



COMMONWEALTH OF PENNSYLVANIA

December 28, 2018

E-FILED

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Joint Application of Aqua America, Inc., Aqua Pennsylvania, Inc., Aqua Pennsylvania Wastewater, Inc., Peoples Natural Gas Company LLC and Peoples Gas Company LLC for all of the Authority and the Necessary Certificates of Public Convenience to Approve a Change in Control of Peoples Natural Gas Company LLC and Peoples Gas Company LLC by Way of the Purchase of All of LDC Funding LLC's Membership Interests by Aqua America, Inc. / Docket Nos. A-2018-3006061, A-2018-3006062, A-2018-3006063

Dear Secretary Chiavetta:

Enclosed please find the Motion to Compel Responses to the Office of Small Business Advocate's Interrogatories, Set I, Question No. 2, Subparts a., b., c., and d., on behalf of the Office of Small Business Advocate ("OSBA"), in the above-captioned proceedings.

Copies will be served on all known parties in these proceedings, as indicated on the attached Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Erin K. Fure
Assistant Small Business Advocate
Attorney ID No. 312245

Enclosures

cc: Robert D. Knecht
Brian Kalcic
Parties of Record

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joint Application of Aqua America,	:	Docket No. A-2018-3006061
Inc., Aqua Pennsylvania, Inc., Aqua	:	Docket No. A-2018-3006062
Pennsylvania Wastewater, Inc.,	:	Docket No. A-2018-3006063
Peoples Natural Gas Company LLC	:	
and Peoples Gas Company LLC for	:	
all of the Authority and the	:	
Necessary Certificates of Public	:	
Convenience to Approve a Change	:	
in Control of Peoples Natural Gas	:	
Company LLC and Peoples Gas	:	
Company LLC by Way of the	:	
Purchase of All of LDC Funding	:	
LLC’s Membership Interests by	:	
Aqua America, Inc.		

**MOTION OF THE OFFICE OF SMALL BUSINESS ADVOCATE
TO DISMISS OBJECTIONS OF AQUA AMERICA, INC., AQUA
PENNSYLVANIA, INC., AND AQUA PENNSYLVANIA WASTEWATER, INC.
AND COMPEL RESPONSES TO OSBA SET I, NO. 2, SUBPARTS (A)
THROUGH (D) INTERROGATORIES**

Pursuant to 52 Pa. Code § 5.342(g), the Office of Small Business Advocate (“OSBA”) hereby requests that Administrative Law Judge (“ALJ”) Mary D. Long dismiss the objections of Aqua America, Inc. (“Aqua America”), Aqua Pennsylvania, Inc. (“Aqua PA”), and Aqua Pennsylvania Wastewater, Inc. (“Aqua PA Wastewater”) (collectively, “Aqua” or the “Companies”) and compel Aqua to answer OSBA Interrogatories Set I, No. 2, subparts (a) through (d). In support of this Motion, OSBA avers as follows:

I. Procedural Background

1. On November 13, 2018, Aqua, Peoples Natural Gas Company LLC, (“Peoples Natural Gas”) and Peoples Gas Company LLC (“Peoples Gas”) filed the *Joint Application of Aqua America, Inc., Aqua Pennsylvania, Inc., Aqua Pennsylvania Wastewater, Inc., Peoples Natural Gas Company LLC and Peoples Gas Company LLC for all of the Authority and the Necessary Certificates of Public Convenience to Approve a Change in Control of Peoples Natural Gas Company LLC and Peoples Gas Company LLC by Way of the Purchase of All of LDC Funding LLC’s Membership Interests by Aqua America (“Joint Application”)* pursuant to Sections 1102(a)(3) and 2210(a)(1) of the Public Utility Code, 66 Pa. C.S. §§ 1102(a)(3) and 2210(a)(1).

2. On December 7, 2018, the OSBA filed a Notice of Appearance, Notice of Intervention and Protest in opposition to the *Joint Application*.

3. On December 10, 2018, the OSBA served Set I of its Interrogatories upon Aqua.

4. On December 11, 2018, the Utility Workers Union of America, Local 612 filed a Petition to Intervene.

5. On December 11, 2018, the Bureau of Investigation and Enforcement (“I&E”) of the Pennsylvania Public Utility Commission (“Commission”) filed Notices of Appearance.

6. On December 19, 2018, the Laborers District Council of Western Pennsylvania filed a Petition to Intervene and Notice of Appearance.

