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August 6, 2012

**Via Hand Delivery**

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

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SECRETARY'S OFFICE

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;  
**REPLIES TO EXCEPTIONS OF UGI PENN NATURAL GAS, INC**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission are an original and nine (9) copies of the Replies to Exceptions of UGI Penn Natural Gas, Inc., filed on behalf of Leatherstocking Gas Company, LLC. Copies of this document have been served upon the parties of record as indicated on the certificate of service.

Should you have any questions or require anything further, please do not hesitate to contact me at 717.236.1300.

Very truly yours,

Thomas J. Sniscak  
Janet L. Miller  
*Counsel for Leatherstocking Gas Company, LLC*

TJS/WEL/bes

Enclosures

cc: Per Certificate of Service  
Honorable David A. Salapa, Administrative Law Judge

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Leatherstocking Gas	>:	
Company, LLC to Supply Natural Gas	:	Docket No. A-2011-2275595
Service to the Public in Northern	:	
Susquehanna County, in the Townships of	:	
Bridgewater, Forest Lake, Great Bend,	:	
Harmony, New Milford, and Oakland and in	:	
the Boroughs of Great Bend, Hallstead,	:	
Lanesboro, Montrose, New Milford,	:	
Oakland and Susquehanna	:	

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**REPLIES OF LEATHERSTOCKING GAS COMPANY, LLC  
TO EXCEPTIONS OF UGI PENN NATURAL GAS, INC.**

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NOW COMES, Leatherstocking Gas Company, LLC (Leatherstocking, Company or Applicant) by and through its attorneys in this proceeding, and files with the Pennsylvania Public Utility Commission (Commission) Replies to the Exceptions submitted by UGI Penn Natural Gas Company, Inc. (PNG) in the above-captioned matter. UGI's Exceptions were filed in response to the March 2, 2012 "Initial Decision Sustaining Preliminary Objections and Dismissing Protest" (Initial Decision or I.D.) of Administrative Law Judge (ALJ) David A. Salapa.<sup>1</sup>

For the reasons set forth below, if the Commission addresses Exceptions and Replies, it should: (a) adopt, without modification, the well-reasoned Initial Decision issued by ALJ

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<sup>1</sup> The Initial Decision was served on March 20, 2012, making Exceptions due on or before April 9, 2012 and Replies to Exceptions due on or before April 19, 2012. By Secretarial Letters dated March 29, 2012, April 30, 2012 and May 30, 2012, the period for the filing of Exceptions was extended pending the parties' discussions of settlement of both the Leatherstocking Application and a competing Application filed by PNG. On June 28, 2012, the Commission stayed the filing of Exceptions and Replies to Exceptions pending action on a Joint Petition for Settlement filed by Leatherstocking and PNG. By Secretarial Letter dated July 20, 2012, the Commission lifted the stay and directed that Exceptions be filed on or before July 30, 2012 and Replies to Exceptions be filed on or before August 6, 2012.

Salapa; (b) approve the Joint Stipulation in Settlement between Leatherstocking and PNG (Joint Stipulation), as filed with the Commission on June 21, 2012 and corrected on June 26, 2012, thereby allowing PNG to withdraw its Protest to the Leatherstocking Application and its competing Application at Docket No. A-2012-2284831; and (c) deny PNG's Exceptions in their entirety. In the alternative, the Commission could just approve the Joint Stipulation in Settlement, which would render the Exceptions moot.

# **I. INTRODUCTION AND SUMMARY OF REPLY EXCEPTIONS**

At the outset, Leatherstocking affirms that both it and PNG stand by the Joint Stipulation in Settlement filed in this proceeding. Both PNG and Leatherstocking would have preferred not to have to submit Exceptions and Reply Exceptions. If the Commission believes it must address the Exceptions and Reply Exceptions in the course of considering the Joint Stipulation providing for withdrawal of PNG's protest and its counter-application, it should adopt, without modification, the Initial Decision of ALJ Salapa, which decision is well-reasoned and supported by case law which is subsequent to and supersedes the old cases cited by PNG in its Exceptions.

Adopting the ALJ's decision is important, in Leatherstocking's opinion, to prevent placeholder and unripe protests such as the one filed by PNG which lacked the requirements for standing, and has greatly delayed Leatherstocking's getting service to customers deprived of the natural gas literally under their feet. Specifically, if PNG, as it asks in its Exceptions, is permitted to file a "placeholder" protest when it lacks standing, and then well after a protest deadline, to retroactively attempt to backfill defects, by amendments, then the whole protest deadline becomes meaningless. Obviously, in setting a deadline for parties to perfect their standing and right to participate, the Commission recognizes that an application such as Leatherstocking may be "necessary and proper for the service, accommodation, convenience or

safety of the public”<sup>2</sup> and thus delay as caused here and hearings invited by PNG’s protest is not in the public interest.

