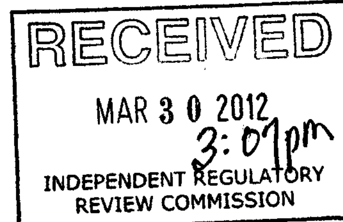

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March 27, 2012

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

VIA EXPRESS MAIL

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

**Re: Revisions to Code of Conduct at 52 Pa. Code § 54.122; Docket No. L-2010-2160942**

Dear Secretary Chiavetta:

Enclosed for filing are the original plus 15 copies of the written comments of UGI Corporation, UGI Utilities, Inc. - Electric Division and UGI Energy Services, Inc. in response to the Public Utility Commission's Proposed Rulemaking Order in the above-captioned docket.

Should you have any questions concerning this filing, please feel free to contact me at (610) 992-3750.

Sincerely yours,

Melanie J. Elatieh

Counsel for UGI Corporation, UGI Utilities, Inc. and UGI Energy Services, Inc.

Enclosures

460 NORTH GULPH ROAD, KING OF PRUSSIA, PA 19406

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MAR 27 2012
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

| Revisions to Code of Conduct at 52 Pa. Code § 54.122. | : | Docket No. L-2010-2160942 |
|---|---|---|

# COMMENTS OF THE UGI COMPANIES[1] TO THE PROPOSED RULEMAKING ORDER

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

## I. INTRODUCTION

On August 25, 2011, the Public Utility Commission ("Commission") issued a Proposed Rulemaking Order ("Order" or "Proposed Rulemaking") requesting comments on the proposed amendments to 52 Pa. Code § 54.122, Code of Conduct. The stated purpose of the Order is to strengthen the safeguards currently in place that prohibit incumbent utilities from directly or indirectly favoring their competitive supplier affiliates.

The UGI Companies appreciate the opportunity to provide comments to the Proposed Rulemaking. As background, UGI was founded in Pennsylvania in 1882. Bringing over 130 years of trusted energy-related experience to millions of customers, UGI is a financially strong organization committed to the local communities and people it serves.

UGI Corporation is a holding company that, through its subsidiaries – including, among others, UGI Utilities and UGI Energy Services – distributes, stores, transports and markets energy products and related services. UGI Corporation became the parent corporation in 1992 pursuant to a shareholder-approved plan of restructuring. The 1992 restructuring represented a

[1] For purposes of these comments, the "UGI Companies" shall be defined as UGI Corporation, UGI Utilities, Inc. – Electric Division ("UGI Utilities") and UGI Energy Services, Inc. ("UGI Energy Services" or "UGIES.")

return to UGI's original basis of organization – the holding company structure. From 1882 to 1953, a period of 71 years, UGI subsidiaries engaged in various lines of utility and non-utility businesses. It was the nation's first public utility holding company, and it was not until 1953 when, in response to the requirements of the Public Utility Holding Company Act of 1935, the Company completed its reorganization into an operating company format – a structure in which it managed both its utility and non-utility businesses until 1992. The restructuring back into a holding company structure in 1992, with UGI Corporation as the parent, allowed for the rearrangement of the legal and economic relationships between the regulated gas and electric utility businesses and the non-utility businesses. The resultant separation of utility and non-utility operations served as a platform for growth for UGI, as it permitted each line of business to independently attain a capital structure and cost of capital consistent with its respective industry practices and enhanced the ability of investors to evaluate each line of business independently.

UGI Utilities is the utility subsidiary of UGI Corporation. It is comprised of two regulated divisions encompassing a natural gas distribution operation (the "Gas Division") and an electric distribution operation (the "Electric Division"), and it wholly owns two natural gas distribution companies – UGI Penn Natural Gas, Inc. ("UGI PNG") and UGI Central Penn Gas, Inc. ("UGI CPG"). The Electric Division is a "public utility" and an EDC as those terms are defined under the Public Utility Code, 66 Pa.C.S. §§ 102 and 2803, subject to the regulatory jurisdiction of the Commission. The Electric Division furnishes electric distribution, transmission, and default service provider electric supply services to approximately 62,000 customers throughout its certificated service territory, which includes portions of Luzerne and Wyoming Counties, Pennsylvania. The Gas Division, UGI PNG and UGI CPG each is a "public utility" and a "natural gas distribution company" as those terms are defined under the

Public Utility Code, 66 Pa. C.S. §§ 102 and 2202, subject to the regulatory jurisdiction of the Commission. Together, the Gas Division, UGI PNG and UGI CPG provide natural gas distribution service to approximately 575,000 customers in portions of 46 eastern and central Pennsylvania counties.

UGI Energy Services is the midstream and marketing subsidiary of UGI Corporation. It was formed in 1995 to pursue the opportunities created by federal and state deregulation of electricity and natural gas commodity supply markets, direct access and customer choice. UGI Energy Services has been licensed by the Commission as both an electric generation supplier ("EGS") and natural gas supplier ("NGS") since the inception of retail competition in the Commonwealth,[2] authorized to serve all customer classes in all utility territories. UGIES sells electricity, natural gas, liquid fuels and renewable energy products to commercial and industrial customers at approximately 30,000 locations behind 33 natural gas utility systems and 19 electric utility systems in all or portions of Pennsylvania, New Jersey, Delaware, New York, Massachusetts, Ohio, Maryland, Virginia, North Carolina and the District of Columbia. In addition, UGI Energy Services owns and operates a variety of midstream natural gas assets which support the storage, transportation, and delivery of natural gas. It also owns and operates a number of electric generation assets in Pennsylvania, including solar-powered generation facilities totaling more than five megawatts.

The UGI Companies are and have been active supporters of both wholesale and retail electricity competition and the development of customer choice within the Commonwealth. Based on their combined experience in the competitive wholesale and retail markets, the UGI

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[2] On July 24, 1998, the Commission issued UGIES an EGS license at Docket NO. A-110076, and on October 19, 1999, the Commission issued UGIES a NGS license at Docket No. A-125018.

Companies believe that their comments will provide the Commission with a valuable perspective on the proposed regulations.

## II. COMMENTS

### A. The Proposed Rulemaking Will Create an Unlevel Playing Field Among Electric Generation Suppliers to the Detriment of Retail Competition and Consumers and Will Create a Climate of Regulatory Uncertainty for Pennsylvania-Based Companies.

The Commission's objective in regulating the competitive retail market should be to ensure that barriers to market entry are low, the exchange of accurate and timely market information is available to consumers and that the rules of the road for market participants are clear, fair and non-discriminatory. Market participants wishing to enter and effectively compete within the market should be able to do so, bringing their own special capabilities, resources, and efficiencies. In a truly competitive market, the entity that is the most efficient and that can bring the most value to customers should prevail – benefiting consumers through lower prices and higher-quality services.

The Proposed Rulemaking expresses a desire to level the playing field among competitive suppliers by strengthening the safeguards currently in place that prohibit incumbent utilities from directly or indirectly favoring their competitive supplier affiliates. Unfortunately, the proposed regulations impose onerous and unnecessary restrictions on the operations of suppliers who are affiliated with Pennsylvania EDCs, which will significantly diminish their ability to compete in retail electricity markets across the Commonwealth, region and nation. The Proposed Rulemaking tilts the field in favor of other suppliers, who enjoy no such restrictions in Pennsylvania or in their home states or nations of origin. Giving an artificial advantage to such suppliers will reduce the overall pressure for such suppliers to bring forth new or better services and products or more efficient, less costly processes that result in lower prices to consumers.

Such a result is contrary to the fundamental goal of an effective competitive market, *i.e.*, to benefit customers through lower prices.

Unfortunately, the Commission's Proposed Rulemaking at this stage in customer choice and competition marks a departure from the environment of regulatory certainty that this Commission has historically provided. The proposed rules place unnecessary and unfair burdens on Pennsylvania-based businesses. This regulatory uncertainty could cause Pennsylvania businesses to stand on the sidelines while they wait for the rulemaking whirlwind to settle. It also will undermine important policy objectives, including the continued development of retail competition in Pennsylvania and the promotion of the public interest.

### 1. Prohibition on Affiliated-Supplier's Continued Use of Its Brand Name

Sections 54.122(3)(iv) and (v) of the Proposed Rulemaking prohibit an EGS from sharing the same or similar name or fictitious name as its affiliated EDC or its corporate parent and from sharing any similar word, term, name, symbol, device, registered or unregistered mark, or any combination thereof, as its affiliated EDC. If these provisions are adopted by the Commission, a competitive supplier affiliated with a Pennsylvania EDC would be forced to create a new brand identity. Such a mandate is administratively burdensome and violates all principles of brand management and marketing. It will place affiliated suppliers at a competitive disadvantage relative to other suppliers who are not subject to such re-branding requirements in Pennsylvania or in their home states or countries. This proposal will harm competition because it will increase consumers' search and information costs, reduce overall competitive pressure for suppliers to improve efficiencies and limit choices available for consumers.

