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February 6, 2013

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor (filing room)
Harrisburg, PA 17120

Re: Petition of Metropolitan Edison Company, Petition of Pennsylvania Electric Company, and Petition of West Penn Power Company - Docket Nos. M-2012-2334387, M-2012-2334392 and M-2012-2334398; **REPLY BRIEF**

Dear Secretary Chiavetta

Enclosed for filing with the Pennsylvania Public Utility Commission is the Reply Brief of UGI Penn Natural Gas, Inc. and UGI Central Penn Gas, Inc. ("UGI Distribution Companies") in the above-referenced matter. A copy of the enclosed has been served in accordance with the attached Certificate of Service.

If you have any questions, please advise.

Very truly yours,



Christopher M. Arfaa

Counsel for UGI Distribution Companies

CMA/das
Enclosure

cc: Honorable Elizabeth H. Barnes
Per Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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Dated this 6th day of February, 2013

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Metropolitan Edison Company
for Approval of its Act 129 Phase II Energy
Efficiency and Conservation Plan

Docket No. M-2012-2334387

Petition of Pennsylvania Electric Company
for Approval of its Act 129 Phase II Energy
Efficiency and Conservation Plan

Docket No. M-2012-2334392

Petition of West Penn Power Company
for Approval of its Act 129 Phase II Energy
Efficiency and Conservation Plan

Docket No. M-2012-2334398

**REPLY BRIEF OF
UGI UTILITIES, INC. – GAS DIVISION,
UGI PENN NATURAL GAS, INC.
AND
UGI CENTRAL PENN GAS, INC.**

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Pursuant to 52 Pa. Code §§ 5.501-5.502, UGI Utilities, Inc. – Gas Division, UGI Penn Natural Gas, Inc. and UGI Central Penn Gas, Inc. (collectively, the “UGI Distribution Companies” or “UGI”), by and through their counsel, Hawke McKeon & Sniscak LLP, submit their Reply Brief in the above-captioned matter in accordance with the Second Prehearing Order dated December 12, 2012.

I. INTRODUCTION

The UGI Distribution Companies have introduced substantial evidence showing that the EEC Plans proposed by Metropolitan Edison Company (“Met-Ed”), Pennsylvania Electric Company (“Penelec”) and West Penn Power Company (“West Penn”) (collectively, “FirstEnergy,” the “FirstEnergy Companies” or the “Companies”) do not make the most prudent, cost effective use of ratepayer funds, and that, absent the inclusion of the natural gas energy efficiency measures proposed by UGI and the elimination of certain wasteful components proposed by FirstEnergy, approval of the Plans would not be in the public interest. The record demonstrates that UGI’s proposals, which give consumers the choice of energy efficient natural gas water heaters and furnaces, are in all cases dramatically more cost effective and energy efficient under the Commission’s Total Resource Cost (TRC) Test and will increase the potential electric energy savings of the FirstEnergy Plans by *seventeen percent* (17%), by reducing electric consumption by an additional **1.25 Billion kilowatt hours** (1,250,000,000 kWh).

The FirstEnergy Companies demand that the Commission reject UGI’s proposals on several ancillary grounds, none of which is valid. *First*, the Companies claim that the Commission must defer to EDCs’ conservation program selection when reviewing EEC plans, even though both Act 129 and Commission precedent is to the contrary. *Second*, the FirstEnergy Companies make the demonstrably frivolous claim that inclusion of fuel switching measures in

their EEC Plans could subject them to antitrust liability. **Third**, FirstEnergy makes the irrelevant claim that natural gas switching measures may increase natural gas sales, even though the record unambiguously shows that, even with increases in natural gas usage, UGI's proposals are still more efficient than the Companies' proposals due to the greater efficiency of natural gas. **Fourth**, the Companies challenge the natural gas cost input used in UGI's TRC analysis, even though UGI used the input values prescribed by the Commission's TRC Order. **Finally**, and incredibly, the FirstEnergy Companies challenge UGI's demonstration that the FirstEnergy Plans increase electric load by incenting gas-to-electric conversions, by pointing out that UGI was forced to rely on the best evidence available *due to the FirstEnergy's' failure to provide information ordered by the Commission in its Phase I Act 129 proceedings*. As shown below, none of these arguments withstands even cursory examination.

Each of the FirstEnergy Companies was required to prove that its EEC Plan (a) meets the consumption reduction targets and other program requirements set forth in Act 129 and the Commission's implementation orders; (b) is prudent and cost effective, consistent with Pennsylvania's energy conservation policies as established by the General Assembly; and (c) is in the public interest. Each has failed to do so. Therefore, the Companies' petitions for approval of their EEC Plans as filed must be denied, and they should be directed to re-file their plans with the modifications recommended by the UGI Distribution Companies.

