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July 30, 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 for filing please find the Exceptions of UGI Penn Natural Gas, Inc. for the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully Submitted,

Michael W. Hassell

MWH/skr

Enclosures

cc: Honorable David A. Salapa
Office of Special Assistants
Certificate of Service

**CERTIFICATE OF SERVICE
(Docket No. A-2011-2275595)**

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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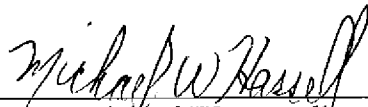
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Date: July 30, 2012



Michael W. Hassell

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**EXCEPTIONS OF
UGI PENN NATURAL GAS, INC.**

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I. INTRODUCTION AND BACKGROUND

On November 23, 2011, Leatherstocking Gas Company, LLC (“Leatherstocking”) filed an Application with the Pennsylvania Public Utility Commission (“Commission”) at Docket No. A-2011-2275595 (“Leatherstocking Application”). In its Application, Leatherstocking seeks a certificate of public convenience, pursuant to Chapter 11 of the Public Utility Code, authorizing it to begin to offer, render, furnish, or supply natural gas distribution services in certain townships and boroughs in rural parts of northern and central Susquehanna County.

On December 27, 2011, UGI Penn Natural Gas, Inc. (“PNG”) filed a protest to the Leatherstocking Application. PNG filed its protest prior to the deadline for filing protests to the Application. In its protest, PNG indicated, among other things, that it had been engaged in substantial market development activities in the area covered by the Leatherstocking 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 the Leatherstocking Application.

The Office of Consumer Advocate (“OCA”) filed a Notice of Intervention and Public Statement in the Leatherstocking Application on December 27, 2011. Williams Field Services Company, LLC (“Williams”) filed a Petition to Intervene in the Leatherstocking Application on December 27, 2011. On January 11, 2012, the Commission’s Bureau of Investigation and Enforcement (“I&E”) entered a Notice of Appearance in the Leatherstocking Application.

On January 12, 2012, a Notice was issued scheduling a Prehearing Conference before the Honorable David A. Salapa (“ALJ”) at 10:00 a.m. on Tuesday, February 14, 2012, in Hearing Room 3 in the Commonwealth Keystone Building, Harrisburg, Pennsylvania.

On January 17, 2012, Leatherstocking filed preliminary objections to PNG's protest stating, among other things, that PNG lacked standing to protest because it did not have a competing application before the Commission.¹

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 (hereinafter "PNG Application").

On January 27, 2012, PNG filed an answer to Leatherstocking's preliminary objections. Therein, PNG argued that it had standing as a protestant because the 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 Leatherstocking Application. PNG also noted that the Company was filing an amended protest to update the initial protest to reflect that the PNG Application was filed on January 18, 2012.

Also on January 27, 2012, PNG filed its amended protest pursuant to Section 5.91 of the Commission's regulations, 52 Pa. Code § 5.91. The amended protest reiterated that PNG's initial protest clearly indicated that it was actively taking steps to extend its service within Susquehanna County. PNG also explained that the purpose of the amended protest was to update

¹ The remainder of Leatherstocking's objections to PNG's protest were not proper preliminary objections 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).

the initial protest to reflect that PNG had filed the competing PNG Application on January 18, 2012.

On February 10, 2012, PNG filed a motion to consolidate the PNG Application with the Leatherstocking Application. PNG's motion to consolidate the two Applications was held in abeyance pending the disposition of the preliminary objections.

The Prehearing Conference in the Leatherstocking Application was held as scheduled and conducted on February 14, 2012. At that time, Leatherstocking indicated that it intended to file preliminary objections to PNG's amended protest. Leatherstocking also requested that the procedural schedule and discovery in the Leatherstocking Application be stayed until the disposition of Leatherstocking's forthcoming second preliminary objections. Leatherstocking's request was granted at the Prehearing Conference without objection.

On February 16, 2012, Leatherstocking filed its preliminary objections to PNG's amended protest to the Leatherstocking Application, again challenging, among other things, PNG's standing as protestant to the Leatherstocking Application.² On February 27, 2012, PNG filed an Answer to Leatherstocking's preliminary objections to PNG's amended protest to the Leatherstocking Application.