Similarly, PNG’s Exception 1 argument that because it allegedly had future interest in serving or had allegedly took steps to look into serving the area at issue supports standing is directly contrary to the multitude of recent cases cited by Leatherstocking and the Initial Decision that says preliminary interest, exploratory steps, and potential intent are *not a “direct, immediate, substantial and pecuniary interest”*<sup>3</sup> sufficient to confer standing. Think about it: PNG’s position would allow any utility or potential competitor who merely thought about or looked into serving an area to file a protest and, as here, greatly delay the application from being approved and equally delay service by moving it toward the hearing process. It is bad enough that it took this long to dismiss PNG or resolve its Protest through the Joint Stipulation. Thus, the PUC should confirm, as it recently did in *Columbia Water*<sup>4</sup> *infra.*, that such protests will be discouraged and dismissed. Adopting the ALJ’s decision will do that. Leatherstocking’s application, if UGI’s Exceptions were successful, would take well over a year, as hearings would not occur until PNG’s status on standing was determined. That is not good for Pennsylvania or Pennsylvanians who will benefit from Leatherstocking’s service.

Alternatively, the Commission could and should grant the Joint Stipulation in Settlement filed by the parties.<sup>5</sup> While the Joint Stipulation contains terms under which both the

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<sup>2</sup> 66 Pa. C.S. §1103(a).

<sup>3</sup> Reply Exceptions *infra.* pp. 7-11.

<sup>4</sup> *Joint Application of Columbia Water Company and Marietta Gravity Water Company*, Docket Nos. A-2012-2282219 and A-2012-2282221 (Order entered July 20, 2012).

<sup>5</sup> The Commission’s Bureau of Investigation and Enforcement (I&E) has taken the position that the Commission cannot adopt the Joint Stipulation in Settlement because, as properly determined by ALJ Salapa, PNG has no standing to participate in the Leatherstocking Application proceeding and therefore cannot be a party to a settlement of that proceeding. Because of the unique nature of the substance of the Joint Stipulation which is materially a petition to withdraw a protest and application, however, I&E’s arguments on this issue must fail and the Commission can, in fact, grant the requests made in the Joint Stipulation. Moreover, I&E’s other arguments against the Joint Stipulation (competition, safety problems if there is competition...) are unripe in that they may be raised by I&E and decided when and if a future application is filed for Leatherstocking’s territory by PNG or some other applicant.

Leatherstocking and PNG applications can be “settled” or resolved without the expenditure of additional resources, *the true nature of the filing is a request that PNG be permitted to withdraw* (a) the protest it filed in the Leatherstocking proceeding at Docket No. A-2011-2275595 and (b) the competing application PNG filed at Docket No. A-2012-2284831, *as is required in litigated proceedings by the Commission’s regulation at 52 Pa. Code § 5.94*. That section specifically states that the Commission itself may rule on the withdrawal requests. Permitting the withdrawals will allow Leatherstocking’s untested Application to proceed through the modified procedure to approval and issuance of a certificate of public convenience authorizing the Company to provide the requested natural gas service. Having granted the Joint Stipulation providing for PNG’s withdrawal, the Commission would also have the option of declining to address the Exceptions as they would be moot with PNG’s Joint Stipulation exit from the proceeding.

Leatherstocking notes that it is imperative the Commission act quickly in resolving this matter either way and in entering a Final Order with regard to the merits of Leatherstocking’s Application. Upon approval of the Application, Leatherstocking can begin the process to provide service to customers in the applied-for section of Susquehanna County who currently have no access to such service. Almost a full year has passed since Leatherstocking filed its Application. The public interest requires that the Joint Stipulation in Settlement and Leatherstocking’s Application be granted.

For these reasons, and for the reasons set forth below in more detail, Leatherstocking requests that the settlement be approved. If it is necessary to address Exceptions and Replies, PNG’s Exceptions should be denied, the Initial Decision should be adopted by the Commission without modification, and in either event the Leatherstocking Application be considered in the Commission’s non-litigated or modified procedure for decision.

