

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**INITIAL DECISION  
DENYING IN PART AND GRANTING IN PART  
UGI’S MOTION FOR SUMMARY JUDGMENT**

Before  
Mary D. Long  
Administrative Law Judge

INTRODUCTION

A motion for summary judgment by a gas utility is granted in part and denied in part. The motion is granted regarding the relocation of several meters in the City of Reading that were not placed under windows which could be used as fire exits. The motion is granted in part and denied in part regarding the scope of the proceedings and is denied in all other respects because there are issues of material fact in dispute.

## PROCEDURAL HISTORY

On November 25, 2015, the Centre Park Historic District, Inc. (CPHD), filed a formal complaint which alleged that UGI Utilities, Inc. – Gas Division (UGI), violated the Commission’s regulation regarding the placement of meters in historic districts of the City of Reading, Pennsylvania, 52 Pa.Code § 59.18. UGI filed an answer denying the material allegations of the complaint on December 15, 2015. It is UGI’s position that Section 59.18 grants it discretion in the placement of meters in historic areas and that its actions have been appropriate as required by the Public Utility Code.

A prehearing conference was held on that complaint on February 11, 2016. At that conference counsel for the City of Reading and Centre Park Historic District notified me that the City would be filing its own complaint which would effectively “subsume” the complaint made by the Centre Park Historic District.

On February 17, 2016, the City of Reading filed a formal complaint against UGI Utilities, Inc. (UGI), challenging UGI’s placement of meters in historic districts as well as the outside placement of meters in unsafe locations in other districts of the city. On March 14, 2016, UGI filed an answer denying the material allegations of the complaint and also preliminary objections seeking dismissal of the complaint. The City of Reading filed an answer to the preliminary objections on March 24, 2016. By interim order dated March 29, 2016, the preliminary objections were denied.

A further prehearing conference was held on March 30, 2016. Counsel for the City of Reading, CPHD and UGI appeared. The Complainants requested that their complaints be consolidated. UGI did not object. Following a discussion of the issues raised and implicated by the complaints, the parties agreed that discussion and consultation would be fruitful to narrow or resolve the issues. A further conference was scheduled to discuss the progress made by the parties in their discussion and what further proceedings may be appropriate to resolve the dispute.

A further prehearing conference was held on July 14, 2016. The parties had not made progress toward settlement of their dispute; therefore a litigation schedule was set. The Commission's Bureau of Investigation and Enforcement (BIE) entered an appearance on August 10, 2016.

On September 1, 2016, UGI filed a petition for interlocutory review and answer to material questions to the Commission. BIE and UGI filed a joint motion to modify the litigation schedule. The request was granted and by interim order dated September 2, 2016, the litigation schedule was suspended pending action by the Commission on UGI's petition.

By Opinion and Order entered February 7, 2017, the Commission declined to answer the material question and returned the matter to the Office of Administrative Law Judge for disposition. By interim order dated February 22, 2017, a further prehearing conference was scheduled for March 14, 2017. The parties were also directed to provide prehearing memoranda which detailed the status of discovery and proposed a procedural schedule which included dates for evidentiary hearings.

The parties filed their prehearing memoranda as directed. By agreement the prehearing conference was rescheduled for Thursday, March 16, 2017. At my request, the Complainants and UGI also filed supplemental prehearing memoranda on March 16, 2017, which addressed specific discovery issues which were raised in their memoranda.

The prehearing conference convened on March 16, 2017. Counsel for the Complainants, UGI and BIE appeared. The bulk of the conference was devoted to the discussion of several outstanding discovery issues.<sup>1</sup>

Following the conference, I issued a Sixth Prehearing Order which, among other things, directed the Complainants to produce spreadsheets setting forth a list of disputed meters which included the date a permit was issued by the City of Reading and the date the meter was relocated (Stipulated Spreadsheets). UGI was provided with an opportunity to respond by

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<sup>1</sup> Those matters were disposed of by interim order on March 21, 2017.

stipulating or objecting to facts related to each contested meter. The Complainants were directed to serve the final Stipulated Spreadsheets by May 24, 2017.

The Sixth Prehearing Order also directed the parties to complete all discovery by May 30, 2017, and scheduled a further prehearing conference for June 15, 2017.

A further prehearing conference was held on June 15, 2017. The Complainants and UGI each filed prehearing memoranda. Various matters relating to these proceedings were discussed. No party requested an extension of the May 30, 2017 deadline for discovery or expressed a desire to depose witnesses.

