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January 27, 2012

Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: Application of Leatherstocking Gas Company, LLC to Supply Natural Gas Service to the Public in Certain Townships and Boroughs in Northern Susquehanna County, Pennsylvania
Docket No. A-2011-2275595

Dear Secretary Chiavetta:

Enclosed please find the Answer of UGI Penn Natural Gas, Inc. to the Preliminary Objections of Leatherstocking Gas Company, LLC in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully Submitted,

Michael W. Hassell

MWH/skr
Enclosures
cc: Certificate of Service
Honorable David A. Salapa

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Leatherstocking Gas Company, LLC to Supply Natural Gas Service to the Public in Certain Townships and Boroughs in Northern Susquehanna County, Pennsylvania	:	Docket No. A-2011-2275595

RECEIVED
JAN 27 2012
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

ANSWER OF UGI PENN NATURAL GAS, INC. TO THE PRELIMINARY OBJECTIONS OF LEATHERSTOCKING GAS COMPANY, LLC

TO THE HONORABLE DAVID A. SALAPA:

UGI Penn Natural Gas, Inc. ("PNG"), by and through its attorneys, Post & Schell, P.C., hereby files this Answer to the Preliminary Objections filed by Leatherstocking Gas Company, LLC ("Leatherstocking") in the above-captioned matter. This Answer is filed pursuant to the Regulations of the Pennsylvania Public Utility Commission ("Commission") at 52 Pa. Code § 5.101(f).

In its Preliminary Objections, Leatherstocking raises the following four objections to the Protest filed by PNG: (1) lack of standing; (2) PNG can file an application to provide service in Susquehanna County even if the Commission approves Leatherstocking's Application; (3) Leatherstocking's Application satisfies the Commission's regulations and should be approved; and (4) the Commission should establish an expedited schedule if PNG's protest is not dismissed. Preliminarily, it must be noted that Leatherstocking's objections numbered 2 through 4 above are not proper preliminary objections under the Commission's regulations, which

expressly limit the legal and factual grounds that may be raised in preliminary objections.[1] These improper objections are nothing more than an attempt by Leatherstocking to bolster its Application and remedy some of the deficiencies and concerns raised by PNG's Protest. Clearly, the use of preliminary objections for such purposes is prohibited by the Commission's regulations and the standard of review for preliminary objections.[2] For these reasons, the preliminary objections numbered 2 through 4 above should be denied.

Notwithstanding, and without waiver of objection thereto, for the reasons explained below, Leatherstocking's Preliminary Objections should be denied in their entirety. PNG herein responds to the separately-numbered paragraphs of Leatherstocking's Preliminary Objections as follows:

---

[1] Pursuant to the Commission's regulations, preliminary objections in response to a pleading are limited to the following grounds:

> (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
>
> (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
>
> (3) Insufficient specificity of a pleading.
>
> (4) Legal insufficiency of a pleading.
>
> (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
>
> (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

52 Pa. Code § 5.101(a).

[2] *See id.* Further, to the extent that Leatherstocking seeks to amend, modify, or supplement its Application, Leatherstocking's remedy is to file an amended application pursuant to 52 Pa. Code § 5.91, rather than filing what is tantamount to a "speaking demurrer." *See Regal Industrial Corp. v. Crum & Forster, Inc.*, 890 A.2d 395, 398 (Pa. Super. 2005) ("A 'speaking demurrer' is defined as 'one which, in order to sustain itself, requires the aid of a fact not appearing on the face of the pleading objected to, or, in other words, which alleges or assumes the existence of a fact not already pleaded, and which constitutes the ground of objection and is condemned both by the common law and the code system of pleading.' BLACK'S LAW DICTIONARY 299 (6th ed. 1991). A 'speaking demurrer' cannot be considered in sustaining a preliminary objection."). *See also Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwlth. 2007) (the Presiding Officer need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion).

I. PROCEDURAL BACKGROUND

1–5. Paragraphs 1 through 5 of the Preliminary Objections related to the procedural history in the above-captioned matter. The averments therein reference and relate to Leatherstocking's Application and PNG's Protest. These are written documents filed with the Commission, the terms of which speak for themselves. Any interpretation, characterization, or selective quotation is denied.

