**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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|  | Public Meeting held December 21, 2017 |
| Commissioners Present:  Gladys M. Brown, Chairman  Andrew G. Place, Vice Chairman  Norman J. Kennard  David W. Sweet  John F. Coleman, Jr. |  |
| Centre Park Historic District, Inc.  v.  UGI Utilities, Inc.  City of Reading  v.  UGI Utilities, Inc. | C-2015-2516051  C-2016-2530475 |
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**OPINION AND ORDER**

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**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Letter Request to Withdraw Exceptions (Withdrawal Request), filed by UGI Utilities, Inc. (UGI) on October 31, 2017, in relation to the above-captioned proceedings. Centre Park Historic District, Inc. (CPHD) and the City of Reading (City) (collectively, the City Parties) filed a Letter in Opposition to the Withdrawal Request (Opposition Letter) on November 14, 2017. Also before the Commission are the Exceptions of UGI, filed on September 27, 2017, to the Initial Decision Denying in Part and Granting in Part UGI’s Motion for Summary Judgment (I.D. or Initial Decision) of Administrative Law Judge Mary D. Long, issued on September 7, 2017. The City Parties filed Replies to Exceptions on October 6, 2017. For the reasons stated below, we shall: (1) deny UGI’s Withdrawal Request; (2) deny UGI’s Exceptions; and (3) adopt the ALJ’s Initial Decision.

**History of the Proceeding**

On November 25, 2015, CPHD filed a Formal Complaint, alleging that UGI violated Section 59.18 of the Commission’s Regulations, 52 Pa. Code § 59.18, by failing to consider the inside meter placement in all designated historic districts in Reading, Pennsylvania. One of the pertinent provisions at issue in this proceeding is Section 59.18(d), which provides the following, in part:

 (d)  *Inside meter locations.*

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

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     (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.

On December 15, 2015, UGI filed an Answer denying the material allegations in the Complaint. UGI averred that Section 59.18 grants it discretion in the placement of meters in historic areas.

On February 17, 2016, the City filed a Formal Complaint against UGI, challenging UGI’s placement of meters in historic districts, in violation of Section 59.18, as well as the outside placement of meters in unsafe locations in historic districts and other districts of the city, in violation of Section 59.18 and 49 C.F.R. § 192.353. On March 14, 2016, UGI filed an Answer denying the material allegations of the Complaint, as well as Preliminary Objections seeking dismissal of the Complaint.

The City Parties have also raised allegations that UGI violated certain provisions of Section 59.18(a)(8) of the Commission’s Regulations. Section 59.18(a)(8) provides the following:

(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.

52 Pa. Code § 59.18(a)(8)(i)-(vi).

In its Preliminary Objections, UGI argued that the City’s Complaint should be dismissed because it requested relief that could not be granted in a complaint proceeding by asking the Commission to impose new rules and standards concerning meter location that do not currently exist under the Commission’s Regulations. UGI stated that the City should have petitioned the Commission for the issuance or amendment of Regulations, consistent with 52 Pa. Code § 5.43. The City filed an Answer to the Preliminary Objections on March 24, 2016. In its Answer, the City averred that it is not seeking to amend current Regulations or requesting that the Commission promulgate new Regulations, but, rather, it is seeking an adjudication of its Complaint to provide clarity to the Parties regarding the proper application of

Section 59.18.

By Interim Order dated March 29, 2016 (March 2016 Order), ALJ Long denied UGI’s Preliminary Objections. In doing so, the ALJ stated that the City’s Complaint challenges UGI’s application of a Commission Regulation and whether UGI’s actions in the placement of meters in the City complied with the Regulations. The ALJ found that such a determination is fact-intensive and does not lend itself to resolution based only on the pleadings.

By Prehearing Order dated March 30, 2016, the Complaints of CPHD and the City were consolidated.

On August 10, 2016, the Commission’s Bureau of Investigation and Enforcement (I&E) filed a Notice of Appearance.

On September 1, 2016, UGI filed a Petition for Interlocutory Review and Answer to Material Question (Petition). UGI sought interlocutory review and answer to the following Material Questions:

(1) Whether the CPHD’s and the City’s Complaint should be dismissed because the relief requested – impose new rules and standards concerning meter locations that do not currently exist under the PUC’s regulations – is beyond the scope of a formal complaint proceeding and should be addressed through a petition for amendment of the PUC’s regulations pursuant to 52 Pa. Code § 5.43.

(2) Alternatively, whether the scope of the evidence and issues to be addressed in this proceeding should be limited to whether the locations of UGI’s meters violate the Public Utility Code or PUC regulations as currently enacted.

UGI requested that the Commission answer the Material Questions in the affirmative. Petition at 2. The City Parties filed a Brief in Opposition to the Petition on September 9, 2016. UGI filed a Brief in Support of the Petition on September 12, 2016.

By Order entered February 9, 2017 (*Interlocutory Review Order*), the Commission declined to answer the Material Questions UGI presented in its Petition and returned the matter to the Office of Administrative Law Judge.

The ALJ issued a Sixth Prehearing Order, dated March 21, 2017, that, *inter alia*, directed the City Parties to produce spreadsheets containing a list of disputed meters which included the date the City issued a permit and the date each meter was relocated or installed (Stipulated Spreadsheets). UGI was provided with the opportunity to respond by stipulating or objecting to the facts related to each contested meter. The ALJ issued an Eighth Prehearing Order, dated April 19, 2017, that excused the City Parties from providing the date each meter was relocated or installed. Instead, the Eighth Prehearing Order directed UGI to provide the dates of service line installation for the contested meters and provided the City Parties with the opportunity to stipulate or object to UGI’s service line installation data.

