



COMMONWEALTH OF PENNSYLVANIA

July 10, 2019

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 Main Brief, **Public Version**, on behalf of the Office of Small Business Advocate ("OSBA"), in the above-captioned proceeding.

Copies will be served on all known parties in this proceeding, 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, 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
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**MAIN BRIEF – PUBLIC VERSION
ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE**

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Date: July 10, 2019

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I. INTRODUCTION

On November 13, 2018, Peoples Natural Gas Company LLC (“Peoples Natural Gas”), and Peoples Gas Company LLC (“Peoples Gas”) (collectively, “Peoples”) together with Aqua America, Inc. (“Aqua America”), Aqua Pennsylvania, Inc. (“Aqua PA”), and Aqua Pennsylvania Wastewater, Inc. (“Aqua PA Wastewater”) (collectively, “Aqua”) 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). The *Joint Application* proposed a plan of acquisition whereby Aqua America would purchase all the membership interests of LDC Funding LLC (“Funding”), the indirect parent company of Peoples, and thereby obtain control of Peoples (hereinafter the “Proposed Transaction”).¹

On December 7, 2018, the Office of Small Business Advocate (“OSBA”) filed a Notice of Appearance, Notice of Intervention and Protest in opposition to the *Joint Application* filed by Aqua and Peoples (collectively, the “Joint Applicants”). Throughout the proceedings, the OSBA has opposed the *Joint Application* and, consistent with that position, requests that the *Joint Application* be denied. Also, Joint Applicants reached a settlement with certain parties in this case and filed a *Joint Petition for Approval of Non-Unanimous, Complete Settlement Among*

¹ *Joint Application*, at 1-6, 11, ¶¶ 1-10, 29-30.

Most Parties on June 26, 2019 (“*Non-Unanimous Settlement*”). The OSBA is not a signatory to, and opposes, the *Non-Unanimous Settlement*. In accordance with the procedural schedule, the OSBA submits this Main Brief requesting that both the *Joint Application* and *Non-Unanimous Settlement* be rejected for failure to (a) demonstrate that Aqua America is technically fit to own the Peoples Companies, and (b) demonstrate that the Proposed Transaction will result in affirmative public benefits.

II. HISTORY OF THE PROCEEDING

As directed by Administrative Law Judge (“ALJ”) Mary D. Long at the June 11, 2019, hearing, a comprehensive procedural history is set forth in the *Joint Applicants’ Statement in Support of Settlement Petition*.²

III. LEGAL STANDARDS

A. Burden of Proof

Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), provides that the party seeking a rule or order from the Pennsylvania Public Utility Commission (“Commission”) has the burden of proof in that proceeding. It is axiomatic that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

B. Standards for Approval of Acquisition and Settlement

Section 1102(a) of the Public Utility Code, 66 Pa. C.S. § 1102(a), provides that the Proposed Transaction may not be consummated unless the Commission first issues a certificate of public convenience.

² Transcript of Initial Evidentiary Hearing held June 11, 2019, at 244.

When a certificate of public convenience is required, Section 1103(a) of the Public Utility Code, 66 Pa. C.S. § 1103(a), allows the Commission to issue the certificate only upon a finding or determination that the granting of such certificate is “necessary or proper for the service, accommodation, convenience, or safety of the public.”

According to the Pennsylvania Supreme Court, satisfying this standard requires the Commission to find that the Proposed Transaction would “affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way.” *City of York et al., v. Pennsylvania Public Utility Commission*, 449 Pa. 136, 141; 295 A.2d 825, 828 (1972).

Popowsky v. Pa. P.U.C., 594 Pa. 583, 937 A.2d 1040 (2007) is precedent with respect to the affirmative public benefit standard. The Pennsylvania Supreme Court stated the following, when addressing the issue of affirmative public benefits in a telecommunications merger proceeding between Verizon Communications, Inc. and MCI, Inc.:

In summary, as indicated in *City of York*, the appropriate legal framework requires a reviewing court to determine whether **substantial evidence** supports the Commission's finding that a merger will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way. In conducting the underlying inquiry, the Commission is not required to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome, or impossible; rather, the PUC properly applies a preponderance of the evidence standard to make factually-based determinations (including predictive ones informed by expert judgment) concerning certification matters.