Finally, regarding competitive or safety concern issues introduced by I&E regarding the Joint Stipulation in that it does not foreclose future competition, Leatherstocking notes that Commission approval of the Joint Stipulation will not create or authorize any issues with regard to gas-on-gas competition, flexing of distribution rates or treatment of flexed revenues for ratemaking purposes that are to be investigated by the Commission in a generic proceeding initiated at Docket No P-2011-2277868.<sup>6</sup> First, the Joint Stipulation provides for the withdrawal of PNG's application and there is no competition. Second, if PNG or some other applicant seeks a franchise for Leatherstocking's territory, I&E and the other interveners are free under the Joint Stipulation in Settlement to contest in the future whether the application should be denied for reasons such as competition, duplication of facilities, or safety reasons<sup>7</sup> not in the public interest. The Commission, of course, can decide should any such future application be filed, if those concerns warrant denial of any future application or if special conditions are necessary.

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<sup>6</sup> Secretarial Letter issued July 25, 2012 at Docket No. 2011-2277868.

<sup>7</sup> I&E in its Motion to Strike the Joint Stipulation raised that competition (more than one utility certificated) may create gas safety concerns, though I&E did not explain precisely how. That issue, if it has merit, is rendered moot by the Joint Stipulation resulting in withdrawal of PNG's application. That issue, like the other I&E competitive concerns, would be ripe to address if and only if PNG or some other entity sought LDC rights in Leatherstocking's franchise area, and could be adjudicated or addressed then. Hence, I&E's concerns should not derail the Joint Stipulation.

## **II. REPLIES TO 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.<sup>8</sup>

**Reply to Exception No. 1:** PNG Lacks Standing to Protest Leatherstocking's Application and the I.D. Correctly Applied Recent Commission Precedent.

ALJ Salapa's Initial Decision properly recommends that PNG's Protest be dismissed on the basis that it lacks standing to protest the Leatherstocking Application. PNG's Exceptions oppose this dismissal on the basis of its allegation that it (a) "is actively taking steps to extend its service within Susquehanna County" and (b) "clearly indicated" in its protest and amended protest that it intended to file, "in the near future," its own application to serve the same portions of Susquehanna County as proposed in Leatherstocking's Application. According to PNG, these future plans and plan steps are sufficient to establish its standing to participate in this proceeding and to protest Leatherstocking's Application.

PNG also argues the I.D. wrongly concludes it lacked standing to oppose Leatherstocking's 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"<sup>9</sup> that Leatherstocking proposed to serve. Phrased another way, PNG argues the I.D.'s conclusion means a utility cannot have the "direct, immediate, and substantial interest" required to protest an application for service authority "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."<sup>10</sup> According to PNG, this conclusion is both

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<sup>8</sup> PNG Exceptions, pp 7-17.

<sup>9</sup> PNG Exceptions, pp. 6-7.

<sup>10</sup> PNG Exceptions, pp. 8-9.

erroneous and “an unprecedented new announcement of law that is inconsistent with prior competing application proceedings.”<sup>11</sup>

PNG is wrong on both arguments. It is PNG’s pronouncement on this issue that is unfounded because each of the situations cited above in combination clearly supported the ALJ’s conclusion that PNG had no standing to protest Leatherstocking’s Application at the time the protest was filed. While PNG’s Exceptions, citing old cases contrary to recent and superseding precedent adopted by the ALJ directly on point, attempt to convince the Commission the case law holds otherwise, standing to protest an application for service authority is, in fact, determined *at the time the protest is filed* and all elements required to establish standing must exist at that time.

PNG cannot, as it attempted to do in this case, cure its lack of standing by filing a “placeholder” protest within the proper time period, later file its application to provide service, and then rely on its late-filed application to create, retroactively, standing to participate in the Leatherstocking proceeding. PNG would render the requirement to file a valid protest by the protest deadline meaningless. That, for reasons discussed below, would be poor policy and invite huge delay contrary to the public interest in applications such as Leatherstocking (where no service is presently available) being considered and approved.

In addition, PNG claims in its Exceptions that its lack of a valid certificate of public convenience to provide natural gas service in the areas of Susquehanna County proposed in Leatherstocking’s Application is the only reason why the I.D. concludes PNG has no standing to participate in this proceeding. A review of the I.D., however, shows that is not the only reason. Not only does PNG currently have no valid certificate of public convenience for the area at issue but, at the time it filed its initial protest, it had no valid application seeking issuance of such a

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<sup>11</sup> PNG Exceptions, pp. 6, 7, 8.



certification pending before the Commission. By its own admission, PNG filed its counter-application three weeks after the protest period had closed.