Following the conference, I issued an interim order on June 15, 2017, which set forth deadlines for the filing of dispositive motions and responses. That order required the motions and responses to conform to the Commission's regulations at 52 Pa.Code §§ 5.102-5.103, as well as Pa.R.C.P. Nos. 1035.1-1035.5. The order also directed the parties to schedule a settlement conference and serve a status report which stated the date the conference was scheduled. As of this writing, I have not received the status report.<sup>2</sup>

On July 6, 2017, UGI filed a motion for summary judgment. That motion was supported by the Stipulated Spreadsheets and certain photographs which were produced by the Complainants in discovery and referenced on the Stipulated Spreadsheets. The motion did not include a legal memorandum. The Complainants filed a response to UGI's motion on July 26, 2017.

Also on July 6, 2017, the Complainants filed a motion for partial summary judgment. That motion was supported by the affidavit of John Slifko and photographs and included a legal memorandum. UGI filed a response to the motion on July 26, 2017. The Complainants' motion is decided by separate interim order.

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<sup>2</sup> See Paragraph 3 of July 15, 2017 Interim Order.

## FINDINGS OF FACT

1. The Complainants are the City of Reading and the Centre Park Historic District.
2. The Respondent is UGI Utilities, Inc., a jurisdictional public utility.
3. In historic districts of the City of Reading, 132 meters and meter infrastructures are located under windows that are not used as emergency fire exits. (UGI Motion, Appendix C).
4. In non-historic districts of the City of Reading, 205 meters and meter infrastructures are located under windows that are not used as emergency fire exits. (UGI Motion, Appendix D)

## DISCUSSION

### Standard for Summary Judgment

The purpose of summary judgment is to challenge the sufficiency of the evidence that the opposing party has to support his claim at hearing.<sup>3</sup> The Commission's rules set forth the requirements for motions for summary judgment:

(a) Generally. After the pleadings are closed, but within a time so that the hearing is not delayed, a party may move for judgment on the pleadings or summary judgment. A motion must contain a notice which states that an answer or other responsive pleading shall be filed within 20 days of service of the motion.

(b) Answers. An answer to a motion for judgment on the pleadings or summary judgment, including an opposing affidavit or verification to a motion for summary judgment, may be filed within 20 days of the date of service of the motion. The answer to a motion for summary judgment may be supplemented by

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<sup>3</sup> *Scalice v. Pennsylvania Benefits Trust Fund*, 883 A.2d 429 (Pa. 2005); *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001).

depositions, answers to interrogatories or further affidavits and admissions.

(c) Motion for summary judgment. A motion for summary judgment must be based on the pleadings and depositions, answers to interrogatories, admissions and supporting affidavits. Documents not already filed with the Commission shall be filed with the motion.

(d) Decisions on motions.

(1) Standard for grant or denial on all counts. The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

(2) Standard for grant or denial in part. The presiding officer may grant a partial summary judgment if the pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law on one or more but not all outstanding issues.

3) *Form of decision.* The presiding officer will grant, in whole or in part, the motion in the form of an initial or recommended decision which shall be subject to exceptions as set forth in § 5.533 (relating to exceptions). Denial of a motion will be in the form of a written order.<sup>4</sup>

The Commission has interpreted Section 5.102(c) of its regulations in conformity with Rule 1035 (now Rule 1035.1) of the Pennsylvania Rules of Civil Procedure,<sup>5</sup> which provide:

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<sup>4</sup> 52 Pa.Code § 5.102.

<sup>5</sup> *South River Power Partners, L.P. v. West Penn Power Company*, Docket No. C-00935287 (Order entered November 6, 1996). Further, the June 15, 2017 order informed the parties that motions must conform to the Pennsylvania Rules of Civil Procedure in addition to the Commission's rules.

## Rule 1035.2 Motion

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.<sup>6</sup>

## Rule 1035.3 Response. Judgment for Failure to Respond

a) Except as provided in subdivision (e), the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion identifying

(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or

(2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

(b) An adverse party may supplement the record or set forth the reasons why the party cannot present evidence essential to justify opposition to the motion and any action proposed to be taken by the party to present such evidence.<sup>7</sup>

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<sup>6</sup> Pa.R.C.P. No. 1035.2.

<sup>7</sup> Pa.R.C.P. No. 1035.3.

The Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences.<sup>8</sup> All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.<sup>9</sup> Judgment will be granted only where the right to relief is clear and free from doubt.