By way of further response, PNG stated in its Protest that it has been engaged in substantial market development activities in the area covered by the Application, and that it intended in the near future to file its own application seeking Commission approval to construct its own natural gas facilities to provide natural gas service to all or a substantial portion of the service area contemplated by Leatherstocking's Application. Consistent with that representation, on January 18, 2012, PNG filed with the Commission the "Application of UGI Penn Natural Gas, Inc. for approval to begin to offer, render, furnish or supply gas utility service to the public in the additional territories of Bridgewater, Forest Lake, Great Bend, Harmony, New Milford and Oakland Townships, and Great Bend, Hallstead, Lanesboro, Montrose, New Milford, Oakland and Susquehanna Depot Boroughs, Susquehanna County, Pennsylvania," Docket No. A-2012-2284831. Contemporaneous with the filing of this Answer, PNG filed an Amended Protest, pursuant to 52 Pa. Code § 5.91(b), to incorporate the filing of this competing application. Thus, as it indicated it would do in the Protest, PNG clearly has filed a competing application, which seeks authority to serve all of the service area contemplated by Leatherstocking's Application.

Further, on December 27, 2011, the Office of Consumer Advocate and the Williams Field Services Company, LLC separately filed Petitions to Intervene. On January 11, 2012, the Bureau of Investigation and Enforcement entered a Notice of Appearance.

II. RESPONSE TO PRELIMINARY OBJECTIONS

6. Pursuant to the Commission's regulations, a person or entity may file a protest to object to an application if the person or entity has an interest or right that may be affected in the proceeding and the person or entity has adequate standing. A protest must set forth in a clear and concise fashion the facts from which the protestant's interest and standing may be determined, and the grounds for the protest. *See* 52 Pa. Code §§ 5.51-5.52. A review of PNG's Protest clearly reveals that it fully complies with and satisfies the Commission's requirements for a protest.

7. Pursuant to the Commission's regulations, preliminary objections in response to a pleading are limited to the following grounds:

> (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
>
> (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
>
> (3) Insufficient specificity of a pleading.
>
> (4) Legal insufficiency of a pleading.
>
> (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
>
> (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

52 Pa. Code § 5.101(a). As explained above, the only objection that falls within these permitted grounds for preliminary objections is Leatherstocking's contention that PNG lacks standing to protest the Leatherstocking Application. For the reasons explained herein, that objection is without merit and should be denied. The remainder of Leatherstocking's objections should be denied for failure to comply with the Commission's regulations pertaining to preliminary objections.

8. In ruling on preliminary objections, the Presiding Officer must accept as true all well-pled allegations of material facts in the pleading being objected to, as well as all inferences reasonably deducible therefrom. *Stilp v. Cmwlth.*, 910 A.2d 775, 781 (Pa. Cmwlth. 2006) (citing *Dep't of Gen. Serv. v. Bd. of Claims*, 881 A.2d 14 (Pa. Cmwlth. 2005); *accord Complaint of Nat'l Fuel Gas Distrib. Corp. and Petition for an Order to Show Cause*, Docket No. P-00072343 (December 26, 2007). However, the Presiding Officer need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwlth. 2007). For preliminary objections to be sustained, it must appear with certainty that the law will permit no recovery, and any doubt must be resolved in favor of the non-moving party. *Stilp*, at 781.

A. <u>Response to Preliminary Objection No. 1</u>: Lack of Standing to Protest the Application

9. Leatherstocking contends that PNG's Protest fails to establish standing or legal sufficiency and cannot be cured. These averments are legal conclusions to which no response is required. *See Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwlth. 2007) (the Presiding Officer need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion). To the extent a response is deemed necessary, PNG denies these conclusory and unsupported statements for the reasons explained herein.

10. Generally, the Commission has held that a person or entity has standing if the person or entity has a direct, immediate, and substantial interest in the subject matter of a proceeding. *Application of Consumers Pennsylvania Water Co. - Shenango Valley Division*, Docket No. A-212750F0007, 2001 Pa. PUC LEXIS 1 (January 11, 2001) (citing *William Penn*

Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975)). The Commission has explained the requirements for standing as follows:

> A protestant's interest in the subject matter of a proceeding is direct if the protestant's interest is adversely affected by the actions challenged in the protest, is immediate if there is a close causal nexus between the protestant's asserted injury and the actions challenged in the protest, and is substantial if the protestant has a discernible interest other than the general interest of all citizens in seeking compliance with the law.

Id. at *10-11 (citing *Ken R. ex rel. C.R. v. Arthur Z.*, 546 Pa. 49, 682 A.2d 1267 (1996); *In re El Rancho Grande, Inc.*, 496 Pa. 496, 437 A.2d 1150 (1981); *William Penn*, 623 A.2d 897 (Pa. Cmwlth. 1993)).