II. ARGUMENT

A. The Commission Should Direct The FirstEnergy Companies To Incorporate UGI's Natural Gas Fuel Switching Proposals Into Their Phase II EEC Plans.

1. Act 129 authorizes and directs the Commission to disapprove and modify EEC programs that do not make sufficiently prudent, cost-effective use of ratepayer funds.

The FirstEnergy Companies assert that the UGI Distribution Companies' proposals should be rejected because "fuel switching is not required by law or Commission order."¹ This circular argument begs the question at issue in this proceeding:

Whether, in order to implement Act 129 in a manner that serves the public interest, the Commission *should* require the FirstEnergy Companies to incorporate fuel switching as proposed by UGI in this proceeding?

The Commission should answer this question in the affirmative.

As argued in UGI's main brief, the record in this proceeding establishes that neither Pennsylvania nor the FirstEnergy Companies' ratepayers will realize the full benefits of the Commission's Act 129 energy conservation program unless the Companies' Phase II EEC Plans promote natural gas fuel switching measures in lieu of, or at least to the same extent as, the incentives for electric measures proposed by the FirstEnergy Companies. In these circumstances, the text, the purpose, and the Commission's implementation of Act 129 require that the Companies' Plans be rejected as filed and modified to incorporate the UGI Distribution Companies' fuel switching proposals.

a. The Commission's role in this proceeding is not merely to rubber-stamp the FirstEnergy Companies' proposals.

The FirstEnergy Companies insist that it is not the Commission's "role" to require fuel switching measures in an EEC plan even where, as in this case, such measures are demonstrably

¹ FirstEnergy Main Brief at 19.

superior to the measures proposed by the EDC.² To the contrary, that is *precisely* the Commission’s role under Act 129.

Section 2806.1(b) provides that an EDC’s EEC plan “shall include specific proposals to implement energy efficiency and conservation measures.”³ It further provides that the consumer and small business advocates and interested members of the public may submit recommendations “as to how the electric distribution company could improve its plan.”⁴ After considering the merits of the EDC’s proposals and other parties’ recommendations, the Commission shall approve or disapprove the plan.⁵ The text of the statute thus establishes that: (a) the energy efficiency and conservation measures put forward by the EDC are no more than “*proposals*” to be considered by the Commission; (b) third parties may *recommend alternatives* to these proposals; and (c) the Commission may *disapprove* the EDC’s plan after considering third-party recommendations. The Commission’s responsibility and authority to modify an EEC plan’s energy efficiency and conservation proposals are underscored by the requirement that such measures “*shall include . . . energy efficient heating and cooling equipment or systems and energy efficient appliances and other technologies, practices or measures approved by the Commission.*”⁶ Thus, if a third party’s recommended energy efficiency and conservation measure is “approved by the Commission,” the recommended measure “*shall*” be included in the EEC plan under consideration.

The FirstEnergy Companies’ contrary interpretation would render these provisions superfluous. Since every Pennsylvania statute must be construed, if possible, “to give effect to

² FirstEnergy Main Brief at 25.

³ 66 Pa. C.S. § 2806.1(b)(1)(i)(A).

⁴ 66 Pa. C.S. § 2806.1(e)(1).

⁵ 66 Pa. C.S. § 2806.1(e)(2).

⁶ 66 Pa. C.S. § 2806.1(m) (definition of “Energy and conservation measures”) (emphasis added).

all its provisions,”⁷ Act 129 must be read to authorize and direct the Commission to reject EEC proposals that do not include adequate energy efficiency and conservation measures and to order the adoption of third party proposals that do.⁸

As Chairman Powelson observed at the start of the Phase II proceedings, the Commission must ensure that “any future Act 129 programs are effective uses of consumers’ money.”⁹ Accordingly, he “strongly encourage[d]” all interested parties to participate in this process so that the Commission could “perform a thorough examination of these programs and the benefits to consumers.”¹⁰ This statement is meaningless if the selection of energy efficiency and conservation programs is left to the unfettered discretion of the EDCs.

Scrutiny is particularly important because EDC financial interests are not necessarily aligned with the public interest in promoting the most cost-effective or most energy-efficient conservation measures. Act 129 has mandated energy and peak load reductions with program cost recovery only, subject to cost caps and with no possibility of recovering lost revenues until future base rate cases. As a result, *effective* Act 129 EEC plans are likely to lead to decreased EDC distribution revenues and earnings.¹¹ As demonstrated by the FirstEnergy Companies’

⁷ 1 Pa. C.S. § 1921(a) (“Every statute shall be construed, if possible, to give effect to all its provisions.”).