Popowsky, 937 A.2d at 1057 (emphasis added).

The Supreme Court found evidence of affirmative public benefits in the proposed merger between Verizon and MCI:

Indeed, even from a lay perspective, bearing in mind today's technological advances affecting all segments of business and personal life, there is much force to the Commission's conclusion that a combination of Verizon's and MCI's assets and strengths has substantial potential to create an integrated infrastructure supporting delivery of innovative, high-speed data and video services via the fiber-optic network, as well as deployment of mobile devices freeing workers from fixed workstations.

Popowsky, 937 A.2d at 1058.

Although the Supreme Court permitted predictive benefits, it does not follow that the *City of York* standard is easily met. Verizon and MCI both brought tangible assets to the table, which even a “lay perspective” could see the benefits of when those tangible assets were combined. The benefits were not purely speculative.

“Further, when the ‘public interest’ is considered, it is contemplated that the benefits and detriments of the acquisition be measured as they impact on *all affected parties*, and not merely on one particular group” *Middletown Township v. Pennsylvania Public Utility Commission*, 482 A.2d 674, 682 (Pa. Cmwlth. 1984) (emphasis in original). In addition, Section 1103(a) allows the Commission to impose upon its issuance of a certificate of public convenience “such conditions as it may deem to be just and reasonable.”

In accordance with Sections 1102(a)(3) and 1103(a) of the Public Utility Code, the Commission may not grant a certificate of public convenience with respect to the Proposed Transaction unless the Commission determines that the Proposed Transaction is “necessary or proper for the service, accommodation, convenience, or safety of the public.” As noted above, satisfying this standard requires the Commission to find that the proposed merger would “affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way.” *City of York*, 449 Pa. at 141, 295 A.2d at 828.

Pursuant to Section 2210 of the Public Utility Code, 66 Pa. C.S. § 2210, the Commission generally has the responsibility for taking steps to prevent anticompetitive or discriminatory conduct and the unlawful exercise of market power. Regarding gas utility transactions, Section 2210(a)(1) specifically requires the Commission to consider:

Whether the proposed merger, consolidation, acquisition or disposition is likely to result in anticompetitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail gas customers from obtaining the benefits of a properly functioning and effectively competitive retail natural gas market.

66 Pa. C.S. §2210(a)(1).

Section 2210(a)(2) requires the Commission to consider the effect of the Proposed Transaction on the employees of the natural gas distribution company or any other authorized collective bargaining agent representing those employees. Furthermore, the Commission is authorized by Section 2210(b) to impose necessary terms and conditions to “preserve the benefits of a properly functioning and effectively competitive retail natural gas market.”

IV. SUMMARY OF ARGUMENT

The *Joint Application* and the *Non-Unanimous Settlement* must be rejected because the Joint Applicants have failed to demonstrate that Aqua America will have the technical expertise to operate a natural gas distribution utility. Joint Applicants’ argument that Aqua America must be presumed to be technically fit to operate a gas distribution utility because it is a certificated water utility should be rejected by the ALJ and the Commission. Joint Applicants’ only credible argument for technical competence is that Aqua America will retain all of Peoples existing employees and technical expertise, including all senior management.

***** BEGIN HIGHLY CONFIDENTIAL STATUTORY ADVOCATES ONLY

***** END HIGHLY CONFIDENTIAL STATUTORY
ADVOCATES ONLY *****

The *Joint Application* must also be denied because the Joint Applicants have failed to satisfy the standard set forth in the *City of York* case. First, the Proposed Transaction fails to provide any quantifiable or verifiable benefits, and does not provide any affirmative public benefits for small business customers. In the *Non-Unanimous Settlement*, the Joint Applicants set forth numerous commitments which they claim are affirmative public benefits. However, rather than demonstrating *any* affirmative public benefits, these commitments are merely a continuation of the status quo operations of the Joint Applicants (which would continue in the absence of a merger), or constitute a vague, illusory, or unenforceable wish list.