In ruling on a motion for summary judgment, it is not the presiding officer's function to decide any issues of disputed fact, or resolve conflicting inferences which may be drawn from such facts. In considering the motion, the presiding officer will solely determine whether there is an issue of fact to be tried.<sup>10</sup>

As set forth below, UGI's motion is granted as to a subset of meters which were relocated beneath windows, is granted in part on the legal issues related to the scope of the proceedings, but is denied in all other respects. Accordingly, I am required by Section 5.102(d) of the Commission's regulations to render my ruling as an initial decision subject to exceptions.<sup>11</sup>

#### 52 Pa.Code § 59.18

Section 59.18 of the Commission's regulations regulates the placement of gas meters. The regulation was completely rewritten by the Commission in order to bring it into conformance with federal gas safety regulations. After two rounds of notice and comment, and consideration of input from a variety of entities, the final regulation became effective on September 13, 2014.

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<sup>8</sup> *First Mortgage Co. of Pennsylvania v. McCall*, 459 A.2d 406 (Pa.Super. 1983); *Mertz v. Lakatos*, 381 A.2d 497 (Pa.Cmwlth. 1976).

<sup>9</sup> *Thomson Coal Company v. Pike Coal Company*, 412 A.2d 466 (Pa. 1979).

<sup>10</sup> *Penn Center House Inc. v. Hoffman*, 520 Pa. 171, 176, 553 A.2d 900, 903 (1989).

<sup>11</sup> 52 Pa.Code § 5.102(d).



The bulk of the claims in the formal complaints are that UGI violated Section 59.18(d), by failing to consider inside placement of meters in the City of Reading's historic districts:

(d) Inside meter locations.

(1) Inside meter locations shall be considered only when:

...

(ii) A meter is located in a building that meets one of the following criteria:

(A) A building is listed in the National Register of Historic Places or the customer or building owner notifies the utility that the building is eligible to be listed in the National Register of Historic Places and the eligibility can be readily confirmed by the utility.

(B) A building is located within a historic district that is listed in the National Register of Historic Places or the customer or building owner notifies the utility that the historic district is eligible to be listed in the National Register of Historic Places and the eligibility can be readily confirmed by the utility.

(C) A building has been designated as historic under the act of June 13, 1961 (P. L. 282, No. 167) (53 P. S. §§ 8001—8006), known as the Pennsylvania Historic District Act, the Pennsylvania Municipalities Planning Code (53 P. S. §§ 10101—11202) or a municipal home rule charter.

(D) A building is located within a locally designated historic district or is eligible for the listing, or a building is individually designated under a local ordinance as a historic landmark or is eligible for the listing.

The Complainants also allege that certain meter placements violate Section 59.18(a)(8):

(8) Meters and service regulators may not be installed in the following locations:

(i) Beneath or in front of windows or other building openings that may directly obstruct emergency fire exits.

(ii) Under interior stairways.

- (iii) Under exterior stairways, unless an alternate means of egress exists and the meter and service regulator are installed in a well-vented location under stairs constructed of noncombustible material.
- (iv) A crawl space.
- (v) Near building air intakes under local or State building codes.
- (vi) In contact with soil or other potentially corrosive materials.

### Disposition of the Motion

1. UGI's claim that 1,147 meters were relocated prior to the effective date of Section 59.18.

UGI contends that it is entitled to judgment as a matter of law, because many of the contested meters were relocated prior to the effective date of amended Section 59.18. UGI bases this argument on the service line installation dates<sup>12</sup> provided on the Stipulated Spreadsheets and the stipulation to those dates by the Complainants.

The Complainants in response concede that they stipulated to the dates provided by UGI for the service line installations on the Stipulated Spreadsheets. However, the Complainants contend that the stipulation did not include any agreement that the service line installation date was the date the meter was relocated. Therefore, UGI is not entitled to judgment as a matter of law.

I agree with the Complainants. Based upon the representation by UGI counsel, the service line installation dates are not the same as the date the meter was relocated. UGI is not entitled to summary judgment on this issue.

The genesis of the creation of the Stipulated Spreadsheets was the fourth prehearing conference held on March 16, 2017. After reviewing the parties' prehearing

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<sup>12</sup> UGI Motion ¶¶ 51, 63.

memoranda and resolving certain discovery disputes, it became clear that the parties had made little progress in identifying the disputed meters and stipulating to any of the basic facts regarding those meters.<sup>13</sup> Accordingly, the parties were directed to create spreadsheets which would inventory the contested meters by address and location in the historic districts and another for the non-historic districts:

1. That the Complainants will create a spreadsheet which includes a list of the contested meters in historic districts in a format substantially similar to the tables in Exhibit D which was attached to the City of Reading's formal complaint. In addition to the columns included in Exhibit D, the Complainants shall add columns to the table which include 1) the date a permit was issued, if one was issued; and 2) the date the meter was relocated. This spreadsheet shall be served on me and on the other parties on or before **April 20, 2017**.