The ALJ's Initial Decision ("I.D.") on the preliminary objections was issued by Secretarial Letter dated March 20, 2012. The I.D. treated Leatherstocking's preliminary objection on the basis of lack of standing as a request for summary judgment. (I.D., pp. 8-9.) On this basis, the I.D. concluded that there was no material issue of fact for trial and that Leatherstocking was entitled to judgment as a matter of law on the issue of PNG's standing to file the initial December 27, 2011 protest. Specifically, the I.D. found that PNG did not have

² The remainder of Leatherstocking's objections to PNG's protest were not proper preliminary objections 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).

standing to protest because, at the time it filed its initial protest, PNG did not have a certificate of public convenience authorizing it to serve the service territory proposed in the Leatherstocking Application. (I.D., pp. 11-13.) The I.D. further found that PNG was not entitled to file an amended protest, and that PNG failed to establish good cause for filing its amended protest after the close of the protest period. (I.D., pp. 15-18.)

PNG requested three extensions of time to file Exceptions and Reply Exceptions to facilitate a settlement that would fully resolve PNG's and Leatherstocking's respective issues in both the Leatherstocking Application and PNG Application. All parties of record consented to the extensions. In a Secretarial Letter dated May, 2012, the Commission approved the third extension of time to file Exceptions.

On June 21, 2012, Leatherstocking and PNG filed a Joint Stipulation for Settlement in both the Leatherstocking Application and PNG Application. Under the terms of the Joint Stipulation, if adopted, PNG would agree to withdraw its protest to the Leatherstocking Application and PNG would withdraw the PNG Application, with the right to re-file to serve all or a portion of the territory in the future, with certain exceptions. Further, if adopted, Leatherstocking would agree to amend its current Application to specify that it is seeking a nonexclusive territory, and agree that it would not protest a future application filed by PNG to serve in the identified territory. The OCA, Williams, and Borough of Lanesboro³ are not signatories to the Joint Stipulation, but indicated no opposition to the Joint Stipulation.⁴

By letter dated June 27, 2012, I&E advised the Commission of its opposition to the Commission's direct consideration of the Joint Stipulation. On June 28, 2012, Leatherstocking and PNG submitted letters in response to I&E's opposition to the Commission's consideration of

³ The Borough of Lanesboro is a party to the PNG Application proceeding.

⁴ On June 22, 2012, I&E indicated in an electronic correspondence that it opposed the Joint Stipulation.

the Joint Stipulation. Also on June 27, 2012, I&E submitted its Motion to Strike the Joint Stipulation. Leatherstocking and PNG submitted Answers to I&E's Motion to Strike on July 17, 2012. I&E's Motion to Strike the Joint Stipulation is still pending before this Commission.

The Commission's disposition of the Joint Stipulation and I&E's Motion to Strike may render these Exceptions moot. PNG fully supports the Joint Stipulation. Further, for the reasons more fully explained in PNG's Answer, the Commission should deny the Motion to Strike and approve the Joint Stipulation. If the Commission adopts the Joint Stipulation, these Exceptions and the issues raised herein will become moot.

With the filing of the Joint Stipulation, Leatherstocking and PNG also requested that the Commission postpone the due date for filing Exceptions and Reply Exceptions to a date 30 days following a Commission decision on the Joint Stipulation.⁵ In a Secretarial Letter issued on June 28, 2012, the Commission stayed the period for filing Exceptions pending further notice from the Commission. On July 20, 2012, the Commission issued a Secretarial Letter lifting the stay and directing that Exceptions must be filed within ten days and Reply Exceptions within five days thereafter.

PNG herein files these Exceptions to the I.D., pursuant to 52 Pa. Code § 5.533 and the Secretarial Letter dated July 20, 2012. For the reasons explained below, PNG respectfully requests that the Commission adopt PNG's Exceptions, reverse the I.D., and grant PNG protestant status in the Leatherstocking Application. Alternatively or additionally, PNG requests that the Commission approve the Joint Stipulation, and thereby resolve the two pending Application proceedings.

⁵ On June 22, 2012, I&E indicated in an electronic correspondence that it opposed the requested extension.

II. SUMMARY OF EXCEPTIONS

Exception No. 1: The I.D. erred in concluding that PNG did not have standing to protest because, at the time it filed its initial protest, PNG did not have a certificate of public convenience authorizing it to serve the service territory proposed in the Leatherstocking Application. The conclusion reached in the I.D. is an unprecedented new announcement of law that is inconsistent with prior competing application proceedings. There is nothing in the Public Utility Code or the Commission's regulations and orders that requires a public utility to hold a certificate of public convenience authorizing it to serve the same service territory proposed in an application in order to have standing to protest the application. Rather, the Commission must look at the totality of the circumstances to determine whether a direct, immediate, and substantial interest will be affected by the outcome of the proceeding.