Second, the Proposed Transaction as amended by the *Non-Unanimous Settlement* has two significant negative impacts.

Firstly, from a financial perspective, the Proposed Transaction would dilute earnings for Aqua America's shareholders, it would increase the financial risk for the combined entity through higher debt, and it may result in higher interest costs for ratepayers. The only financial beneficiary of this transaction is the seller, namely the SteelRiver entities.³

³ Peoples Gas and Peoples Natural Gas are wholly-owned subsidiaries of PNG Companies LLC, indirectly owned by SteelRiver Infrastructure Fund North America LP ("SRIFNA") and an affiliated fund. These funds are managed by SteelRiver Infrastructure Associates LLC and its affiliated management entities (collectively, "SteelRiver"). *Joint Application*, at 7, ¶15; 9, ¶18. Funding is a wholly-owned direct subsidiary of LDC Parent LLC, which is indirectly owned by SRIFNA and an affiliated fund managed by SteelRiver. *Joint Application*, at 10, ¶22.

Secondly, from a regulatory perspective, the *Non-Unanimous Settlement's* treatment of the Goodwin-Tombaugh natural gas gathering systems (“G/T Systems”) is, at best, highly problematic because it is not economic. If approved, the *Non-Unanimous Settlement* would substantially modify key provisions in the settlement of the last merger case involving the Peoples Companies, it would effectively reverse the Commission’s decision in that matter, and it would result in significantly higher costs for all Peoples ratepayers than those that would be incurred under existing regulation. The only potential beneficiaries of this provision in the *Non-Unanimous Settlement* would be the customers currently served by the G/T Systems, but at an enormous (and unreasonable) cost to other ratepayers.

The Joint Applicants have failed to meet their burden of proving that the Proposed Transaction would affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way. Accordingly, the OSBA respectfully requests that the ALJ and the Commission reject the *Joint Application* and the *Non-Unanimous Settlement* in their entirety.

V. ARGUMENT

A. Whether Aqua America, Inc. is Technically, Financially and Legally Fit to Own the Peoples Companies

1. Whether Aqua America Should Be Presumed Technically, Financially and Legally Fit to Own the Peoples Companies

To obtain a certificate of public convenience as a prerequisite for acquiring Peoples, Aqua America “has the burden, by preponderance of the evidence, to establish that it is technically, legally and financially fit to provide the proposed service.” *McCloskey v. Pennsylvania Public Utility Commission*, 195 A.3d 1055, 1058 (Pa. Cmwlth, 2018) *citing Seaboard Tank Lines, Inc. v. Pennsylvania Public Utility Commission*, 93 Pa. Commw. 601, 502 A.2d 762 (Pa. Cmwlth. 1985); *See also* 66 Pa. C.S. § 332(a). Aqua America is a water and

wastewater utility holding company, Aqua PA is a public utility that provides water service, and Aqua PA Wastewater is a public utility that provides wastewater service.⁴ Peoples Natural Gas, which includes its Equitable Division, is a public utility which provides natural gas transmission, distribution, and supplier of last resort services in Pennsylvania.⁵ Peoples Gas is a public utility that provides natural gas transmission, distribution, and supplier of last resort services in Pennsylvania.⁶

Joint Applicants assert in the *Joint Application* that “Aqua America is presumed to be technically, legally and financially fit to assume control of the Peoples Companies by virtue of its long-standing existence and ownership of jurisdictional public utility service providers, *e.g.*, Aqua PA.”⁷ Aqua America should not be afforded any such presumption. Adopting the Joint Applicants’ argument that a Pennsylvania **water and wastewater utility** is automatically fit to own and operate a Pennsylvania **natural gas distribution utility** merely on the basis of its status as a “jurisdictional public utility service provider” would be reckless and would lead to absurd results.⁸ OSBA witness Robert D. Knecht testified, as follows:

Under that logic, for example, Pike County Light & Power would automatically be deemed fit to operate Aqua PA, and The Newton Artesian Water Company would automatically be deemed fit to operate PPL Electric.⁹

⁴ *Joint Application*, at 5-6, ¶¶8, 11, 12.