2. That the Complainants shall create a spreadsheet which includes a list of the contested meters which are not located in historic districts in a format substantially similar to the tables in Exhibit D which was attached to the City of Reading's formal complaint. In addition to the columns included in Exhibit D, the Complainants shall add columns to the table which include 1) the date a permit was issued, if one was issued; and 2) the date the meter was relocated. The contested meters shall be organized by neighborhood or proximity. This spreadsheet shall be served on me and on the other parties on or before **April 20, 2017**.

3. That UGI shall respond by adding an additional column which includes either its stipulation to the data provided or by specific objection. UGI's stipulation shall not be construed as an admission that the meter relocation is in violation of the Public Utility Code, regulations or directives of the Commission. UGI's responses shall be served on me and the other parties on or before **May 4, 2017**.

4. That the spreadsheets directed above shall be served in both hard copy and electronic format.<sup>14</sup>

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<sup>13</sup> N.T. 89.

<sup>14</sup> Sixth Prehearing Order entered March 21, 2017; see also N.T. 89-91.

On April 14, 2017, the Complainants requested a short extension of the April 20, 2017 deadline for the initial spreadsheet in order to complete a search of the City records for the dates that Building and Trades Permits were issued. The Complainants also represented that the City did not keep any record of the dates the meters were relocated. Therefore, the Complainants asked to be excused from providing these dates. By answer filed on April 17, 2017, UGI did not object to the extension of time, provided that its deadlines were extended as well.

UGI's answer did not address the Complainants' request to be excused from providing the date that the meters were relocated. In my view, the meter relocation date was important in order to create a complete record. On April 18, 2017, I emailed the parties:

Counsel –

In Paras. 12-15 the Complainants state that they cannot comply with the directive to supply the date that a meter was relocated. UGI does not state in its answer whether UGI can provide that information. Is that information available to UGI and can it be included with the spreadsheet by May 11, 2017?

In response, by email dated April 18, 2017, UGI counsel stated:

Your Honor,

Apologies for the delay in responding to your email. Similar to the City of Reading, UGI's records do not track the specific date that each meter was installed or relocated. UGI suggests that the permit data already being compiled by the City and inputted into the spreadsheets provides a relative timeframe for each meter installation. Although UGI does not track the specific date each meter was installed or relocated, the Company does record the date of the service line installation. UGI submits that it can use the service line installation data to confirm the relative timeframe for each meter installation as identified by the permit data to be provided by the City.<sup>15</sup>

Thank you.

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<sup>15</sup> It is puzzling that UGI does not maintain records of when a meter is installed or relocated. In my experience, utilities routinely keep records of the serial number and installation date of each meter on a customer's utility record. These records are often produced in high bill complaints.

Based on UGI's response, by email dated April 19, 2017, the Complainants were excused from providing the meter relocation date on the Stipulated Spreadsheet:

Counsel –

Given UGI's response, the Complainants are excused from providing the date the meter was relocated on the initial spreadsheet submission. UGI shall instead provide the date that the service line was installed with its response.

By interim orders dated April 18, 2017 and April 19, 2017, the requested extensions of time were granted; the Complainants were excused from providing the meter relocation dates; and UGI was directed to provide the dates that the service lines were installed.

The Complainants served their initial spreadsheets on April 27, 2017, along with an executive summary of the information provided. By email dated May 11, 2017, UGI requested an additional short extension of time to file its response with a similar extension granted to the Complainants for submission of the final spreadsheet. Those requests were granted. UGI filed its responsive spreadsheet, including the service line installation dates and executive summary on May 15, 2017. At no point during the development of the Stipulated Spreadsheets did UGI represent that the meters were relocated at the same time the service lines were installed:

Although the Company does not keep records of when every meter is installed or relocated, the service line installation dates are *generally* indicative of the time when a meter is initially installed or relocated.<sup>16</sup>

The Complainants' final responsive spreadsheet was served on May 24, 2017. The Complainants' final responsive spreadsheet did not include a column which noted their stipulation or objection to the service line installation dates. At the June 15, 2017 prehearing conference, Complainants' counsel was asked if they intended to stipulate or object to the service line installation dates. Counsel responded:

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<sup>16</sup> Letter from UGI dated May 15, 2017 at p. 3 (emphasis added).