On July 6, 2017, the City Parties filed a Motion for Partial Summary Judgment. UGI filed an Answer to the Motion for Partial Summary Judgement on July 26, 2017. By Interim Order dated September 7, 2017, the ALJ denied that Motion.

Also, on July 6, 2017, UGI filed a Motion for Summary Judgment (Motion), which is addressed herein, requesting that the above-captioned Complaints be dismissed, in whole or part. UGI’s Motion was supported by the Stipulated Spreadsheets and certain photographs that were produced by the City Parties during discovery and referenced on the Stipulated Spreadsheets. UGI’s Motion did not include a legal memorandum as the ALJ directed in the Interim Order dated June 15, 2017. On July 26, 2017, the City Parties filed a Response to the Motion along with a Brief in Opposition to the Motion.

In its Motion, UGI first averred that it is entitled to judgment as a matter of law regarding 1,147 meters in historic and non-historic districts that were relocated prior to the effective date of Section 59.18 of the Commission’s Regulations. In response, the City Parties averred that they did not stipulate or agree that the service line installation date was the same date that the meter was relocated.

Second, UGI argued that there was no genuine issue of material fact regarding 337 meters that are not located beneath or in front of an opening that can be used as a fire exit and, therefore, these meters cannot violate Section 59.18(a)(8)(i) of the Commission’s Regulations, 52 Pa. Code § 59.18(a)(8)(i). In response, the City Parties argued that it was enough to show that a meter was beneath a window and that it was not necessary to show that the window could also serve as an emergency fire exit.

Third, UGI averred that pictures the City Parties provided during discovery show that 163 meters are not in contact with the soil or other corrosive material and, therefore, cannot be in violation of Section 59.18(a)(8)(vi) of the Commission’s Regulations, 52 Pa. Code § 59.18(a)(8)(vi). The City Parties withdrew their claims regarding these 163 meters.

Fourth, UGI argued that pictures the City Parties provided during discovery demonstrate that none of the meters in historic districts are located under exterior staircases and, therefore, cannot be in violation of Section 59.18(a)(8)(vi) of the Commission’s Regulations, 52 Pa. Code § 59.18(a)(8)(iii). In reply, the City Parties withdrew their claim that two of the meters were located under an exterior stairway, but, as to the remaining five meters, the City Parties maintained that the photographs clearly show the meters are not placed underneath an exterior stairway.

Fifth, UGI asserted that there was no genuine issue of material fact pertaining to 118 locations identified by the City Parties that do not contain a meter. In response, the City Parties argued that the presence of infrastructure indicated where a meter would be located if a customer requested gas service.

Sixth, UGI argued that it was entitled to summary judgment regarding claims and issues that it contended are beyond the Commission’s subject matter jurisdiction, including UGI’s compliance with the City’s historic district regulations; the City’s local street cut permits and building and trade permits; and claims related to the legality of the City’s historic district regulations. The City Parties responded that the statements the Commission made in the *Final Rulemaking Order: Rulemaking Re Amendment to 52 Pa. Code § 59.18 Meter Location*, Docket No. L-2009-2107155 (Order entered May 23, 2014) (*Final Rulemaking Order*) incorporate within the overall

Section 59.18 requirements some local historic district requirements, along with the protections afforded historic resources by federal and state law and the Pennsylvania Constitution.

Finally, UGI argued that it is entitled to judgment as a matter of law because the City Parties have requested relief that cannot be granted in a Section 701[[1]](#footnote-1) Complaint proceeding on the basis that it would impose new regulatory requirements on UGI that conflict with or do not exist in the Commission’s current Regulations. In reply, the City Parties stated that they are asking the Commission for relief that falls directly within Section 701 of the Code: to determine whether UGI has violated Section 59.18 in connection with the manner in which UGI has been applying that Regulation.

In the Initial Decision, issued September 7, 2017, the ALJ granted the Motion, in part. As previously noted, the Parties filed Exceptions and Replies to Exceptions.

By Interim Order dated October 5, 2017 (October 5 Interim Order), the ALJ suspended this proceeding pending the Commission’s decision on the Exceptions.

By email dated October 17, 2017, UGI requested a conference call to “discuss the status of the proceedings and potential approaches to move the case faster toward disposition.” By email, the City Parties objected to the request on the basis that it would be inefficient to further litigate the Complaints while the Commission considers UGI’s Exceptions. ALJ Long directed UGI to file a motion to vacate the October 5 Interim Order and to include a thorough proposal explaining an approach to move the case faster toward a final disposition. Interim Order on Request for Further Proceedings, dated October 18, 2017.

On October 31, 2017, UGI filed a Motion to Vacate the October 5 Interim Order (Motion). Also on October 31, 2017, UGI filed the instant Withdrawal Request. UGI’s request to vacate the October 5 Interim Order and proposal for further proceedings was premised upon the Commission’s approval of UGI’s Withdrawal Request.

On November 14, 2017, the City Parties filed a Response to UGI’s Motion, objecting to the Company’s proposal to move the matter forward. The City Parties averred that nothing in the Commission’s rules permits a “conditional withdrawal” of the Exceptions. The City Parties stated that without a Commission disposition of the Exceptions or an unconditional withdrawal of the Exceptions, uncertainty would be created, making it difficult for the City Parties to prepare their case. The City Parties also objected to the timeframe proposed by UGI for the preparation of written testimony and hearing. Also on November 14, 2017, the City Parties filed their Opposition Letter.