Although it may be clear that UGI Utilities and UGI Energy Services each share a common name – UGI - in their respective brand identities, it may be less clear to the Commission that each company has spent significant time and money in creating its own

separate brand strategy and identity. The chief principle in any successful branding strategy is to build and market a clear brand identity. A name is an essential building block of a company's overall brand identity. One cannot simply remove this foundation without tearing down the entire brand. Yet, building a clear brand identity requires more than just a name and it does not happen by chance. It is a purposeful endeavor and the result of disciplined, strategic and creative thinking. The outcome is a strategy, story and experience – a brand – that is an asset to a company. This asset helps drive a company's business ahead.

Clear brand identification benefits the market by lowering search and information costs and providing market accountability. Brand identification improves market efficiencies by helping to reduce consumers' and investors' search and information costs, while at the same time providing economies of scale to suppliers. It also creates the incentive for firms associated with the brand to maintain consistent quality levels across its various products and services and provide overall better service to customers.

For the past 17 years, UGI Energy Services has spent significant time and money in developing and marketing its brand identity across a number of products, services, platforms and markets in Pennsylvania, New Jersey, Delaware, New York, Massachusetts, Ohio, Maryland, Virginia, North Carolina and the District of Columbia. This brand identity has been developed and used in all facets of UGI Energy Services' business (described above), and not just in the marketing of electricity retail supply within Pennsylvania. It is across these various products, services, platforms and markets that UGI Energy Services has built, managed and marketed its brand.

In developing its brand, UGI Energy Services has carefully endeavored to distinguish its identity from that of UGI Utilities in order to eliminate or minimize potential customer and/or

investor confusion.[3] There is no question about it – UGI Energy Services' long-term interests are served by distinguishing its brand identity from that of the utility, as are the interests of consumers and the market. Lingering customer or investor confusion about who UGI Energy Services is vis a vis the utility is not an advantage for UGI Energy Services. A branding strategy that allows customer or investor confusion to flourish about a brand identity is a short-lived strategy – one that might allow a company to capture low hanging fruit in the short-term (*i.e.*, confused customers) but would inhibit the retention of such customers in the long-term and therefore inhibit the ability to grow the business. UGI Energy Services has long recognized and labored under this principle, which has driven many of UGIES' major investments and propelled the company's success, and today the inclusion of "UGI" into the architecture of UGIES' brand does not create confusion and does not make UGIES's brand synonymous with that of UGI Utilities.

The fact that UGI Corporation, UGI Utilities and UGI Energy Services share the "UGI" name is not misleading to customers. To the contrary, the use of the shared name conveys truthful information to the market that UGI Utilities and UGI Energy Services are related entities operating under a common ownership and corporate structure in Pennsylvania. The shared use of the name is an effective, short-hand way to convey this truthful information to consumers and investors alike. Customers should be free to make their choices based on whatever accurate information they deem relevant, including whether a supplier is part of a Pennsylvania-based, Fortune 500 organization with a long-standing commitment to Pennsylvanians and local communities. Given the abundant choices available to consumers in today's marketplace, a

[3] As a part of this effort, among other things, UGI Energy Services has developed a distinct logo from UGI Utilities and UGI Corporation. Company logos can be found in *Appendix A*.

customer should be free to exercise her preference in this regard and should be able to have this information conveyed in the most efficient manner.

To date, there is no evidence showing that there is customer confusion as a result of the affiliated supplier's use of the affiliated EDC or parent corporation name in its brand identity. If such potential confusion ever existed, it certainly stands to reason that such confusion would have been most prevalent at the outset of competition rather than sixteen years into competition. But the Commission had the chance to ban the use of the shared name at the beginning of competition, and it rejected such a ban. In the Commission's Final Rulemaking Order establishing the existing Competitive Safeguards regulations, entered April 28, 2000 ("*2000 Competitive Safeguards Order*"), the Commission concluded that a ban on affiliated EGSs from having the same or similar name or logo as a regulated EDC was not necessary to promote competition with the use of an adequate disclaimer. The Commission stated:

> Enron urges us to prohibit an EDC-affiliated generation supplier from using the utility name or logo, or in the alternative, to impose disclosure requirements to properly inform customers about such affiliation. *Again, we are unwilling to flatly prohibit use of utility name or logo. While it may be that there is some initial customer confusion concerning retail competition and the role of utilities, their affiliates and competitors, we have adopted a strong and ongoing customer education program that we believe has been successful in acquainting Pennsylvanians with their retail options.* Pennsylvania continues to have one of the highest retail electric generation shopping rates in the nation. However, we do accept Enron's suggestion that we include disclosure language such as that adopted in the PECO settlement and have modified 52 Pa. Code § 54.122(1) accordingly.

*2000 Competitive Safeguards Order*, at 10-11 (emphasis added).

If any customer confusion about the shared use of the name does in fact exist today, which nothing in the record suggests that it does, a ban on the use of the same or similar name would not help to clear it up. To the contrary, a complete ban on affiliates' use of the same or

similar name would be misleading to consumers and would simply increase customers' search and information costs.[4] Consumers clearly are entitled to know just who they are dealing with, and the use of the shared name efficiently conveys this information to consumers. The UGI Companies believe the more effective way of addressing any such potential confusion, to the extent it exists, would be through the continued use of appropriate disclaimers, which the Commission's existing Code of Conduct currently require EGSs and NGSs to utilize in their marketing and sales materials to the public,[5] and which has been proposed for retention in this Proposed Rulemaking.

Furthermore, the efficient communication of this truthful information is not a barrier to entry for suppliers not affiliated with Pennsylvania EDCs, nor is it an impediment to such suppliers to effectively compete against affiliated suppliers in Pennsylvania. Since the inception of customer choice and competition, and more recently since the expiration of generation rate caps, competitive electric suppliers have flocked to the Pennsylvania market. According to the Commission's competition website, in the largest EDC service territories, PECO and PPL, for example, residential customers can choose from over 40 and 34 suppliers, respectively. Business customers in each territory can select from over 50 suppliers. One does not have to dig much deeper to be able to draw the conclusion that the barriers to entry in the Pennsylvania market are low. Additionally, the Commission's competition website shows that presently 1,645,510 retail customers, representing over 55% of the state's retail electric load, have switched their electricity

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[4] It may also potentially lead to customer complaints that consumers have been denied the opportunity to know whether they are dealing with utility affiliates. Although it could be argued that restrictions on the use of EDC or corporate parent brand names or logos by affiliated EGSs can be inferred from the broad powers granted by Chapter 28, including protection of the public and prevention of anticompetitive conduct, such a restriction runs afoul of the express mandate in Section 2801(d)(2) that consumers be provided with "accurate customer information." Indeed, such a restriction would fail to accurately disclose whether an EGS is affiliated with an EDC.

[5] *See* 52 Pa. Code §§ 54.122, 62.142.

supply from an entity other than the default service provider. These statistics clearly indicate a competitive retail electric marketplace.

Moreover, despite the fact that there exist affiliated suppliers who share in the name of the Pennsylvania EDC and/or the parent corporation, many marketers have made the deliberate decision to make major investments to build and market their respective brand identities in the Pennsylvania retail market. Some key examples include Energy Plus Holdings, LLC ("Energy Plus"), Reliant Energy and Green Mountain Energy Co. ("Green Mountain") – each of which has been extremely successful in winning Pennsylvania customers due, largely in part, to their effective deployment of brand management and marketing, but also due to the innovative products and services they offer customers. Thus, it is not clear how the affiliated supplier's use of the shared name is a barrier to entry for non-affiliated suppliers or an impediment to competition.

What is clear, however, is that requiring EDC-affiliated suppliers to rebrand (and possibly market under two different brands) after they have already made major investments in their branding strategies will undoubtedly create an unlevel playing field among competitive suppliers and give suppliers who are not affiliated with Pennsylvania EDCs an unfair "leg up" in the retail market. As explained above, UGI Energy Services has made significant investments in developing, managing and marketing its brand over the course of 17 years across various products, services, platforms and markets. If this proposal is approved, it would require a significant investment on the part of UGIES to create a new brand (as well as impose significant expenses on UGIES to market under two different brands). Such a result is confusing and would destroy the value of UGIES' existing brand identity. For example, UGIES markets combined energy products and services to customers in Pennsylvania – would this mean it would have to

use one name for the electric product and its existing brand identity for all other products? And would it mean UGI Energy Services would have to market under two different brands to its regional and national chain customers who are based or located in Pennsylvania as well as in other states? This result is also inefficient and will only drive up UGI Energy Services' (and other affiliated EGSs') prices offered to consumers. This proposed rule will undoubtedly place UGI Energy Services (and other affiliated EGSs) at an unfair competitive disadvantage in retail markets in Pennsylvania and across the nation.