Your Honor, we don't have any independent information. So, at this point, I have no issue with stipulating because the city simply does not maintain that information and there is no way I can contest it. So, in the interest of just moving it along, we will stipulate to the dates supplied by UGI.<sup>17</sup>

The Complainants' stipulation regarding the service line installation date does not constitute a stipulation that the meters were relocated before the effective date of Section 59.18. Indeed, this claim by UGI in its motion is flatly contrary to the representation made by counsel that the service line installation date along with the permit issuance dates ought to provide "the *relative* timeframe for each meter installation." In reality, the timeframe between the service line installation and the issuance of permits in many cases is a span of several years. This means that the service line installation date is of questionable utility in establishing the approximate date that a meter was relocated.<sup>18</sup>

In short, UGI has failed to prove that there is no genuine issue of material fact that meters were relocated prior to September 13, 2014. UGI's representation of the significance of the service line installation date in its motion for summary judgment is contrary to the representation by counsel in response to my query regarding UGI's meter relocation records.

2. Meters installed beneath windows – Section 59.18(a)(8)(i)

UGI seeks summary judgment based on the Complainants' stipulation that certain meters are not "under an opening that could be a fire exit."<sup>19</sup> Since the meter is not under an opening that could be a fire exit, according to UGI, the meter placement cannot violate Section 59.18(a)(8)(i).

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<sup>17</sup> N.T. 101. The Complainants had also failed to serve a hard copy of the final Stipulated Spreadsheet as required by Paragraph 4 of the Sixth Prehearing Order. The Complainants were directed to do so at the June 15, 2017 conference. The Complainants served the hard copies later that day.

<sup>18</sup> E.g., 1711 Alcase Rd – service line installation 7/11/2008; Street Cut Permit Date 1/22/2016; 514 Chestnut Street – service line installation 6/16/1990; Building and Trade Permit date 7/11/2015. UGI Motion for Summary Judgment Appendix A, pg. 1.

<sup>19</sup> UGI Motion at Appendices C and D.

The Complainants in response do not directly address the stipulation that certain meters are not “under an opening that could be a fire exit.” Instead, they contend that it is enough to establish a violation of the regulation that a meter is beneath a window, and that it was not necessary to make a separate determination that the window could also serve as an emergency exit. The Complainants aver that there is a material fact that the meter location may “directly obstruct” a fire exit.

UGI has established that 337 highlighted meters in Appendices C and D, are under a window, but are **not** under an opening that could be a fire exit according to the data presented in the Stipulated Spreadsheets. Section 59.18(a)(8)(i), precludes the placement of meters “[b]eneath or in front of windows or other building openings that may directly obstruct emergency fire exits.” A plain reading of the regulation requires more than a meter placement beneath a window. The placement must also “directly obstruct emergency fire exits.” If the meter is placed beneath a window, but that window is not an emergency exit the placement cannot violate the regulation. Based on the Stipulated Spreadsheets, UGI has sustained its burden of proving that these meter placements do not violate Section 59.18(a)(8)(i), as a matter of law because the selected meters that are placed under windows are not “under an opening that could be used as a fire exit.”<sup>20</sup>

As the non-moving party and the party with the ultimate burden of proof in the case, the Complainants cannot defeat UGI’s motion by speculating that the meter placement may nevertheless present an obstruction of some other fire exit in violation of Section 59.18(a)(8)(i).<sup>21</sup> Nor can the Complainants defeat the motion by speculating on what the meter surveyors may or may not have intended by the observations made of the meter placements and how the results of those surveys were presented by the Complainants on the Stipulated Spreadsheet. The Stipulated Spreadsheets indicate that these particular meters are not “under an opening that could be used as

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<sup>20</sup> UGI Motion, Appendices C and D.

<sup>21</sup> *Marks v. Tasman*, 589 A.2d 205, 206 (Pa. 1991)(“Therefore, where a motion for summary judgment has been made and properly supported, parties seeking to avoid the imposition of summary judgment must show by specific facts in their depositions, answers to interrogatories, admissions or affidavits that there is a genuine issue for trial.”)

a fire exit.” In order to defeat the motion, the Complainants had to produce facts in support of their claim which demonstrate that there is an issue for trial.

In sum, UGI’s motion for summary judgment is granted on this issue. The Complainants claim that the 337 meters and meter infrastructures highlighted in gray on Appendices C and D to UGI’s motion for summary judgment violate Section 59.18(a)(8)(i), are dismissed.

3. Meters and Exterior Stairways – Section 59.18(a)(8)(iii)

UGI moves for summary judgment regarding seven meters which it claims are not under exterior stairways in violation of Section 59.18(a)(8)(iii). In support of its motion, UGI cites photographs presented by Complainants in discovery.<sup>22</sup>

In response, the Complainants withdraw their claim that two of the meters are located under an exterior stairway.<sup>23</sup> As to the remaining five meters, the Complainants dispute that the photographs definitively demonstrate that the meters are not placed underneath an exterior stairway.

