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McNees Wallace & Nurick LLC  
attorneys at law

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PAMELA C. POLACEK  
DIRECT DIAL: (717) 237-5368  
DIRECT FAX: (717) 260-1736  
E-MAIL ADDRESS: PPOLACEK@MWN.COM

August 25, 2009

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

**VIA HAND DELIVERY**

**RE: Natural Gas Distribution Companies And the Promotion of Competitive Retail Markets; Docket No. L-2008-2069114**

Dear Secretary McNulty:

Please find enclosed the original and fifteen (15) copies of the Comments of the Industrial Energy Consumers of Pennsylvania ("IECPA"), the Central Penn Gas Large Users Group ("CPGLUG"), the Columbia Industrial Intervenors ("CII"), the PNG Industrial Intervenors ("PNGII"), and the UGI Industrial Intervenors ("UGIII") (collectively, "Industrial Customer Groups") in the above-referenced proceeding.

Please date stamp the extra copy of this transmittal letter and Comments and kindly return them for our filing purposes.

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Very truly yours,

McNEES WALLACE & NURICK LLC

By

Pamela C. Polacek  
Shelby A. Linton-Keddie

Counsel to the Industrial Customer Groups

SLK/km  
Enclosures

- c: Lawrence F. Barth, Esq., Law Bureau (via E-mail and Hand Delivery)
- Richard Wallace, Bureau of Audits (via E-mail and Hand Delivery)
- Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Natural Gas Distribution Companies :  
And the Promotion of Competitive : Docket No. L-2008-2069114  
Retail Markets :

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**COMMENTS OF THE INDUSTRIAL CUSTOMER GROUPS**

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Pamela C. Polacek (Pa. I.D. No. 78276)  
Shelby A. Linton-Keddie (Pa. I.D. No. 206425)  
McNees Wallace & Nurick LLC  
100 Pine Street  
P.O. Box 1166  
Harrisburg, PA 17108-1166  
Phone: (717) 232-8000  
Fax: (717) 237-5300

Counsel to Industrial Energy Consumers of  
Pennsylvania, Central Penn Gas Large Users Group,  
Columbia Industrial Intervenors, PNG Industrial  
Intervenors, and UGI Industrial Intervenors

Dated: August 25, 2009

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## I. INTRODUCTION

At the Public Meeting held on March 26, 2009, the Pennsylvania Public Utility Commission ("PUC" or "Commission") initiated a rulemaking proceeding to adopt regulations governing the relationships between Natural Gas Distribution Companies ("NGDCs") and Natural Gas Suppliers ("NGSs") that sell or seek to sell natural gas to end users on the NGDC distribution systems, and seeking public comment on the proposed regulations ("Rulemaking Order"). The Proposed Rulemaking Order was entered by the Commission on March 27, 2009, and published in the Pennsylvania Bulletin on July 11, 2009. The Industrial Energy Consumers of Pennsylvania ("IECPA"), Central Penn Gas Large Users Group ("CPGLUG"), Columbia Industrial Intervenors ("CII"), PNG Industrial Intervenors ("PNGII"), and UGI Industrial Intervenors ("UGIII"), (collectively, "Industrial Customer Groups") submit these Comments in order to address their preliminary position and concerns regarding the Commission's proposed regulations on NGDCs and the promotion of competitive retail markets.<sup>1</sup>

IECPA is a 24 member ad hoc group of energy intensive industrial customers of electricity and natural gas. More than 41,000 Pennsylvanians are employed by IECPA member companies, which use significant amounts of electricity and natural gas in their operations. CPGLUG, CII, PNGII, and UGIII are all ad hoc groups of commercial, institutional and industrial customers of natural gas that participate in various proceedings before this Commission. Several issues and regulations as proposed by the Commission may impact large customers. The Industrial Customer Groups submit these Comments to explain the history of natural gas supply competition in Pennsylvania and highlight how that history should be reflected in the proposed regulations.

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<sup>1</sup> The Industrial Customer Groups' failure to address a specific proposed regulation does not represent the Industrial Customer Groups' support for, or acquiescence to, such proposal. The Industrial Customer Groups are only addressing primary areas of concern in these Comments.