Contrary to PNG's arguments and citation to old cases not reflecting recent Commission cases directly on point holding to the contrary of the older cases, the Commission has clearly and consistently establish the precedent that a party *without authority* to provide service in the territory proposed in an application, or a party *merely alleging exploratory* activities, has no standing to protest that application and that future wants or intentions to serve the area an applicant seeks is insufficient for standing to protest.<sup>12</sup>

Because PNG *admits* these facts in its Initial protest, Amended Protest and Answer to Preliminary Objections, PNG cannot now complain to the Commission that the I.D. inappropriately and, by making "an unprecedented new announcement of law that is inconsistent with prior competing application proceedings,"<sup>13</sup> concludes PNG has no standing to protest Leatherstocking's Application. Similarly, PNG's arguments in Exception 2 (discussed below) regarding due process as well as its claim that "amending" allows it to cure retroactively its lack of standing at the time of the protest deadline are without foundation, should be disregarded by the Commission, and the I.D. should be adopted without modification.

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<sup>12</sup> *Application of Consumers Pennsylvania Water Company – Shenango Valley Division*, 2001 Pa. PUC LEXIS 1, Docket No. A-212750F0007, Order entered January 11, 2001 (Commission dismissed PAWC's protest because PAWC had no certificated rights in Applicant's applied-for territory thus "PAWC has not shown that it has an interest which is adversely affected by Consumers' proposed service in southern Mahoning Township."); *Joint Application of Philadelphia Suburban Water Company and Geigertown Water Company for Approval of (1) the Transfer, by Sale, of the Water System Assets of Geigertown Water Company to Philadelphia Suburban Water Company; (2) the Right of Philadelphia Suburban Water Company to Furnish Water Service to the Public in a Described Area of Robeson and Union Townships, Berks County; and (3) the Abandonment by Geigertown Water Company of Water Service to the public in its Current Service Territory*; Docket Nos. A-212370F0061 and A-211040F2000; Orders entered April 19, 2001 and May 25, 2001 (PAWC lacked standing to protest because it had no certificated rights to serve in the Applicant's applied-for territory); *Joint Application of Aqua Pennsylvania, Inc. and Country Club Gardens Water Co.*, 2006 Pa. PUC LEXIS 30 (competitive and future growth concerns were speculative and conjectural and did not confer a direct interest sufficient to grant standing).

<sup>13</sup> PNG Exceptions, pp. 6, 7, 8.

The ALJ, Leatherstocking, and PNG all agree that the Commission has stated the following with regard to the requirements for a party's standing:

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.<sup>14</sup>

The I.D. correctly concluded that PNG<sup>15</sup> must satisfy all of these and here has not satisfied any as this general standard has been specifically interpreted and applied by the Commission to protest situations such as the instant.

Regardless of how PNG attempts to express its argument, it is trying to convince the Commission that a utility's standing to protest an application for service authority is *not* determined at the time its protest is filed. Rather, PNG improperly argues that a utility merely needs to "actively take steps" to consider serving the area to establish its standing to protest a pending application by another. A utility's expression in a protest of *future interest, intention to file an application to provide service, or allegation of exploratory activities* as discussed below,

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<sup>14</sup> *Consumers Water, 2001 Pa. PUC LEXIS at \*10-11*. PNG Exceptions at 8.

<sup>15</sup> PNG's service in a small part of the lower tier of Susquehanna County and reference thereof in its tariff cannot support or bootstrap standing regarding the open or uncertificated territory sought by Leatherstocking in the northern tier of Susquehanna County. The Commission has held that even the listing of a municipality or county in the tariff of a public utility, without the concomitant issuance of a certificate of public convenience granting authority to serve, is insufficient to establish standing to protest an application filed by another utility. Application of Aqua Pennsylvania, Inc. for Approval to Begin to Offer, Render, Furnish or supply Water Service to the Public in an Additional Portion of Dallas Township, Luzerne County, Docket No. A-210104F0080, Order entered May 22, 2008. Aqua Pennsylvania, Inc. (Aqua PA) filed an application on June 27, 2007 for authority to offer service in an additional portion of Dallas Township, Luzerne County in order to provide water to a new residential development. United Water Pennsylvania, Inc. (United) filed a protest in which it claimed, *inter alia*, that United had prior Commission approval to serve the applied-for territory. In its motion for summary judgment, Aqua PA asserted that United lacked standing to protest the application because the only support it provided for its alleged authority to serve was its tariff, which included Dallas Township, Luzerne County is the list of territories served. In recommending that the motion for summary judgment be granted, the ALJ concluded that:

[A] tariff does not authorize a public utility to provide service and that only a certificate of public convenience authorizes service to a particular territory. United did not provide any reference to its certificate of public convenience in its discovery responses, its Protest, or its Answer to the Motion for Summary Judgment. United failed to demonstrate that it had standing to protest Aqua PA's Application. (*Id.* Order at 3).

have been repeatedly and recently held by the Commission as insufficient to establish standing to protest a pending application. Specifically, the Commission recognizes that such contentions do not and cannot establish the immediate, direct and pecuniary interest of a party required for standing to protest another party's application before the Commission.