No such Commission mandate will be imposed on other suppliers competing in the Pennsylvania retail electric market. Yet many suppliers competing within the Pennsylvania retail electricity market are affiliated with and share the name of an affiliated electric utility located in another state and/or that of its parent corporation. For example, the following regional and national marketers all use the same name that their affiliated utility and/or parent corporation uses in their home market:

| | Supplier | Affiliated Utility / Parent Corporation |
|---|---|---|
| • | ConEdison Solutions, Inc. | Consolidated Edison Company of New York (Con Edison) / Consolidated Edison, Inc. (ConEdison, Inc.) |
| • | Dominion Retail d/b/a/ Dominion Energy Solutions | Dominion Virginia Power; Dominion North Carolina Power; Dominion East Ohio; Dominion Hope / Dominion Resources, Inc. |
| • | DPL Energy Resources, Inc. | Dayton Power and Light (DPL) / DPL Inc.[6] |
| • | DTE Energy Supply, Inc. | Detroit Edison Company (DTE) / DTE Energy Co. |
| • | Duke Energy Retail Sales, LLC | Duke Energy Carolinas; Duke Energy Ohio; Duke Energy Indiana; Duke Energy Kentucky / Duke Energy Corporation |
| • | GDF SUEZ Energy Resources NA, Inc. | / GDF SUEZ Energy North America |

[6] DPL Inc. is in turn owed by AES Corporation as a result of a recent acquisition that closed on November 28, 2011.

| | | |
|---|---|---|
| • | Integrys Energy Services, Inc. | / Integrys Energy Group |
| • | MidAmerican Energy Company | / MidAmerican Energy Holdings Company |
| • | NextEra Energy Services Pennsylvania, LLC | / NextEra Energy, Inc. |
| • | Pepco Energy Services, Inc. | Potomac Energy Power Company (Pepco) / Pepco Holdings, Inc. |
| • | South Jersey Energy Co. | South Jersey Gas Co. / South Jersey Industries |
| • | Unitil Resources, Inc. d/b/a Usource | Unitil Energy Systems, Inc. / Unitil Corporation |
| • | Washington Gas Energy Services, Inc. | Washington Gas Light Co. / WGL Holdings, Inc. |

Meanwhile, the largest marketer on the East Coast – Hess Corporation – is an oil company which is free to use the same brand as its corporate brand, retail gasoline stations and toy trucks. Centrica – Direct Energy's parent corporation – benefits from using the British Gas name (the oldest gas utility in Great Britain before it was demerged in 1997) to market commodity supply in Great Britain. Additionally, as discussed above, Energy Plus, Reliant Energy and Green Mountain each made major investments in their respective brand strategies before each company was acquired by their common parent corporation, NRG Energy, Inc ("NRG"). As wholly-owned subsidiaries of NRG, these marketers are now affiliated but continue to market to consumers under their separately established brand identities – and consumers have no short-hand way of knowing this affiliated relationship.

Based upon UGI Energy Services' review, there appears to be 24 jurisdictions (including Pennsylvania) that now have or at one time permitted the creation of competitive retail electric supply markets. There are only two states – Delaware and Maine – that completely prohibit the

use of a public utility's name, logo, or likeness. In Delaware, there is only one electric utility operating in the entire state – Delmarva Power & Light ("Delmarva Power"). Delmarva Power is a wholly-owned subsidiary of Pepco Holdings, Inc. ("Pepco Holdings"), the parent corporation to another regulated utility – Pepco – that delivers electricity to customers in the District of Columbia and its Maryland suburbs. Neither the District of Columbia nor Maryland prohibits the use of the public utility's name; thus, not surprisingly, Pepco Energy Services, Inc. – the affiliated supplier, a Commission-licensed EGS and NGS – uses the name of its parent corporation and of its affiliated utility that operates in jurisdictions with no such ban. Meanwhile, in Maine, there are only three electric utilities, two of which – Banger Hydro-Electric Co. and Main Public Service Co. – are affiliated entities under a common parent corporation, Emera Inc. Again, to no surprise, their affiliated competitive supplier – Emera Energy Services – uses the name of the parent corporation.

Furthermore, in reviewing the switching statistics in Delaware and Maine, it does not appear that this name ban has been a driver for customer shopping in these states. As shown in the table below, as compared to these two states, Pennsylvania is leading in terms of the total percentage of customers that are shopping:

| Electric Switching Statistics – Number of Customers[7] | | | |
|---|---|---|---|
| | **Pennsylvania** | **Delaware** | **Maine** |
| Total Customers (Res & C&I) | 5,650,102 | 301,832 | 770,926 |
| Total Switched | 1,645,510 | 17,678 | 38,131 |
| **Total % Switched** | **29.1%** | **5.9%** | **4.9%** |

[7] The most current data available by state was used in the above analysis. Pennsylvania data is as of March 21, 2012, as posted on the PAPowerSwitch website (available at http://www.papowerswitch.com/).
Delaware data is as of February 24, 2012 and is posted on the Delaware Public Service Commission website (available at http://depsc.delaware.gov/electric/DPSC%20Choice%20Report.xls).
Maine data is as of December 2011 and is posted on the Maine Public Utility Commission website (available at http://www.maine.gov/tools/whatsnew/attach.php?id=180998&an=1).

Out of the remaining 21 jurisdictions, 15 states allow the use or reference of a public utility's name or likeness in a competitive supplier's marketing materials, provided that an express disclaimer is used. At least one state, Oklahoma, has indicated that a public utility's competitive supplier affiliate can refer to its public utility affiliate without restriction, so long as the two entities can be distinguished ("Oklahoma Rule"). The remaining five jurisdictions are silent on the issue. Based upon this review, it appears that the vast majority of jurisdictions with competitive retail electric supply markets have concluded that it is either not appropriate or impermissible to prohibit the use or reference of a public utility's name or likeness by a competitive supplier.

The Commission's proposed rule is essentially "handing out" artificial advantages to regional and national marketers not affiliated with a Pennsylvania EDC, which undoubtedly will harm competition and place unnecessary and unfair burdens on Pennsylvania-based businesses. By giving regional and national suppliers a special "leg up," the Commission will (unintentionally) be reducing the overall pressure for suppliers to bring forth new or better services and products or more efficient, less costly processes that result in lower prices to consumers. Such a result is contrary to the fundamental goal of an effective competitive market, *i.e.*, to benefit customers through lower prices and high-quality services.

The regulatory uncertainty created by this change in rules needlessly interferes with UGI Energy Services' (and other EDC-affiliated supplier's) future investment decisions in branding and marketing strategies. Based on the Commission's ruling in the *2000 Competitive Safeguards Order*, there was no reason for UGI Energy Services not to continue to develop its own brand using the UGI name, both within and outside the Commonwealth of Pennsylvania, and, since that time, it has expended a significant amount of time and resources in an attempt to do so. To

avoid the risk of harm to the market and to eliminate the regulatory risks to future investments, the Commission should reject Sections 54.122(3)(iv) and (v) of the Proposed Rulemaking.

### 2. Disclaimer Language and Licensing Agreement Requirements

Section 54.122(iv) of the Proposed Rulemaking requires affiliated EGSs using the name of the Pennsylvania EDC or parent corporation to include a disclaimer in its communications to the public stating that the EGS is not the same company as the EDC whose EDC identifier is featured, and that a customer need not buy the EGS's products or services in order to continue receiving services from the EDC. In print and internet communications, the disclaimer shall be placed immediately adjacent to the EDC identifier and shall be in equal prominence to the main body of the text. In radio or television communications, the disclaimer shall be clearly spoken.

Although UGI Energy Services believes the optimal rule on this issue is the Oklahoma Rule, UGIES notes that the disclaimer language is consistent with the disclaimer presently required by the existing Code of Conduct. UGIES recommends, however, that the disclaimer requirement be modified so that an affiliated supplier need only include the disclaimer in advertisements directed at its affiliated EDC service territory. Customers in an EDC territory are not likely to be confused by a supplier name that shares the name of another EDC territory. For example, PECO customers likely will not be confused by UGI Energy Services. Thus, it is not clear why this disclaimer would be required in EDC territories other than in the affiliated EDC territory.