I do not find the photographs alone to be so definitive as to the placement of the meter in relation to other fixtures that it is appropriate to grant summary judgment.

4. Meters Installed in Contact with Soil – Section 59.18(a)(8)(vi)

UGI has also moved for summary judgment alleging that 163 meters identified in Appendices E and F of the motion are not in contact with soil. In support of its motion UGI relies on photographs supplied by the Complainants in discovery and included in Appendix G of the UGI’s motion.

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<sup>22</sup> UGI Motion, Appendix G.

<sup>23</sup> 601 N. 3d Street and 506 W. Douglass Street.



In response, the Complainants “no longer contest the location of the 163 meters identified by UGI on Appendix E and F on the basis that the meters were installed ‘in contact with soil or other potentially corrosive materials . . . .’”<sup>24</sup>

In view of the Complainants’ withdrawal of its claim regarding the 163 meters, UGI’s motion for summary judgment on this claim is moot.

#### 5. Locations that Have No Meter Installed

UGI moves to dismiss claims regarding locations that do not have a meter. These locations are identified on the Stipulated Spreadsheet as having meter infrastructure only or having inactive gas service. UGI states, the Complainant’s claims that these locations violate either Section 59.18 or Section 59.33,<sup>25</sup> should be dismissed as a matter of law.

The Complainants respond that the presence of infrastructure indicates where a meter would be located if a customer requested gas service. Therefore, it is appropriate to

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<sup>24</sup> Complainants’ Response at p. 17.

<sup>25</sup> Section 59.33 provides:

(a) *Responsibility.* Each public utility shall at all times use every reasonable effort to properly warn and protect the public from danger, and shall exercise reasonable care to reduce the hazards to which employees, customers and others may be subjected to by reason of its equipment and facilities.

(b) *Safety code.* The minimum safety standards for all natural gas and hazardous liquid public utilities in this Commonwealth shall be those issued under the pipeline safety laws as found in 49 U.S.C.A. §§ 60101—60503 and as implemented at 49 CFR Parts 191—193, 195 and 199, including all subsequent amendments thereto. Future Federal amendments to 49 CFR Parts 191—193, 195 and 199, as amended or modified by the Federal government, shall have the effect of amending or modifying the Commission’s regulations with regard to the minimum safety standards for all natural gas and hazardous liquid public utilities. The amendment or modification shall take effect 60 days after the effective date of the Federal amendment or modification, unless the Commission publishes a notice in the *Pennsylvania Bulletin* stating that the amendment or modification may not take effect.

(c) *Definition.* For the purposes of this section, “hazardous liquid public utility” means a person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for transporting or conveying crude oil, gasoline, petroleum or petroleum products, by pipeline or conduit, for the public for compensation.

(d) *Enforcement.* Each public utility shall be subject to inspections as may be necessary to assure compliance with this section. The facilities, books and records of each public utility shall be accessible to the Commission and its staff for the inspections. Each public utility shall provide the Commission or its staff the reports, supplemental data and information as it shall from time to time request in the administration and enforcement of this section.

(e) *Records.* Each public utility shall keep adequate records as required for compliance with the code in subsection (b). The records shall be accessible to the Commission and its staff.

consider whether the location is consistent with the Commission's regulations. Therefore, in the Complainants' view, summary judgment is not appropriate.

As noted before, UGI's motion did not include a memorandum of law.<sup>26</sup> There is no dispute that certain locations do not have a meter or active gas service. However, the bald statements concerning the lack of the meter or active gas service made without an explanation for the basis of UGI's position that there is no violation of the Commission's regulations is not a sufficient basis upon which to grant summary judgment.

#### 6. UGI's Motion Regarding the Scope of the Proceeding

UGI also seeks summary judgment as to legal claims made by the Complainants which the utility claims are beyond the Commission's jurisdiction. Specifically, UGI seeks dismissal of claims that UGI (1) failed to comply with the City's historic district regulations; and (2) failed to obtain local permits from the City for the meter installation and relocation projects. UGI also contends that Section 59.18 does not mandate compliance with local ordinances as a matter of law and that the complaints should be dismissed because the relief requested by the Complainants cannot be granted. UGI finally claims that the Complainants seek relief regarding whether the City's historic district regulations are appropriate under state and federal law.