Here, the I.D. did not give sufficient weight to the fact that PNG was actively taking steps to extend its service within Susquehanna County, and that PNG clearly indicated that it was filing in the near future an application to serve all of the service area contemplated by the Leatherstocking Application. Further, PNG's competing application currently is pending before the Commission. Clearly, competing applications provide a basis for standing.

Exception No. 2: The I.D. erred in concluding that PNG was not entitled to file an amended protest, and that PNG failed to establish good cause for filing its amended protest after the close of the protest period. The conclusion reached by the I.D. is inconsistent with the plain language of the regulations and sound principles of statutory construction. The plain and unambiguous language of Section 5.91(b) clearly provides that a party is entitled to file an amended protest, as a matter of course, in response to all preliminary objections filed under Section 5.101 without limitation.

The I.D. also erred in concluding that PNG was not permitted to file an amended protest because amended pleadings are only available in response to preliminary objections and Leatherstocking's preliminary objections were being treated as a motion for summary judgment. The *sue sponte* treatment of Leatherstocking's preliminary objections as a motion for summary judgment has serious due process implications. Further, the I.D. incorrectly states that lack of standing is not a valid preliminary objection to a protest, which must establish, among other things, the protestant's interest and standing. Finally, even assuming, *arguendo*, that PNG's amended protest is required to meet the standards of good cause for allowing a "late-filed" protest, it has done so.

III. ARGUMENT

A. **EXCEPTION NO. 1: The I.D. erred in concluding that PNG did not have standing to protest because, at the time it filed its initial protest, PNG did not have a certificate of public convenience authorizing it to serve the service territory proposed in the Leatherstocking application.**

The I.D. erred in concluding that PNG did not have standing to protest the Leatherstocking Application because, at the time it filed its initial protest, PNG did not have a certificate of public convenience authorizing it to serve the service territory proposed in the Leatherstocking Application. (I.D., pp. 11-13.) The I.D. found that PNG did not have a direct and immediate interest that would be adversely affected if the Leatherstocking Application were granted because PNG did not have authority to serve the proposed service territory at the time it filed its initial protest on December 27, 2012. The I.D. also found that the PNG Application filed on January 18, 2012, after the protest deadline had passed, did not cure the issue of standing. (I.D., p. 13.)

The conclusion reached in the I.D. is an unprecedented new announcement of law that is inconsistent with prior competing application proceedings. Further, the I.D. did not give

sufficient weight to the fact that PNG was actively taking steps to extend its service within Susquehanna County, and that PNG clearly indicated in its initial protest that it was filing in the near future an application to serve all of the service area contemplated by the Leatherstocking Application. For these reasons, as more fully explained below, the I.D. should be reversed and PNG should be granted protestant standing in the Leatherstocking Application proceeding.

The only issue to be decided by the pending preliminary objections is whether the averments in the protest, if accepted as true, were sufficient to establish that PNG has standing and an interest or right that may be affected in the Leatherstocking Application proceeding. 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)).

In a new announcement of law, the I.D. concludes that a utility cannot have a direct, immediate, and substantial interest as a protestant to an application for a certificate of public convenience unless it holds, at the time it files its protest, a certificate of public convenience

authorizing it serve the service territory proposed in the application. In reaching this conclusion, the I.D. relies on the Commission's decisions in *Application of Glen Alsace Water Co.*, 45 PA PUC 472 (July 26, 1971) ("*Alsace Water*") and *Application of Consumers Pennsylvania Water Co. - Shenango Valley Division*, Docket No. A-212750F0007, 2001 Pa. PUC LEXIS 1 (January 11, 2001) ("*Shenango Valley*"). However, these cases are easily distinguishable. Furthermore, the issue of standing in those cases was not decided solely on whether or not the protestant held a certificate of public convenience at the time the protests was filed; rather, each case looked at the totality of the circumstances in determining protestant standing.

In *Alsace Water*, the Alsace Water Company filed an application seeking a certificate of public convenience to begin to provide water service to a certain portion of Exeter Township. A.V.W., Inc. ("AVW") filed a protest challenging the application. At the time it filed its protest, AVW was providing water services to 25 customers in an area adjacent to the service territory proposed in the application. However, it was determined that AVW did not hold a certificate of public convenience to provide water service to the public. Notably, the Commission did not hold that AVW lacked standing because it did not have a certificate of public convenience authorizing it to serve the proposed service territory. Rather, the Commission held that AVW lacked standing because it "is not authorized by this Commission to furnish public water service." Clearly, AVW could not have had a direct, immediate, and substantial interest as a protestant to the application because it was unlawful for AVW to provide any water service to the public, let alone in the service territory proposed in the application.