In addition, UGIES notes that no basis has been articulated to support the required placement of the disclaimer language in print materials. No evidence has been shown that such placement is necessary to address any legitimate concern (such as, for example, to minimize potential customer confusion, assuming such confusion exists). The Commission should understand that, similar to branding strategies, companies spend significant time and money in

creating marketing materials that will grab the attention of customers. Requiring lengthy disclaimer language right next to the affiliated supplier's name in the same font size as the text of the name just seems arbitrary and it will potentially make such materials less attractive to the eye of a consumer. It could also make some materials more costly to produce. No such disclaimer requirement applies to other suppliers – despite the fact that many suppliers, as discussed above, are either affiliated with utilities in their home states or countries and/or affiliated with other suppliers. Thus, this placement requirement has the potential to weaken the consumer appeal of the marketing materials used by affiliated suppliers and will give other suppliers an artificial leg up in grabbing consumer attention. The Commission should consider and weigh this potential harm before arbitrarily mandating the placement of the disclaimer.

Section 54.122(iv) of the Proposed Rulemaking requires affiliated EGSs using the name of the Pennsylvania EDC or parent corporation to enter into an appropriate licensing agreement specifying such rights. There is potential for this proposed requirement, when read together with the proposed requirement that EDC's assets be transferred to affiliates at not less than market value, to be interpreted to require any such license agreement to include royalty payments at market based rates. This interpretation should be rejected. Such a mandate wrongly assumes that the goodwill associated with the 'UGI" name was entirely generated by the regulated utility, which is simply not the case. Since well before the Commission spoke on this issue in 2000, the "UGI" name has been used and developed across a number of products, services, and platforms offered by several affiliates of the utility, including UGI Energy Services. These non-utility uses of the "UGI" name have contributed significantly to the value of the name. It would be a burdensome, if not impossible, task to determine the UGI affiliates' individual contribution to the goodwill value of the "UGI" name. Further, requiring market-based royalty payments simply

creates a transfer from the affiliate to the utility, which again places an onerous burden on the affiliated supplier when its competitors enjoy no such burdens in their home states or countries.

### 3. Restrictions on Shared Services and Pricing on Asset Transfers

Sections 54.122(3)(ix) and (4)(iii) of the Proposed Rulemaking prohibits the sharing of office space, employees, and services by a Pennsylvania EDC and an affiliated EGS. This proposed rule is overly restrictive and essentially bans the holding company structure under which many, if not all, Pennsylvania EDCs and their affiliated suppliers operate today, including UGI Corporation, UGI Utilities and UGI Energy Services. Holding companies have become the standard form of corporate organization for large companies offering a variety of products and services and/or operating in multiple jurisdictions (states or countries). Where a holding company structure is employed, it is necessary and highly desirable to provide a number of services and functions through shared service organization. This may be accomplished through use of a service company model or by housing the organization within the utility or holding company for the purpose of providing administrative and operational services to utility and non-utility businesses alike. Such services include, but are not limited to, accounting, financial, payroll, purchasing, computer and information technology, human resources, regulatory and legal. Generally, shared services are provided to affiliated companies at fully allocated cost, including overheads and benefits.

On April 30, 1992, the Commission approved an Affiliated Interest Agreement between UGI Corporation and UGI Utilities ("Holding Company AIA"). The Holding Company AIA sets forth the terms by which UGI Utilities may provide certain centralized services to or receive

such services from UGI Corporation and its unregulated subsidiaries on a cost basis.[8] The Holding Company AIA was filed in accordance with the requirements of Section 2102(b) of the Public Utility Code, 66 Pa. C.S. § 2102(b), and after investigation and analysis, the Commission concluded that the terms and conditions were reasonable and consistent with the public interest.

The Commission's proposed restrictions on shared service organizations will require EDCs and affiliated EGSs to absorb certain shared functions into their own operations, as stand-alone companies, thereby losing the benefit of the economies of scale achieved through a common business services organization. Yet, many active marketers in Pennsylvania are affiliated with major utility holding companies located outside of Pennsylvania that also employ an affiliated service company model or holding companies employees that provide services across a number of companies. Similarly, many marketers from non-utility businesses located within and outside of Pennsylvania also use common service organizations to aid in their business operations. The proposed Commission rules do not apply to these entities, which would create an unfair competitive advantage for these entities while disabling the Pennsylvania-based utility holding company structure.

To reduce the risk of loss of economies of scale for Pennsylvania-based suppliers and EDCs and to eliminate risks to investments caused by the regulatory uncertainty of this proposed

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[8] Pursuant to the Commission-approved Holding Company AIA under 66 Pa. C.S. § 2102(b), UGI Corporation provides certain centralized services to its subsidiaries, including UGI Utilities and UGIES, at cost. Such services include, among other things: executive management, cash management, tax services, internal auditing, treasury services, pension fund management, financing activities, investor relations, external reporting, insurance, risk management, legal, and similar types of services. (*See* Opinion and Order entered May 21, 1992, Affiliated Interest Agreement Between UGI Corporation and UGI Utilities, Inc., Docket No. G-00920296.) Under the Holding Company AIA, UGI Utilities in turn is authorized to provide certain services at cost to UGI Corporation and its subsidiaries, including UGIES. Such services include, but are not limited to, information services, payroll, accounts payable, accounting, finance, human resources and similar types of services. Pursuant to a separate affiliated interest agreement approved by the Commission, UGI Utilities is also authorized to provide certain other services to its affiliates, which include, but are not limited to: office space, pipeline engineering, construction and maintenance. (*See* Secretarial Letter, dated July 3, 2003, Affiliated Interest Agreement Between UGI Utilities, Inc. and Corporation and its Subsidiaries, Docket No. G-00031008; Secretarial letter dated October 20, 2004, Affiliated Interest Agreement between UGI Utilities, Inc. and UGI Energy Services, Inc., Docket No. G-00041075.) The foregoing list of Commission-approved affiliated interest agreements is not exhaustive.

rule, the UGI Companies believe that EDCs and their affiliated EGSs should be permitted to continue to share services as permitted under the existing Code of Conduct and previously approved affiliated interest agreements. Specifically, the UGI Companies should continue to be permitted to share services under its Commission-approved affiliated interest agreements, including, but not limited to, the Holding Company AIA.

Section 54.122(3)(ii) of the Proposed Rulemaking, if adopted, would bar an EDC from selling, releasing, or otherwise transferring to an affiliated EGS, assets, services, or commodities that have been included in regulated rates for anything less than market value. As stated above, many active retail marketers from other states are affiliated with major utility holding companies, some of which may have utility subsidiaries. The proposed Commission rules requiring the transfer of assets at market value do not apply to these entities. This means such entities could acquire assets from an affiliated company at less than market value (assuming they otherwise meet all necessary regulatory approvals in their home states in the case of transfers from regulated utilities), which again could create an unfair competitive advantage for out-of-state marketers. Moreover, given that this rule represents such a significant departure from existing Commission precedent and practice (as discussed further below in Section C), it has the potential to impact future transaction and investment decisions and undermine the overall policy objective of promoting the public interest.

### B. The Commission Has Expressed No Rational Basis for the Proposed Rulemaking and Has More Than Sufficient Authority Under the Existing Code of Conduct to Address any Potential Affiliate Abuse.

In initiating the current proceeding, via the Advance Notice of Proposed Rulemaking Order, entered March 18, 2010, the Commission simply noted that the Competitive Safeguard regulations were adopted in 2000 and that the electric industry has "changed" since that time, but offered no evidence, examples, or data to support this position. The Commission therefore

concluded that it was time to review the Competitive Safeguard regulations to determine if changes were warranted. The Commission provided no other basis to support its proposal to revise the existing Code of Conduct.

In response to the Advance Notice of Proposed Rulemaking, six entities submitted comments for the Commission's consideration. Many of the commenting parties acknowledged the success of the competitive retail electric market under the existing Code of Conduct. Although several commenting parties made minor recommendations to the existing Code of Conduct, none these parties provided any data or basis to support their respective proposals. Moreover, none of the commenting parties stated or otherwise suggested that the competitive retail electric market was unsuccessful under the existing Code of Conduct.

There simply has been no evidence offered to support the need to make blanket changes to the retail electric market or the existing Code of Conduct at this time.[9] The sole basis for the Proposed Rulemaking is that the electric industry has "changed" since Competitive Safeguard regulations were adopted in 2000. To the extent the electric industry has "changed," it has changed for the better, especially since the expiration of the rates caps in all EDC territories. For example, the statistics discussed above clearly indicate that retail electric competition has been successful under the existing Code of Conduct.