## II. COMMENTS

Section 2204(g) of the Natural Gas Choice and Competition Act ("Competition Act") required the Commission, within 5 years of the Competition Act's enactment, to investigate whether there was "effective competition for natural gas supply."<sup>2</sup> If finding no effective competition, the Commission was required to "explore avenues . . . for encouraging increased competition in the Commonwealth."<sup>3</sup> As indicated in the Commission's October 2005 Report to the General Assembly on Pennsylvania's Retail Natural Gas Supply Market, the PUC found that, as of the date of the report, "effective competition" did not exist in Pennsylvania's natural gas market. Therefore, the Commission convened a Natural Gas Stakeholders' group, otherwise known as "SEARCH" (Stakeholders Exploring Avenues for Removing Competition Hurdles), which released a final report in May of 2008. Shortly thereafter, the Commission issued a Final Order and Action Plan in September, 2008, which detailed the work of the SEARCH Committee and concluded that the Commission could take a number of steps to help promote the development of competition in Pennsylvania's retail markets for natural gas supply.<sup>4</sup> This proposed rulemaking addresses one of these areas: NGDCs and their relation to the retail supply market.

A central finding in the Commission's Final Order and Action Plan was that reforms were needed to attract suppliers to the market because, in the Commission's judgment, "increasing the number of suppliers and, in time, the variety of service offerings available in the marketplace would be expected to attract customers to the market."<sup>5</sup> In this vein, the Proposed Rulemaking Order proposes to reformulate the price to compare for supplier of last resort ("SOLR")

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<sup>2</sup> 66 Pa. C.S. § 2204(g).

<sup>3</sup> Id.

<sup>4</sup> Investigation into the Natural Gas Supply Market: Report on Stakeholders' Working Group (SEARCH); Action Plan for Increasing Effective Competition in Pennsylvania's Retail Natural Gas Supply Services Market, Docket No. L-00040103F0002, Order entered December 19, 2008 (hereinafter "Final Order and Action Plan").

<sup>5</sup> Id. at 6.

customers,<sup>6</sup> to require NGDCs to implement purchase of receivables ("POR") programs for NGSs serving residential and small business accounts<sup>7</sup> and to memorialize in the regulations the statutory language in § 2204(d) of the Public Utility Code regarding capacity assignment.<sup>8</sup> The Proposed Rulemaking Order allows for a "nonbypassable reconcilable surcharge" "to recover the reasonable and prudently incurred costs of implementing and promoting natural gas competition within the Commonwealth" to be "recovered on a per unit basis on each unit of commodity which is sold or transported over its distribution system without regard to the customer class of the end user."<sup>9</sup> Finally, the Proposed Rulemaking Order authorizes NGDCs to create another surcharge to recover regulatory assessments, again on a per unit basis.<sup>10</sup>

The Industrial Customer Groups understand the Commission's desire to bring the benefits of natural gas competition to other customer classes. Larger customers have long recognized and pursued competitive natural gas supply alternatives, even before the enactment of the Natural Gas Choice and Competition Act in 1999. In most areas of the Commonwealth, larger customers no longer have the NGDC as their "backstop" or SOLR for gas supply services.<sup>11</sup> There is no need to "attract" larger customers to the market because they are already there and have been for decades. Thus, as explained below, although the Industrial Customer Groups do not wish to impede the Commission's efforts to extend competition to other customer classes, the Industrial Customer Groups respectfully question whether the proposed surcharge should apply to non-SOLR customers, especially on a per unit basis, when the focus of the Commission's actions is to reform procedures regarding other customer classes.

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<sup>6</sup> See Proposed 52 Pa. Code § 62.223.

<sup>7</sup> See *id.* at Proposed § 62.224.

<sup>8</sup> See *id.* at Proposed § 62.225.

<sup>9</sup> *Id.* at Proposed § 62.226.

<sup>10</sup> See *id.* at Proposed § 62.227.

<sup>11</sup> See 66 Pa. C.S. 2807(a)(1).