⁸ The Commission’s general powers under the Public Utility Code remove any doubt as to the Commission’s authority and responsibility to order the FirstEnergy Companies to incorporate the UGI Distribution Companies’ proposals into their EEC Plans. See 66 Pa. C.S. § 501(a) (“In addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof . . .”).

⁹ *Secretarial Letter Seeking Comments on Planning Issues for Act 129 Energy Efficiency and Conservation Programs after May 31, 2013*, Docket No. M-2012-2289411, Statement of Chairman Robert F. Powelson (March 1, 2012).

¹⁰ *Id.*

¹¹ See *Petition of UGI Utilities, Inc. – Electric Division for Approval of Its Energy Efficiency and Conservation Plan*, Docket No. M-2010-2210316, Opinion and Order entered Oct. 19, 2011, at 21 (“2011 UGI EEC Plan Order”) (“[W]e fully appreciate the financial disincentive that the lost revenues that result from a successful EE&C plan has on a utility.”); see also Responsive Comments of the UGI Distribution Companies, *Act 129 Fuel Switching Working Group* (submitted March 12, 2010).

advocacy in this proceeding, EDCs are likely to vigorously defend less cost-effective measures that preserve at least some electric load.

Given these incentives, the Commission cannot implement Act 129 as the General Assembly intended merely through passive rubber-stamping of an EDC's preferred energy efficiency and conservation programs.¹² Indeed, the Commission has not hesitated to order EDCs to modify their EEC plans when it deemed such modifications necessary. For example, in reviewing West Penn's Phase I EEC plan, the Commission rejected the company's Distributed Generation Program "due to the fact that, as proposed, it is costly, has an extremely low TRC and is not needed to meet the mandated peak demand target,¹³ and thus was not "appropriate in a program funded by the ratepayers."¹⁴ The Commission also rejected West Penn's Contract Demand Response Program as filed and ordered modification of the program to address the Commission's concerns.¹⁵ Similarly, the Commission rejected PECO Energy's "Renewable Resources Program" because the low benefit/cost ratio of the program indicated that the program "may not be an effective use of ratepayer funds."¹⁶

¹² 1 Pa. C.S. § 1922(5) (In ascertaining the intention of the General Assembly, it may be presumed "[t]hat the General Assembly intends to favor the public interest as against any private interest.").

¹³ *Petition of West Penn Power Company d/b/a Allegheny Power for Approval of its Energy Efficiency and Conservation Plan, Approval of Recovery of its Costs through a Reconcilable Adjustment Clause and Approval of Matters Relating to the Energy Efficiency and Conservation Plan*, Docket No. M-2009-2093218, Order entered October 23, 2009, at 42 ("*West Penn Oct. 23, 2009 Order*").

¹⁴ *West Penn Oct. 23, 2009 Order* at 43.

¹⁵ *West Penn Oct. 23, 2009 Order* at 107.

¹⁶ *Petition of PECO Energy Company for Approval of its Act 129 Energy Efficiency and Conservation Plan and Expedited Approval of its Compact Fluorescent Lamp Program*, Docket No. M-2009-2093215, Order entered October 28, 2009, at 51 ("*PECO Oct. 28, 2009 Order*"). The Commission also ordered modifications to the UGI Distribution Companies' EDC affiliate's EEC Plan. *See 2011 UGI EEC Plan Order* (requiring EDC to modify EEC plan by, among other things, eliminating revenue recovery rider, reducing residential fuel switching incentive rebate levels, and reducing total program expenditures).

b. The Commission has articulated a clear and affirmative policy to allow fuel switching measures to be included in EEC plans.

The FirstEnergy Companies assert that “there is no clear and affirmative policy to allow for fuel switching, given that the Commission affirmatively stated that fuel switching should not be mandated.”¹⁷ This is simply untrue. Act 129 authorizes and directs the Commission to adopt an energy efficiency and conservation program that includes “[s]tandards to ensure that each [EEC] plan includes a variety of energy efficiency and conservation measures.” In response, (1) the Commission has adopted natural gas fuel switching protocols and inputs in its Technical Reference Manual (TRM)¹⁸ and TRC Test¹⁹; (2) several EDCs, *including the FirstEnergy Companies*, have proposed EEC plans that include incentives for the installation of natural gas fuel switching measures;²⁰ and, perhaps most significant, (3) *the Commission has approved EEC plans that include natural gas fuel switching incentives.*²¹

The FirstEnergy Companies imply that when the Commission adopted the recommendation of the Fuel Switching Working Group (“FSWG”) Staff Report that “fuel switching should not be mandated,” it established a policy never to require fuel switching in an

¹⁷ FirstEnergy Main Brief at 20.