As established in Leatherstocking's Preliminary Objections to the initial Protest, Commission decisions support that such activities are not sufficient to provide PNG with standing to protest the Application or to raise its right to provide the requested service over the right of Leatherstocking to do so.<sup>16</sup> These expressions of interest and exploratory activities create no perfected standing interest at the time of the protest deadline that will be adversely affected by the approval of the Application.<sup>17</sup>

Most recently, the Commission in *Columbia Water* affirmed that speculative, future plans or concerns, as those expressed by PNG are insufficient to confer standing:

We agree with the ALJ and the Joint Applicants that the City has presented nothing upon which we could base a finding that the City has standing to participate in this proceeding. We adopt the characterization of the City's contentions used by the ALJ as competitive concerns, potential future expansion opportunities, regionalization and operational concerns. I.D. at 14. As noted by the ALJ, we have previously held that these types of concerns are too speculative and conjectural to confer a direct interest sufficient to confer standing. See, *Joint Application of PAWC and Evansburg* and *Joint Application of Aqua PA and Country Club Gardens*.<sup>18</sup>

At pages 12-13 of its Exceptions, PNG argues that "[u]nder the theory advanced 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

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<sup>16</sup> Preliminary Objections at pp.9-12, which are incorporated herein by reference.

<sup>17</sup> *Request of the Pennsylvania-American Water Company and the Newtown Artesian Water Company Under Section 2102(n) of the Public Utility Code for Approval of Contract Between Affiliated Interests*; Docket No. G-2011-2232461 ("[T]he Authority's averment of a 'potential' effect on its 'economic interests' ... like its speculative averment of an alleged – but unspecified – effect on 'operational interests' is inadequate to confer standing because '[m]ere conjecture about possible future harm does not confer a direct interest in the subject matter of a proceeding.'", citing *Consumers –Shenango Valley*.)

<sup>18</sup> *Columbia Water*, slip op. at 11.

certificate of public convenience at the time the protest is filed.” That is not true. Leatherstocking had an application pending at the time of its protest to PNG’s application. PNG did not at the time of its protest of Leatherstocking.

Nonetheless, incorrectly arguing that the ALJ’s decision is inconsistent with prior Commission decisions, PNG cites the 1989 proceedings involving the *Application of the Audubon Water Company and Application of Citizens Utilities Home Water Company*.<sup>19</sup> These cases, however, which have been superseded by more recent precedent, are clearly distinguishable from the facts of this case for two reasons. *First*, no pleading had been filed in either case seeking to dismiss the other utility’s competing application under the legal reasoning and decisions cited by the I.D. so the Commission never reached the standing issue in this 1989 proceeding. Thus, it is and cannot be “precedent” as alleged by PNG. *Second*, the caselaw to bar any protest had not yet evolved as it has now. PNG’s argument essentially would have the Commission roll the clock back to 1989 determinations as opposed to what the Commission has done since and just recently in *Columbia Water*.

PNG’s argument that it had standing when protests were due boils down to it allegedly having an intention or exploratory activities to someday serve the area at issue. The fact that PNG actually filed this application three weeks after its placeholder protest, Leatherstocking submits, was more likely precipitated by the filing of Leatherstocking’s Application than by PNG’s completion of its alleged exploratory activities. Thus, PNG, at the time protest and standing was to be determined, had only an intention and its retaliatory later application cannot retroactively cure that defect.

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<sup>19</sup> Docket Nos. A-00101797F.2 and A-00101852F.2, 1989 Pa. PUC LEXIS 11, 69 Pa. PUC 88 (January 4, 1989).

Finally, at the time it filed its protest, PNG had no interest in the subject matter of Leatherstocking's Application that was different from the interest of the Commission or that of the general public – *i.e.*, to ensure that the requested service was “necessary or proper for the safety, accommodation or convenience of the public” and that authorizing Leatherstocking to provide the requested service was in the public interest. That function is amply protected and represented by statutory advocates such as I&E, the OCA and the OSBA. PNG's intent to request the same or a similar service authority at some point in the future does not equate to the substantial interest required to establish standing for PNG to participate in the Leatherstocking proceeding.