The Commission's existing Code of Conduct was finalized in the *2000 Competitive Safeguards Order*. In the *2000 Competitive Safeguards Order*, the Commission addressed a number of the provisions that are proposed in the Commission's current Proposed Rulemaking

[9] Section 1504 of the Public Utility Code authorizes the Commission to adopt "just and reasonable" regulations. 66 Pa.C.S. § 1504. In order for the Commission's regulations to be valid and binding, they must be adopted within the granted power, issued pursuant to proper procedure, and they must be reasonable. *Popowsky v. Pennsylvania Public Utility Commission*, 589 Pa. 605, 630, 910 A.2d 38, 53 (2006). Here, neither the Commission, nor any of the parties that submitted comments in response to the Advance Notice of Proposed Rulemaking, provided any rational basis, other than the lapse of time, for the proposals set forth in the Proposed Rulemaking.

including: (1) limitations on an EGS' use of an affiliated EDC's name or logo; (2) restricting the sharing of operational and managerial personnel, facilities, and information and to adopt cost allocation rules for common costs; and (3) regulating the transfer of non-power goods and services between an affiliated EDC and EGS. Following the receipt of comments and reply comments, the Commission rejected these specific proposals and approved the existing Code of Conduct.

In rejecting the above-mentioned proposals in the *2000 Competitive Safeguards Order*, the Commission noted that the Competitive Safeguard Regulations and provisions of the Public Utility Code provided the Commission with adequate oversight should any of these concerns raised by the rejected provisions become an issue in Pennsylvania. Further, the Commission noted that parties' could file a complaint, pursuant to 66 Pa.C.S. §2811(f), asking the Commission to remedy such behavior. The Commission's authority over such matters has not changed since 2000.

The Commission has in place extensive rules and codes of conduct to prevent improper sharing of marketing and other competitively sensitive information between EDCs and their retail marketing affiliates, and other sections of the proposed regulations would establish additional safeguards. These safeguards will permit the continued sharing of the currently permitted services by affiliates, while at the same time precluding employees of a competitive EGS gaining access to information in a manner that would allow or provide a means to transfer confidential information from a utility to an affiliate, create an opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of affiliates. In other words, the Commission has adequate

means and authority under the existing regulations and Public Utility Code to monitor, enforce, and remedy any potential competitive affiliate abuse issues.

The Commission has failed to identify any reason, including the lapse of time, which would support a departure from its prior holding in the *2000 Competitive Safeguards Order*, or otherwise support the Proposed Rulemaking. Should a market participant raise these issues in the future, the Commission has more than sufficient authority to act.

### C. *The Commission's Proposal to Restrict the Pricing of Transferred Assets Is Inconsistent with Existing Commission Precedent, May Result in Loss of* **Important and Significant Public Benefits and Unreasonably Interferes with the Management of Public Utilities.**

#### 1. Inconsistent with Existing Commission Precedent

Section 54.122(3)(ii) of the Proposed Rulemaking, if adopted, would bar an EDC from selling, releasing, or otherwise transferring to an affiliated EGS, assets, services, or commodities that have been included in regulated rates for anything less than market value. The purpose of the Proposed Rulemaking is to implement and enforce the provisions of the Electricity Generation Customer Choice and Competition Act, Chapter 28 of the Public Utility Code, 66 Pa.C.S. §§ 2801, *et seq*. However, there is nothing in Chapter 28 of the Code that authorizes the Commission to set or regulate the value of assets transferred or sold by an EDC. The Commission's authority to regulate the transfer of property used or useful in the public service is governed by Chapter 11 of the Public Utility Code, 66 Pa.C.S. §§ 1100, *et seq*. Further, the Commission's authority to regulate agreements between a public utility and its affiliates is governed by Chapter 21 of the Public Utility Code, 66 Pa.C.S. §§ 2100, *et seq*. As explained below, there is nothing in either Chapters 11 or 21 that authorizes the Commission to set or regulate the value of assets transferred or sold by an EDC to an affiliate.

Section 1102(a)(3) of the Pennsylvania Public Utility Code requires that public utilities obtain a certificate of public convenience prior to transferring "the title to, or the possession or use of, any tangible or intangible property used or useful in the public service." 66 Pa.C.S. § 1102(a)(3). The Commission may issue a certificate of public convenience upon a finding that "the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public." 66 Pa.C.S. § 1103(a). The standard for approval of a certificate of public convenience to transfer property used or useful in the public service under Section 1102(a)(3) has been interpreted to require the Commission to find that the transaction would "promote the service, accommodation, convenience, or safety of the public in some substantial way." *City of York v. Pennsylvania Public Utility Commission*, 449 Pa. 136, 151, 295 A.2d 825, 828 (1972).

The "substantial public interest" standard articulated in *City of York* is satisfied by a simple preponderance of the evidence of benefits, and such burden can be shown without legally binding commitments or quantifiable benefits. *Popowsky v. Pennsylvania Public Utility Commission*, 594 Pa. 583, 611, 615, 937 A.2d 1040, 1057, 1059 (2007). Therefore, a public utility need not demonstrate that a proposed transaction will provide the absolute maximum public benefits that may or may not be possible but, rather, that the proposed transaction has some public benefits.

The Commonwealth Court previously has considered and rejected the argument that the public benefits of a transaction cannot be determined until the market value of the transferred asset is known. In *Middletown Township v. Pennsylvania Public Utility Commission*, 482 A.2d 674 (Pa. Cmwlth. 1984), a township argued that, among other things, the "Commission's determination of whether the acquisition was or was not in the public interest necessarily

demanded that the probable cost of acquisition be calculated as part of that process." *Id.* at 682. The Commonwealth Court disagreed, stating:

> Such a determination ... does not necessarily play a significant role, if any, in the public interest determination. When public utility property is sold either in an arms-length transaction or a forced acquisition, the compensation received ... represents capital belonging to the utility and its stockholders, and not to the utility's customers, nor may those monies be transferred to the remaining customers in the form of lower rates. *Philadelphia Suburban Water Company v. Pennsylvania Public Utility Commission*, 427 A.2d 1244 (Pa. Cmwlth. 1981), *citing Board of Public Commissioners v. New York Telephone Company*, 271 U.S. 23, 32, 46 S.Ct. 363, 366, 70 L.Ed. 808 (1926), (customers pay for service, not for the property used to render it; by paying . . . bills for service they do not acquire any interest, legal or equitable in the property used for their convenience or in the funds of the company). Under the facts of this case, there was no need for a determination of the price in order to decide whether the acquisition was in the public interest.. The compensation would inure to the benefit of the stockholders and company itself, and have little, if any, direct impact on the Water Company's customers.

*Id.* at 682. Accordingly, the market value of an asset transferred by a public utility is not necessary to the determination of whether the proposed transaction provides public benefits under Chapter 11 of the Public Utility Code. Clearly, the Courts have determined that there is nothing in Chapter 11 of the Public Utility that requires assets transferred or sold by an EDC to be at market value. *See also Application of UGI Penn Natural Gas, Inc. for Approval of the Transfer by Sale of 9.0 Mile Natural Gas Pipeline, Appurtenant Facilities and Right of Way, Located in Mehoopany, PA*, Docket No. A-2010-2213893, p. 18 (July 25, 2011) (hereinafter, "*PNG Application*") ("The express language in Sections 1102, [and] 1103 ... of the Code does not require that the [asset] must be transferred at the fair market value").

The proposed regulation is inconsistent with all relevant Commission precedent. The Commission has repeatedly approved the sale of utility assets to affiliates at depreciated original cost. *See, e.g., Application of PECO Energy Company for Approval of its Restructuring Plan*

*Under Section 2806 of the Public Utility Code*, Docket Nos. R-00973953, *et al.*, 1997 Pa. PUC LEXIS 51; 181 P.U.R.4th 517 (December 23, 1997) (approving the transfer of generation assets to affiliates at the depreciated original cost); *Application of Pennsylvania Power & Light Company*, Docket No. R-00973954 1998 Pa. PUC LEXIS 131 (June 15, 1998) (same); *Pennsylvania Public Utility Commission v. T. W. Phillips Gas & Oil Co.*, Docket Nos. R-00051178 (August 22, 2006) (adopting the Recommended Decision approving a joint petition for settlement that provided for, among other things, approval of T. W. Phillips' transfer of production plant assets to its unregulated subsidiary, and removal from T. W. Phillips' books of account the original cost of the transferred assets and the amount of depreciation reserve applicable to the original cost as of the transfer date); *Pennsylvania Public Utility Commission v. UGI Utilities; Inc. - Gas Division*, Docket No. R-00994786 (June 29, 2000) (approving the transfer of UGI Utilities' peaking facilities to an affiliate at the depreciated original cost); *PNG Application*, Docket No. A-2010-2213893 (July 25, 2011) (approving the transfer of PNG's pipeline to an affiliate at the depreciated original cost). In each of these cases, the Commission determined that the overall transactions provided substantial public benefits and approved the transactions as a whole, including the transfer at depreciated original cost. There is no basis for a regulation that prohibits a result that Commission has repeatedly found to be in the public interest under specific facts.