11. Leatherstocking relies upon the Commission's decisions in Application of *Consumers Pennsylvania Water Co. - Shenango Valley Division*, Docket No. A-212750F0007, 2001 Pa. PUC LEXIS 1 (January 11, 2001) ("*Shenango Valley*") and *Joint Application of Philadelphia Suburban Water Company and Giegertown Water Company*, Docket Nos. A-212370F0061 and A-211040F2000 (Orders Entered April 19, 2001 and May 25, 2001) ("*Giegertown*") for the proposition that "[m]ere conjecture about possible future harm does not confer a direct interest in the subject matter of a proceeding." *Id.* at *11. However, as more fully explained below, PNG's protest is not based upon "mere conjecture" of future harm. PNG has indisputably filed a competing application for the same service territory as that sought in the Leatherstocking. PNG's Protest clearly indicated that PNG has been engaged in substantial market development activities in the area covered by the Application, and that PNG intended in the near future to file its own application seeking Commission approval to construct its own natural gas facilities to provide natural gas service to all or a substantial portion of the service area contemplated in the Application. Moreover, on January 18, 2012, PNG in fact filed its application with the Commission, as asserted in its Amended Protest.

12. PNG's Protest clearly meets the requirements to establish standing. PNG's Protest explained its standing to participate in this proceeding as follows:

> 3. PNG is planning to file a certificate application with the Commission to extend its service within Susquehanna County, including all or part of the service territory proposed in the Application. PNG currently is investigating the best means of extending its service within Susquehanna County, including the negotiation of necessary supply arrangements and the identification of specific customer loads, neither of which appear to have been finalized by Leatherstocking. PNG has had substantial contact and outreach with customers in Susquehanna County, as well as with gathering systems and local producers to determine the best means of expanding service into additional portions of Susquehanna County. Further, PNG has been assessing the technical and logistical requirements that would be necessary to build facilities that would enable PNG to provide reasonably priced, safe, and reliable service in the same areas covered by the Application from gathering lines and field production and possibly its other gas infrastructure.
>
> 4. PNG currently provides natural gas services within Lackawanna, Wayne, and Wyoming Counties, which are neighboring counties to Susquehanna County. Further, PNG's certificated service territory presently includes Forest City Borough, Uniondale Borough, Clifford Township, and Auburn Township, which are located in Susquehanna County. Given the close proximity, it would be a natural extension of PNG's existing facilities and certificated service territory to serve additional areas within Susquehanna County, including all or part of the service territory proposed in the Application.
>
> 5. The Commission's disposition of Leatherstocking's Application will have a direct, immediate, and substantial impact on the contemplated extension of PNG's existing facilities and certificated service territory to serve additional areas within Susquehanna County.

See PNG Protest, ¶¶ 3-5. Furthermore, on January 18, 2012, PNG in fact filed the application referenced in the Protest. In that application, PNG seeks to expand its existing certificated service territory in Susquehanna County to include all of the area contained in Leatherstocking's Application. Contemporaneous with the filing of this Answer, PNG filed an Amended Protest,

pursuant to 52 Pa. Code § 5.91(b), to state that it had filed a competing application. Despite Leatherstocking's characterization to the contrary, PNG's interest is not "wholly speculative" but, rather, is immediate and direct because PNG's competing application currently is pending before the Commission. *See, e.g., Application of the Audubon Water Company; Application of Citizens Utilities Home Water Company*, Docket Nos. A-00101797F.2 and A-00101852F.2, 1989 Pa. PUC LEXIS 11, 69 Pa. PUC 88 (January 4, 1989) (Audubon and Citizens Home filed competing applications with the Commission on May 28, 1985 and July 29, 1985 respectively, which were consolidated for purposes of hearing and decision).

13. Leatherstocking attempts to downplay the steps taken by PNG in anticipation of filing its application by characterizing them as "wishful thinking activities." However, there is nothing of record to refute the verified facts alleged in the Protest. As explained in Paragraph 8, *surpa*, all well-pled allegations of material facts as well as all inferences reasonably deducible therefrom must be accepted as true for purposes of preliminary objections. As explained in Paragraph 12, *supra*, PNG engaged in substantial contact and outreach with customers in Susquehanna County, as well as with natural gas gatherers and local producers, to determine interest and costs involved in expanding service into additional portions of Susquehanna County. These were preliminary steps necessary before PNG filed its application. Moreover, Leatherstocking's characterization of PNG's efforts as "wishful thinking" is demonstratably incorrect, as PNG followed up its Protest by the actual filing of a competing application and Amended Protest.

14. Leatherstocking asserts that the only interest alleged by PNG was intent to file a competing application at some "undefined time in the future." PNG clearly stated in its Protest

that it intended to file its application in the near future. PNG in fact filed its application with the Commission about three weeks later on January 18, 2012.

15. Leatherstocking seeks to support its contention that PNG lacks standing by reference to two cases involving protest by a water utility against applications by other water utilities to expand their service territories. Both of these cases are easily distinguishable, as they did not involve *competing* applications.