In the Interim Order on Motion to Vacate, dated November 16, 2017 (November 2017 Interim Order), ALJ Long emphasized that UGI’s Exceptions are not solely related to a single narrow issue that could be bifurcated from the proceeding. Rather, the ALJ stated that UGI’s Exceptions seek dismissal of the Complaints in their entirety. The ALJ also stated that if the Commission does not permit UGI’s conditional withdrawal of its Exceptions, it is not a judicious use of resources to attempt to litigate a matter which could be dismissed. The ALJ concluded that she has no authority to schedule further proceedings until the Commission acts on either the request to conditionally withdraw the exceptions or on the Exceptions themselves. The ALJ additionally directed the Parties to serve written testimony within sixty days of the Commission’s action on the Exceptions or on UGI’s request to conditionally withdraw the Exceptions and determined that an evidentiary hearing would be scheduled thirty days after the service of written testimony.

On November 21, 2017, the Commonwealth Court issued an unreported, single judge Memorandum Opinion in *UGI Utilities, Inc. v. City of Reading and Pa. PUC* (*UGI Utilities*), 2017 Pa. Commw. LEXIS 957. Pursuant to Section 414 of the Internal Operating Procedures of the Commonwealth Court, this opinion may be cited for its persuasive value and not as binding precedent. In *UGI Utilities*, UGI commenced an enforcement action in Commonwealth Court, seeking a declaratory judgment that the City’s Ordinance 45-2015 was invalid and a permanent injunction barring the City from enforcing the Ordinance. Judge James Gardner Colins determined that the City’s Ordinance No. 45-2015 was preempted by the Public Utility Code and

52 Pa. Code § 59.18 and enjoined the City from enforcing that Ordinance. While the subject matter of the Commonwealth Court proceeding is outside of our jurisdiction and the decision on the Ordinance does not materially impact our discussion in this Opinion and Order, we note that our discussion herein is consistent with the discussion regarding our regulatory authority under Section 59.18 that is set forth in the Memorandum Opinion.

**Discussion**

As a preliminary matter, we note that any issue we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. [*Consolidated Rail Corp. v. Pa. PUC,* 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also see, generally,* [*University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

**Request to Withdraw Exceptions**

**1. Positions of the Parties**

UGI requests permission to withdraw its Exceptions, “provided that UGI retains the right to raise these issues and arguments in briefing and, if necessary, in Exceptions from an Initial Decision issued after the conclusion of the evidentiary hearings.” Withdrawal Request at 1. UGI avers that it did not file its Exceptions to delay the final resolution of this matter and that it is looking forward to a prompt and final resolution regarding the location of its meters and the application of Section 59.18 of the Commission’s Regulations. UGI explains that it was constrained procedurally by 52 Pa. Code § 5.536, which requires a party to file Exceptions to an Initial Decision to preserve its rights. UGI continues that it filed Exceptions to ensure that it did not waive significant legal issues, including the scope of this Complaint proceeding, from further review by the Commission or appellate courts. UGI asks that the Commission allow UGI to withdraw its Exceptions and permit the Parties to raise the issues in its Exceptions in briefing and in Exceptions to an Initial Decision issued after the conclusion of the evidentiary hearings. UGI believes this process would be more efficient and enable the Commission to address all issues in one order after the hearings are concluded. Withdrawal Request at 2.

In their Response, the City Parties object to UGI’s withdrawal of its Exceptions. The City Parties state that UGI may withdraw its Exceptions pursuant to Section 5.539 of the Commission’s Regulations, 52 Pa. Code § 5.539, however, upon the withdrawal, the Initial Decision becomes “final and effective.” The City Parties aver that there is no legal provision governing Exceptions to an Initial Decision that provides the remedy sought by UGI – the simultaneous withdrawal and preservation of the issues raised in Exceptions. Response at 1. The City Parties argue that such a practice would be in direct conflict with Section 5.539, and UGI has not identified any authority to support its request for special treatment and an exemption from the Commission’s Regulations. The City Parties additionally aver that UGI’s request does not serve the public interest of judicial economy because the City Parties have already incurred legal fees requiring the expenditure of public funds when they filed their Replies to Exceptions. The City Parties believe that the public interest is best served by moving forward with a final disposition of the issues raised in the Exceptions so that the issues do not continue unresolved throughout the course of the litigation on the merits. Accordingly, the City Parties request that the Commission deny UGI’s request to withdraw its Exceptions and that the Commission proceed to decide the merits of the issues raised in the Exceptions. Response at 2.

**2. Disposition**

#### Based on our review of the Parties’ positions and the applicable law, we shall deny UGI’s Withdrawal Request under the present circumstances. Section 5.539 of our Regulations, which governs the withdrawal of Exceptions, provides the following:

#### § 5.539. Withdrawal of appeals.

  (a)  The filing of exceptions to a recommended or initial decision shall be deemed to be an appeal to the Commission of the recommended or initial decision and is subject to review by the Commission.

  (b)  An appeal to the Commission may be withdrawn at any time. If the presiding officer’s previous decision is not otherwise subject to Commission review, it becomes final and effective upon the filing of a notice of withdrawal.