Generally, the Commission is without jurisdiction to adjudicate private contractual disputes.[10] However, Chapter 21 of the Public Utility Code requires Commission approval for any affiliated interest contract before the contract can become effective, as well as provides the

[10] *See, e.g., Adams v. Pa. P.U.C.*, 819 A.2d 631 (Pa. Cmwlth. 2003) (concluding that the Commission lacked jurisdiction over private contractual disputes); *see also Fairview Water Co. v. Pennsylvania Public Utility Commission*, 502 A.2d 162 (Pa. 1985) (holding that the Commission does not have jurisdiction to determine the scope and validity of an easement); *Tucker v. Pa. P.U.C.*, 917 A.2d 378, 380 (Pa. Cmwlth. 2007) (holding that the Commission lacks jurisdiction to adjudicate matters relating to negotiable instruments).

Commission with continuing jurisdiction over affiliated interest agreements. Thus, such transactions, to the extent they are made between affiliated interests within the meaning of 66 Pa.C.S. § 2101, must follow the rules of Chapter 21 of the Public Utility Code, at the risk of being disallowed or voided pursuant to those statutory provisions.

Section 2102(a) provides that:

> No contract or arrangement providing for the furnishing of management, supervisory, construction, engineering, accounting, legal, financial, or similar services, and no contract or arrangement for the purchase, sale, lease, or exchange of any property, right, or thing or for the furnishing of any service, property, right or thing other than those above enumerated, made or entered into after the effective date of this section between a public utility and any affiliated interest shall be valid or effective unless and until such contract or arrangement has received the written approval of the commission. If such contract is oral, a complete statement of the terms and conditions thereof shall be filed with the commission and subject to its approval.

66 Pa. C.S. § 2102(a). Chapter 21 further provides that the Commission shall not approve such contracts "unless satisfactory proof is submitted...of the cost to the affiliated interest of rendering the services or of furnishing the property or service...to the public utility." 66 Pa. C.S. § 2102(b). However, there is nothing in Chapter 21 that requires transactions between affiliates to be at market value. *See PNG Application*, p. 18 ("The express language in Section ... 2102 of the Code does not require that the [asset] must be transferred at the fair market value"). Further, nothing in Chapter 21 authorizes the Commission to preemptively set the value of transactions between affiliates.

UGI Utilities and all major utilities in the Commonwealth have affiliated interest agreements that price inter-company transactions at cost. The proposed regulations are facially inconsistent with the statutory scheme and precedent thereunder. The Commission's approval of a transfer of assets from a public utility to an affiliate must be made on a case-by-base basis.

Further, it must be remembered that the Commission has continuing jurisdiction over affiliated interest agreements "so far as necessary to protect the public interest" and may take remedial action if necessary. 66 Pa.C.S. § 2103.[11]

The proposed regulation is unnecessary and would unduly require transactions to be made at fair market value, which is contrary to established precedent. There have been numerous instances, as cited herein, where the Commission has found that the transfer to an affiliate at depreciated original cost is in the public interest. The proposed regulation would not permit the Commission to depart from fair market value without a waiver of the regulation. The better practice is to preserve existing Commission discretion and not establish a binding rule that runs contrary to established precedent.

**2. Loss of Important and Significant Public Benefits**

The proposed regulation could harm customers. Indeed, there could be transactions where the fair market value may be less than the depreciated original cost. To the extent that customers of the utility funded the transferred asset through rates, these customers could incur increased costs as a result of the loss. *See Barasch, et al. v. Pennsylvania Public Utility Commission*, 515 A.2d 651, 653 (Pa. Cmwlth. 1986) (acknowledging that the gain or loss on an investment should accrue to those who have provided the funding for the investment) (citing *Philadelphia Suburban Water Company v. Pennsylvania Public Utility Commission*, 427 A.2d 1244 (Pa. Cmwlth. 1981)).

Also, there may be transactions where the transfer at depreciated original cost to an affiliate benefits customers and the public. For example, in the *PNG Application*, the

[11] *See also Application of PECO Energy Company*, Docket Nos. R-00973953, et al., 1997 Pa. PUC LEXIS 51; 181 P.U.R.4th 517 (December 23, 1997); *Affiliated Interest Agreement between United Telephone Company of Pennsylvania and United Telephone Long Distance, Inc. whereby the former will provide the latter with Billing and Collection Services, Equipment Leasing, Management Services, Repair Services and Telemarketing Services*, Docket No. G-870086, 1987 Pa. PUC LEXIS 11; 65 Pa. PUC 446 (December 21, 1987).

Commission approved the transfer of a pipeline from UGI Penn Natural Gas ("PNG") to UGIES at its net depreciated value. The Commission found that the transfer of the pipeline to UGIES at net depreciated value would provide important benefits to customers and the public, including the following:

> (1) P&G's plant will benefit from a lower cost source of supply, thus making the plant more competitive; (2) a more competitive P&G plant will benefit P&G employees and local businesses that supply the plant and the plant's employees; (3) local landowners leasing their land for natural gas production will benefit from royalty revenue for gas produced on their land; and (4) Citrus' production and related gathering services will be a source of income for production and gathering field workers that otherwise would not be employed in the area. Further, the proposed transaction provides an important environmental benefit because use of the existing Auburn line as a gathering line will avoid the environmental impact of building a second pipeline to bypass the Auburn Line.

*PNG Application*, p. 23. The Commission further found that one significant public benefit of the proposed transaction was the promotion of Marcellus Shale development and enhanced access to Marcellus Shale natural gas. *Id.*

If adopted, the proposed regulation would restrict the Commission's ability to approve such transactions, which could result in the loss of important and significant public benefits. Clearly, the better approach is a case-by-case review, which has been the Commission's practice for many years.

### 3. Unreasonable Interference with Internal Management

EDCs are private corporations whose businesses are affected with a public interest. The EDCs own the property they devote to public service. An EDC has the right to either sell an asset with Commission approval or to not sell it. As the Commission has previously explained:

> The utility has the discretion to consider the risks and benefits of available alternative business transactions and then to decide which transaction to ultimately present to the Commission for

> consideration and approval. It is well-established that the Commission's authority to interfere with the internal management of a utility is limited and "[t]he Commission is not empowered to act as a super board of directors for the public utility companies of this state." *See Metropolitan Edison Co. v. Pa. PUC*, 437 A.2d 76, 80 (Pa. Cmwlth. 1981).

*PNG Application*, p. 19.

Clearly, the Commission has no jurisdiction to compel an EDC to sell an asset to any particular entity and does not have the jurisdiction to require the EDC to sell it at any particular price.[12] Rather, as explained above, the Commission's jurisdiction is limited to reviewing the proposal presented for Commission approval and determine if it is in the public interest, *i.e.*, provides some substantial public benefit. There is no legal requirement that an EDC sell an asset to an independent third party, and there is no legal requirement that it be sold at the maximum possible market value. Rather, the EDC is only required to show that there are substantial public benefits from the transaction.

One of the primary attributes of private property ownership is the ability to sell one's property.[13] Unreasonable restrictions on alienation are not permitted. Unreasonable limitations as to sales price go to the heart of private ownership of property and generally are viewed as restrictions on the alienation of property. Restricting the purchase price to an affiliate, without any evidence of any problem to be solved or any evidence that this restriction will in any way

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[12] The risks and benefits of alternative business transactions are for the utility to consider in the first instance and ultimately determine which transaction to present to the Commission for approval. *See Metropolitan Edison Co. v. Pennsylvania Public Utility Commission*, 437 A.2d 76 (Pa. Cmwlth. 1981) (the Commission's authority to interfere in the internal management of a utility company is limited and it is not empowered to act as a super board of directors for the public utility companies of the state).

[13] The free alienation of property is an inherent right of the owner, subject only to restraint if against the public interest. *Northern Pennsylvania Power Co. v. Pennsylvania Public Utility Com.*, 5 A.2d 133, 134 (Pa. 1939), *abrogated and overruled on other ground by*, 449 Pa. 136, 295 A.2d 825, (1972) *and* 17 A.3d 425 (Pa. Cmwlth. Ct. 2011). The right to sell property is a basic component of ownership that is well-established in the common law of this country. See Perin v. Carey, 65 U.S. 465, 494-95 (1860). An unreasonable restraint on alienation is an effective prohibition against transferability.

promote retail competition, is an unreasonable restriction on alienation of the utility companies' property and an unreasonable interference with the internal management of a public utility.

### D. The Proposed Rulemaking Violates the Protections of the United States Constitution.

#### 1. The Prohibition on the Use of the Shared Name Violates the First Amendment of the United States Constitution.

The Proposed Rulemaking provides, among other things, that an EGS may not have the same or similar name as an affiliated EDC, and that an affiliate EGS include specific disclaimer language in its marketing materials. The use of a name or logo is considered commercial speech, which is entitled to protection under the First Amendment. The proposed absolute prohibition on the use of an affiliated EDC's name or logo violates the First Amendment because it is more restrictive than necessary to preserve the Commission's interests in promoting competition and avoiding customer confusion.