In the first case, *Shenango Valley*, Pennsylvania American Water Company ("PAWC") sought to protest the application of Consumers Pennsylvania Water Co. - Shenango Valley Division ("Consumers") seeking Commission approval to serve Mahoning Township. PAWC subsequently filed an amended protest. The administrative law judge ("ALJ") dismissed the protest and amended protest for lack of standing, as PAWC neither had, nor sought, authority to serve the contested territory.

After the ALJ issued the initial decision, PAWC filed a second amended protest alleging that: it has a "right" to seek to provide water service in Mahoning Township; it abuts a portion of the applied-for territory; it could serve the Mahoning Township by extending its facilities from adjacent territories; and that it has actively explored the possibility of service in the Mahoning Township.[3] *Shenango Valley*, at *14-15. Again, PAWC failed to allege any competing application to serve the contested territory. The Commission affirmed the ALJ's dismissal of PAWC's protest and amended protest for lack of standing. Further, the Commission concluded that PAWC had no right under the Commission's regulations to amend its earlier protests to establish standing. *Shenango Valley*, at *16. Although the Commission did not offer

[3] Leatherstocking's Preliminary Objections also state that PAWC's second amended protest indicated that it "had received service requests from potential customers in Consumer's proposed service area...." *See* Preliminary Objections at p. 8. However, it is unclear from the Commission's order in *Shenango Valley* that this was in fact alleged in PAWC's second amended protest.

its reasoning for rejecting the second amended protest, it is clear that such an amendment would be impermissible under the provisions of 52 Pa. Code § 5.91(c), which prohibits amendments to an application after hearings have commenced, absent Commission permission.

Importantly, it does not appear from the Commission's order that any of PAWC's protests alleged that it had any intention, immediate or otherwise, to file an application for a certificate of public convenience to serve Mahoning Township. By contrast, PNG's Protest clearly stated that it intended in the *near future* to file its own application seeking Commission approval to construct its own natural gas facilities to provide natural gas service to all or a substantial portion of the service area contemplated by Leatherstocking's Application. In addition, PNG's Amended Protest, filed as of course within 20 days of Leatherstocking's Preliminary Objections, clearly asserts PNG's standing as a party with a competing application.[4]

16. Similarly, Leatherstocking's reliance on *Giegertown* is misplaced. In *Giegertown*, PAWC sought to protest the joint application after the deadline established by the Commission for protests and petitions to intervene. The Commission dismissed the protest as untimely and held that PAWC failed to allege any adverse effect on PAWC stemming from the joint application.

This case also is easily distinguished. PNG did file a timely Protest, as well as a timely Amended Protest. Further, it does not appear from the Commission's order that PAWC's protests alleged that it had any intention, immediate or otherwise, to file an application for a certificate of public convenience to serve the area sought in the joint application. By contrast, PNG's Protest clearly stated that it intended in the *near future* to file its own application seeking Commission approval to construct its own natural gas facilities to provide natural gas service to

[4] Under Section 5.91(b), PNG's filing of an Amended Protest as of course deems moot Leatherstocking's Preliminary Objections to the original Protest. Nevertheless, to protect PNG's interests, this Answer is being filed to the Preliminary Objections.

all or a substantial portion of the service area contemplated by Leatherstocking's Application, and its Amended Protest stated that it filed its application with the Commission on January 18, 2012.

17. Clearly the cases cited by Leatherstocking do not support its claim that PNG lacks standing. While a claim by a protestant that it might possibly serve an area in question at some unknown time in the future may be insufficient to establish standing to protest an application for a certificate of public convenience, this is not what was alleged in PNG's Protest or its Amended Protest. As explained in Paragraphs 11 and 12, *supra*, PNG clearly stated that it intended to file its application in the near future. More importantly, PNG in fact filed its application on January 18, 2012, less than one month after filing its Protest, and within 20 days of the filing of Leatherstocking's Preliminary Objections. The Commission's disposition of Leatherstocking's Application will have a direct, immediate, and substantial impact on PNG's application requesting a certificate authorizing it to extend its existing facilities and certificated service territory to serve additional areas within Susquehanna County.

18. Leatherstocking contends that PNG's filing of its application does not confer standing. Leatherstocking's argument is based on the Commission's holding in *Shenango Valley* that PAWC had no right under the Commission's regulations to amend its earlier protests to establish standing. *Shenango Valley*, at *16. However, as explained above, the Commission's conclusion in *Shenango Valley* was that PAWC could not file a second amended protest after an initial decision had been issued dismissing PAWC's protest and amended protest for lack of standing. This is clearly in accord with 52 Pa. Code § 5.91(c). PNG clearly does have the right to file an Amended Protest, which it has done. Section 5.91(b) unequivocally provides:

> (b) Amendments in response to preliminary objections. A party may file an amended pleading as of course within 20 days after

> service of a copy of a preliminary objection filed under § 5.101 (referring to preliminary objections). If a party has filed an amended pleading as of course, the preliminary objections to the original pleading shall be deemed moot.