The Complainants contend that UGI's motion should be denied. In their view, statements made by the Commission in its Final Rulemaking Order<sup>27</sup> "represent an incorporation of some local historic district requirements *within* the overall requirements that are part of Section 59.18, as well as an incorporation of the protections afforded historic resources by federal law, state law, and the Pennsylvania Constitution."<sup>28</sup> Therefore, according to the Complainants, the Commission has jurisdiction to consider these issues.

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<sup>26</sup> A memorandum of law was required for both parties' motions and responses. See interim order dated June 15, 2017, Paragraph 7.

<sup>27</sup> L-2009-2107155 (Final Rulemaking Order entered May 23, 2014).

<sup>28</sup> Complainants Response to UGI's Motion for Summary Judgment, p. 21.

UGI claims that there is nothing in the Public Utility Code which grants the Commission the authority or jurisdiction to enforce local or state historic district regulations or ordinances. UGI also claims that it is entitled to judgment as a matter of law because nothing in Section 59.18 requires compliance with local ordinances. The Complainants argue that the Commission incorporated the requirements that UGI must comply with local historic district regulations and permitting requirements into Section 59.18.

As UGI correctly observes, the Commission, as a creature of legislation, possesses only the authority that the General Assembly has specifically granted to it in the Public Utility Code. That is, the Commission has only the powers expressly conferred or necessarily implied by its enabling statute.<sup>29</sup> The Commission must act within and cannot exceed its jurisdiction.<sup>30</sup> Jurisdiction may not be conferred by the parties where none exists.<sup>31</sup> Indeed, subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy.<sup>32</sup> It is correct to say that the Commission does not have independent authority to independently enforce local regulations or permit requirements.

However, the Complainants are not seeking enforcement of local ordinances in a vacuum. The essential dispute at the heart of these complaints is the significance and weight to be given to local restrictions when relocating meters from inside to outside in historical districts. The Commission gave significant consideration to this issue in crafting Section 59.18, and obviously did not intend to ignore issues related to exterior placement of meters in historical districts. Thus, the significance of local historic ordinances is not as narrow as argued by UGI.

Nor is the significance of local ordinances in relation to a utility's duty under Section 59.18 as broad as advocated by the Complainants. The Complainants suggest that

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<sup>29</sup> *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1977); *Allegheny County Port Authority v. Pa. Pub. Util. Comm'n*, 237 A.2d 602 (Pa. 1967). See also *Department of Environmental Resources v. Butler County Mushroom Farm*, 454 A.2d 1, 4 (Pa. 1982), and *Pequea Township v. Department of Environmental Protection*, 716 A.2d 678, 686 (Pa.Cmwlth. 1998).

<sup>30</sup> *City of Pittsburgh v. Pa. Pub.Util.Comm'n*, 43 A.2d 348 (Pa.Cmwlth. Ct. 1945).

<sup>31</sup> *Roberts v. Matorano*, 235 A.2d 602 (Pa. 1967).

<sup>32</sup> *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa.Cmwlth. Ct. 1992), *alloc. den.*, 637 A.2d 293 (1993).

language in the Commission’s May 23, 2014 Final Rulemaking Order means that the Commission “incorporated” local historic district requirements into Section 59.18.

We shall also decline to address visual impact alternatives that may avoid or minimize the impact of installing the meter and/or regulator outside. Although we would expect a gas utility or any utility to provide reasonable and adequate service when installing its equipment outside, we shall not attempt to set what may be subjective requirements that would avoid or minimize the impact to an historic resource.

....

The recommendation has been made that the regulations should develop requirements for relocating meters and regulators outside in locally designated historic districts and provide alternatives for typical historic building types. As we just indicated, we do have a number of guidelines for relocating meters outside which would apply to outside meters in locally designated historic districts. We do believe, however, that the utility, in applying the regulation, has an obligation to know whether gas line improvements and meter location projects are located in historic areas. This is a burden that any property owner or contractor would probably have in undertaking exterior improvements in an historic district, since the local municipality may require prior approval before a building permit is issued.<sup>33</sup>

Nor does Section 59.18 vest the Commission with the authority to opine as to the adequacy of any historic district regulations. Indeed, the Commission was invited by commenters to develop guidelines for the placement of meters and consideration of aesthetics but declined to do so.

This is not to say that UGI’s compliance with local historic regulations or compliance with permit requirements are completely irrelevant to whether UGI has complied with Section 59.18:

Generally, we agree that historic preservation consideration should be taken into account when considering where and how to install gas metering and regulating equipment.

...

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<sup>33</sup> Final Order at pp. 30-31 (footnote omitted).