Unlike *Alsace Water*, PNG is a Pennsylvania certificated public utility that provides natural gas transmission, distribution, and supplier of last resort services to approximately 157,000 customers throughout its certificated service territory. PNG's certificated service

territory includes all or portions of thirteen Pennsylvania Counties, including 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. Unlike AVW in *Alsace Water*, it clearly is not unlawful for PNG to provide natural gas service to the public. In addition, in its Protest, PNG specifically noted its intention to shortly file a competing application for the territory, which it did three weeks following the filing of its initial protest.

In *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 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. *Shenango Valley*, at *14-15. Again, PAWC failed to allege any intention of filing a 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.⁶

⁶ Further, the Commission concluded that PAWC had no right under the Commission's regulations to file its second amended protest to establish standing. *Shenango Valley*, at *16. Although the Commission did not offer 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 in *Shenango Valley* 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, in its initial protest, PNG clearly indicated that it was actively taking steps to extend its service within Susquehanna County, and that PNG was filing in the near future an application to serve all of the service area contemplated by Leatherstocking's Application. Consistent with that representation, PNG filed the PNG Application with the Commission on January 18, 2012, only three weeks after it file the initial protest.

The issue of standing to protest and application for a certificate of public convenience was recently addressed by the Commission in *Joint Application of Columbia Water Company and Marietta Gravity Water Company for approval of: 1) the transfer of rights, service obligations, water system and assets used and useful in the operation of the water system of Marietta Gravity Water Company to Columbia Water Company; 2) the abandonment of service by Marietta Gravity Water Company; and 3) all other approvals or certificates as appropriate, including approval of Securities Certificates*, Docket Nos. A-2012-2282219 *et al.* (July 20, 2012) (hereinafter "*Columbia Water*"). The City of Lancaster filed a protest to the joint application, requesting that the Commission deny the application. To support standing as a protestant, the City alleged as follows: (1) the City competes with Columbia Water for customers within Lancaster County; (2) the City's existing service territory is proximate to the service territory proposed to be acquired by Columbia Water; (3) the Commission should consider the rational regionalization of water systems; (4) the natural expansion of the City's water system includes portions of townships that are served by the water company to be acquired by Columbia Water; and (5) the City believes that it could provide better service at lower costs than Columbia Water

could provide to customers if the application is approved.⁷ Citing to *Shenango Valley, supra*, the Commission held that the City lacked standing to protest the joint application on the basis that “entities which do not have, or have not applied for, overlapping territory in conflict with the territory sought do not have standing to protest an application.” *Columbia Water*, at p.12.

Importantly, the City in *Columbia Water* did not allege that it had any intention, immediate or otherwise, to file an application for a certificate of public convenience to acquire the water company that was the subject of the joint application. In fact, the City conceded that the water company to be acquired by Columbia Water had declined to enter into negotiations with or entertain any offers from the City to acquire the water company.⁸ Consequently, the City had no basis to file an application in the future to acquire the water company, and made no allegation of an intent to file such an application.⁹ By contrast, in its initial protest, PNG clearly indicated that it was actively taking steps to extend its service within Susquehanna County, and that PNG was filing in the near future an application to serve all of the service area contemplated by Leatherstocking’s Application. Moreover, PNG in fact filed the PNG Application with the Commission on January 18, 2012, only three weeks after it file the initial protest. PNG clearly “applied for” the service area contemplated by Leatherstocking’s Application, consistent with the standing requirements set forth in *Columbia Water*.

Under the theory advance in the I.D., parties that have filed competing applications for the same service territory would not have standing to protest the other party’s application because neither party would actually hold a valid certificate of public convenience at the time the

⁷ See Protest of City of Lancaster, Docket No. A-2012-2282219 (Filed February 7, 2012).

⁸ See Footnote 7.

⁹ Although the Commission does have authority to order the acquisition of small water and sewer utilities under Section 529 of the Public Utility Code, 66 Pa.C.S. § 529, that authority is limited to situations where the small water or sewer utility is incapable of providing safe and adequate service. No such assertions were made with respect to Marietta Gravity Water Company.

protest is filed. Under this theory, Leatherstocking would not have standing to protest the PNG Application because it did not actually hold a valid certificate of public convenience authorizing it to serve the territory proposed in the PNG Application at the time Leatherstocking filed its protest. Such a result is inconsistent with prior Commission decisions. *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); *see also Application of K-Cab, Inc.*, Docket No. A-00111416, F0004, 1995 Pa. PUC LEXIS 135 (Nov. 15, 1995). Clearly competing applications provide a basis for standing.