7. On December 19, 2018, the Office of Consumer Advocate (“OCA”) filed a Protest and Public Statement.

8. On December 20, 2018 Aqua filed Objections (“*Aqua Objections*”) to OSBA Set I, No. 2, subparts (a) through (d).

9. On December 21, 2018, a PreHearing Conference was scheduled before ALJ Long for January 18, 2019.

10. On December 21, 2018, the Pennsylvania Independent Oil and Gas Association filed a Petition to Intervene.

11. On December 21, 2018, the United States Steel Corporation filed a Petition to Intervene.

12. On December 21, 2018, Equitrans, L.P. filed a Notice of Appearance and Petition to Intervene.

13. On December 26, 2018, Duquesne Light Company filed a Petition to Intervene.

14. On December 27, 2018, the Coalition for Affordable Utility Service and Energy efficiency in Pennsylvania (“CAUSE-PA”) filed a Petition to Intervene.

II. Discussion

15. In its December 20th Objections, the Companies argued OSBA Set I, No. 2, subparts (a) through (d) were overly broad and were written to seek information that is irrelevant, immaterial, and not likely to lead to the discovery of admissible evidence. *Aqua Objections*, at 3-4.

16. For ease of reference, OSBA Set I, No. 2 is set forth below:

2. Reference Application at page 13 paragraph 38:

a. In MS Excel electronic format, please provide the financial forecasts developed by Aqua America which justified an

acquisition price of \$4.275 billion. Please include all supporting workpapers.

- b. Please provide copies of any and all external or internal valuation or financial appraisal studies of the Peoples companies used by Aqua America to evaluate the Proposed Transaction.¹
- c. Please identify any and all external financial, accounting and appraisal advisors retained by Aqua America regarding the Proposed Transaction.
- d. Please provide copies of all presentations made to Aqua America's board of directors regarding the Proposed Transaction.
- e. Please provide copies of all meeting minutes for Aqua America board of directors meetings in which the Proposed Transaction was addressed.

17. Aqua specifically argued that OSBA Set I, No. 2.a sought information that was not relevant to any material issue in the proceeding and was not reasonably calculated to lead to the discovery of admissible evidence because it sought information related to and financial forecasts developed by Aqua in relation to the acquisition price paid by Aqua. *Aqua Objections*, at 4. Aqua argued this information was not relevant because in the *Joint Application*, Aqua and Peoples represented that no claim to recover the costs of the Proposed Transaction has been made as part of the proceeding or will be made in a future proceeding. *Aqua Objections*, at 4.

18. Aqua argued that the valuations, financial appraisals, and the identification of all external financial, accounting and appraisal advisors sought by OSBA Set I, Nos. 2.b and 2.c were irrelevant because, in the *Joint Application*, Aqua and Peoples represented that no claim to recover the costs of the Proposed Transaction has been made

¹ By way of explanation, the short-form "Proposed Transaction" as used in OSBA's Set I and in the instant Motion to Compel refers to the requested change in control of Peoples to Aqua America by way of the purchase of all of the membership interest of LDC Funding LLC in Peoples by Aqua America. The short-form was taken from the *Joint Application* at ¶5, p. 4.

as part of the proceeding, or will be made in a future proceeding. *Aqua Objections*, at 4-5.

19. Aqua argued that the presentations requested in OSBA Set I, No. 2.d were irrelevant insofar as they contained information that Aqua previously argued was irrelevant in its objections to OSBA Set I, Nos. 2.a through 2.c.

20. Aqua's objections based on relevancy are meritless. The information sought by OSBA Set I, Nos. 2.a through 2.d will aid in the analysis of the magnitude of the purchase price, which is relevant for any transaction involving a public utility for two reasons. First, the Commission should not grant a Certificate of Public Convenience if the Proposed Transaction does not result from prudent management. 66 Pa. C.S. § 1103. Second, Section 1102 requires that the resulting entity must be financially fit. 66 Pa. C.S. §§ 1102, 1103. If the purchase price is excessive, and if it represents a significant share of the surviving entity, the transaction could be financially destabilizing.

21. The information sought in OSBA's Set I, Nos. 2.a through 2.d is relevant because in the instant matter there are two reasons to have concerns about the reasonableness of the purchase price.

First, page one of the *Joint Application's* Appendix J indicated that Peoples Natural Gas had a total book asset value of \$2.312 billion on December 31, 2017, and page one of the *Joint Application's* Appendix K indicated that Peoples Gas had a book asset value of \$0.303 billion, totaling \$2.615 billion. The *Joint Application* indicated that the acquiring entity will assume \$1.3 billion in debt from the existing companies. *Joint Application*, at ¶38, p. 13. In exchange for those net assets, Aqua America indicated that it will need to raise \$0.4 to \$0.9 billion in additional debt. *Joint Application*, at ¶39, p.