¹⁸ See 2013 Pennsylvania Technical Reference Manual §§ 2.18, 2.19, 2.20; 2012 Pennsylvania Technical Reference Manual §§ 2.18, 2.19, 2.20.

¹⁹ See *Re 2012 PA Total Resource Cost (TRC) Test*, Docket Nos. M-2012-2300653, M-2009-2108601, Order entered Aug. 30, 2012, at 41-43; *Implementation of Act 129 of 2008 – Total Resource Cost (TRC) Test 2011 Revision*, Docket No. M-2009-2108601, Final Order – 2011 Total Resource Cost Test Order, at 28 (Aug. 2, 2011).

²⁰ See, e.g., *In re: Petition of Peco Energy Company for Approval of its Act 129 Phase II Energy Efficiency and Conservation Plan*. Docket No. M-2012-2333992, PECO Program Years 2013-2015 Act 129 – Phase II Energy Efficiency and Conservation Plan, filed Nov. 1, 2012 (proposing incentives for installation of high efficiency natural gas water heaters and space heaters). The FirstEnergy Companies’ plans make combined heating and power projects eligible for rebates. See FirstEnergy Main Brief at 22-23.

²¹ See *Petition of UGI Utilities, Inc. – Electric Division for Approval of Its Energy Efficiency and Conservation Plan*, Docket No. M-2010-2210316, Opinion and Order entered Mar. 16, 2012 (“2012 UGI EEC Plan Order”) (approving revised EEC plan that included incentives for installation of high efficiency natural gas water heaters and space heaters); *Petition of PECO Energy Company for Approval of its Act 129 Energy Efficiency and Conservation Plan and Expedited Approval of its Compact Fluorescent Lamp Program*, Docket No. M-2009-2093215, Order entered October 28, 2009 (approving EEC plan that included programs offering \$1,000 incentive for customers with electric baseboard heating and a \$550 incentive for customers with a heat pump to install a high efficiency gas furnace and a \$250 incentive for the conversion to a high efficiency gas hot water heater).

EEC plan. The Commission did no such thing. The recommendation that the Commission adopted states as follows:

Staff . . . believes that fuel switching measures should be available to EDCs and their stakeholders when considering the best means of achieving energy efficiency goals. However, ***just as no other particular energy efficiency program or measure has been mandated***, fuel switching programs should not be mandated ***either***.²²

By adopting this recommendation, the Commission established a policy of treating fuel switching ***just like any other energy efficiency measure*** that it has the power to reject or modify pursuant to Act 129. It does not and cannot mean, as the FirstEnergy Companies imply, that fuel switching measures are inconsistent with Act 129's energy efficiency and conservation policy as implemented by the Commission.

c. Inclusion of natural gas fuel switching measures in the Companies' EEC Plans will not subject them to "potential anti-trust liability."

Straining to find some basis on which to argue that the Commission is powerless to require EDCs to offer natural gas fuel switching measures in appropriate cases, FirstEnergy suggests that such an intent may be inferred from "the fact that any mandate to require the Companies to incent the use of natural gas may expose the Companies to potential anti-trust liability."²³ This suggestion is frivolous.

²² *The Act 129 Fuel Switching Work Group Staff Report*, Docket No. M-00051865, Staff Report at 6 (filed April 30, 2010). Although the Secretarial Letter adopting the Report contained an abbreviated summary of this recommendation, the Letter indicates that the Commission adopted the recommendations actually contained in the report. Secretarial Letter adopting Staff Report, Docket M-00051865.(entered May 21, 2010).

²³ FirstEnergy Main Brief at 19.

The FirstEnergy Companies cite *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*²⁴ as an example of the “potential anti-trust liability” the General Assembly “may” have had in mind when drafting Act 129. The Companies’ reliance on *Yeager's Fuel* is puzzling because the court in that case in fact held that an electric utility that had offered cash incentives to encourage the installation of electric heat pump devices pursuant a state conservation program was entitled to *immunity* from antitrust claims pursuant to the “state action” doctrine. The FirstEnergy Companies nevertheless insist that such a result is “not certain” in the case of programs contained in Commission-approved EEC Plans.²⁵ To the contrary, a brief examination of *Yeager's Fuel* and Act 129 as implemented by the Commission shows that incentive programs contained in Commission-approved EEC plans clearly are entitled to antitrust immunity pursuant to the state action doctrine.