For the reasons stated above, PNG's first Exception should be denied.

**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.<sup>20</sup>

**Reply to Exception No. 2:** PNG's argument actually is that it should be able to retroactively establish requisite standing after the deadline by protest amendments or a subsequent retaliatory application lacks legal support and amendments were never intended nor should be used to cure late-filed protests. Nor should placeholder protests be permitted.

**a. Amendment Cannot Cure An Untimely and Insufficient Protest.**

In Exception No. 2, PNG argues that, under the provisions of the Commission's regulation at 62 Pa. Code § 5.91(b) regarding the amendment of previously filed pleadings, PNG's filing of (a) an application for service authority in Susquehanna County, thereby establishing the needed grounds for standing, and (b) an amended protest reflecting such standing, created a valid protest to Leatherstocking's Application because the initial protest was filed within the protest period set by the Commission. The Commission should not accept

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<sup>20</sup> PNG Exceptions, pp. 17-25.

PNG's proposed interpretation of this regulation. First, PNG would not have filed the amended protest it did had it not recognized the lack of standing in its original protest. That means the amended protest is by definition a late-protest filed beyond the protest deadline. A utility should not be permitted to file a protest retroactively - well after the protest deadline.

Stated another way, allowing a utility to establish its proper standing well after the protest periods have passed and then to "backfill" its insufficient protest makes a mockery of the protest deadline. In fact, allowing this type of action renders the setting of protest periods meaningless and invites delay and litigation of virtually every utility application. The Commission must decline PNG's invitation to interpret the law that way.

Using the logic set forth by PNG at Page 21 of its Exceptions, a party that filed a protest without possessing the necessary standing would automatically have the right to amend its pleading, even after the end of the Commission-set protest period, to incorporate self-serving and newly created "evidence" of standing. Allowing an amended protest to establish standing in this manner is analogous to granting protestant status to a party who clearly submitted a late-filed protest. The Commission has routinely rejected such protests<sup>21</sup> and should not begin such a practice in this case by allowing the procedure suggested by PNG in its Exceptions.

The purpose of setting protest deadlines is to establish some certainty in an application proceeding and to prevent unnecessary delay that would be caused if a party could file a protest at any time. The fact of the matter is that the filing of a late protest can be fatal to the protestant's participation in an application proceeding. It should not matter if the filing is an initial protest submitted after the protest deadline has ended or is an amended protest filed to

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<sup>21</sup> *Re Pennsylvania-American Water Company*, Docket Nos. A-212285F019, A-221285F020 and A-0221285F021 85 Pa. P.U.C. 548 (1995); See also *Consumers Water*, 2001 Pa. PUC LEXIS 1.

retroactively address standing defects at the time protests were due. One either has or does not have standing at the time the protest deadline was due. PNG did not.

Because an initial protest filed by PNG without standing is ineffective to grant participation, there is nothing for PNG to amend. Otherwise, the protest window would never close. Here, at the time PNG filed its initial protest it admitted it did not have certificated service authority in the involved portions of Susquehanna County and that it had no application pending before the Commission seeking that authority.<sup>22</sup> Therefore, its initial protest was invalid for the purpose of establishing standing for it to oppose the Leatherstocking Application. Given the invalidity of PNG's protest at the time it was filed, there is nothing for it to amend and the Commission should deny PNG's attempts to file a valid protest after the Commission-set protest period ended.

PNG's amended protest is, in reality, a late-filed protest and the I.D. properly found that it could not be used retroactively to create a timely and sufficient protest by PNG in this matter. The Commission should disregard PNG's arguments and adopt the ALJ's Initial Decision, without modification.

**b. Interventions by Others Not Opposed to Having the Application Considered Without Hearing Cannot Support PNG's Late and Insufficient Protest and Desire for Hearings.**

PNG also argues it should be granted protestant status in this proceeding because other parties also intervened; thus, its protest allegedly does not change the scope of or delay the proceeding. That is not true. PNG does not mention that the other intervenors have gone on record stating that they do not oppose the application being considered by the Commission without hearing. Williams Field Services, Inc. (Williams) filed a Petition to Intervene but indicated it intended merely to monitor the proceeding. The Pennsylvania Office of Consumer

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<sup>22</sup> PNG Protest at ¶¶ 2-4; PNG Amended Protest at ¶¶ 2-4.