The I.D. held that the PNG Application filed on January 18, 2012, after the protest deadline had passed, did not cure the issue of standing. (I.D., p. 13.) This conclusion is premised on the theory that a utility cannot have a direct, immediate, and substantial interest as a protestant to an application for a certificate of public convenience unless it holds, at the time it files its protest, a certificate of public convenience authorizing it to serve the service territory proposed in the application. However, there is nothing in the Public Utility Code or the Commission's regulations and orders that requires a public utility to hold a certificate of public convenience authorizing it to serve the same service territory proposed in an application in order to have standing to protest the application. Rather, the Commission must look at the totality of the circumstances to determine whether a direct, immediate, and substantial interest will be affected by the outcome of the proceeding.

The issue of standing should not be dependent on the proverbial "race to the courthouse steps" as suggested by the conclusion reached in the I.D. Indeed, such a result would promote a

public policy that favors haste over the public's interest in the adoption of the best overall plan to develop and provide services to a proposed service territory. These are important factual and policy issues that should be carefully examined through a fully-developed record. It clearly is not in the public's interest for an existing utility's right to protest an application for a certificate of public convenience to be determined solely on whether the existing utility holds a certificate of public convenience authorizing it to serve the proposed service territory at the time it files its protest. Rather, the Commission must look at the totality of the circumstances to determine if the existing utility has an interest that could be adversely affected by the outcome of the application.

Here, the I.D. failed to give sufficient weight to the fact that PNG was actively taking steps to extend its service within Susquehanna County, and that PNG clearly indicated that it was filing in the near future an application to serve all of the service area contemplated by Leatherstocking's Application. PNG's initial 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.

(PNG initial protest, ¶¶ 3-5.) The foregoing averments clearly meet the standing requirements set forth in *William Penn*, and established that PNG has a direct, immediate, and substantial interest that could be adversely affected by the outcome of the Leatherstocking Application.

First, PNG's interests are adversely affected by the Leatherstocking Application. Approval of the Leatherstocking Application as originally filed could result in a denial of PNG's pending Application simply on the basis that another entity already had been granted a certificate of public convenience. As the Commission recognized in *Application of Equitable Gas Company*, Docket No. A-121100F0003 (August 13, 1999) ("*Equitable Application*"), there are significant issues in allowing the construction of competitive distribution systems that would serve the same customers.¹⁰ Furthermore, PNG would be denied an opportunity to challenge the financial and technical fitness of a new entity seeking to be certificated in an area when PNG stands ready to serve.

Second, there is a close causal nexus between PNG's asserted injury and the Leatherstocking Application. PNG desires to serve areas that are adjacent to areas it presently serves. PNG believes it can demonstrate that it is better positioned to serve the requested service

¹⁰ It is noted that under the Joint Stipulation, PNG has agreed that any future application it may file for a portion of this service territory would not include services to existing Leatherstocking customers.

territory, by virtue of its experience as a Pennsylvania utility, its existing facilities located near the proposed service territory, and its vastly superior financial resources. With both applications pending before it,¹¹ the Commission is presented with a clear issue of whether to certificate only one fixed utility to serve an area, or to certificate overlapping utilities, or to split the requested service territory between the two competing applicants. These are important factual and policy issues that should be carefully examined through a fully-developed record. If the Commission decides that only one entity will be certificated in the proposed service territory at this time, then the Commission must also decide, as between an existing Pennsylvania utility and a new entity, which should be certificated to serve the area in question. This, of course, will require the development of a sufficient record. Unless PNG is permitted the right to due process, it will be denied an opportunity to prove that it is the best option for providing natural gas service in the additional portions of Susquehanna County.

Third, PNG's interest is substantial. PNG is not merely asserting a general interest in seeking Leatherstocking's compliance with the requirements for a certificate of public convenience, as suggested by the I.D. (I.D., p. 14.). PNG clearly indicated in its initial protest that it was actively taking steps to extend its service within Susquehanna County. If given the opportunity to demonstrate on the record, PNG would establish that it was investigating the best means of extending its service within Susquehanna County both prior to and after Leatherstocking filed its Application. These efforts included investigation of necessary supply arrangements and the identification of specific customer loads, neither of which appear to have been finalized by Leatherstocking when it filed its Application. PNG also engaged in substantial contact and outreach with customers in Susquehanna County, as well as with natural gas

¹¹ It is noted that if the Commission adopts the Joint Stipulation, it will not have to decide at this time whether, and under what conditions, it would authorize another utility to be certificated in any portion of the service territory being sought by Leatherstocking.

gatherers and local producers, both prior to and after Leatherstocking filed its Application, to determine interest and costs involved in expanding service into additional portions of Susquehanna County. These were preliminary steps necessary before PNG could file its application. PNG also clearly indicated in its initial protest that it would be filing in the near future an application to serve all of the service area contemplated by Leatherstocking's Application. Consistent with that representation, PNG filed its Application with the Commission on January 18, 2012, less than one month after filing its protest.