52 Pa. Code § 5.91(b). In that Amended Protest, PNG asserts standing as an applicant for the same territory sought in Leatherstocking's Application.

Leatherstocking's claim that PNG cannot amend its Protest is wrong, as a matter of law. Moreover, under Leatherstocking's theory, utilities would be precluded from protesting an application for a certificate of public convenience unless they had a competing application pending before the Commission at the time the protest was filed. The issue of standing should not be dependent on the proverbial "race to the courthouse steps" as suggested by Leatherstocking. If that were the case, utilities would seek Commission certification of state-wide service territories to avoid being prevented from participating in future certification proceedings. Clearly, this is not what was intended by the requirements for standing.

B. <u>Response to Preliminary Objection 2</u>: PNG can file an Application to Provide Service in Areas of Susquehanna County even if the Commission Approves Leatherstocking's Application.

19. Preliminarily, as explained above, this objection is not a proper preliminary objection under the Commission's regulations, which expressly limit the legal and factual grounds that may be raised in preliminary objections. *See* 52 Pa. Code § 5.101(a). For this reason alone, this preliminary objection should be should be dismissed.

Notwithstanding, and without waiver of objection thereto, PNG agrees that it can file a competing application. In fact, PNG filed its own application on January 18, 2012, seeking Commission approval to construct its own natural gas facilities to provide natural gas service to all or a substantial portion of the service area contemplated by Leatherstocking's Application. However, the issue is not whether PNG may file a competing application but, rather, what is the

best overall plan to develop and provide natural gas services to serve the service territory proposed in the Application, as well as other areas in Susquehanna County. Susquehanna County largely is comprised of rural areas that currently lack natural gas service. The prudent and carefully planned development of natural gas infrastructure in Susquehanna County would be a significant public benefit. Consequently, it is critically important for the Commission to ensure the entity that provides such service has the requisite managerial and technical fitness.

20. PNG acknowledges that presently there are various natural gas distribution companies in the Commonwealth that have overlapping, non-exclusive service territories, principally in western Pennsylvania where gas utilities' service territories predated utility regulation. The existence of overlapping service territories predates, and is preserved by, the Public Utility Code. *See* 66 Pa.C.S. § 103. However, the fact that the Commission is without authority to prevent competition where utilities have rights to serve that predated regulation does not mean that the Commission has a policy in support of creating new overlapping gas distribution territories.

The conclusion that Commonwealth law and public policy do not favor competition among gas distribution utilities finds support in the Commission decision in *Application of Equitable Gas Company*, Docket No. A-121100F0003 (August 13, 1999). Therein, the Commission concluded as follows:

> We agree with the ALJ's finding that the building of a competitive distribution system would necessarily result in wasteful duplication of facilities contrary to the public interest. The creation of another distribution pipeline system and related facilities for the physical delivery of gas supplies to a competitor's gas customers' premises is contrary to the public interest. We agree with the Protestants that gas-on-gas distribution competition in overlapping service territories is wasteful and a duplication of fixed distribution facilities. We shall adopt the ALJ's finding as our own that there is

> nothing in the record that shows how that result might be in the public interest.

Slip Op. at p. 18.

As the Commission recognized in *Equitable*, there are significant issues in allowing the construction of competitive distribution systems. The construction of competitive distribution systems often results in the need to flex distribution rates to retain customers or to acquire new customers. This issue of rate flexing has resulted in the filing of a petition on December 8, 2011, requesting a generic investigation to uniformly resolve issues related to competition between NGDCs, flexing of distribution rates to meet such competition, and treatment of flexed revenues for ratemaking purposes in future ratemaking proceedings. *See Joint Petition Requesting that the Pennsylvania Public Utility Commission Institute a Generic Investigation or Rulemaking Concerning Competition Between Natural Gas Distribution Companies*, Docket No. P-2011-2277868. This petition currently is pending before the Commission. Accordingly, there remains significant uncertainty as to whether, and under what terms, NGDC competition will continue to be permitted. These issues would caution against the creation of further overlapping service territories.[5]

21. PNG incorporates Paragraphs 19 and 20, *supra*, as though fully set forth herein.

C. Response to Preliminary Objection 3 – Leatherstocking's Application Satisfies the Commission's Regulations and Should not be Dismissed.