Private party conduct is immune from antitrust liability under the state action doctrine if the party claiming the immunity shows that the state’s actions pertaining to the challenged conduct satisfy two requirements:

first, the State has articulated a clear and affirmative policy to allow the [allegedly] anticompetitive conduct, and second, the State provides active supervision of [allegedly] anticompetitive conduct undertaken by private actors.²⁶

With respect to the first requirement, the *Yeager's Fuel* court held that PP&L had to demonstrate that it offered the challenged incentives “pursuant to a clearly articulated and affirmatively expressed state policy.”²⁷ State approval of PP&L’s activity was not required, however; “the issue in determining whether actions were taken pursuant to a clearly articulated state policy is

²⁴ 22 F.3d 1260 (3d Cir. 1994), *reh'g denied*.

²⁵ FirstEnergy Main Brief at 20 (emphasis added).

²⁶ *Yeager*, 22 F.3d at 1265 (quoting *Ticor Title Ins. Co. v. FTC*, 504 U.S. 621, 631 (1992) (“*Ticor IP*”)) (bracketed material added).

²⁷ 22 F.3d at 1266.

whether the activity is a ‘ “foreseeable result” of what the statute authorizes.’ ”²⁸ In concluding that PP&L had made the required showing, the court found that it was “reasonably foreseeable that rebates, loans and other load management programs utilities are required to consider could have anticompetitive effects.”²⁹

With respect to the second state action immunity requirement, PP&L was required to demonstrate that “Pennsylvania actively supervised its incentive programs.”³⁰ “The active supervision prong . . . requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”³¹ The court found that the Commission had actively reviewed PP&L’s incentive programs and considered them to be “valid attempts to engage in energy conservation as the legislature required.”³² “Therefore,” the court concluded, “PP&L is immune from antitrust liability for those programs, for they have been actively supervised.”³³

The FirstEnergy Companies argue that the availability of state action immunity to EDCs adopting fuel switching measures pursuant to Act 129 is uncertain because “there is no clear and affirmative policy to allow for fuel switching.”³⁴ As argued above, this is demonstrably false. The promotion of the installation of fuel switching measures – and in particular, natural gas fuel

²⁸ 22 F.3d at 1267-68 (quoting *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, at 372-72 (1991) (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985))).

²⁹ *Id.* at 1268.

³⁰ 22 F.3d at 1270.

³¹ *Yeager*, 22 F.3d at 1270 (quoting *Ticor II*, 504 U.S. at 634; further citation omitted) (alteration in original).

³² *Id.* at 1272.

³³ *Id.*

³⁴ FirstEnergy Main Brief at 20.

switching measures – clearly was, and is, a “foreseeable result” of the activities authorized by Act 129 in order to achieve Pennsylvania’s energy conservation goals.³⁵

Moreover, the Commission clearly possesses, and has exercised, its authority to review EEC plans and to require modification of various programs.³⁶ The review of EEC plans required by Act 129 and provided by the Commission is far more rigorous than the review that was required of the incentive programs at issue in *Yeager’s Fuel*.³⁷ Therefore, if the Commission directs the FirstEnergy Companies to provide incentive programs for natural gas fuel switching measures in their EEC Plans, as it should, the state action doctrine will provide the Companies with immunity against any antitrust claims arising from those programs. The FirstEnergy Companies’ assertion to the contrary is absurd.³⁸

The FirstEnergy Companies’ citation to the *Yeager’s Fuel* decision obviously does not support their position, but it does highlight the significance of their failure to comply with the Commission’s reporting requirements. On remand, the *Yeager’s Fuel* trial court rejected PP&L’s claim that reports of the Commission’s Bureau of Conservation, Economics and Energy Planning reflected state policy, where the reports were based on incomplete information

³⁵ Moreover, the use of incentives such as equipment rebates for to promote such measures was also clearly foreseeable when Act 129 became law. As evidenced by the 1994 *Yeager* opinion, electric utilities had included cash incentives for equipment installation in their energy conservation and load management programs for more than a decade before the Act’s enactment.

³⁶ See, e.g., *Petition of UGI Utilities, Inc. – Electric Division for Approval of Its Energy Efficiency and Conservation Plan*, Docket No. M-2010-2210316 (Opinion and Order entered Oct, 19, 2011) (“*2011 UGI EEC Plan Order*”) (requiring EDC to modify EEC plan by, among other things, eliminating revenue recovery rider, reducing residential fuel switching incentive rebate levels, and reducing total program expenditures).

³⁷ Compare *Yeager*, 22 F.3d at 1271 (describing PUC review of challenged program), with *2011 UGI EEC Plan Order*.