Clearly, PNG's interest is not "wholly speculative" or "mere conjecture" but, rather, is immediate and direct because PNG stated a present intent to serve the area, stated that it was actively taking prudent and preliminary steps necessary to promptly prepare and file its competing application, and currently has a competing application pending before the Commission. For the reasons explained above, the I.D. should be reversed and PNG should be granted protestant status in the Leatherstocking Application proceeding.

B. EXCEPTION NO. 2: The I.D. erred in concluding that PNG was not entitled to file an amended protest and that PNG was required to establish good cause for filing its amended protest after the close of the protest period.

The I.D. held that PNG was not entitled to file an amended protest, and that PNG failed to establish good cause for filing its amended protest after the close of the protest period. (I.D., pp. 15-18.) Specifically, the I.D. concluded that amended pleadings are only permitted in response to preliminary objections alleging insufficient specificity. The I.D. also concluded that PNG was not permitted to file an amended protest because amended pleadings are only available in response to preliminary objections and Leatherstocking's preliminary objections were being treated as a motion for summary judgment. For the reasons more fully explained below, the I.D. should be reversed and PNG should be granted protestant standing in the Leatherstocking Application proceeding.

Preliminarily, it must be noted that PNG's amended protest was not late but, as explained below, was unequivocally permitted by Section 5.91(b). Thus, PNG was not required to show a "good cause for its late filing." Moreover, the I.D.'s conclusion that a showing of good cause was required results from the, *sue sponte*, conversion of Leatherstocking's preliminary objections into a motion for summary judgment. PNG should have been provided an opportunity to show that it had good cause to file the amended protest to update and accurately reflect the fact that the PNG Application had been filed, as it clearly stated was its intent in its initial protest.

Citing to Section 5.101(e) of the Commission's regulations, 52 Pa. Code § 5.101(e), the I.D. concludes that amended pleadings are not permitted in response to all preliminary objections available under Section 5.101(a) but, rather, only in response to preliminary objections alleging insufficient specificity under Section 5.101(a)(3).¹² The conclusion reached by the I.D. is inconsistent with the plain language of the regulations and sound principles of statutory construction.

Section 5.91(b) of the Commission's regulations 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

¹² 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).

amended pleading as of course, the preliminary objections to the original pleading shall be deemed moot.

52 Pa. Code § 5.91(b). The plain and unambiguous language of Section 5.91(b) clearly entitles a party to file an amended protest, as a matter of course, in response to preliminary objections filed under Section 5.101 of the Commission's regulations.¹³

Importantly, the plain language of Section 5.91(b) clearly provides that a party may file an amended protest, as a matter of course, in response to all preliminary objections filed under Section 5.101 without limitation. There is no mention in Section 5.91(b) that amended pleadings are only permitted in response to preliminary objections alleging insufficient specificity under Section 5.101(a)(3). In essence, the I.D. seeks to do something it cannot -- rewrite the regulation to read an additional limitation into the regulation that was not provided by the Commission. *See Melmark Home v. Workers' Compensation Appeal Board (Rosenberg)*, 946 A.2d 159, 162 (Pa. Cmwlth. 2008) (citation omitted) (courts have "no power to insert words into statutory provisions where the legislature has failed to supply them"); *Kmonk-Sullivan v. State Farm Mutual Automobile Insurance Co.*, 567 Pa. 514, 525, 788 A.2d 955, 962 (2001) (although a court must "listen to what a statute says[,] one must listen attentively to what it does not say").