Although we agree with EAP's general premise that utilities are subject to local ordinances in the installation of their facilities, and that the PUC has exclusive jurisdiction over service and facilities is not confined to the distribution of energy but can include any and all acts related to that function. Therefore, we might very well find that meters located outside in an historic district are not in the public interest for a number of reasons.<sup>34</sup>

Although the thrust of the Commission's development of Section 59.18 is public safety, the Commission clearly intended for utilities to have some sensitivity for historic resources:

If an outside meter is not going to become available because of certain restrictions, then an inside meter location must be considered, and that does not appear to us to be ambiguous.<sup>35</sup>

The Commission obviously did not intend to ignore historic districts. Unlike most non-historic areas, meters in historic districts can be placed inside in compliance with the regulation. However, the Commission did not want to set bright line restrictions, as recommended by some commenters, that might have significant safety implications in certain circumstances. Instead, the Commission entrusted discretion with the utilities to balance safety against preservation of the historic integrity of historic resources:

We agree that the regulation does contain provisions that delegate discretion to the utility in making a determination with respect to locating an outside meter. Although we believe that this is necessary that, due to its public safety obligations, the utility be allowed to make the final decision, this decision to locate a meter inside is not without discretion. The regulation does provide, in effect, guidelines that must be followed. If an outside meter is not going to become available because of certain restrictions, then an

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<sup>34</sup> *Rulemaking Re Amendment to 52 Pa.Code §59.18 Meter Location*, Docket L-2009-2107155 (Advance Notice of Final Rulemaking Order entered September 13, 2013), at Attachment One, p. 42-43.

<sup>35</sup> Final Order at p. 46. The Commission removed language in subsection which stated that "inside meter locations shall be considered only when: (i) an outside meter *is not available* due to one of the following restrictions: [certain historic designations]. As currently written, an historic designation does not make an outside meter "unavailable." It simply directs that a utility "shall consider" inside meter locations. See Final Order, Appendix A at p. 5.

inside meter location must be considered, and that does not appear to us to be ambiguous.<sup>36</sup>

Therefore, a failure to secure the proper permits similar to those “any property owner or contractor would probably have in undertaking exterior improvements in an historic district” or lack of a meaningful attempt to be aware of or comply with existing historic district regulations that may restrict exterior alterations, may be considered evidence of a failure to adequately “consider” indoor placement of the meter or a failure to provide reasonable service.<sup>37</sup>

In sum, UGI’s motion for summary judgment regarding the scope of the proceedings is granted in part and denied in part, consistent with the above discussion.<sup>38</sup>

### CONCLUSION OF LAW

1. The grant of summary judgment is only appropriate when there are no genuine issues of material fact in dispute. 52 Pa.Code § 5.102.

2. There is no genuine issue of material fact that meters located beneath windows that are not used as emergency exits do not violate 52 Pa.Code 59.18(a)(8)(i).

3. The Complainants’ withdrawal of its claim that 163 meters are in contact with soil or other corrosive material renders UGI’s motion for summary judgment on this claim is moot.

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<sup>36</sup> Final Order at p. 45-46. The Commission removed language in subsection which stated that “inside meter locations shall be considered only when: (i) an outside meter *is not available* due to one of the following restrictions: [certain historic designations]. As currently written, an historic designation does not make an outside meter “unavailable.” It simply directs that a utility “shall consider” inside meter locations. See Final Order, Appendix A at p. 5.

<sup>37</sup> *West Penn Power Co. v. Pa. Pub. Util. Comm’n*, 578 A.2d 75 (Pa.Cmwlth. 1990)(Although notifying a landowner of tree removal activity is not explicitly required by the Commission’s regulations, a utility’s failure to do so constitutes unreasonable service and is a violation of 66 Pa.C.S. § 1501.).

<sup>38</sup> This discussion of the role of existing local ordinances in historic districts should not be read so as to permit collateral litigation of the ordinances under consideration by the Commonwealth Court in *UGI Utilities, Inc. v. City of Reading*, 499 M.D. 2015.

ORDER

THEREFORE

IT IS ORDERED:

1. That UGI Utilities, Inc.'s Motion for Summary Judgment is granted as to 337 meters at properties highlighted on Appendices C and D of UGI's Motion for Summary Judgment do not violate Section 59.18(a)(8)(i).
2. That UGI Utilities, Inc.'s Motion for Summary Judgment as to the scope of the proceedings is granted in part and denied in part.
3. That UGI Utilities, Inc.'s Motion for Summary Judgment is denied in all other respects.

Date: August 28, 2017

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/s/  
Mary D. Long  
Administrative Law Judge