52 Pa. Code § 5.539. The Regulation permits a party to withdraw its Exceptions at any time. The result of the filing of a notice to withdraw is the same result that would occur if no Exceptions had been filed in the first instance – if the ALJ’s decision is not subject to Commission review, the decision becomes final.[[2]](#footnote-2)

This is the procedure that is typically followed when a party wishes to withdraw its Exceptions; however, UGI’s Withdrawal Request is not a straight-forward withdrawal. UGI asks that it be permitted to retain the right to raise the issues in its Exceptions during the briefing stage and in Exceptions to an Initial Decision issued after the conclusion of the evidentiary hearings. This is a highly contested proceeding in which other Parties, the City Parties, object to the withdrawal based on its conditional nature. UGI’s conditional withdrawal appears to run counter to the language and purpose of Section 5.539 and prior Commission decisions in which we have determined that arguments not raised by parties in their Exceptions or earlier in a proceeding are deemed to be waived. *See* *Pa. PUC v. Uber Technologies, Inc*., Docket No. C-2014-2422723 (Order entered September 1, 2016); *Ruth Matieu-Alce v. Philadelphia Gas Works*, Docket No. F-2015-2473661 (Order entered April 7, 2016); *Petition of PPL Electric Utilities Corporation for Approval of a Distribution System Improvement Charge*, Docket Nos. P-2012-2325034, *et al.* (Order entered October 1, 2015).

The procedural posture of this case is also unique in that the Exceptions relate to an Initial Decision on preliminary objections and not to an Initial Decision issued after an evidentiary hearing has been conducted. As the ALJ noted in the November 2017 Interim Order, UGI is seeking dismissal of the Complaints in their entirety. We find that addressing the Exceptions now will provide some certainty on the issues to be litigated during the hearings and will be a more judicious and expedient use of the Commission’s and the Parties’ resources throughout the remainder of the proceeding. This process will also enable UGI to preserve the issues in its Exceptions for purposes of a potential petition for reconsideration or appeal. For all of these reasons, we shall deny UGI’s request to conditionally withdraw its Exceptions.

**Exceptions to Initial Decision**

**1. Legal Standards**

In the Initial Decision, ALJ Long reached four Findings of Fact, I.D. at 5, and three Conclusions of Law, I.D. at 22. We shall adopt and incorporate herein by reference the ALJ’s Findings of Fact and Conclusions of Law unless they are either expressly or by necessary implication overruled or modified by this Opinion and Order.

The Initial Decision before us is a ruling on UGI’s Motion for Summary Judgment. Motions for summary judgment are governed by Section 5.102 of our Regulations, which provides, in relevant part, as follows:

**§ 5.102. Motions for summary judgment and judgment on the pleadings.**

**\* \* \***

(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 of material fact and that the moving party is entitled to a judgment as a matter of law.

Summary judgment is available when the pleadings, depositions, and other documents show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment should be granted only when the right to relief is clear and free from doubt. In determining the absence of a genuine issue of material fact, the Commission must view the record in the light most favorable to the non-moving party and resolve any doubts against the entry of the judgment. *Day v. Volkswagonwerk Aktiengesellschaft*, 464 A.2d 1313, 1316 (Pa. Super. 1983). In this proceeding, UGI bears the burden of demonstrating clearly that there is no genuine issue of material fact; however, as the non-moving party the Complainant must allege facts showing that an issue for trial exists. *First Mortgage Co. of Pennsylvania v. McCall*, 459 A.2d 406 (Pa. Super. 1983); *Commonwealth v. Diamond Shamrock Chemical Co*., 391 A.2d 1333 (Pa. Cmwlth. 1978).

The provisions at 52 Pa. Code § 5.102 serve judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa. C.S. § 703(a); *Lehigh Valley Power Committee v. Pa. PUC*, 563 A.2d 557 (Pa. Cmwlth. 1989).

**2. Initial Decision**

First, the ALJ addressed UGI’s argument that it is entitled to summary judgment because 1,147 meters were relocated before the effective date of the amended Section 59.18. The ALJ noted that UGI’s argument is based on the service line installation dates provided on the Stipulated Spreadsheets. The ALJ found that UGI is not entitled to judgment as a matter of law because the service line installation dates are not the same as the dates the meters were relocated. I.D. at 10. The ALJ reasoned that UGI did not represent during the development of the Stipulated Spreadsheets that the meters were relocated at the same time the service lines were installed. *Id*. at 13 (citing UGI Letter dated May 15, 2017, at 3). The ALJ stated that the City Parties’ stipulation to the service line installation date did not constitute a stipulation that the meters were relocated before the effective date of Section 59.18. The ALJ also stated that UGI’s claim in its Motion contradicts UGI’s representation in response to the ALJ’s question regarding UGI’s meter relocation records that the service line installation date and the permit issuance dates provide the “relative timeframe for each meter installation.” I.D.

at 14. The ALJ observed that the timeframe between the service line installation and the issuance of permits in many cases spans several years, and the service line installation date is of questionable value in establishing the approximate meter relocation date. *Id*. (citing Motion Appendix A at 1).

