UGI UTILITIES, INC.

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January 23, 2006

VIA EXPRESS MAIL

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

Re: Implementation of the Alternative Energy Portfolio Standards Act of 2004, Docket No. M-00051865

Dear Secretary McNulty:

Enclosed for filing in the above-captioned matter please find an original and fifteen copies of the comments of UGI Utilities, Inc.

Very truly yours,

Mark C. Morrow

Counsel for UGI Utilities, Inc.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of the Alternative Energy Portfolio Standards Act of 2004	:	Docket No. M-00051865

COMMENTS OF
UGI UTILITIES, INC.

UGI Utilities, Inc. ("UGI") appreciates this opportunity to submit comments in response to the Proposed Policy Statement Order issued by the Commission at the above docket (the "Proposed Policy Statement"). These comments are meant to supplement the comments submitted by the Energy Association of Pennsylvania at this docket.

In summary, UGI believes:

- The General Assembly has specified how alternative energy projects in Pennsylvania are to be fostered, and has not elected to foster them by creating new unregulated distribution companies.
- If the Proposed Policy Statement is merely attempting to restate the body of case law defining the term "public utility", it is offering no additional guidance to alternative energy developers, and if it is trying to establish new law there is no reason to believe that the courts would sustain new or strained interpretations of settled law.
- It is not "anti-competitive" to seek to have the statutes of the Commonwealth enforced and applied in a nondiscriminatory manner, or to investigate facts when

settled case law indicates that an applicable legal question turns on the facts and circumstances of each situation.

- The creation of unregulated distribution companies is not needed to enable the energy outputs of alternative energy projects to be sold to end users.
- Pennsylvania natural gas distribution companies can be valuable partners in distributing synthetic gas produced by Advanced Coal Gasification and Liquefaction plants.

I. THE GENERAL ASSEMBLY DID NOT ELECT TO ENCOURAGE ALTERNATE ENERGY PROJECTS BY EXEMPTING RELATED DISTRIBUTION ACTIVITIES FROM REGULATION

In enacting the Alternative Energy Portfolio Standards Act of 2004, 73 P.S. §§ 1648.1 – 1648.8 ("AEPSA"), the General Assembly defined certain "alternative energy sources", and specified methodologies for promoting them; primarily by requiring electric distribution companies ("EDC") and electric generation suppliers ("EGS") to purchase a gradually increasing portion of their electric energy portfolios from these sources. While it had the opportunity to do so, the General Assembly did not promote such energy sources by creating a new class of alternative energy distribution entities that are exempt from some or all of the provisions of the Public Utility Code. The term "public utility" defined in Section 102 of the Public Utility Code, 66 Pa.C.S. §102, and interpreted by Pennsylvania case law, was not altered by the passage of the AEPSA.

While the Commission cites the provisions of 73 P.S. § 1648.7 as supporting its authority to act, and selectively quotes portions of that statutory provision, Section 1648.7 merely states that the Commission shall cooperate with the Department of

Environmental Protection in conducting "an ongoing alternative energy resources planning assessment" that, "at a minimum", will assess "conditions in the alternative energy marketplace" and "identify needed methods to maintain or increase the relative competitiveness of the alternative energy market within this Commonwealth." Section 1648.7 further provides that the Commission is to then cooperate with the Department of Environmental Protection in producing an annual report to designated committees of the General Assembly specifying:

(1) the status of the compliance with the provisions of this act by electric distribution companies and electric generation suppliers.

(2) Current costs of alternative energy on a per kilowatt hour basis for all alternative energy technology types.

(3) Costs associated with the alternative energy credits program under this act, including the number of alternative compliance payments.

(4) The status of the alternative energy marketplace within the Commonwealth.

(5) Recommendations for program improvements.

Section 1648.7 clearly has not conferred new powers on the Commission, and in fact confirms that the Commissions role in promoting alternative energy projects beyond those responsibilities conferred in the AEPSA is to make recommendations to the General Assembly.

II. IF THE COMMISSION IS INTENDING TO ADOPT VARYING INTERPRETATIONS OF THE SAME STATUTORY PROVISION ITS ACTIONS WOULD BE DISCRIMINATORY AND DENY DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW

The Public Utility Code contains but one definition of the term "public utility" that is applicable to all entities, including entities owning or operating alternative energy projects. Specifically, Section 102 of the Public Utility Code, 66 Pa.C.S. §102 provides, in part:

> (1) Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for:
>
> (i) ... distributing or furnishing natural or artificial gas, electricity, or steam ... to or for the public for compensation.
>
> * * * *
>
> (v) Transporting or conveying natural or artificial gas ... petroleum products ... or other fluid substance, by pipeline or conduit, for the public for compensation.