³⁸ The FirstEnergy Companies’ complaint that the inclusion of fuel switching measures would nevertheless subject them to the expense of defending themselves against antitrust suits is even more absurd. As the *Yeager’s Fuel* decision illustrates, there is just as much risk, if not more, of the FirstEnergy Companies being sued for providing incentives exclusively for the installation of electric home water heating and space heating devices. Any party filing such a suit after *Yeager’s Fuel* would likely end up paying the FirstEnergy Companies’ attorney’s fees, assuming that the Companies report the information required for the Commission’s review and supervision of the incentive programs. As argued below, the Companies have not to date provided such information.

regarding the program.³⁹ As Mr. Raab explained, the FirstEnergy Companies have failed to report data indicating the incidence of switching from natural gas to electric as a result of their incentive programs, as ordered by the Commission. Thus the FirstEnergy Companies' incentive programs may indeed raise antitrust concerns, not because they promote natural gas fuel switching measures, but because FirstEnergy has thwarted effective supervision of the programs.

2. Any increase in UGI's sales (or reduction in FirstEnergy revenues) that may occur as a result of natural gas fuel switching does not diminish the energy savings and consumer benefits produced by UGI's proposals.

The UGI Distribution Companies' interest in promoting natural gas fuel switching measures is no more relevant to the merits of such measures than is the FirstEnergy Companies' interest (and the interest of their electric generation affiliates) in opposing them. If natural gas distribution companies (NGDCs) such as UGI benefit from increased throughput or sales from adoption of a fuel switching program, it is because the fuel substitution program is a cost-effective way of promoting conservation, and not because they are being unfairly favored. Stated another way, any benefits to NGDCs are a byproduct of the consumer benefits produced by a fuel substitution program.

If the FirstEnergy Companies truly believed that conservation measures should not generate "sales and profits" for private parties, they would not have proposed incentives for heat pump water heaters and air source heat pump space heaters in their Plans, since such incentives obviously will "increase sales and profits" of the manufacturers, distributors and installers of those devices. Clearly, the FirstEnergy Companies' opposition is not due to potential increases

³⁹ *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 1995-1 Trade Cas. (CCH) ¶ 71,034, 1995 WL 348503 (E.D. Pa. June 6, 1995). Similarly, the Ninth Circuit has held that anticompetitive tariff provisions would fail to satisfy the "active supervision" component of the two-pronged test for state action antitrust immunity if the utility withheld key information requested by the utilities commission that was necessary to permit it to make an informed decision on whether the tariff should be approved. *Cost Management Services, Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 943 (9th Cir. 1996).

in UGI's sales and profits but to potential *decreases* in *their own* sales and profits resulting from the additional 1.25 Billion kilowatt hour (1,250,000,000 kWh) reduction in electricity consumption that would be made possible by adoption of the UGI proposals.

A significant amount of energy is lost in the process of converting fuels into electric power and in the transmission and distribution of electricity from generation plants to end users.⁴⁰ Natural gas fuel switching measures thus not only save the electricity used by the replaced electric appliances, but also the energy lost in the process of generating, transmitting and distributing that electricity. Therefore, any increase in natural gas usage that results from adoption of UGI's proposals will be accompanied by a far greater increase in overall energy savings. While this may not be in the FirstEnergy Companies' private interests, it clearly is in the public interest.⁴¹

3. UGI's TRC analysis used the natural gas costs prescribed by the Commission's TRC Order, which the FirstEnergy Companies may not challenge in this proceeding.

Mr. Raab's TRC analysis shows that UGI's proposals relating to natural gas water heaters and furnaces are significantly more cost effective and energy efficient than the FirstEnergy Companies' corresponding programs. The Companies attack only one aspect of Mr. Raab's TRC analysis – the price of natural gas used in the TRC calculation. This challenge is without merit, since UGI used the prices required by the Commission's TRC test.

⁴⁰ UGI Statement No. 1 at 35-36.

⁴¹ The FirstEnergy Companies' "sales and profits" argument is relevant only in that it underscores the need for Commission action to ensure that their Plans achieve Act 129's conservation requirements in a manner that serves the public interest. The Companies' focus on loss of home heating revenues and market share to natural gas distribution companies demonstrates that their interests are not aligned with promoting the most cost-effective or best conservation plans. To ensure that Act 129 goals are met in a way that best promotes the interest of EDC's *ratepayers* and the citizens of Pennsylvania, the Commission cannot and should not rely on the EDCs' discretion alone for selection of their Plans' energy efficiency and conservation measures.

Act 129 the costs and benefits of EEC plans to be analyzed in accordance with a TRC test approved by the Commission.⁴² The Act also requires an EDC to demonstrate that its plan is cost-effective using the Commission's TRC test.⁴³ Sections 2806.1(c)(3) and 2806.1(d)(2),⁴⁴ as well as the definition of the TRC test in Section 2806.1(m),⁴⁵ provide that the TRC test be used to determine whether ratepayers, as a whole, received more benefits (in reduced capacity, energy, transmission, and distribution costs) than the implementation costs of the EDCs' EEC plans.