Second, the ALJ addressed UGI’s basis for summary judgment that certain meters are not under an opening that could be a fire exit and, accordingly, the meter placement cannot violate Section 59.18(a)(8)(i) of the Commission’s Regulations. I.D.

at 14 (citing Motion Appendices C and D). The ALJ stated that 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 based on the data in the Stipulated Spreadsheets. The ALJ concluded that a plain reading of Section 59.18(a)(8)(i) requires more than a meter placement beneath a window – the placement must also “directly obstruct emergency fire exits.” The ALJ determined that based on the Stipulated Spreadsheets, UGI had shown, as a matter of law, that these meter placements do not violate the Regulation because the selected meters are not under an opening that could be used as a fire exit. I.D. at 15. As such, the ALJ dismissed the City Parties’ claim that the 337 meters and meter infrastructures highlighted on Appendices C and D of the Motion violate Section 59.18(a)(8)(i). I.D. at 16.

Third, the ALJ addressed UGI’s claim that five meters are not under exterior stairways in violation of Section 59.18(a)(8)(iii). UGI relied on photographs the City Parties presented during discovery, attached to UGI’s Motion as Appendix G. The ALJ concluded that the photographs alone were not so definitive on the placement of the meters in relation to other fixtures that it was appropriate to grant summary judgment. I.D. at 16.

Fourth, the ALJ addressed UGI’s argument in favor of summary judgment that 163 meters identified in Appendices E and F of the Motion are not in contact with the soil. UGI relied on photographs the City Parties supplied during discovery, which are included in Appendix G of the Motion. I.D. at 16. The City Parties withdrew their claim regarding these 163 meters and, accordingly, the ALJ found UGI’s Motion pertaining to these meters to be moot. *Id*. at 17.

Fifth, the ALJ addressed UGI’s motion to dismiss claims regarding locations that do not have a meter and are identified on the Stipulated Spreadsheets as having meter infrastructure only or having inactive gas service. *Id*. The ALJ noted the City Parties’ position that the presence of infrastructure indicates where a meter would be located if a customer requested gas service and, therefore, it is appropriate to consider whether the location is consistent with the Commission’s Regulations. The ALJ acknowledged that while there was no dispute that certain locations do not have a meter or active gas service, UGI’s statements, without explanation for the basis of its position that there is no violation of the Commission’s Regulations, were an insufficient basis for granting summary judgment. The ALJ stated that UGI’s Motion did not include a memorandum of law to explain its legal argument, as required by the ALJ’s Interim Order dated June 15, 2017. *Id*. at 18.

Sixth, the ALJ addressed UGI’s argument for summary judgment on the basis that the City Parties’ legal claims are beyond the Commission’s jurisdiction. Specifically, UGI sought dismissal of the claims that: (1) UGI failed to comply with the City’s historic district regulations; and (2) UGI failed to obtain local permits from the City for the meter installation and relocation projects. UGI contended that Section 59.18 does not mandate compliance with local ordinances as a matter of law, and the relief the City Parties request cannot be granted because the Commission does not have jurisdiction to enforce local or state historic district regulations or ordinances. *Id*. The ALJ stated it is correct that the Commission does not have authority to independently enforce local regulations or permit requirements. The ALJ continued, however, that the City Parties are not seeking enforcement of local ordinances in a vacuum, rather, the focus of the Complaints is the significance and weight to be given to local restrictions when relocating meters from inside to outside in historical districts. The ALJ concluded that the significance of local historic ordinances is not as narrow as UGI argued. *Id*. at 19.

The ALJ also concluded that the significance of local ordinances in relation to a utility’s duty under Section 59.18 is not as broad as the City Parties argued. *Id*. The ALJ rejected the City Parties’ argument that Section 59.18 incorporated local ordinances requiring indoor placement of meters. The ALJ stated that Section 59.18 does not vest the Commission with authority to assess the adequacy of historic district regulations, and noted that the Commission was asked by commenters to development guidelines for the placement of meters and consideration of aesthetics but declined to do so. *Id*. at 20 (citing *Final Rulemaking Order* at 30-31). The ALJ continued that this was not to say UGI’s compliance with local historic regulations or permit requirements is completely irrelevant regarding whether UGI has complied with Section 59.18. I.D. at 20. The ALJ noted that, while the main focus of the Commission’s development of Section 59.18 was public safety, the Commission also clearly intended for utilities to have some sensitivity for historic resources. *Id*. at 21 (citing *Final Rulemaking Order* at 46). The ALJ observed that unlike most non-historic areas, meters in historic districts can be placed inside in compliance with Section 59.18. However, the ALJ also observed that the Commission did not set “bright line restrictions” that might have safety implications in certain situations, but, rather, entrusted the utilities with discretion to balance safety considerations with the preservation of historic resources. I.D. at 21-22 (citing *Final Rulemaking Order* at 45-46). The ALJ determined that a failure to secure the proper permits that “any property owner or contractor would probably have in undertaking exterior improvements in a historic district” or a lack of a meaningful attempt to comply with historic district regulations, may be considered proof of a failure to “consider” indoor placement of the meter or a failure to provide reasonable service under Section 1501 of the Code. I.D. at 22. The ALJ pointed out that her discussion of the role of local ordinances in historic districts should not be read to permit collateral litigation of the ordinances under consideration by the Commonwealth Court in *UGI Utilities.*

*Id*. at n. 38.