22. Preliminarily, as explained above, this objection is not a proper preliminary objection under the Commission's regulations, which expressly limit the legal and factual grounds that may be raised in preliminary objections. *See* 52 Pa. Code § 5.101(a). This

[5] Leatherstocking's reference to a 2010 application by PNG to provide service in an area previously certificated to UGI Central Penn Gas Company ("CPG") is clearly distinguishable. Two affiliated companies have no incentive to flex rates in competition with each other to serve as customer, as there is no revenue benefit from discounting a rate in competition with an affiliate.

objection is nothing more than an attempt by Leatherstocking to bolster its Application and remedy some of the deficiencies and concerns raised by PNG's Protest. Clearly, the use of preliminary objections for such purposes is prohibited by the Commission's regulations and the standard of review for preliminary objections.[6] For this reason alone, this preliminary objection should be should be denied.

Notwithstanding, and without waiver of objection thereto, Leatherstocking appears to misunderstand the purpose of a protest. A protest is not a dispositive motion. Rather, a protest is a person or entity's statement of an interest to participate in a proceeding. A protest sets forth the facts from which the protestant's interest and standing may be determined, and the grounds for the protest. *See* 52 Pa. Code §§ 5.51-5.52. In this case, PNG's Protest clearly identifies the grounds, issues, and concerns that it intends to address in this proceeding. As stated in PNG's Protest and Amended Protest, PNG questions whether Leatherstocking can demonstrate (a) a public need or demand for the proposed service, (b) the inadequacy of existing facilities for service, and (c) Leatherstocking's fitness to provide service. Leatherstocking bears the burden of proving such matters in a fully litigated proceeding, and is entitled to no presumptions, either at a pleading stage or at hearing, that would allow it to meet its burden without submission of sufficient evidence. *See* 66 Pa.C.S. § 315 (as the applicant seeking Commission approval, Leatherstocking bears the burden of proof); *see also Re Blue Bird Coach Lines, Inc.*, 72 PA PUC 262, 285-286 (1990) (an existing certificated utility is presumed to be technically, financially, and legally fit to provide services by virtue of its longstanding existence and service as a regulated and certificated utility in Pennsylvania); *Re V.I.P. Travel Services,*

[6] *See* Footnote 2, *supra*.

Inc., 56 PA PUC 625, 631 (1982) (same); *South Hills Movers, Inc. v. PA PUC*, 601 A.2d 1308 (Pa. Cmwlth. 1992) (same).[7]

23. PNG agrees that Susquehanna County largely is comprised of rural areas that currently lack natural gas service. However, this alone is insufficient to carry Leatherstocking's burden to prove a public need for service, as suggested by Leatherstocking. The burden of demonstrating a need for a proposed service is met by showing the proposed service is reasonably necessary for the accommodation or convenience of the public, and that the necessity exists within the area generally served. *Seaboard Tank Lines, Inc. v. Pa. PUC*, 502 A.2d 762 (Pa. Cmwlth. 1985). Furthermore, as explained in PNG's Protest, in assessing how best to meet public need, now and in the future, the Commission must weigh, as between the two applications, which is best able to offer a prudent and carefully planned development of natural gas infrastructure in Susquehanna County that would provide a public benefit to the area.

24. Leatherstocking's unsubstantiated criticism of PNG's prior applications for certificates of public convenience is without merit. In order for the Commission to issue a certificate of public convenience, the applicant must demonstrate, among other things, that it is fit to provide the requested service. *Application of Newtown Artesian Water Company*, 2003 Pa. PUC LEXIS 40 (July 1, 2003). This requires the applicant to establish the following three factors: (i) the technical capacity to meet the need in a satisfactory fashion; (ii) the financial ability to give reliable and responsible service to the public; and (iii) legal fitness -- the ability to operate safely and legally. *See, Re: O'Connor*, 54 Pa PUC 547 (1980); *Warminster Twp. Mun. Auth. v. Pa. P.U.C.*, 138 A.2d 240 (Pa. Super. 1958). However, unlike a new utility seeking

[7] Further, it should be noted that "pleadings generally are not evidence." *Cheryl Weidenhammer and David Dobson v. The Reading Express Airport Shuttle*, Docket No. C-2011-2235035, 2011 Pa. PUC LEXIS 138 at *5 (October 7, 2011) (citing 52 Pa. Code § 5.405). As such, Leatherstocking cannot meet its burden of proof in a litigated proceeding simply by referencing its Application.

Commission certification for the first time, PNG is presumed to be technically, financially, and legally fit to provide natural gas services by virtue of its longstanding existence and service as a regulated and certificated natural gas utility in Pennsylvania. *Re Blue Bird Coach Lines, Inc.*, 72 PA PUC 262, 285-286 (1990); *Re V.I.P. Travel Services, Inc.*, 56 PA PUC 625, 631 (1982); *South Hills Movers, Inc. v. PA PUC*, 601 A.2d 1308 (Pa. Cmwlth. 1992).