Advocate (OCA) intervened and issued a Public Statement but indicated no opposition to the requests made in Leatherstocking's Application in either of those documents. I&E filed a Notice of Appearance but has not been insistent on hearings on the merits of the application. Consequently, PNG's argument that the case is going to hearing and there is no harm letting it in anyway must be rejected.

**c. Contrary to PNG's Claim, its Protest Prejudices Leatherstocking and the Public and Expands Issues in the Matter.**

PNG's further claims in its Exceptions that the filing of its protest did not and does not prejudice Leatherstocking in any way. This claim is not true and without merit. PNG is the only party who challenged the application and wanted a hearing regarding such opposition. Thus, at the time PNG filed its initial protest, it was the only party to the proceeding that *opposed* the application and sought hearings.<sup>23</sup> Without such opposition, the Application could have proceeded through the Commission's modified procedure, which allows for approval of an unopposed application for service without requiring a hearing be held. In contrast, a protested application, requires additional time for formal litigation discovery, testimony preparation and submission, hearings, briefing, issuance of an Initial Decision, filing of Exceptions and Replies to Exceptions and consideration of and entry of a final Commission Order. The amount of time needed to complete all the elements of a fully litigated proceeding, even if effectively accelerated, is considerably more than the time needed for an application to move through the non-litigated/modified procedure used by the Commission in unopposed cases. The litigation PNG invites with its Protest could take well over a year (perhaps two), as the Application was filed in November of 2011, and now has only proceeded to the motions phase and decisions thereon.

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<sup>23</sup> Williams and OCA have stated on the record that neither party opposes the approval of Leatherstocking's Application.



PNG's argument that its late-protest will not burden the proceeding lacks merit, and should be rejected.

Also, the details and issues raised in PNG's protest greatly expand the issues in the matter, as a simple review of the interventions versus PNG's protest and amended protest show. PNG's argument that it should be granted protestant status because it has not expanded the issues or caused delay should be rejected.

- d. **PNG's Argument that its Due Process was Denied by the ALJ Considering the Preliminary Objections as a Request for Summary Judgment is Incorrect Because (1) Tribunals Have Always Had Such Latitude In Civil and Commission Matters, (2) the Only Material or Necessary Facts Regarding PNG's Lack of Standing Were Admitted by PNG Thereby Rendering PNG's Affidavit Argument Superfluous, (3) and the ALJ or Commission Could Consider the POs to be a Motion for Judgment on the Pleadings as PNG's Admissions or Failure to Deny it its Answer to POs, in Addition to Admissions in PNG's Protest and Amended Protest, Establish All Material Facts Not in Dispute Necessary to Dismiss PNG from Leatherstocking's Case.**

PNG next argues in Exception No. 2 that the ALJ should not have considered Leatherstocking's Preliminary Objections as if they were filed as a motion for summary judgment because doing so violated PNG's due process right to answer such a motion. PNG offers no legal citation for this proposition. This is an argument that attempts to put form over substance and, as such, is without merit and should be disregarded. Both the Commission and the Pennsylvania Courts routinely address the substance of a pleading even though it has been technically styled or titled differently by a party.<sup>24</sup> The Commission's own regulation at 52 Pa. Code § 1.2(a) allows both the presiding officer and the Commission to "disregard an error or defect of procedure that does not affect the substantive rights of the other parties." ALJ Salapa

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<sup>24</sup> *In re Telecommunications Act of 1996*, 88 Pa. P.U.C. 332 (1998)(the Commission may interpret or recast a party's pleading in order to secure the just, speedy, and inexpensive determination of every action or proceeding to which it is applicable.) This is in accord with the Pennsylvania Rules of Civil Procedure, Rule No. 126 which states, "The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties."

properly used this regulation, and followed longstanding civil and Commission precedent by considering the substance of Leatherstocking's Preliminary Objections even though the proper form for making its request to dismiss PNG's protest would have been the filing of a motion for summary judgment or perhaps, a motion for judgment on the pleadings.