**3. Exceptions, Replies, and Disposition**

**a. Locations Without an Installed Meter**

In itsfirst Exception, UGI avers that the ALJ erred in denying UGI’s Motion regarding locations where no meters are installed. The meter infrastructure and inactive service locations at issue are listed on Appendix I and J to UGI’s Motion. UGI explained in its Motion that the Parties collectively identified in the Stipulated Spreadsheets fifty-eight historic locations and sixty non-historic locations that have meter infrastructure and/or inactive gas service. Motion at 25. UGI states that the City Parties’ allegations concerning these locations are based solely on the presence of “meter infrastructure” as an indication that a meter may be installed at some unknown future time. Exc. at 4. UGI contends that the City Parties’ allegations are legally flawed because they are seeking to hold UGI accountable for conduct that has not occurred, and the Commission’s Regulations govern actual installation and location of meters, not speculated future meter location. UGI indicates that it has not installed or relocated any meters at these 118 properties and, therefore, it cannot as a matter of law be found in violation of the Commission’s Regulations for installing a meter in a prohibited location. *Id*. at 5.

In their Replies to Exceptions, the City Parties aver that the ALJ properly denied UGI’s Motion with respect to the properties that contain meter infrastructure but do not currently contain meters. R. Exc. at 3. The City Parties state that UGI has failed to cite to any legal authority in support of its argument that the lack of a meter, presently, requires the ALJ, *per se*, to determine that a violation of Section 59.18 cannot be found. *Id*. at 3-4. Further, the City Parties contend that UGI is assuming a fact not in evidence – that the infrastructure identified by the City Parties would never be used to install an exterior meter. The City Parties argue that UGI would not install meter infrastructure in a place where it did not plan to install a meter if a customer requested gas service. The City Parties believe that this issue will be “fleshed out” during cross-examination of UGI’s witnesses during the evidentiary hearings and, if UGI indicates an intention to install a meter at the location of the infrastructure, then, the City Parties contend, the infrastructure is properly the subject of this proceeding. *Id*. at 4.

Our role at this stage of the proceeding is to determine if there are issues of material fact proper for a hearing – we are not herein reaching a determination on the merits or finding a violation of our Regulation regarding these issues. Based on our review of the Parties’ pleadings and the Stipulated Spreadsheets, we find that there are factual issues concerning the locations with meter infrastructure, and UGI has not shown that its right to relief on this issue is clear and free from doubt. Section 59.18 of our Regulations governs meter placement and relocation and broadly applies to both (1) “new meter, regulator and service line installations in new locations,” and (2) “replacing existing meters, regulators and service line facilities.” 52 Pa. Code § 59.18(g). The regulatory provisions at issue in this case are Section 59.18(d), which conveys that a gas utility consider inside meter locations prior to installing or relocating meters outside, and Section 59.18(a)(8), which prohibits a utility from installing meters in certain locations. As the City Parties note, the presence of meter infrastructure may be indicative of UGI’s plan to install a meter in those locations and may, therefore, trigger UGI’s compliance responsibility under these regulatory provisions. These factual issues are appropriate for the Parties to develop during evidentiary hearings, and the ALJ can exercise her discretion at that time to limit or exclude evidence or testimony as necessary. As such, we deny UGI’s Exception.

**b. The Scope of the Proceeding**

In its second Exception, UGI argues that the ALJ erred in implying that Section 59.18 requires gas utilities to consider or comply with local historic district regulations and permit requirements. *Id*. UGI specifically objects to the ALJ’s following statement: “Therefore, a failure to secure the proper permits . . . 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.” *Id*. at 6 (citing I.D. at 22). UGI states that it does not contest that Parties can attempt to introduce information related to local permits and ordinances as evidence that a building is located in a historic district, thereby allowing a gas utility to consider inside meter location under Section 59.18. UGI, however, believes that the Initial Decision goes much further by suggesting that a Section 59.18 violation can be found if a utility fails to secure the proper local permits; make an attempt to be aware of existing historic district regulations; and comply with existing historic district regulations. UGI avers that the Code does not give the Commission authority to enforce compliance with local ordinances, regulations, or permits, and the Commission cannot grant itself authority that was not conferred on it by the General Assembly. Exc. at 6. UGI also avers that Section 59.18(d)(1)(ii) expressly provides that gas utilities need only “consider” inside meter locations for buildings that are historic, eligible to be historic, located in historic districts, or located in areas that are eligible to be historic districts, and the Commission’s Regulations do not require utilities to consider or comply with local historic district regulations or to obtain local permits when installing or relocating a gas meter. *Id*. at 6-7.

Additionally, UGI states that, during the rulemaking process that amended Section 59.18, the Commission considered and rejected establishing a requirement for gas utilities to comply with local historic district regulations. *Id*. at 7 (citing *Final Rulemaking Order* at 30-31). UGI avers that the *Final Rulemaking Order* clearly states that gas utilities retain the discretion to decide where to install their meters in compliance with the Regulation. UGI indicates that the Commission declined to adopt the approach recommended by commenters that suggested the Commission require inside meter locations in historic districts or require utilities to comply with local historic district regulations. Exc. at 7 (citing *Final Rulemaking Order* at 12-13, 30-31, 45-46).

In response, the City Parties state that the ALJ properly denied UGI’s Motion on this issue. The City Parties’ position is that UGI’s Exception pertains to one of the core questions before the ALJ: How much “consideration” of interior meter placement in historic districts does Section 59.18 require? The City Parties contend that UGI interprets Section 59.18 as allowing utilities the full discretion to determine what, if any, consideration is required, and there is no language in the Regulation that supports UGI’s position. R. Exc. at 5. The City Parties support the ALJ’s analysis of the Commission’s jurisdiction over the issues in this case. The City Parties note that there is a difference between having the authority to enforce local historic district regulations, which the ALJ acknowledged is not within the Commission’s jurisdiction, and the question of whether UGI must “consider” such local historic district regulations to comply with Section 59.18. The City Parties aver that UGI essentially argues that local historic district regulations can and should be ignored by a public utility as irrelevant because Section 59.18 does not require a utility to follow any local regulation. The City Parties continue that UGI’s contention contradicts the language in the *Final Rulemaking Order* as well as the Commission’s obligation to protect the historic resources of this Commonwealth pursuant to Article I, Section 27 of the Pennsylvania Constitution.