A utility's involvement with the affiliates of a parent company and what information is conveyed to customers about the affiliates constitutes "commercial speech." *See Friedman v. Rogers*, 440 U.S. 1, 11 (1979). The First Amendment, as applied to the states through the Fourteenth Amendment, protects "commercial speech" from unwarranted restrictions. However, "commercial speech" enjoys a less broad measure of protection as compared to other constitutionally guaranteed expressions. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618. (1995).

The cornerstone of the Supreme Court's commercial speech jurisprudence is *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), which provides for a four-part analysis. First, the court must determine if the speech at issue is misleading or pertains to unlawful activity, in which case it is not entitled to protection. Second, the government is required to show a substantial interest in the challenged regulation. Third, the regulation must also directly advance the asserted governmental interest. Fourth, the regulation must not be more

restrictive than necessary to serve the government's substantial interest. *Id.* at p. 566. As explained below, the ban on affiliated EGSs from having the same or similar name as a regulated EDC falls short of satisfying the *Central Hudson* test.

First, it is not misleading or unlawful for a utility affiliate to use the utility's trade name or logo, especially when adequate disclaimers are in place. As discussed at length above, a ban on affiliate use of a utility name/logo is unfair to consumers. Consumers clearly are entitled to know just who they are dealing with. Some consumers may prefer to take service from a utility affiliate for a variety of reasons, including: the customer is a stockholder; the customer is related to someone that works at the utility; the customer has a favorable impression about the company; there is a history of service with the utility; or sense of localism. Other customers may prefer not to take service from a utility affiliate. Customers should be free to make their choices based on whatever information they deem relevant, including whether the EGS is affiliated with a Pennsylvania EDC. Requiring affiliates to adopt a dissimilar name could lead to complaints that consumers had been denied the opportunity to know whether they are dealing with utility affiliates.

Second, although it is clear that the Commission has a legitimate interest in promoting competition and avoiding customer confusion, the proposed complete ban on affiliated EGSs having the same or similar name as their regulated EDCs or corporate parent is more restrictive than necessary to serve the Commission's interest. The goals sought to be achieved clearly can be met, without burdening First Amendment rights, through open-access requirements, regulatory oversight of the utility-affiliate relationship, and the adoption of reasonable

disclaimers.[14] Because these elements are already in place in the Commonwealth, there is no need for the new regulations set forth in the Proposed Rulemaking.

For these reasons, the UGI Companies believe that the Commission's proposed ban on affiliated EGSs from having the same or similar name as a regulated EDC and corporate parent violates the First Amendment protection of commercial speech.

**2. The Ban on the Use of the Shared Name Constitutes a Regulatory Taking under the Takings Clause of the Fifth Amendment.**

Affiliated EGSs have trademark and other property rights in their name, in which they have invested very substantial sums and built substantial goodwill. In the proposed rule, the Commission revisits existing rules and Commission-approved use of names and proposes to ban affiliated EGSs from having the same or similar names, symbols, and marks as a regulated EDC as well as ban on having the same name as the corporate parent. The Commission's proposal constitutes a regulatory taking or confiscation of property under the Takings Clause of the Fifth Amendment of the United States Constitution.

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, (1897). There are two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). The first category of a regulatory taking occurs when the government requires an owner to suffer a permanent physical invasion of their property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The second category of a regulatory taking occurs when a

[14] The United States Supreme Court has held that, although unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech, an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

regulations completely deprives an owner of "all economically beneficial use" of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992).

In *Lucas*, the United States Supreme Court held that the government must pay just compensation for such "total regulatory takings," *Id.* at 1026-1032. Further, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. As Justice Holmes noted "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Id.* at 415. The Commission's proposed ban on affiliated EGSs from having the same or similar names, symbols, and marks as a regulated EDC is a taking because it completely and totally deprives affiliated EGSs the use of their existing trademarks and corporate name. In addition, the proposed rule limits the use of a current trademark or brand name, and such a limitation does not just regulate EGSs; rather, it goes "too far" and constitutes a taking.

Regulatory takings are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). In *Penn Central* the United States Supreme Court identified several factors that have particular significance when analyzing a regulatory takings claim. *Id.* at 124. Primary among those factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. *Id.* Further, under *Penn Central*, where a regulation places limitations that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect, the

extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.[15] *Penn Central*, at p.124.

Here, the EGSs, such as UGIES, have invested significant funds and other resources in their corporate names, logos, and trademarks. These EGSs have a more than reasonable expectation to continue to use their corporate names, logos, and trademarks. This continued expectation is reasonable given that the Commission previously concluded in the 2000 *Competitive Safeguards Order* that EGSs should be permitted to use names and logos similar to those of their corporate affiliates, provided they include an adequate disclaimer and the Commission approves the use of fictitious names with those similarities. Further, the proposed ban on the use of corporate names, logos, and trademarks was not a foreseeable change in the regulatory scheme. The proposed ban is a sudden and completely unsupported regulatory shift from the Commission's previous position, which, if adopted, clearly would render the EGSs' investments in their corporate names, logos, and trademarks worthless. Therefore, EGSs had a reasonable investment-backed expectation in continuing to use their corporate names, logos, and trademarks.

Regarding the economic impact of the Commission's actions, the taking clause is invoked where a regulation interferes drastically with a property's uses and where the application of the law destroys or severely diminishes the value of the property. *Rogin v. Bensalem Township*, 616 F.2d 680, 690 (3d Cir. 1980), cert. denied, 450 U.S. 1029, (1981). In assessing whether a regulation effects a taking, the United States Supreme Court considers whether the regulation denies an owner the "economically viable" use of its property. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 499 (1987). Courts focus on the

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[15] In addition, the character of the governmental action may be relevant in discerning whether a taking has occurred. *Id.*; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984).

remaining uses permitted and the residual value of the property. *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (1987).

Here, the proposed ban on EGSs' use of the same or similar name or logo of an affiliated EDC will undoubtedly require names and logos to be altered. Not only will this require significant investments by the EGSs, the EGSs will have no residual value with regard to their current corporate names, logos, and trademarks. The economic impact of the proposed rule would be to destroy the value of the EGSs' corporate names, logos, and trademarks, thus invoking the Fifth Amendment.

### 3. The Proposed Prohibition on Sharing of Employees and Services Violates the Commerce Clause of the United States Constitution.

The Proposed Rulemaking prohibits, among other things, the sharing of office space, employees, or certain services by EDC and an affiliated EGS. If these provisions are finalized and adopted by the Commission, the EDC and an affiliated EGS would be required to occupy different buildings and would be required to discontinue any sharing of employees and certain services. Denying the ability to share offices, employees, or certain services with an affiliate could substantially increase costs to the individual affiliated EDC and EGS.

Several retail marketers from other states are active in the Pennsylvania retail energy market. These out-of-state marketers are affiliates in major utility holding companies that employ service companies and/or shared services. The Proposed Rulemaking does not appear to apply to these entities but, rather, only to the shared offices, employees, or services of EGSs affiliated with Pennsylvania EDCs. As a result, if the Proposed Rulemaking is adopted, EGSs affiliated with Pennsylvania EDCs would be prohibited from occupying the same building and from sharing employees and certain services, while out-of-state marketers would be free to do so.

This prohibition would create an unfair and unreasonable competitive advantage for out-of-state marketers for purposes of marketing activities within the Commonwealth.

Importantly, several EGSs affiliated with a Pennsylvania EDC do not necessarily limit their marketing activities to the Commonwealth. Indeed, many of these EGSs engage in marketing activities outside of the Commonwealth. Because the prohibition on shared offices, employees, or services does not apply to out-of-state marketers, the Proposed Rulemaking would put EGSs affiliated with a Pennsylvania EDC at a competitive disadvantage when conducting marketing activities outside of the Commonwealth. Placing EGSs affiliated with a Pennsylvania EDC at a competitive disadvantage for business conducted outside the Commonwealth affects commerce among the states, which implicates the Commerce Clause of the United States Constitution, U.S. Const., art. I, § 8, cl. 3.