⁵ *Joint Application*, at 7-8, ¶¶15, 16.

⁶ *Joint Application*, at 9, ¶¶18, 19.

⁷ *Joint Application*, at 16, ¶50.

⁸ OSBA Statement No. 1, at 5.

⁹ *Id.*

Aqua America’s ill-conceived “presumption” flies in the face of the requirement that technical fitness be demonstrated prior to an acquisition’s approval. A demonstration of technical competence must remain a criterion for approving this type of transaction (even if the purchaser is a Pennsylvania utility) to ensure that the public is protected.¹⁰ Aqua America, a water and wastewater utility holding company, has presented no record evidence that it is technically competent to own and operate Peoples Gas and Peoples Natural Gas.

2. Additional Considerations Concerning Aqua America’s Fitness to Own the Peoples Companies

Aqua America admitted that it does not have *any* experience owning and operating a natural gas utility.¹¹ Peoples is mandated to adhere to a Distribution Integrity Management Plan (“DIMP”) under Chapter 49 Parts 192.1001-192.1015 of the Code of Federal Regulations.¹² A DIMP requires a natural gas utility to perform certain risk management strategies and provides the framework to prioritize investment in pipeline improvements in a natural gas utility’s Long Term Infrastructure Improvement Plan (“LTIIP”).¹³ In assessing Aqua’s fitness to own Peoples, the OSBA respectfully requests that the ALJ and the Commission acknowledge that Aqua has no experience completing or maintaining a DIMP.

An uninformed observer might think that because water utilities and natural gas utilities both install pipes underground, Aqua America should be considered technically fit. That, of course, is absurd. The operation of water and natural gas utilities is in no way similar enough to make one automatically capable of operating another. For example, if there is a water leak in an

¹⁰ *Id.*

¹¹ Transcript of Initial Evidentiary Hearing held June 11, 2019, at 75.

¹² I&E Statement No. 3, at 3.

¹³ I&E Statement No. 3, at 3-5.

underground pipe, there can certainly be serious consequences, but the same leak in a natural gas pipe (as the Commission knows all too well) can result in explosions and deaths.

Furthermore, the operation at different pressures, storage requirements, and prioritization, are not the same for water and natural gas, and can have real world consequences if not done correctly. Consider the incident with Columbia Gas in New England with the over-pressurization of the system and the results that followed. There has been no demonstration on the record that Aqua has any knowledge or experience in dealing with such issues. The pipeline used for water service is not the same as the pipeline used for gas service.¹⁴ There is no evidentiary basis to conclude that Aqua America can satisfy the burden that it will be able to maintain safe, reliable service for customers upon completion of the Proposed Transaction.

The Joint Applicants argue that a key factor in determining technical fitness is the fact that the same highly-experience teams already in place at the Peoples Companies will continue to lead the natural gas operations after closing of the Proposed Transaction.¹⁵ In particular, the Joint Applicants note that Aqua America would have access to the “intellectual capital and expertise in natural gas operations and management of the Peoples Companies” which include Morgan O’Brien and his management team.¹⁶

*******BEGIN HIGHLY CONFIDENTIAL STATUTORY ADVOCATES**

ONLY***** 

¹⁴ Transcript of Initial Evidentiary Hearing held June 11, 2019, at 180. Joint Applicants’ Witness James Barbato testified that: “Aqua does use some of the PVC that the gas, plastic that the gas company uses, but we use much more ductile iron pipe, metal pipe than gas. The gas side also uses steel pipe. We do some steel pipe work, but nowhere as much as gas.”