R. Exc. at 6. According to the City Parties, the ALJ’s conclusion that a utility’s failure to obtain proper permits or to be aware of or comply with existing historic district regulations may be considered evidence of failure to adequately consider interior meter placement is well-founded and well-reasoned. The City Parties submit that whether UGI properly considered inside meter placement or whether it violated Section 59.18 are factual issues that can only be properly determined following a hearing. *Id*. at 7.

Upon review, we find that the ALJ’s analysis regarding our jurisdiction in this matter is legally sound and consistent with the *Final Rulemaking Order*. As a creature of legislation, this Commission has only the authority the legislature has granted to us in the Code. *Feingold v. Bell*, 477 Pa. 1, 383 A.2d 791 (1977); *Allegheny County Port Authority v. Pa. PUC*, 237 A.2d 602 (Pa. 1967). As the ALJ correctly stated, we do not have jurisdiction to enforce local regulations or permit requirements. *See* I.D. at 19. However, we do have jurisdiction to ensure that a gas utility is providing reasonable and adequate service to its customers, and such service may include an assessment of a utility’s actions in installing its equipment outside and whether a utility has given adequate and reasonable “consideration” to inside meter locations under Section 59.18(d) of our Regulations. While the Commission has been clear that, due to a utility’s public safety obligations, utilities retain the discretion to make the final decision regarding meter location, the Commission has also acknowledged a utility’s responsibility to ensure that it is providing reasonable and adequate service in making that decision. In crafting the amendment to Section 59.18, we stated:

[W]e further clarify that our jurisdiction over service and facilities is not confined to the distribution of energy but can include any and all acts related to that function. *West Penn Power v. Pennsylvania Public Utility Commission*, 578 A.2d 75 (Pa. Cmwlth. 1990). Therefore, we might very well find that meters located outside in a historic district are not in the public interest for a number of reasons.

*Advance Notice of* *Final Rulemaking Order: Rulemaking Re Amendment to*

*52 Pa. Code § 59.18 Meter Location*, Attachment 1 at 43, Docket No. L-2009-2107155 (Order entered September 13, 2013); *see also Final Rulemaking Order* at 30.

The *Final Rulemaking Order* also provides that a utility, in applying Section 59.18(d), is obligated to know whether meter location projects are occurring in historic districts. We stated, “This is a burden that any property owner or contractor would probably have in undertaking exterior improvements in a historic district, since the local municipality may require prior approval before a building permit is issued.” *Final Rulemaking Order* at 31. The ALJ considered this portion of the *Final Rulemaking Order* in generally discussing the type of evidence that may be relevant in determining whether a gas utility adequately considered indoor meter placement or whether a gas utility provided reasonable service under the circumstances. We do not read the ALJ’s discussion as establishing a definitive rule for situations in which violations of Section 59.18(d) will be found. Moreover, we do not intend to establish such a definitive rule in reaching a determination that there are jurisdictional issues present here that are appropriate for an evidentiary hearing. We find that the ALJ’s decision properly balances our lack of jurisdiction to enforce local regulations or permit requirements with our jurisdiction to evaluate whether UGI’s meter placements violate Section 59.18. Accordingly, we shall deny UGI’s Exception on this issue.

**c.** **Available Relief in this Complaint Proceeding**

Third, UGI contends that the ALJ failed to address UGI’s argument in its Motion that the Commission cannot grant the City Parties’ requested relief in a Section 701 complaint proceeding, because it would impose regulatory requirements regarding meter locations that conflict with or do not exist in the Commission’s Regulations. UGI states that while the ALJ acknowledged its argument that the Complaints here should be dismissed because the relief requested by the Complainants cannot be granted, the ALJ did not fully address its argument. Exc. at 9. UGI requests that if the Commission determines that the Complaints should not be dismissed in their entirety, then the Commission should clarify the relief that can be granted in order to facilitate the Parties’ efforts in the development and litigation of a complete record on the issues before the Commission for adjudication. *Id*. at 9-10 n. 7. UGI maintains that the Complainants’ requested relief, if granted, would require UGI to place all meters in designated historic districts inside buildings, “except where the utility establishes a greater safety risk than in similarly situated historic properties.” Exc. at 12 (citing City Complaint at ¶ 53(i)). UGI argues that this relief conflicts with Section 59.18(d)(1), which requires only that a utility “consider” inside meter locations for historic district buildings. Exc. at 12-13.

Further, UGI asserts that the City Parties’ requested relief seeks to impose new, additional regulatory requirements that only would apply to UGI. For example, UGI points to the City’s request that UGI be required to provide a statement of justification to the City when UGI installs an exterior gas meter in a historic district. Exc. at 13 (citing City Complaint ¶ 53(e), (g)). UGI continues that the City attempts to impose new regulatory requirements on the exterior placement of gas meters related to the meters’ historical and aesthetic impact. Exc. at 13 (citing City Complaint at ¶ 53(f) and (h)). UGI also avers that the City Parties propose new restrictions on exterior meter locations related to their safety concerns, for instance, CPHD’s request that UGI be prohibited from installing any outside meter within 10’ of a City walk unless it is placed in a buried vault. Exc. at 13 (citing CPHD Complaint ¶ 5). UGI believes that if the City Parties disagree with the Commission’s meter relocation Regulations or wish to impose new regulatory requirements, they should file a petition pursuant to 52 Pa. Code § 5.43 to amend or modify the Regulations. Exc. at 14.