13-14. Therefore, the \$2.6 billion in assets will then be financed by debt of \$1.7 to \$2.6 billion, implying fairly high financial leverage for the purchased assets (a debt to asset ratio of 65% ($\$1.7/\2.6) to 85% ($\$2.2/2.6$)). The *Joint Application* then indicated that the Proposed Transaction will require the acquiring entity to raise \$2.2 to \$2.9 billion in equity on top of this substantial debt. *Joint Application*, at ¶39, p. 13. Under these terms, the acquiring entity will be raising equity far in excess of the book value of the assets net of debt. Raising this equity may not be a concern if, in fact, the purchased entity has a real value of \$4.25 billion. However, if the purchase price is excessive, it is not clear that the purchasing entity will have the financial ability to go back to the capital markets and raise the necessary funds to meet the capital requirements associated with the Long-Term Infrastructure Improvement Plans of both the Aqua companies and the Peoples companies.

Second, as OSBA indicated in its *Notice of Intervention and Protest*, the Proposed Transaction was not enthusiastically greeted by the shareholders of Aqua America. *Notice of Intervention and Protest of the Small Business Advocate*, at ¶9, p. 4. On October 23, 2018, the date that the Proposed Transaction was announced, Aqua America's stock price fell significantly, resulting in what OSBA estimates to be an over \$800 million loss in market capitalization from October 22, 2018, to October 26, 2018. While market reaction is not dispositive as to the prudence of a particular transaction, the negative market reaction in this case is an indicator that the Commission should apply scrutiny to the transaction to ensure that it is not the result of an imprudent process and that it will not put a financial strain on the resulting entity.

22. Aqua additionally argued that OSBA Set I, No. 2.d is “overly broad because it includes all presentations made to the board of directors, regardless of whether those presentations were relied upon by the board of directors in deciding to execute the Proposed Transaction or formed the basis for any approval of any decision by the board of directors regarding the Proposed Transaction.” *Aqua Objections*, at 5.

23. OSBA Set I, No. 2.d requested the production of “copies of all presentations made to Aqua America’s board of directors regarding the Proposed Transaction” and is therefore limited in scope and time. Aqua posited that OSBA Set I, No. 2.d is overly broad because OSBA sought presentations made to the board of directors regarding the Proposed Transaction, but which were not relied upon by the board of directors in deciding to execute the Proposed Transaction. Accepting Aqua’s position would permit Aqua to take a “cherry-picking” approach to the production of documents. Fairness dictates that a party should not be able to disclose only those materials that support its position while simultaneously concealing materials unfavorable to its position. *See Katz v. AT&T Corp.*, 191 F.R.D. 433, 439 (E.D. Pa. 2000). All presentations made to the board of directors regarding the Proposed Transaction are relevant, including those presentations containing information that the board of directors may have chosen to disregard in its decision to execute the Proposed Transaction. Additionally, board members were necessarily aware of the content of all presentations made relating to the Proposed Transaction, and that memory must necessarily have contributed to the decisions made by each board member.

WHEREFORE, the OSBA respectfully requests that ALJ Long grant this motion to dismiss the *Aqua Objections* and compel Aqua to answer OSBA's Set I, Nos. 2.a, 2.b, 2.c, and 2.d.

Respectfully submitted,



Erin K. Fure
Assistant Small Business Advocate
Attorney ID No. 312245

For: John R. Evans
Small Business Advocate

Office of Small Business Advocate
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Dated: December 28, 2018

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joint Application of Aqua America,	:	Docket No. A-2018-3006061
Inc., Aqua Pennsylvania, Inc., Aqua	:	Docket No. A-2018-3006062
Pennsylvania Wastewater, Inc., Peoples	:	Docket No. A-2018-3006063
Natural Gas Company LLC and	:	
Peoples Gas Company LLC for all of	:	
the Authority and the Necessary	:	
Certificates of Public Convenience to	:	
Approve a Change in Control of	:	
Peoples Natural Gas Company LLC	:	
and Peoples Gas Company LLC by	:	
Way of the Purchase of All of LDC	:	
Funding LLC's Membership Interests	:	
by Aqua America, Inc.	:	

VERIFICATION

I, Erin K. Fure, hereby state that the facts set forth herein above are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: December 28, 2018



(Signature)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joint Application of Aqua America, Inc., Aqua Pennsylvania, Inc., Aqua Pennsylvania Wastewater, Inc., Peoples Natural Gas Company LLC and Peoples Gas Company LLC for all of the Authority and the Necessary Certificates of Public Convenience to Approve a Change in Control of Peoples Natural Gas Company LLC and Peoples Gas Company LLC by Way of the Purchase of All of LDC Funding LLC's Membership Interests by Aqua America, Inc.	:	Docket No. A-2018-3006061
	:	Docket No. A-2018-3006062
	:	Docket No. A-2018-3006063
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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been served via email and/or First-Class mail (*unless other noted below*) upon the following persons, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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DATE: December 28, 2018



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