However, Section 69.1401 of the Proposed Policy Statement is captioned "Non-public utility status of alternative energy source projects[,]" and the Proposed Policy statement then specifies how the Commission intends to interpret Section 102 of the Public Utility Code when that interpretation is applied to "an alternate energy source."

The Commission cannot adopt alternative interpretations of the same statutory provision to favor a privileged class of entities without being discriminatory and denying due process and equal protection under the law to entities that are not in that privileged class.

In this regard the Commission should consider that a system that honors the rule of law and applies laws in a consistent and logical manner ultimately promotes economic development by enhancing the certainty of applicable rules and the confidence interpretations of it. Arbitrary administrative actions that disregard law or promote strained interpretations of it, even if to promote what seem like laudable ends, ultimately leads to greater uncertainty and excessive litigation and degrades the investment climate of the Commonwealth.

III. THE COMMISSION'S PROPOSED RELIANCE ON SELF-SERVING NON-PUBLIC CONTRACTS THAT CAN BE MODIFIED AT WILL IS NOT IN ACCORD WITH PENNSYLVANIA LAW

Section 69.1401(a)(3) of the proposed policy statement indicates that an alternative energy source will not be considered a public utility if:

> (3) the service is provided to a single customer or to a defined, privileged, and limited group when the provider reserves its right to select its customers by contractual arrangement such that no one among the public, outside of the selected group, is privileged to demand service, and resale of the service is prohibited.

The Commission's Proposed Policy Statement Order further clarifies:

Our proposed policy would permit a project to qualify as a non-public utility under these standards even though the limiting contractual provisions permit the developer to substitute customers if a customer goes out of business, for example. It would also permit the developer to rearrange the project, and revise the customer group if, for example, the actual output from the alternative energy source proves to be materially less than or greater than projected levels. We believe that these clarifications are consistent with generally applicable Commission precedents, as well as relevant appellate cases. Moreover, there is

little chance that a project, once constructed, could be reconfigured to such a degree that it would cause it to lose its non-public utility status.

The Commission's proposed planned reliance on private, self-serving, and easily amendable contractual agreements to determine public utility status would create a loop hole so large as to essentially exempt all alternative energy facilities from utility regulation. It is also not in accord with established case law, and would almost certainly not be sustained by the courts on appeal.

Pennsylvania courts have generally held that offering one of the services defined in Section 102 of the Public Utility Code to the public for compensation up to the limits or capabilities of the facilities used is public utility service. While limited categories of service, such as service to a single customer or services rendered by a landlord to its tenants ancillary to a landlord/tenant relationship have been found not to constitute public utility service, it is the substance of these arrangements, and not the contract, that is relevant.

While the Proposed Policy Statement would place significance on the fact that a contract would limit service to a small group (even though it could be amended to add or substitute others later), the Commonwealth Court has held that service can be subject to regulation even if it would be useful only to a very small number of customers. *Waltman v. Pa. P.U.C.*, 596 A.2d 1221 (Pa. Cmwlth. 1991). For example, the Commonwealth Court has stated:

> "Furthermore, the private or public character of a business does not depend upon the number of persons who actually use the service; rather, the proper characterization rests upon whether or not the service is available to all members of the public who may require the service. *C.E. Dunmire Gas Co., Inc. v. Pennsylvania Public Utility*

> *Commission*, 50 Pa. Commonwealth Ct. 600, 413 A.2d 413 A.2d 473 (1980). The fact that only a limited number of persons may have occasion to use the utility's service does not make it a private undertaking if the general public has the right to subscribe to such a service. *Masgai v. Pennsylvania Public Service Commission*, 124 Pa. Superior Ct. 370, 188 A. 599 (1936); *Borough of Ambridge, supra* [108 Pa. Super. 298, 165 A. 47 (1933)].

Waltman, 596 A.2d at 1224.[1]

The Commonwealth Court reached a similar conclusion in affirming a grant of a certificate of public convenience authorizing the furnishing of petroleum pipeline service. In *Bucks County Board of Commissioners v. Pa. P.U.C.*, 11 Pa. Cmwlth. 487, 497, 313 A.2d 185, 190-91 (1993), the Court stated:

> "The appellants contend, as we understand their brief and argument, that the Commission committed three errors of law. They first declare that IEC is not a public utility because it is a creation of one or a few privately owned public utilities designed to serve only them. . . . It is, under the law, a public utility although, of necessity, it will have few customers. The appellants simply disagree with the holding of *Independence Township School District Appeal,* 412 Pa. 302, 194 A.2d 437 (1963) that a pipeline company serving three non-public utilities was nevertheless a public utility entitled to exemptions from local taxes."