In their Replies to Exceptions, the City Parties aver that the ALJ properly denied UGI’s Motion concerning the scope of relief sought in the City Parties’ Complaints. The City Parties emphasize that UGI previously requested that the Commission limit the scope of relief available in this case in its Petition for Interlocutory Review. R. Exc. at 7. The City Parties state that the Commission correctly declined to answer the Material Questions presented and found that the ALJ should be permitted to exercise her discretion regarding the proper scope of the proceeding. *Id*. (citing *Interlocutory Review Order* at 17-19). The City Parties assert that UGI has not provided any reasoned legal argument or authority to explain why the Commission should deviate from its prior determination on this issue. The City Parties believe that the ALJ is “uniquely equipped” to determine the scope of and remedies available in this proceeding because the ALJ has worked with the Parties for almost two years to focus the matters before her. R. Exc. at 8.

The ALJ addressed UGI’s argument that the Complaints should be dismissed because the relief the City Parties request cannot be granted within her discussion of the scope of the proceeding. The ALJ’s decision discusses the Commission’s jurisdiction over the instant Complaints in the context of evaluating whether proper consideration has been given to inside meter placement under Section 59.18 of our Regulations and Section 1501 of the Code. While the ALJ did not spell out the specific relief available to the Parties, there would be relief under the Code and the Commission’s Regulations, which may include the imposition of a civil penalty and other appropriate relief, if a violation is found after an evidentiary hearing is conducted. The ALJ previously addressed UGI’s argument when she denied UGI’s Preliminary Objections, finding that the Complaints challenged UGI’s application of a Commission Regulation and whether UGI’s actions in the placement of meters in the City complied with the Regulations. *See* Interim Order dated March 29, 2016. We also addressed UGI’s argument previously in our *Interlocutory Review Order*, in which we stated the following:

We also find that it would not be appropriate to limit the scope of possible relief or to make a predetermination regarding relief at this stage in the proceeding. We have previously determined that it is within the ALJ’s discretion to determine what remedy to recommend in the event that the ALJ finds a violation of the Code, a Commission Order, or Regulation after a full evidentiary hearing. *See Susan Kreider v. PECO Energy Company*, Docket No.

P-2015-2495064 (Order entered January 28, 2016).

We are not compelled to alter our previous determination on this issue in the context of a motion for summary judgment ruling.

Since the initiation of this proceeding, the ALJ has been properly exercising her discretion in regulating the course of this proceeding, consistent with

52 Pa. Code § 5.483(a), and has focused the scope of the proceeding through prehearing conferences, rulings on motions, and the issuance of various procedural orders. The ALJ also has the discretion to exclude irrelevant or immaterial evidence during the hearing and can therefore further focus the issues as necessary during the hearing. We will not interfere with the ALJ’s discretion in this regard or prejudge any of the issues in this proceeding. We find it important that cases involving Section 59.18 be evaluated on a case-by-case basis and that the Parties be provided with the opportunity to develop a complete record for our review, particularly since it appears that this is the first litigated proceeding before us involving the interpretation and application of Section 59.18 since the amended Regulation became effective on September 13, 2014. For these reasons, we shall deny UGI’s Exception on this issue.

**Conclusion**

Based on our review of the Initial Decision, the Parties’ filings, and the applicable law, we shall: (1) deny UGI’s Withdrawal Request; (2) deny UGI’s Exceptions; and (3) adopt the ALJ’s Initial Decision; **THEREFORE,**

**IT IS ORDERED:**

1. That the Letter Request to Withdraw Exceptions filed by UGI Utilities, Inc. on October 31, 2017, is denied.

2. That the Exceptions filed by UGI Utilities, Inc. on September 27, 2017, are denied.

3. That the Initial Decision Denying in Part and Granting in Part UGI’s Motion for Summary Judgment of Administrative Law Judge Mary D. Long, issued on September 7, 2017, is adopted, consistent with this Opinion and Order.

4. 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 Utilities, Inc.’s Motion for Summary Judgment do not violate Section 59.18(a)(8)(i).

5. That UGI Utilities, Inc.’s Motion for Summary Judgment as to the scope of the proceedings is granted, in part, and denied, in part.

6. That UGI Utilities, Inc.’s Motion for Summary Judgment is denied in all other respects.

7. That this matter is returned to the Office of Administrative Law Judge.

**BY THE COMMISSION**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: December 21, 2017

ORDER ENTERED: December 21, 2017

1. Section 701 of the Code, 66 Pa. C.S. § 701, provides the following:

   The commission, or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission. [↑](#footnote-ref-1)
2. Section 5.536(a) of our Regulations explains the procedure used when no Exceptions are filed, as follows:

   If no exceptions are filed in a proceeding included within § 5.533(a) (relating to procedure to except to initial, tentative and recommended decisions), the decision of the administrative law judge will become final, without further Commission action, unless,

   within 15 days after the decision is issued, two or more Commissioners request that the Commission review the decision.

   52 Pa. Code § 5.536(a); *see also*, 66 Pa. C.S. § 332(h). [↑](#footnote-ref-2)