In addition, the proposed regulatory assessment surcharge appears to be unnecessary and unadvisable. NGDCs can avail themselves of the normal base rate process to recover regulatory assessments. Moreover, the design of the proposed mechanism is flawed and will disproportionately impact larger users, when there is no evidence that the level of an NGDC's regulatory assessments is tied to the Mcf throughput. If a surcharge to remove regulatory assessments from the normal ratemaking process is pursued, another recovery mechanism (such as a percentage surcharge similar to the State Tax Adjustment Surcharge ("STAS")) should be used.

**A. NGDC Costs of Competition Related Activities**

As proposed in the Rulemaking Order, and consistent with the Commission's September 11, 2008, Final Order and Action Plan, the Commission has tentatively concluded that NGDCs "should be able to recover *reasonable* costs that are *prudently* incurred in connection with the implementation of any changes designed to promote the development of effective competition in the retail market."<sup>12</sup> As explained by the PUC, such costs would "also include those associated with increasing customer participation in the market such as modifications to NGDC billing systems or increased consumer education activities."<sup>13</sup> Accordingly, the Commission has proposed that NGDCs be allowed to recover these costs through a surcharge (which would be recovered on a per unit basis on each unit of commodity sold or transported over its distribution system without regard to the customer class of the end user),<sup>14</sup> with an automatic adjustment mechanism. Further, the PUC contends that "to the extent it helps promote competition, the surcharge for competition related activities benefits all customers and, therefore, it should be

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<sup>12</sup> Final Order and Action Plan at 21(emphasis in original).

<sup>13</sup> Id.

<sup>14</sup> See Proposed 52 Pa. Code § 62.226.

paid by all customers, shoppers and non-shoppers alike."<sup>15</sup> Because the proposed regulation at 52 Pa. Code § 62.226 indicates that this surcharge would be collected from all customer classes, the Industrial Customer Groups oppose this aspect of the proposed regulations.

Large commercial and industrial ("C&I") customers have had the opportunity to transport natural gas procured from various suppliers since the mid-1980s. In fact, pursuant to a Petition filed by the Pennsylvania Gas Association for an expedited rulemaking regarding gas transportation, on October 16, 1986, at Docket No. L-860016, the Commission adopted uniform transportation regulations governing natural gas transportation service, codified at 52 Pa. Code §§ 60.1-60.9. Throughout this period, rules, terms and conditions for service to large transportation customers have been developed through multiple tariff filings, cases and proceedings before the Commission. Large C&I customers have invested significant resources over the last 25 years to litigate transportation service issues in numerous PUC proceedings without recovering those costs from other customer classes. As recognized by various NGDCs during their restructuring proceedings in early 2000, these rules generally have worked well for existing Large C&I customers.

The Competition Act,<sup>16</sup> which became effective July 1, 1999, extended the availability of transportation service to all retail natural gas customers, regardless of size;<sup>17</sup> however, in recognition of the satisfactory level of supply competition for Large C&I customers, the Competition Act created a SOLR obligation for NGDCs that was limited to supply service for residential, small commercial, small industrial and essential human needs customers.<sup>18</sup> In extending the competitive supply procurement right to smaller commercial and residential

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<sup>15</sup> Rulemaking Order at 7.

<sup>16</sup> See 66 Pa. C.S. §§ 2201-2212.

<sup>17</sup> See *id.* §§ 2203(2), 2204(b).

<sup>18</sup> See 66 Pa. C.S. § 2207(a)(1) ("After the effective date of this chapter, the natural gas distribution company shall serve as the supplier of last resort for residential, small commercial, small industrial and essential human needs customers...").

customers, the Competition Act also appropriately recognized that extension of transportation availability should not detrimentally impact the rates, terms and conditions of service for existing transportation customers. In fact, the Competition Act expressly provides that a NGDC "may continue to provide natural gas service to its customers under all tariff rate schedules and riders incorporated into its tariff, and policies or programs, existing on the effective date of this chapter."<sup>19</sup> As the Commission may recall, the Competition Act was drafted through a stakeholder process. IECPA participated in that process to ensure that existing competition for Large C&I customers was not harmed as a result of the Competition Act and that Large C&I customers would not be forced to pay costs associated with the extension of the supply competition to smaller customers.<sup>20</sup> Such a result is consistent with the subsequent restructuring proceedings held in accordance with the Competition Act. While changes were made in the restructuring proceedings for small residential and commercial customers, NGDCs attempted and succeeded in maintaining the status quo for transportation service to the Large C&I sector.