Although Section 5.91(b) does not limit when an amended pleading is permitted in response to preliminary objections, Section 5.91(c) does provide an explicit limitation on the timing of amendments.¹⁴ Thus, the Commission enumerated a specific limitation on when

¹³ *See Wheeling-Pittsburgh Steel Corp. v. Department of Environmental Protection*, 979 A.2d 931, 937 (Pa. Cmwlth. 2009) ("Statutory construction rules apply equally to the interpretation of administrative regulations."). As in any statutory construction issue, the goal is to ascertain and effectuate the intention of the legislative body. 1 Pa.C.S. § 1921(a). Generally, the plain language provides the best indication of legislative intent. *UMCO Energy, Inc. v. Department of Environmental Protection*, 938 A.2d 530, 535 (Pa. Cmwlth. 2007). "When the words of a statute [or administrative regulation] are clear and unambiguous, a court must not disregard them under the pretext of pursuing the spirit of the statute [or administrative regulation]." *Middletown Township v. Lands of Stone*, 595 Pa. 607, 616, 939 A.2d 331, 337 (2007) (citing 1 Pa.C.S. § 1921).

¹⁴ Section 5.91(c) provides as follows:

amended pleadings are permitted in response to preliminary objection; however, the Commission did not limit the use of amended pleadings only in response to preliminary objections alleging insufficient specificity under Section 5.101(a)(3) as suggested by the I.D. The maxim *expressio unius est exclusio alterius* holds that the express inclusion of one thing implies the exclusion of another; this means that any omission by the Commission was deliberate. *Commonwealth v. Ostrosky*, 589 Pa. 437, 446 n.7, 909 A.2d 1224, 1229 n.7 (2006); BLACK'S LAW DICTIONARY, 620 (8th ed. 2004).

Further, the I.D.'s reliance on Section 5.101(e) is misplaced. Section 5.101(e) provides as follows:

(e) Preliminary objection regarding insufficient specificity.

(1) If a preliminary objection regarding insufficient specificity in a pleading is filed, an answer is not required until further directed by the presiding officer or the Commission.

(2) When an amended pleading is filed in response to a preliminary objection alleging insufficient specificity in a pleading, the preliminary motion will be deemed to be moot in accordance with § 5.91 (relating to amendment of pleadings generally).

52 Pa. Code § 5.101(e). Clearly, the heading for Section 5.101(e) indicates that it is only applicable to preliminary objections regarding insufficient specificity. Further, the cross-reference to Section 5.91 merely acknowledges that an answer to a preliminary objection regarding insufficient specificity is not required, while at the same time recognizing that if an amended pleading is filed then the preliminary objection becomes moot in accordance with

Limitation. Except as otherwise provided in this subchapter, no amendment to a pleading may be filed within 5 days preceding the commencement of or during a hearing unless directed or permitted by the Commission or the presiding officer after opportunity for all parties to be heard thereon.

52 Pa. Code § 5.91(c).

Section 5.91. Importantly, there is nothing in Section 5.101(e) to suggest that it limits or is otherwise intended to modify Section 5.91(b).

Finally, the interpretation of the I.D. -- that amended pleadings are only permitted in response to preliminary objections alleging insufficient specificity under Section 5.101(a)(3) -- is inconsistent with Section 5.101(h). Section 5.101(h) provides that if a preliminary objection is granted, the party who submitted the stricken pleading has the right to file an amended pleading. 52 Pa. Code § 5.101(h). Notably, Section 5.101(h) does not limit the availability of amended pleadings only to preliminary objections granted on the ground of insufficient specificity. Clearly, Section 5.101(h) anticipates that amended pleadings are permitted in response to all grounds for preliminary objections, not just insufficient specificity.

The I.D. also concludes that PNG was not permitted to file an amended protest because amended pleadings are only available in response to preliminary objections and the I.D., *sue sponte*, decided to treat Leatherstocking's preliminary objections as a motion for summary judgment. This *post hoc* justification for concluding that PNG was not entitled to file an amended protest is in error and must be rejected by the Commission for several reasons.

First, Leatherstocking in fact filed preliminary objections twice, both of which objected to the protest on the basis of standing. PNG filed timely responses to the preliminary objections. Both of these parties are represented by counsel with significant experience in litigating matters before the Commission. Counsel for these parties made educated and strategic decisions on what should be filed in order to represent the best interests of their respective clients. The I.D. should not be permitted to *sue sponte* remove this decision-making authority from the counsel for these parties. To the extent that preliminary objections on the basis of standing were improper, which

PNG denies for the reasons explained below, the I.D. should have simply dismissed the preliminary objections on that basis.