With respect to inputs for fuel switching, the 2013 TRC Test provides: "For purposes of the PA TRC Test, increased fuel costs have been defined as the NYMEX gas costs for the first 10 years and the EIA gas cost projections thereafter."⁴⁶ The Commission has thus determined that the NYMEX gas costs are the proper input for additional fuel costs when applying the TRC Test to fuel switching measures. It is undisputed that Mr. Raab used the NYMEX gas costs prescribed by 2013 TRC Test, as even the FirstEnergy Companies' witness Mr. Fullem acknowledged on cross examination.⁴⁷ Essentially, the Companies are objecting to the Commission's specification of the NYMEX input for the 2013 TRC Test. They may not do so here.

The Commission's determination that the NYMEX gas costs are the proper measure of the additional fuel costs caused by natural gas fuel switching measures for purposes of the TRC Test has not been set aside, annulled or modified on judicial review. Therefore, pursuant to Section 316 of the Public Utility Code, that determination remains "conclusive upon all parties

⁴² 66 Pa. C.S. § 2801(a)(3).

⁴³ See 66 Pa. C.S. § 2806.1(b)(1)(i)(I).

⁴⁴ 66 Pa. C.S. §§2806.1(c)(3) and (d)(2).

⁴⁵ 66 Pa. C.S. § 2806.1(m).

⁴⁶ 2012 TRC Order at 41.

⁴⁷ Tr. at 87. The FirstEnergy Companies' brief inexplicably omits this fact.

affected thereby.”⁴⁸ The FirstEnergy Companies, who actively participated in all of the Commission’s TRC test proceedings, did not object to this input, either when it was first proposed for inclusion in the 2011 TRC Test or when it was proposed to be retained in 2013 TRC Test. Nor have they sought amendment of the Commission’s 2012 TRC Order. Therefore, they may not collaterally attack the Commission’s inclusion of the input in the 2013 TRC Test in this proceeding.⁴⁹

Mr. Raab’s calculation of the cost savings that may be achieved by adoption of the UGI Distribution Companies’ proposals, and the resulting benefits to consumers, are therefore undisputed.⁵⁰

B. The Commission Should Direct The FirstEnergy Companies To Eliminate The Payment Of Incentives (1) Where Fuel Switching From Natural Gas to Electric Could Result And (2) For The Installation Of Ground Source Heat Pumps.

- 1. The Companies cannot use their own failure to track gas-to-electric fuel switching as ordered by the Commission to rebut UGI’s evidence that the Companies’ programs encourage such switching and thus increase electric load.**

Mr. Raab concluded that the FirstEnergy Companies’ water heating and space heating incentives are likely increasing electric load by encouraging switching from natural gas, based on data and assumptions he was required to use because the Companies failed to comply with the Commission’s directives to track these kinds of natural gas to electric conversions. As a result, UGI has proposed the prohibition of incentives where fuel switching from natural gas to electric could result.

⁴⁸ 66 Pa. C.S. § 316 (Effect of Commission Orders).

⁴⁹ 66 Pa. C.S. § 316; *see also* *Beaver County v. Public Utility Commission*, 28 Pa. Cmwlth. 511, 516, 369 A.2d 509, 512 (Pa.Cmwlth. 1977) (“when a party chooses not to appeal an administrative order imposing some obligation upon it, that party cannot contest the unappealed order in some future proceeding”).

⁵⁰ In any event, the Companies presented no evidence that changing the price of natural gas would materially change Mr. Raab’s analysis.

In approving the FirstEnergy Companies' Phase I Plans with modifications, the Commission ordered each Company to track the following data regarding fuel switching: "(1) type of appliance or equipment being replaced; (2) the availability of natural gas at the customer's location or immediate area; and, (3) whether electric appliances or equipment were installed in areas where natural gas is available."⁵¹ It is undisputed that the FirstEnergy Companies failed to report the fuel switching data as ordered by the Commission.⁵² Since the FirstEnergy Companies failed to report actual instances of switching from natural gas appliances to electric, Mr. Raab used the best evidence available.⁵³

In response, the FirstEnergy Companies have not introduced any evidence to rebut Mr. Raab's calculations, much less the data they originally were supposed to report to the Commission. Instead, they argue in their brief that Mr. Raab's conclusion is unsupported because it is not based on actual fuel switching data. But neither UGI nor the Commission has this data because *the Companies failed to track it as required by the Commission's order.*