While the Industrial Customer Groups agree that there can always be improvements with regard to the level of natural gas competition in the Commonwealth, the Industrial Customer Groups are comfortable with maintaining the status quo for Large C&I competition, and allowing those incremental improvements to occur through the traditional processes. Although the Industrial Customer Groups appreciate the Commission's effort "to ensure that consumers of natural gas will be able to shop for gas that is marketed on a level playing field for all market participants,"<sup>21</sup> the Industrial Customer Groups respectfully submit that the proposed regulations are not aimed at promoting competition for Large C&I customers (who already have it), but

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<sup>19</sup> 66 Pa. C.S. § 2203(14).

<sup>20</sup> Such compromise also produced risk for Large C&I customers, who have no fundamental protection for a SOLR similar to residential, small commercial and small industrial customers. Large C&I customers were willing to take this "trade-off" in order to continue to minimize the potential cost impact on the existing transportation customers due to the passage of the Competition Act.

<sup>21</sup> Rulemaking Order at 1.



instead are aimed at other customer classes (specifically residential and small commercial). The price to compare ("PTC") modifications do not impact larger customers because they cannot rely on SOLR service. The POR program is limited to residential and small commercial accounts. Although the capacity assignment regulations apply to larger customers, this regulation is a nearly verbatim restatement of the rights under Section 2204(d)(1) & 2204(d)(3) of the Competition Act.<sup>22</sup> Cost of service ratemaking mandates that costs be recovered from the ratepayers from whom the costs were incurred to serve. Because these regulations and the Commission's efforts are not aimed at promoting competition for Large C&I customers, it is patently unreasonable and contrary to cost causation principles to force C&I customers to contribute to funding such enhancements when they do not benefit from such programs. Accordingly, only residential and small commercial customers should be required to pay any surcharge that results from this Rulemaking.

Moreover, the Commission's proposal to recover this surcharge on a per unit basis on each unit of commodity sold or transported over a NGDC's distribution system without regard to the customer class of the end user is wholly unjustified. In a cost of service study, costs that cannot be directly assigned to a particular class generally are allocated on a customer, demand or energy (Mcf) basis, or based on a blended allocator.<sup>23</sup> The costs at issue here can be directly assigned to the residential and small commercial classes. The cost categories that typically would be allocated to customer classes based on a pure Mcf allocator (or a blended allocator that includes a Mcf component) are production plant and purchased gas cost expense.<sup>24</sup> Creating a POR program or changing billing systems to modify the PTC are not production plant and

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<sup>22</sup> See 66 Pa. C.S. 2204(d)(1),(3).

<sup>23</sup> Many variations exist regarding blended allocators and how to calculate the demand and energy components of the allocators. The Industrial Customer Groups have used the three broad categories here.

<sup>24</sup> See, e.g., Gas Rate Design at 28, National Association of Regulatory Utility Commissioners (Aug. 6, 1981).

purchased gas cost expenses; rather, they appear to be accounting or administrative and general expenses. Enacting a Mcf charge to all customers to recover these costs would be highly inappropriate.<sup>25</sup>

Large C&I customers' concerns regarding transportation issues are codified at 52 Pa. Code §§ 60.1-60.9. Conversely, in connection with the Competition Act, issues relating to Natural Gas Supply Customer Choice for residential and small commercial customers are codified at 52 Pa. Code Chapter 62, which includes Sections on: Universal Service and Energy Conservation Reporting Requirements;<sup>26</sup> Reporting Requirements for Quality of Service Benchmarks and Standards;<sup>27</sup> Customer Information Disclosure;<sup>28</sup> Licensing Requirements for Natural Gas Suppliers;<sup>29</sup> and Standards of Conduct.<sup>30</sup> The Commission's proposal in this proceeding to create Regulations for 52 Pa. Code §§ 62.221- 62.227 and its purpose in fostering "a competitive retail marketplace for natural gas service to residential and small commercial customers..."<sup>31</sup> further confirm that these regulations are not meant to apply to Large C&I customers. Accordingly, Large C&I customers should not be forced to pay the surcharge for competition related activities. Proposed 52 Pa. Code § 62.226 should be revised to apply only to residential and small commercial customers.