Contrary to its arguments on this issue, PNG was not prejudiced by the ALJ's treatment of the Preliminary Objections, nor were any of its due process or substantive rights affected – the courts and this Commission have great latitude to interpret or recast a party's pleading in order to secure the just, speedy, and inexpensive determination of every action or proceeding to which it is applicable.<sup>25</sup> PNG had a full opportunity to and did respond to the Preliminary Objections filed by Leatherstocking in response to PNG's protest and amended protest. PNG's admissions in its Protest, Amended Protest, and Answer to Preliminary Objections *contain all material or necessary facts to support the ALJ's dismissal of PNG for a lack of standing.*

In those pleadings, PNG was permitted to raise all its arguments why it had standing or why the ALJ and the Commission should deny the Preliminary Objections and grant PNG standing in this proceeding. In issuing the Initial Decision, the ALJ fully and properly addressed the parties' arguments on standing as set forth in the Preliminary Objections and responses. The material facts of this case would have been the same if Leatherstocking had questioned PNG's standing in a motion for summary judgment or judgment on the pleadings as they were set forth in its Preliminary Objections.

Those facts, as admitted by PNG<sup>26</sup> are: it did not have certificate rights for the area Leatherstocking applied-for when it filed its original (and for that matter amended) protest; it

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<sup>25</sup> PNG's assertion that it should be afforded the right to amend its Protest should the Preliminary Objections be granted was not raised by PNG in its Answer to Leatherstocking's Preliminary Objections and is therefore waived. 52 Pa. Code §5.533(c) directs that parties/participants refer to relevant portions of the record and passages in previously-filed briefs, insofar as practical, when offering a statement of reason supporting an exception.

<sup>26</sup> Failure to deny facts set forth in Preliminary Objections are deemed admitted. 52 Pa. Code § 5.61

only had alleged future intentions to serve the area; and it filed its application roughly 3 weeks after the protest deadline.<sup>27</sup> That is all that is necessary for the ALJ and this Commission to reject PNG's protest as untimely and insufficient. There is no point, other than for PNG to try to retroactively create and apply new facts, for affidavits or consideration of anything other than the pleadings. As stated above, if that is permitted the protest period never closes, and delay is invited.

The only interest PNG may possibly have had at the time of its initial protest was a future but unripe interest in expanding its own service territory. As discussed above regarding PNG Exception 1, exploratory activities do not equal standing. PNG should not be able to act retroactively to change this interest after the end of the protest period in order to improperly provide it standing in this proceeding.<sup>28</sup>

The ALJ could have, and this Commission can, consider the Preliminary Objections as a Motion for Judgment on the Pleadings regarding standing, as the pleadings (Leatherstocking's Preliminary Objections, PNG's Protest, Amended Protest, and Answer to Preliminary Objections) are all that are necessary to establish the material facts not in dispute to dismiss PNG. No affidavits are necessary.

In sum, at the time it filed its protest, PNG had no direct, immediate, substantial or pecuniary interest that allowed it to oppose the service rights requested by Leatherstocking. PNG had no Commission authority to serve the involved areas of Susquehanna County; it had no pending application before the Commission and its stated intention to file an application for these rights was insufficient to establish such an interest; and its amended protest was untimely and could not be used to cure the lack of standing that existed at the protest deadline.

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<sup>27</sup> PNG Protest at ¶¶ 2-4; PNG Amended Protest at ¶¶ 2-4; PNG Answer to Preliminary Objections ¶¶ 1-5.

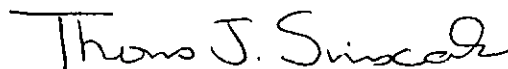
<sup>28</sup> *Re Pennsylvania-American Water Company*, Docket Nos. A-212285F019, A-221285F020 and A-0221285F021 85 Pa. P.U.C. 548 (1995); See also *Consumers Water*, 2001 Pa. PUC LEXIS 1.

Based on these facts, the I.D. properly concluded that PNG had no standing to protest Leatherstocking's Application and nothing presented in PNG's Exceptions provides support for reversing or modifying the I.D. PNG's Exception on this issue should be denied.

### III. CONCLUSION

WHEREFORE, for the reasons set forth above, Leatherstocking Gas Company, LLC respectfully requests that the Joint Stipulation in Settlement be approved; UGI Penn Natural Gas, Inc. be permitted to withdraw its protest filed at Docket No. A-2011-2275595 and its competing application filed at Docket No. A-2012-2284831; the Initial Decision issued by Administrative Law Judge David A. Salapa be adopted without modification; the Application filed by Leatherstocking be decided through the Commission's non-litigated/modified procedure; and Leatherstocking be authorized to provide natural gas service in portions of Susquehanna County, Pennsylvania.

Respectfully submitted,



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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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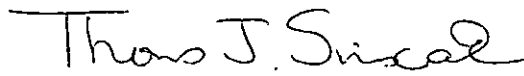
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Dated: August 6, 2012