningful actions to protect natural and historic resources. *See, Penn. Env'tl. Def. Found. v. Commw. ("PEDF II")*, 161 A.3d 911 (Pa. 2017). UGI refers to Judge Colins' first decision in this case regarding the ERA amendment, but fails to explain that *City of Reading* requires that the Commission, and not the City, preemptively regulate UGI. *City of Reading* is completely silent on the issue of HOW the Commission regulate UGI, or what role the City and the District have in the Commission's regulating UGI. In fact, the District argues that *City of Reading* relies on this exact process to determine the bounds of the Commissions implementation of the ERA.

The District further argues that the Commission, through this process, will need to determine what ERA remedies are appropriate in the Commission's complaint process and which remedies may need to be taken up in separate rulemaking. In sum, UGI attempts to argue that CPHD does not challenge the constitutional authority of the Commission's recent adoption of § 59.18, and, therefore, any other constitutional discussion is irrelevant. In concise

terms, the entire point of CPHD's main brief is a new interpretation of the ERA amendment is now the law of Pennsylvania. This interpretation occurred after the Commission's 2014 adoption of § 59.18. Under this new interpretation, the Commonwealth, its instrumentalities (i.e. the Commission), now have a specific fiduciary duty to protect historic assets. This new interpretation of the ERA now impacts upon the interpretation and implementation of § 59.18. In an abundance of caution, CPHD is not stating outright that § 59.18 is unconstitutional. In a more tempered approach, CPHD argues that the Commission should, given *PEDF II*, further clarify the implementation of § 59.18. In light of *PEDF II* and other very recent cases discussed below, all Pennsylvania municipalities, historic districts and gas utilities are now faced with new duties, and consequentially, new perplexities, regarding the exact implementation of § 59.18 and whether "consideration" of historic resources has any tangible meaning. UGI's defense that these questions are irrelevant is misplaced.

III. **UGI POSITS THAT THE COMMISSIONS ADOPTION OF § 59.18 REGULATIONS, WHICH MAKE MENTION OF HISTORIC RESOURCES, NOW FULFILLS THE NEW ERA FIDUCARY DUTY REQUIREMENT UNDER PEDF II. IT DOES NOT.**

UGI attempts to argue that the mere existence of Section 59.18 fully and completely satisfies its obligations towards the Commission's, the City's and the District's respective ERA duties. It plainly does not. The presence or absence of any permitting authority does not constitute any defense in an ERA action. *Clean Air Council*, 185 A.3d at 493 fn.21. Under the pre-2017 rubric, a permittee was able to rely upon an agency determination as an affirmative defense in an ERA claim. *Id.* However, any such argument is now obsolete, and the actor holding trusteeship duties must show that they acted in a reasonable manner considering the totality of the facts. *Id.* at 493-94.

A party complaining of an ERA complaint must show a gap in the sovereign's duty to protect the corpus of the ERA trust. *Project PT v. Penn Twp. Zoning Hearing Bd.*, 39 C.D. 2018, 42 C.D. 2018 at *27-31 (Pa. Commw. Nov. 8, 2018). Such harms must not be speculative, but must be shown by competent evidence before the finder of fact, here the Commission. *Id.* at *31. A reviewing Court will look with favor on permittees who conduct independent reviews of potential community harms from a project, using what the Commission finds as competent evidence to evaluate trusteeship requirements. *Id.* at *24. A reviewing Court will also look with favor upon special conditions in permits that address reasonably ascertainable harms that could befall the community. *Id.* at *24-25.

The sovereign “*must reasonably account for the environmental features of the affected locale. . .*” where a project is proposed. *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, ___ A.3d ___, 2295 C.D. 2015 at * (Pa. Commw. Oct. 26, 2018) *en banc*; Quoting, *Robinson Twp. v. Commw.*, 83 A.3d 901, 953 (Pa. 2013) (“*Robinson II*”) (emphasis in original). The sovereign is required to develop a record to determine if a credible question of impact to the corpus of the ERA trust has or could occur. *Id.* at 953 fn32.

The corpus of the ERA trust includes “the full array of resources implicating the public interest, as these may be defined by statute or at common law.” *Marcellus Shale Coalition v. Dept. Env'tl. Prot.*, ___ A.3d ___, 573 M.D. 2016 at *32 (Pa. Commw. Aug. 23, 2018) *en banc*; Citing, *PEDF II*, 161 A.3d at 931-32. “[T]he constitutional concept of ‘public natural resources’ includes: not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and

fauna (including fish) that are outside the scope of private property.” *Id.* at *31-32, *Citing, Robinson II*, 83 A.3d at 980.

Here, the Commission is deep within the process of developing the appropriate record to evaluate the corpus of the trust – namely the preservation of historic resources within its regulatory authority. As the primary and preemptive trustee, the Commission must now decide if it has a competent record to determine where trust obligations lie and how each trustee meets its respective trust obligations. UGI fails to understand these obligations. The Commission has been identified as the entity to balance utility regulation, public safety and historical preservation. UGI’s blanket assertions that no further review is necessary utterly fail to consider the current state of ERA jurisprudence.

IV. **CPHD HAS NOT IMPROPERLY SUPPLEMENTED THE RECORD.**

UGI also seeks to strike CPHD’s arguments and brief based on the improper introduction of new records after the record is closed. CPHD’s main brief is entirely a legal argument and nothing is added to the record and no arguments are made regarding the evidence of this case, other than the incorporation of the arguments set forth in the City’s main brief. The three (3) exhibits in CPHD’s brief that UGI claims are prejudicial include: 1) a settlement stipulation before the Ohio Public Utility Commission regarding a dispute between a gas utility and a historic district; 2) A Utility Meter Installation Guideline issues by the Washington D.C.’s Office of Historic Preservation; and 3) a list of Pennsylvania and national organizations involved in technical assistance regarding public utilities and historic preservation. First, two of these are public records based on Pennsylvania Rules of Evidence, official governmental records may be admitted and are an exception to the hearsay rule. *See generally, D’Alessandro v. Pennsylvania*

State Police, 937 A.2d 404 (Pa. 2007); 225 Pa. Code § 803(8). These are also documents that speak for themselves. The Commission has the discretionary authority to take official notice of relevant information. CPHD has not moved that these Exhibits be included in the record and there are no fact or evidence questions supported by these reports. The Ohio dispute was resolved by stipulation and did not continue to the point in which there is a reported decision by an appellate court. This is akin to a cite in a brief to a decision from another state. Out-of-state decisions have no binding authority on Pennsylvania, but cases can be cited simply for persuasive, informational and comparison purposes. This is normal in any legal brief.

The larger point of CPHD's main brief is this case is not only a case of first impression in Pennsylvania, but also nationally. This case also involves a complex intersection between federal and state laws pertaining to public utility regulation and gas transmission lines, and federal and state laws pertaining to historic preservation. It is helpful to look to what is occurring in other states and determine how other jurisdictions are grappling with the same conundrum. Clearly, the Commission has the discretion to take judicial notice of CPHD's brief and exhibits, and can either consider or reject this information. As these are not part of the record of the case regarding questions of fact, and CPHD has not sought or moved for their admission, UGI's attempt to strike is not supported.

Respectfully Submitted,

Date: December 6, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically served the foregoing upon the following:

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