The Companies have thus *twice* failed to provide the Commission with the data required to determine the precise extent to which their incentives have prompted customers to switch from natural gas systems to less-efficient electric measures: first by failing to report the data as required by the Commission's order on their Phase I plans, and, second, by failing to introduce the data into the record of this proceeding in response to the UGI Distribution Companies'

⁵¹ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company for Consolidation of Proceedings and Approval of Energy Efficiency and Conservation Plans*, Docket Nos. M-2009-2092222, M-2009-2112952 and M-2009-2112956, Opinion and Order entered Oct. 28, 2009, at 129-130 (ordering paragraphs 10, 19); *Petition of West Penn Power Company d/b/a Allegheny Power for Approval of its Energy Efficiency and Conservation Plan, Approval of Recovery of its Costs through a Reconcilable Adjustment Clause and Approval of Matters Relating to the Energy Efficiency and Conservation Plan*, Docket No. M-2009-2093218, Opinion and Order entered Oct. 23, 2009, at 52; *see id.* at 104 (ordering paragraph 9).

⁵² As noted above, this may expose the FirstEnergy Companies to antitrust liability by negating an essential element of the state action doctrine as applied in the *Yeager's Fuel* case.

⁵³ Tr. at 78; *see also* UGI Main Brief at 25-26.

analysis. Having done nothing to provide the missing data, they cannot now complain of its absence.

Mr. Raab's testimony is the only evidence in the record on this issue. *If* the fuel switching data that the FirstEnergy Companies failed to report to the Commission contradict his conclusions, they should have introduced it into the record on rebuttal. Having failed to do so, their assertions about such data are mere argument and, as such, have no weight. Therefore, the record establishes that the FirstEnergy Companies' incentive programs are increasing electric load by promoting gas-to-electric fuel switching.

2. The FirstEnergy Companies admit that their Residential Ground Source Heat Pump incentive promotes free ridership at the expense of ratepayers.

As Mr. Raab explained, a residential customer who is unwilling to install a GSHP for \$10,000 is unlikely to want to install one for \$9,400.⁵⁴ Therefore, the only customers who will collect the \$600 residential GSHP rebate offered by the FirstEnergy Companies will be "free riders" who would have installed a GSHP without the rebate. The \$600 payment thus does not function as an "incentive" at all, but rather as a windfall – a waste of ratepayer money. UGI therefore has recommended elimination of the payment of incentives to promote ground source heat pumps.

The FirstEnergy Companies do not dispute Mr. Raab's conclusion. Instead, in a burst of candor, they respond that "they have already factored free ridership into their plan and program designs."⁵⁵ But that is precisely UGI's point: the FirstEnergy Companies' residential GSHP programs are *designed* to hand out ratepayer funds without regard to whether the payments

⁵⁴ UGI Statement No. 1 at 18-19.

⁵⁵ FirstEnergy Main Brief at at 22.

promote energy conservation as required by Act 129. Such programs obviously are not effective uses of ratepayer money.

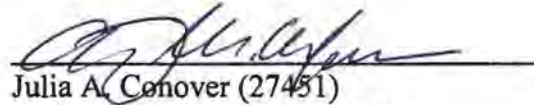
III. CONCLUSION

For all of the foregoing reasons, and for the reasons stated in their Main Brief, the UGI Distribution Companies respectfully request that the Commission reject the FirstEnergy Companies' EEC Plans as filed and direct the Companies to modify their respective Plans to:

1. Provide the same incentive as the FirstEnergy Companies proposed for efficient water heating measures to every customer who installs a natural gas water heater with an energy factor (EF) greater than 67%, the efficiency of an Energy Star® natural gas water heater.
2. Provide in lieu of, or as an alternative to, the ASHP measure: (a) an incentive payment of \$1,400 to every residential customer who installs a natural gas furnace with an annual fuel use efficiency (AFUE) greater than 95% and a SEER 15 electric central air conditioning unit; and (b) an incentive payment of \$2,500 to every residential customer who installs a natural gas furnace with an AFUE greater than 95% and a SEER 16 electric central air conditioning unit. The FirstEnergy Companies shall accommodate this modification by (a) lowering participant levels, (b) funding the same participant levels by a reduction in funding to measures with lower cost effectiveness than those proposed by UGI, (c) funding through the use of eliminated ground source heat pump program budget funds, or (d) a combination of (a), (b) and (c).
3. Eliminate the payment of incentives to promote ground source heat pump installations.
4. Prohibit the payment of incentives where fuel switching from natural gas to electric could result.

5. Inform their customers of the true electricity savings that would be achieved by employing natural gas water heating and natural gas space heating measures and give such measures the same exposure as other efficient equipment measures in their Phase II education, awareness and outreach programs.

Respectfully submitted,



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