Furthermore, PNG's prior uncontested certificate applications are not at issue in this proceeding. Rather, the issue that is to be decided in this proceeding is whether Leatherstocking meets the requirements for a certificate of public convenience. What PNG has alleged in prior, unrelated, and unprotested, applications does not somehow excuse or otherwise relieve Leatherstocking from its burden to demonstrate fitness, adequacy of service, and public need in this proceeding.

25. PNG incorporates Paragraph 24, *supra*, as though fully set forth herein.

26. PNG incorporates Paragraph 24, *supra*, as though fully set forth herein.

27. PNG incorporates Paragraph 24, *supra*, as though fully set forth herein.

28. PNG incorporates Paragraph 24, *supra*, as though fully set forth herein. Again, the prior PNG applications referenced by Leatherstocking were uncontested and PNG is presumed to be technically, financially, and legally fit to provide natural gas services. Leatherstocking's Application has been contested and, moreover, Leatherstocking as a new uncertificated gas utility has the burden to demonstrate that it is technically, financially, and legally fit to provide natural gas services. Further, there is simply no basis in fact or law to support Leatherstocking's improper request that the Commission "reopen and rescind" PNG's prior Commission-approved certificates of public convenience.

29. Leatherstocking submits that it has the expertise, operational fitness, and managerial fitness to own or operate a Pennsylvania regulated NGDC because its parent Corning is a New York certified NGDC and its other parent is a diversified energy company. However, these allegations alone do not necessarily establish that Leatherstocking is fit to own and operate an NGDC in the Commonwealth of Pennsylvania subject to the regulatory jurisdiction of the Commission. There are vast differences in the operations and regulatory schemes for New York and Pennsylvania regulated NGDCs. Furthermore, the averments in Paragraph 29 of Leatherstocking's Preliminary Objections are nothing more than an attempt by Leatherstocking to bolster its Application and remedy some of the deficiencies and concerns raised by PNG's Protest. Clearly, the use of preliminary objections for such purposes is prohibited by the Commission's regulations and the standard of review for preliminary objections.[8]

30. Leatherstocking contends that the "financial soundness" of its parent companies Corning and Mirabito demonstrate that Leatherstocking is financially fit. Although it may be relevant, the financial capability of Leatherstocking's parent companies does not alone establish that Leatherstocking will be operated in a financially sound manner. Indeed, the Application does not describe whether Leatherstocking will have access to sufficient long-term financial resources to operate as a public utility on a permanent basis, and PNG has the right to demand proof of Leatherstocking's long-term financial capabilities. Furthermore, the averments in Paragraph 30 of Leatherstocking's Preliminary Objections are nothing more than an attempt by Leatherstocking to bolster its Application and remedy some of the deficiencies and concerns raised by PNG's Protest. Clearly, the use of preliminary objections for such purposes is

[8] *See* Footnote 2, *supra*.

prohibited by the Commission's regulations and the standard of review for preliminary objections.[9]

31. Leatherstocking's asserts that the "public interest" would be served by denying PNG's Protest on Preliminary Objections, and adopting a "quicker" non-litigated procedural schedule. While such an approach may be in Leatherstocking's interest, the proposed violations of PNG's due process rights is hardly in PNG's or the public's interest. As explained in PNG's Protest, based on the projections of capital investments and customer additions provided in Leatherstocking's application, it appears that Leatherstocking has proposed initial distribution rates that would exceed the distribution rates PNG would charge if it extended its existing tariff rates. Among the issues to be considered by the Commission is whether it would be in the public's interest to approve Leatherstocking's Application, rather than PNG's competing application, where Leatherstocking proposes to charge higher rates than PNG, where Leatherstocking will not provide customers the ability to shop for natural gas supply service from competing Natural Gas Suppliers. In addition, the Commission may need to consider issues related to sources of supply. If Leatherstocking has an interconnection agreement with Laser Pipeline Company, LLC, ("Laser") and if, as has been the case to date, Laser is not willing to negotiate such an agreement with PNG, the Commission will have to decide if it should permit an unregulated gathering system to in effect usurp the Commission's power to determine who should serve areas of the Commonwealth. This would be the situation if Laser is only permitting interconnections to favored NGDC applicants for yet unknown reasons.

Denying the protest of a party that clearly has a direct, immediate, and substantial interest in the subject matter of this proceeding cannot be a public benefit. Moreover,

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[9] *See* Footnote 2, *supra*.