¹⁵ *Joint Application*, at 23, ¶73.

¹⁶ *Id.*

[REDACTED]

*****END HIGHLY CONFIDENTIAL STATUTORY ADVOCATES ONLY*****

¹⁷ Joint Applicants' Statement No. 1, Revised, at 13.

¹⁸ Transcript of Initial Evidentiary Hearing held June 11, 2019, at 114-115

¹⁹ *Id.*

²⁰ Transcript of Initial Evidentiary Hearing held June 11, 2019, at 89-90.

B. Whether the Proposed Transaction, as Conditioned by the Non-Unanimous Settlement, Will Result in Substantial Affirmative Public Benefits

As a preliminary matter, when analyzing whether an affirmative public benefit will result from the Proposed Transaction, it is imperative that any alleged affirmative public benefit be measured against the status quo.²¹ In other words, the relevant inquiry should be whether the Proposed Transaction results in an affirmative public benefit when compared to the current state of Aqua and Peoples. The OSBA contends that such an analysis aligns with the requirement that the Commission may only issue a certificate of public convenience upon finding that the certificate is *necessary or proper* for the service, accommodation, convenience, or safety of the public.²² Additionally, a comparison to the status quo provides the only rational and measurable metric by which to evaluate the Proposed Transaction for affirmative public benefits.

1. Purchase Price and Financing

The basics of the Proposed Transaction are as follows. The purchase price is \$4.275 billion, of which \$1.3 billion is existing Peoples debt being assumed by Aqua America. The remaining \$3 billion in the purchase price would be financed with a combination of new debt and new equity. The *Joint Application* indicates that new debt would be in the \$0.4 to \$0.9 billion range,²³ and new equity in the \$2.2 to \$2.9 billion range.²³ The *Non-Unanimous Settlement* indicates that debt financing of the purchase will not exceed 50 percent of the price.²⁴ This implies that total debt cannot exceed about \$2.14 billion (50% * \$4.275 billion), and thus new

²¹ OSBA Statement No. 1, at 6, and OSBA Statement No. 1-S at 3-4.

²² See 66 Pa. C.S. § 1103(a).

²³ *Joint Application* at 13-14, ¶¶38-39.

²⁴ *Non-Unanimous Settlement*, at 9, ¶46.

debt cannot exceed \$0.84 billion (\$2.14 billion - \$1.3 billion in assumed debt) or \$840 million.²⁵ Most importantly, however, because the purchase price substantially exceeds the book value of the companies being purchased, the new combined entity will need to record approximately \$2.0 billion as a “goodwill” asset.²⁶ The Joint Applicants agree (and the *Non-Unanimous Settlement* stipulates) that the goodwill asset will not be included in rate base, and it therefore will produce no revenue.²⁷

In short, Aqua America is paying the SteelRiver entities some \$2.0 billion for assets that will produce zero revenues. It is not difficult to see where the financial benefit of the Proposed Transaction would go.

The Joint Applicants justify this enormous price premium based on the opinion of an “independent” investment bank, which concluded that the purchase price was not unreasonable compared to similar transactions.²⁸ Nevertheless, the evidence indicates that the Proposed Transaction will have a negative impact on existing shareholders, debtholders, and probably ratepayers.

²⁵ See calculations at OSBA Statement No. 1-S, at 5, footnote 3. The OSBA recognizes that there is some uncertainty surrounding the amount of new debt. The oral testimony of Joint Applicants’ witness Mr. Schuller suggests that some \$436 million has been raised, and that no further debt financing will be necessary. Transcript of Initial Evidentiary Hearing held June 11, 2019, at 127-128. Nevertheless, whether the new debt is \$436 million, \$840 million, or \$900 million, the simple fact is that the combined entity will have considerably more debt than the current sum of its parts.

²⁶ OSBA Statement No. 1 at 3.

²⁷ OSBA Statement No. 1 at 8.