As the Commonwealth Court also stated in *C.E. Dunmire Gas Co., Inc. v. Pa. P.U.C*, 50 Pa. Cmwlth. 600, 413 A.2d 473, 474 (1980):

> "The private or public character of a business does not depend upon the number of persons by whom it is used, but upon whether or not it is open to the use and service of all members of the public who may require it. *Borough of Ambridge v. P.S.C.*, 108 Pa. Super. 298, 165 A.47 (1933). In the present case, the only restriction the company put on whom it serves is based upon the availability of the company's supply. Thus, the company did not limit its

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[1] In *Bethlehem Steel*, the Supreme Court criticized this passage of *Waltman*, but only to the extent that the passage should not be applied to service to a single customer.

> service to a specific privilege class, such as its tenants, as was the case in *Drexelbrook Associates v. Pennsylvania Public Utility Commission*, 418 Pa. 430, 212 A.2d 237 (1965)."

An alternative energy provider selling gas or electricity pursuant to a private contract to entities willing to take that service would be offering service to or for the public regardless of the fact that a contract is in place restricting service to those customers who subscribed to the service.

IV. THE CREATION OF UNREGULATED DISTRIBUTION COMPANIES IS NOT NEEDED TO CREATE A MARKET FOR GAS AND ELECTRIC PRODUCED BY ALTERNATIVE ENERGY PROJECTS

Alternate energy projects are already able to interconnect with the electric grid in accordance with non-discriminatory interconnection procedures administered by area regional transmission organizations, and, after obtaining appropriate authority from FERC, are able to sell their power into a wholesale market at unregulated rates. If an electric generation supplier license is obtained from the Commission, retail sales may be made as well.

Similarly, if an alternate energy project generates marketable gasses, it is able to interconnect with interstate pipelines or gathering facilities and can sell those gasses in either the wholesale, or if it obtains a license from the Commission, retail markets at unregulated rates.

If a particular project is not near electric or gas transmission facilities, but has sufficient electric or natural gas to sell that it believes would justify the construction of private distribution facilities, it can contact with the local EDC or NGDC who can construct and operate facilities to enable the electric or gas to reach end users (just as

many natural gas producers do). As a result of the scope of EDC and NGDC systems, such interconnects would enable the alternate energy project to reach a larger universe of potential customers than would be available through privately constructed distribution facilities. In addition, the possibility of constructing duplicate facilities would be reduced, NGDCs would possible be in a better position to provide back-up and balancing services and the ability for the Commission to monitor pipeline safety and reliability issues would be increased.

V. THERE ARE CONSTRUCTIVE MEASURES THE COMMISSION COULD TAKE TO ENCOURAGE GAS SALES FROM COAL GASIFICATION AND OTHER ALTERNATE ENERGY PROJECTS

There are constructive measures, within the Commission's authority, that the Commission could take to encourage gas sales from Advanced Coal Gasification and Liquefaction plants or other alternate energy projects that would be within the Commission's authority.

First, the Commission should work with the Department of Environmental Resources to encourage coal gasification or other gas-producing alternative energy projects to contact area NGDCs as early in the project development process as possible to explore the options for distributing the gas produced. Such early contact may enable the NGDC to incorporate potential gas production into gas supply plans, and assist the developer in locating the project at a location where potential profits could be maximized.

Second, the Commission could provide assurance to NGDCs that if they entered into potential long-term gas supply contracts with an Advanced Coal Gasification and Liquefaction plant or other alternate energy supplier, that the costs of such supplies

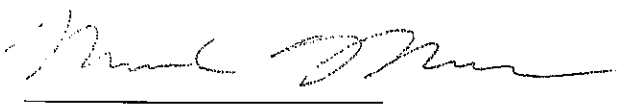
would be recoverable through purchased gas cost rates. This would facilitate NGDC's entry into long-term synthetic gas purchase contracts that could facilitate the financing of Advanced Coal Gasification and Liquefaction plants.

To the extent the Commonwealth's policy is to foster certain industries by providing them preferred access to synthetic natural gas or reduced distribution rates, the establishment of unregulated utilities is not required to accomplish that goal. If synthetic natural gas sources are connected to NGDC facilities, the preferred industries would still be free to purchase the synthetic gas and to use available transportation rate schedules to transport that gas. By the establishment of synthetic gas transportation rates, the Commission could also ensure that no more costs are allocated to such customers for the distribution and delivery of such gas is appropriate.

VI. CONCLUSION

For all the foregoing reasons, the Commission should not adopt its proposed policy statement, and should instead seek to implement constructive policies to encourage the development of alternative energy projects consistent with its scope of authority.

Respectfully submitted,



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