The United States Supreme Court has interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State, otherwise known as the dormant Commerce Clause. *See C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 390 (U.S. 1994) (citing *Hughes v. Oklahoma*, 441 U.S. 322 (1979)). The Pennsylvania Supreme Court has conducted an extensive analysis of the Commerce Clause and has explained that the "Commerce Clause has a negative or dormant aspect which limits the power of the states to erect barriers against interstate trade where Congress has not affirmatively acted to either authorize or forbid the challenged state activity …." *Empire Sanitary Landfill v. Pennsylvania Department of Environmental Resources*, 546 Pa. 315, 333, 684 A.2d 1047, 1055 (1996)). As the United States Supreme Court recently observed, the "modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism -- that is, regulatory measures

designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) (internal quotation marks and citation omitted). The dormant Commerce Clause walks a narrow path leading courts to "rebuff[] attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535, (1949). Thus, economic harms or anticompetitive choices that unjustifiably burden interstate commerce, either into or out of the state, implicate the dormant Commerce Clause.

The analysis for determining whether a state law or regulation violates the dormant Commerce Clause proceeds on two tiers. First, it inquires whether the state law discriminates against interstate commerce. Unless discrimination is demonstrably justified by a factor unrelated to economic protectionism, a "discriminatory law is virtually *per se* invalid." *Davis*, 553 U.S. at 338 (internal quotation marks and citation omitted); *see also Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005). If there is no discrimination, the second tier requires the court to consider whether the state law or regulation "unjustifiably . . . burden[s] the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon*, 511 U.S. 93, 98 (1994); *see also Yamaha*, 401 F.3d at 567. In addressing whether a state law unjustifiably burdens interstate commerce, the courts generally apply the so-called *Pike* test, under which the challenged law or regulation "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The proposed prohibition on shared offices, employees, or services by an EGS affiliated with a Pennsylvania EDC imposes a burden on interstate commerce. Specifically, an EGS affiliated with a Pennsylvania EDC would be at a competitive disadvantage with respect to marketing activities conducted outside the Commonwealth, as compared to in-state and out-of-state marketers not affiliated with Pennsylvania EDCs that are not subject to the proposed prohibition and are free to continue to share offices, employees, or services with their respective parents or holding companies. Given the increase in costs associated with not being able to share offices, employees, or services, an EGS affiliated with a Pennsylvania EDC would not be able to effectively compete against out-of-state marketers offering the same or similar services in the retail electric market, or even non-EDC affiliated Pennsylvania-based EGSs, either in-state or out-of-state. In-state and out-of-state marketers that are able to realize the benefits and savings associated with shared offices, employees, or services would have a significant competitive advantage for marketing activities conducted inside and outside of the Commonwealth. This is a significant burden on EGSs with an affiliated Pennsylvania EDC. Clearly, if approved, the proposed regulation will impose a significant barrier to the ability of EGSs affiliated with a Pennsylvania EDC to compete in the interstate market.

If the proposed regulation is adopted, an EGS affiliated with a Pennsylvania EDC will effectively be unable to competitively participate in the retail electric market in those states that allow marketers to share office space, employees, or services with an affiliated parent or holding company. Stated otherwise, the proposed regulation could act as an economic bar to EGSs with an affiliated Pennsylvania EDC from entering the interstate retail electric market in those states and to compete in the in-state market either on its affiliated EDC system or other EDCs' systems. This is a significant burden on EGSs with an affiliated Pennsylvania EDC and, moreover, it

could have serious repercussions on competition by the loss of customers' ability to select in-state EGSs over out-of-state marketers.

The stated benefits of the Commission's Proposed Rulemaking are to increase competition by providing retail electric customers with options to obtain their generation service from an EGS, and to provide EGSs with direct access to the EDCs' transmission and distribution system on a nondiscriminatory basis at rates, terms, and conditions comparable to the EDC's own use of the system. The Commission concluded that there was a concern that incumbent utilities would directly or indirectly favor affiliated EGSs, to the detriment of robust retail electric competition. According to the Commission, such anti-competitive practices might take form in the sharing of customer information, the linking of regulated services to non-competitive services, financial subsidy of an affiliate through the use of EDC staff and facilities, etc.

Clearly, the Proposed Rulemaking seeks to provide local benefits in the form of increased competition. However, as explained above, Pennsylvania currently has a robust competitive market with participation by both in-state and out-of-state marketers. Importantly, there is no evidence or data to suggest that the sharing of offices, employees, or services by EGSs and their affiliated Pennsylvania EDCs, subject to the existing Code of Conduct, has negatively impacted competition in the retail electric market. Indeed, there are many marketers without an affiliated Pennsylvania EDC that actively participate in the Pennsylvania retail electric market.

Further, the existing Code of Conduct provides adequate safeguards from sharing of customer information and providing an unfair advantage to affiliates. Also, it must be remembered that the Commission retains jurisdiction over affiliate interest agreements that pertain to the sharing of offices, employees, or services. To the extent that the Commission, or any other party for that matter, believes that there is an improper sharing of services or that an

EDC has provided an unfair advantage to an affiliate EGS, the Commission may always undertake an investigation of the affiliates, either upon its own or through a third-party complaint.

Given the existing robust competitive market, the safeguards of the existing Code of Conduct and affiliate interest agreements, and the competitive disadvantage to EGSs affiliated with a Pennsylvania EDC to effectively compete in both the intrastate and interstate retail electric markets, the proposed prohibition on the sharing of offices, employees, or service, if approved, imposes a burden that clearly is excessive in relation to the local benefits. For these reasons, the UGI Companies believe that the Proposed Rulemaking, if approved, would violate the dormant Commerce Clause protection of interstate commerce.

#### 4. The Prohibition on the Transfer of Assets At Less Than Market Value Violates the Commerce Clause of the United States Constitution.

Although the proposed regulation does not appear to expressly discriminate against interstate commerce, the proposed requirement imposes a burden on interstate commerce. Specifically, an EGS affiliated with a Pennsylvania EDC would be at a competitive disadvantage with respect to marketing activities conducted outside the Commonwealth, as compared to out-of-state marketers that are not subject to the proposed rule and are free to acquire assets from their respective affiliates at less than market value. The out-of-state marketers that are able to realize the benefits and savings associated with acquiring assets from affiliates at less than market value would have a significant competitive advantage for marketing activities conducted inside and outside of the Commonwealth. An EGS affiliated with a Pennsylvania EDC would not be able to effectively compete against out-of-state marketers offering the same or similar services in the retail electric market, either in-state or out-of-state. Clearly, if approved, the proposed regulation will impose a significant barrier to the ability of EGSs affiliated with a

Pennsylvania EDC to compete in the interstate market. Such a burden would be excessive in relation to the perceived local benefits of enhanced retail competition. For these reasons, the UGI Companies believe that this provision in the Proposed Rulemaking, if approved, would violate the dormant Commerce Clause protection of interstate commerce.

## III. CONCLUSION

For all of the above-mentioned reasons, the UGI Companies urge the Pennsylvania Public Utility Commission to revise or remove Sections 3(ii), 3(iv), 3(v), 3(ix) and 4(iii) of the proposed amendments to 52 Pa. Code § 54.122, as set forth in the above-captioned August 25, 2011 Proposed Rulemaking Order, consistent with the comments stated above.

Respectfully submitted,

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Dated: March 27, 2012

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Appendix A

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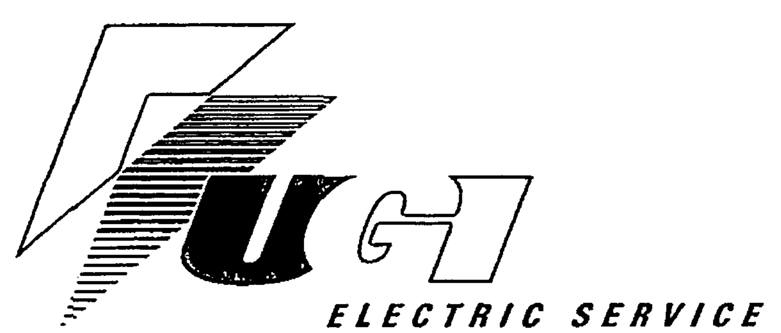
# UGI Utilities, Inc. Logo

# Electric Division Logo

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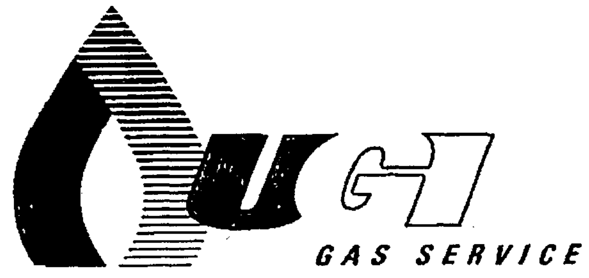
# Gas Division, UGI PNG & UGI CPG Logos



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# UGI Energy Services Logos

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|---|---|
| UGI Energy Services, Inc. | UGI Energy Services Inc. |
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| UGI Storage Company | UGI Storage Company |
| UGI LNG, Inc. | UGI LNG Inc. |
| UGI Power Generation | UGI Power Generation |

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