Leatherstocking's suggestion that its Application could be moved to a non-litigated "modified procedure" disregards the fact that the Bureau of Investigation and Enforcement has entered a Notice of Appearance, and that the Office of Consume Advocate and Williams Field Services Company, LLC have filed Petitions to Intervene. Leatherstocking's Application is by no means uncontested and, thus, PNG should be permitted to continue to participate.

Further, as a new, un-certificated utility with no ties to the Commonwealth or experience with the Commission's regulatory scheme, it is imperative that the Commission carefully consider Leatherstocking's Application to ensure that it has fully and satisfactorily satisfied each of the elements required for a certificate of public convenience. The Commission should consider whether conditions on any approval are necessary in order to protect the public interest. *See* 66 Pa.C.S. § 1103(a) ("The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable."); *see also id.* § 2210(b) ("[T]he commission shall not approve such proposed merger, consolidation, acquisition or disposition, except upon such terms and conditions as it finds necessary to preserve the benefits of a properly functioning and effectively competitive retail natural gas market"). A determination as to appropriate conditions requires the development of a thorough record and a meaningful opportunity for interested parties to be heard.

D. <u>Response to Preliminary Objection No. 4</u>: An Expedited Procedural Schedule Should be Established if PNG's Protests is Not Denied.

32. Preliminarily, as explained above, this objection is not a proper preliminary objection under the Commission's regulations, which expressly limit the legal and factual grounds that may be raised in preliminary objections. *See* 52 Pa. Code § 5.101(a). For this reason alone, this preliminary objection should be should be denied.

Notwithstanding, and without waiver of objection thereto, PNG submits that an expedited procedural schedule is not appropriate or necessary in this proceeding. It is imperative that the Commission carefully consider Leatherstocking's Application to ensure that it has fully satisfied each of the elements required for a certificate of public convenience. Further, the Commission must ensure that Leatherstocking will provide adequate, efficient, safe, and reasonable service at just and reasonable rates. Furthermore, the Commission should determine, as between two competing applications for service, which application provides the greater public benefit, taking into account the experience of the applicants and rates for service, their ability to promote retail markets, and other issues of public importance. The Commission's determination of these important issues requires the development of a thorough record and a meaningful opportunity for interested parties to participate and be heard.

Further, Leatherstocking has failed to explain why it is necessary to complete construction of its proposed facilities during the "2012 construction season." In fact, it is unclear from the Application whether potential customers have sought service from Leatherstocking or otherwise support the Application. A desire to quickly commence construction is not a basis to require parties and the Commission to meet an abbreviated schedule. The prudent and carefully planned development of natural gas infrastructure in Susquehanna County is significantly more important than an early construction date.

33. PNG incorporates Paragraph 32, *supra*, as though fully set forth herein. By way of further response, the prior PNG application referenced by Leatherstocking was uncontested and PNG was presumed to be technically, financially, and legally fit to provide natural gas services. Leatherstocking's Application has been contested and, moreover, Leatherstocking bears the burden to demonstrate that is technically, financially, and legally fit to provide natural

gas services. The 77 days that the Commission took to approve an uncontested application is not the standard for a contested proceeding. For example, in *Application of Equitable Gas Company*, Docket No. A-121100F0003 (August 13, 1999), the application was filed in April 1998, hearings were held in November 1998, and a final decision was not entered until August 1999. Although PNG is not proposing a schedule at this time, the foregoing demonstrates that sufficient time is needed to allow for discovery, submission of testimony, hearing, and briefing before a decision on the two competing applications can be rendered. PNG will be prepared, at the prehearing conference, to discuss the establishment of an efficient procedural schedule and discovery process, consistent with due process and the Commission's need to have a fully developed record. The regulatory process is one of the risks that an applicant for a certificate of public convenience must bear, and Leatherstocking should not be granted expedited treatment.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, UGI Penn Natural Gas, Inc. respectfully requests to be granted "Protestant" status, and that the Preliminary Objections of Leatherstocking Gas Company, LLC be denied.

Respectfully submitted,

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Date: January 27, 2012

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Leatherstocking Gas Company, LLC to Supply Natural Gas Service to the Public in Certain Townships and Boroughs in Northern Susquehanna County, Pennsylvania	:	Docket No. A-2011-2275595

VERIFICATION

I, J.P. Ghio, Vice President, Supply, hereby state that I am duly authorized to and do make this Verification on behalf of UGI Penn Natural Gas, Inc.; that the facts set forth in the foregoing Protest of UGI Penn Natural Gas, Inc. are true and correct to the best of my knowledge information and belief; and that I understand that my statements made herein are subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsifications to authorities).

J.P. Ghio

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the following persons, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

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Date: January 27, 2012

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