²⁸ *****BEGIN CONFIDENTIAL*****

*****END CONFIDENTIAL*****.

Consider the implications of the Proposed Transaction as it relates to the goodwill asset. SteelRiver is paid some \$2.0 billion for an asset that produces no revenue. This asset is financed by somewhere between \$436 and \$840 million in new debt, and the balance from equity. Because this asset produces no revenue, the new debt simply adds to the overall riskiness of the combined company, relative to the status quo.²⁹ And, similarly, the new equity simply serves to dilute the existing earnings of the independent companies, since the same earnings will now need to be spread over a larger equity base. Moreover, this dilution is likely to have a negative impact on the resulting combined entity's ability to raise equity capital in the future.³⁰ It is therefore unsurprising that both the debt rating agencies and the stock market provide evidence that the Proposed Transaction will have a negative impact.

With respect to the Aqua America debt, both Standard & Poor's and Moody's explicitly recognize that the Proposed Transaction will increase the riskiness of Aqua America debt.³¹ Lower credit ratings for the debt will serve to lower the value of that debt, which has a negative impact on existing bondholders. Moreover, lower credit ratings will likely lead to higher interest rates, which will be passed on to ratepayers.³²

From the perspective of Aqua America's shareholders, the stock market reaction was consistent with the conclusion of the debt rating agencies, in that the announcement of the Proposed Transaction was not well-received. The impact of the announcement of the Proposed Transaction on Aqua America's stock price was an almost immediate reduction of about 11

²⁹ OSBA Statement No. 1 at 8.

³⁰ OSBA Statement No. 1, at 10.

³¹ OSBA Statement No. 1-S at 6.

³² OSBA Statement No. 1 at 7, 10.

percent in the three days following the announcement of the Proposed Transaction, relative to the Dow Jones utility Index (“DJU”).³³ While the relative Aqua America stock price recovered to a certain extent, it nevertheless remained approximately 7 percent below the pre-announcement level, measured relative to the DJU, at the time intervenor evidence was submitted.³⁴ Additionally, it is likely that Aqua America’s stock price recovery is due to factors unrelated to the Proposed Transaction.³⁵ In effect, the initial negative impact of the Proposed Transaction announcement on Aqua America’s market cap was about \$720 million, and in late March of 2019 was \$450 million (assuming, for argument’s sake, that the recent gain *was* related to market reconsideration of the Proposed Transaction).³⁶

The inflated purchase price of \$2 billion, combined with the market’s reaction to the Proposed Transaction announcement, demonstrates that the Proposed Transaction will be financially destabilizing for the combined entity. As set forth below, the Joint Applicants have committed to numerous construction projects in the *Non-Unanimous Settlement*, many of which will require large amounts of capital to complete. Creating a combined entity that is less financially stable than both Aqua and Peoples as they exist separately today is not an affirmative public benefit.

³³ OSBA Statement No. 1, at 8-9.

³⁴ OSBA Statement No. 1, at 9.

³⁵ OSBA Statement No. 1, at 9. As noted by OSBA Witness Mr. Knecht in footnote 20 of OSBA Statement No. 1, “Some of the relative gain in WTR post-transaction may relate to the settlement resolution of Aqua’s recent Pennsylvania base rates proceeding (now pending Commission review), and Peoples/Equitable filing for a base rate increase (now being litigated).”

³⁶ OSBA Statement No. 1, at 8-9.

2. Public Ownership of The Peoples Companies

The Joint Applicants assert that an affirmative public benefit of the Proposed Transaction will be that Peoples will have improved access to equity markets post-transaction.³⁷ The implication of this argument is that Aqua America will have better access to capital than the privately-held SteelRiver entities. This argument fails for two reasons.