## **B. Regulatory Assessments**

In addition to creating a surcharge for costs "in connection with the implementation of any changes designed to promote the development of effective competition in the retail market,"

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<sup>25</sup> In addition, a per unit charge approach for collecting competition promotion costs will assign a greater cost burden on a NGDC's largest customers, regardless of the actual benefit that these customers receive through any competition-related activities enacted under the proposed regulations. A per unit surcharge is highly inequitable and should be rejected.

<sup>26</sup> 52 Pa. Code §§ 62.1-62.8.

<sup>27</sup> Id. at §§ 62.31-62.37.

<sup>28</sup> Id. at §§ 62.71-62.80.

<sup>29</sup> Id. at §§ 62.101-62.114.

<sup>30</sup> Id. at §§ 62.141-62.142.

<sup>31</sup> Proposed 52 Pa. Code § 62.221(emphasis added).

the Commission, in its September 11, 2008, Final Order and Action Plan also considered implementing an automatic adjustment surcharge that would be used to directly recover assessments from customers.<sup>32</sup> As indicated in the SEARCH report, "this mechanism would allow NGDCs to recover these costs outside of a base rate case, similar to the way state taxes are collected from customers."<sup>33</sup> Consistent with this determination, in this proposed rulemaking proceeding, the Commission has proposed a regulation that would create a surcharge "to allow NGDCs to recover the cost of their annual regulatory assessments to fund the Commission, Office of Consumer Advocate and Office of Small Business Advocate."<sup>34</sup> Similar to the proposed surcharge related to NGDC costs of competition related activities, the proposed regulatory assessment would be "recovered on a per unit basis on each unit of commodity which is sold or transported over its distribution system without regard to the customer class of the end user."<sup>35</sup> Because there is no causal connection between the SEARCH process and the need for a regulatory assessment, combined with the fact that basing this surcharge on a per unit basis without regard to the customer class of the end user is wholly unjustified, the Industrial Customer Groups oppose the regulatory assessment surcharge.

There is no causal connection between the proposed regulatory assessment surcharge and the SEARCH process. This fact was recognized by the Commission in its September 11, 2008, Final Order and Action Plan, where the Commission stated "...this proposal will not directly increase competition in the retail natural gas market..."<sup>36</sup> Despite this realization, the PUC attempted to justify its inclusion as part of this rulemaking when stating "...the establishment of a surcharge with an automatic adjustment clause that allows for the timely recovery of regulatory

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<sup>32</sup> Final Order and Action Plan at 22.

<sup>33</sup> *Id.* (citing SEARCH Report, p. 58).

<sup>34</sup> Rulemaking Order at 8.

<sup>35</sup> Proposed Regulation 52 Pa. Code § 62.227.

<sup>36</sup> Final Order and Action Plan at 23.

assessments which will include costs of the Commission actions to promote and facilitate natural gas competition can be a fair and efficient means to recover costs from stakeholders."<sup>37</sup> The Commission did not quantify what portion of the regulatory assessments will be related to promoting competition as opposed to other regulatory activities.

As the Commission recognizes, regulatory assessments traditionally have been recovered through base rates.<sup>38</sup> The Industrial Customer Groups respectfully submit that there is no need to depart from that historic practice. Although regulatory assessments may increase, other cost elements in the rates may offset that increase. One prime example of this is the rate case expense that is embedded in rates. After the normalization period for rate case expense is concluded, the utility continues to recover the embedded annual expense even though it is presumed to have fully recovered its rate case expense through established rates. Consumers do not get the benefit of a rate reduction after the normalization period, which typically is three to five years. Rather, that revenue is retained by the NGDC to offset other expenses that may have increased since the rate case.