Second, these preliminary objections were filed prior to the Prehearing Conference held in this matter. To the extent that the preliminary objections were going to be treated as a motion for summary judgment, the parties should have, at a minimum, been provided notice at the Prehearing Conference. If notice had been provided, PNG would have been permitted to supplement its answer with an affidavit, attesting to the fact that PNG had filed a competing application, consistent with the allegations contained in the initial protest. *See* 52 Pa. Code § 5.102(b). Such attestation, as permitted by regulation, would have served the same purpose as the amended protest, which was to bring to the ALJ's attention additional facts in support of PNG's position that it had a direct, immediate, and substantial interest in the Leatherstocking Application, and that PNG was not alleging only a speculative interest in serving the contested area in the future. The parties should have been provided the opportunity to supplement their respective filings, to the extent necessary, to comply with and meet the standard of review for a motion for summary judgment. By *sue sponte* converting the preliminary objections to a motion for summary judgment and failing to give the parties notice of the same, the I.D. has interfered with the parties' due process rights.

Third, the I.D. states that lack of standing is not a valid preliminary objection to a protest. In support the I.D. notes that "lack of standing" was removed from the Commission's regulations as one of the grounds permitted for preliminary objections. The reliance on this change overreaches and loses sight of the fact that the issue to be decided is whether the averments set forth in PNG's protest were sufficient to establish protestant status.

Preliminary objections to a pleading are available to object to, among other things, the legal insufficiency of a pleading. 52 Pa. Code § 5.101(a)(4). Under the Commission's regulations, 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. 52 Pa. Code § 5.52. Clearly, the failure to set forth facts sufficient to establish standing would render a protest a legally insufficient pleading and, therefore, subject to preliminary objections under Section 5.101(a)(4).

Based on the foregoing, the I.D. erred in concluding that PNG was not entitled to file an amended protest. Such error is not merely ministerial in nature, as the ALJ then concluded that that PNG was required to establish good cause for a "late filed" protest after the close of the protest period, and that PNG failed to address the Commission's four standards for allowing late-filed protests. If PNG had been made aware of the ALJ's intention to convert Leatherstocking's preliminary objections into a motion for summary judgment, and thereby conclude that an amended protest was not permitted in a summary judgment context, PNG could have responded to the standards for allowing late-filed protests. Clearly, PNG meets the four enunciated standards in *Joint Application of Pennsylvania-American Water Company and Thames Water Aqua Holdings GmbH*, Docket Nos. A-212285F0096, *et al.* (May 9, 2002):

1. Does the petitioner have a reasonable excuse for missing the protest date?

As explained above, PNG did not miss the protest due date, as it timely filed a protest to the Leatherstocking Application. PNG did not complete and file its own application to serve the territory in question before the deadline for protests because it takes time to compile the information necessary to prepare and file a proper application. Indeed, 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 could file its application. However, PNG placed everyone on notice of its intent to file an application as soon as possible, and in fact filed the PNG Application only three weeks after filing its initial protest to the Leatherstocking Application. The amended protest was filed on the same date as the PNG Application.

2. Was the proceeding contested at the time of filing the protest?

The Leatherstocking Application was clearly contested at the time PNG filed its amended protest. Interventions had been filed by OCA and Williams at the same time PNG filed its initial timely protest, and prior to the time it filed the amended protest. Further, I&E filed a notice of intervention prior to the date that PNG filed the amended protest.

3. Will the receipt of the late-filed protest delay the orderly progress of the case?

PNG's initial, timely protest and its amended protest were filed well in advance of the Prehearing Conference. Therefore, no schedule had been established.

4. Will the late-filed protest significantly broaden the issues or shift the burden of proof?

As the applicant, Leatherstocking technically already bears the burden of proof to 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. Further, as a new utility seeking Commission certification for the first time, Leatherstocking 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, Inc.*, 56 PA PUC 625, 631 (1982) (same); *South Hills Movers, Inc. v. PA PUC*, 601 A.2d 1308 (Pa. Cmwlth. 1992) (same). Thus, PNG's protest did not broaden the issues or shift Leatherstocking's burden of proof.

Thus, if PNG's amended protest is required to meet the standards of good cause for allowing a "late-filed" protest, it has done so.

For the reasons explained above, the I.D. should be reversed and PNG should be granted protestant status in the Leatherstocking Application proceeding.

IV. CONCLUSION

WHEREFORE, UGI Penn Natural Gas, Inc. respectfully requests that the Pennsylvania Public Utility Commission adopt these Exceptions, reverse the Initial Decision of Administrative Law Judge David A. Salapa, and grant UGI Penn Natural Gas, Inc. protestant status in the above-captioned application proceeding.

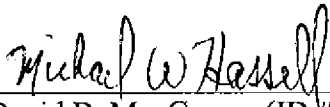
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