Allowing a separate surcharge for regulatory expenses constitutes single issue ratemaking. Apart from specific costs recovered through automatic adjustment charges, Pennsylvania has followed the generally accepted ratemaking prohibition against single issue ratemaking.<sup>39</sup> Single issue ratemaking occurs when only one element of the general ratemaking equation is examined between rate cases and the customers' rates are adjusted to reflect only changes in that element. Single issue ratemaking is fundamentally unfair and inequitable because it does not permit the Commission to examine other savings or expense adjustments that may favor consumers. Under single issue ratemaking, the Commission reviews only a limited

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<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> See, e.g., Pa. Indus. Energy Coalition v. Pa. Pub. Util. Comm'n, 653 A.2d 1336, 1350 (Pa. Commw. 1995).

portion of the overall ratemaking equation and, in effect, assumes that a single variable such as the amount expended for regulatory assessments translates into reduced profits for the utility. The NGDCs' profits may decrease due to regulatory assessments; however, if embedded cost in rates for debt expense or the litigation of the last rate case or other items decrease, the utility's profit or return is unaffected. Implementing single issue ratemaking schemes such as that proposed in 52 Pa. Code § 62.227 deprive the Commission of the ability to examine those types of offsets.

Moreover, the Commission's proposal to recover this surcharge on a per unit basis on each unit of commodity sold or transported over its distribution system without regard to the customer class of the end user is wholly unjustified. In cost of service studies, regulatory assessments are typically allocated to customer classes based on a blended allocator that ultimately ties back to a customer component and potentially also a demand component (similar to administrative and general expenses).<sup>40</sup> The Commission's "per unit" proposal would reallocate these costs on an energy (Mcf) basis. If this surcharge proposal is implemented (which it should not be), a percentage of revenue approach applied to the service the customer purchases from the NGDC (*i.e.*, transportation service for most larger customers) is more consistent with cost of service principles. This is more analogous to the structure of the STAS mechanism.<sup>41</sup> Any benefits that large customers arguably receive from the activities covered by the regulatory assessment have no relation whatsoever to the amount of natural gas received. Accordingly, if the Commission approves the surcharge over the objections raised herein, the surcharge should not be collected on an Mcf basis.

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<sup>40</sup> See, e.g., Gas Rate Design at 28, National Association of Regulatory Utility Commissioners (Aug. 6, 1981).


<sup>41</sup> See 52 Pa. Code § 54.97.

### III. CONCLUSION

**WHEREFORE**, the Industrial Energy Consumers of Pennsylvania, Central Penn Gas Large Users Group, Columbia Industrial Intervenors, PNG Industrial Intervenors, and UGI Industrial Intervenors respectfully request that the Pennsylvania Public Utility Commission consider and adopt, as appropriate, the foregoing Comments.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By 

Pamela C. Polacek (Pa. I.D. No. 78276)  
Shelby A. Linton-Keddie (Pa. I.D. No. 206425)  
100 Pine Street  
P.O. Box 1166  
Harrisburg, PA 17108-1166  
Phone: (717) 232-8000  
Fax: (717) 237-5300

Counsel to Industrial Energy Consumers of  
Pennsylvania, Central Penn Gas Large Users Group,  
Columbia Industrial Intervenors, PNG Industrial  
Intervenors, and UGI Industrial Intervenors

Dated: August 25, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant).

**VIA E-MAIL**

Irwin A. Popowsky  
Office of Consumer Advocate  
555 Walnut Street, 5<sup>th</sup> Floor, Forum Place  
Harrisburg, PA 17101-1923  
[spopowsky@paoca.org](mailto:spopowsky@paoca.org)

William R. Lloyd, Jr.  
Office of Small Business Advocate  
Commerce Building, Suite 1102  
300 North Second Street  
Harrisburg, PA 17101  
[willoyd@state.pa.us](mailto:willoyd@state.pa.us)

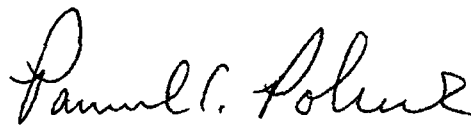
J. Michael Love, Esq.  
Energy Association of PA  
800 North Third Street, Suite 301  
Harrisburg, PA 17103  
[mlove@energypa.org](mailto:mlove@energypa.org)

Johnnie Simms, Esquire  
Office of Trial Staff  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor West  
Harrisburg, PA 17120  
[josimms@state.pa.us](mailto:josimms@state.pa.us)

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Pamela C. Polacek

Counsel to the Industrial Customer Groups

Dated this 25<sup>th</sup> day of August, 2009, at Harrisburg, Pennsylvania.