First, Joint Applicants offer no evidence that the SteelRiver entities have experienced any difficulty in raising capital needed by the Peoples Companies, nor do Joint Applicants provide any quantification for such benefits. Experts for both I&E and OCA confirm that view.³⁸

Second, the Joint Applicants' argument assumes that investors are unable or unwilling to invest in a private venture, implying that publicly-owned Aqua America has access to more sources of financing.³⁹ The Joint Applicants' argument ignores the fact that publicly-owned companies are subject to substantially more regulatory scrutiny than are privately-held firms, which would make the latter more attractive to certain investors.⁴⁰ Moreover, public ownership has generally been losing ground to private equity.⁴¹ Specifically, private equity has certain

³⁷ *Joint Application*, at 27, ¶86.

³⁸ I&E Statement No. 1 at 5; OCA Statement No. 2 at 27, footnote 14.

³⁹ OSBA Statement No. 1, at 13.

⁴⁰ *Id.*

⁴¹ OSBA Statement No. 1-S, at 10. OSBA Witness Mr. Knecht cited to a Credit Suisse review in his surrebuttal testimony that can be accessed at:

https://www.cmgwealth.com/wp-content/uploads/2017/03/document_1072753661.pdf

financing advantages over public ownership, which were recently recognized by the Milken Institute:⁴²

Private capital markets have become a favored alternative source of company financing. In addition, private equity firms have become more innovative in developing options for financing the growth of small and emerging firms, and converting many publicly listed companies into private companies. Consequently, more companies are choosing to be privately owned, or are staying private for longer periods before becoming publicly listed.⁴³

The fact that there is an observable trend to more private equity and less public ownership negates the Joint Applicants' argument that there is any affirmative public benefit to public ownership of the Peoples Companies.⁴⁴ Instead of demonstrating that public ownership will be an affirmative public benefit of the Proposed Transaction, the Joint Applicants have merely pointed out a difference in investment options – without demonstrating that such a difference creates any advantage.

The Joint Applicants also assert that the increased reporting requirements for public companies that would apply to Peoples post-transaction is an affirmative public benefit.⁴⁵ However, all public utilities, by virtue of their status, are already required to share significant information with their regulators and are essentially an “open-book” to regulators.⁴⁶ The Joint Applicants have not proven that any additional information regarding Peoples will be provided

⁴² OSBA Statement No. 1-S, at 10.

⁴³ OSBA Statement No. 1-S, at 10 (*citing* <https://assets1b.milkeninstitute.org/assets/Publication/Viewpoint/PDF/WP-083018-Companies-Rush-to-Go-Private-FINAL2.pdf> Consulted 17 May 2019).

⁴⁴ OSBA Statement No. 1-S, at 10.

⁴⁵ *Joint Application*, at 27-28, ¶89.

⁴⁶ OSBA Statement No. 1-S, at 10.

under Aqua ownership that is not already provided currently by Peoples.⁴⁷ Again, the Joint Applicants have failed to demonstrate that any affirmative public benefits will result from this Proposed Transaction.

3. Job Retention and Growth in Western Pennsylvania

The Joint Applicants further claim that the acquisition of Peoples by Aqua America would maintain jobs in Pennsylvania and provide expanded job opportunities for gas and water/wastewater employees.⁴⁸ While maintaining local employment and keeping existing commitments are not negative factors, similarly they are not demonstrated affirmative public benefits.⁴⁹ As set forth above, the proper evaluation to satisfy the burden of proof of what constitutes an affirmative public benefit should be a comparison to the status quo. It is likely that both companies would maintain their existing workforce in the absence of the Proposed Transaction. While the Joint Applicants assert that the Proposed Transaction will lead to expanded job opportunities, they fail to explain how, when, and in what manner the Proposed Transaction will create new jobs. In short, the Joint Applicants fail to demonstrate that the Proposed Transaction will create expanded job opportunities. Furthermore, the Proposed Transaction increases the risk that redundancies may develop in the combined entity over time, which could lead to increased job loss. Accordingly, the fact that already existing jobs will be maintained fails to demonstrate any affirmative public benefit from this Proposed Transaction.

⁴⁷ OSBA Statement No. 1, at 13.

⁴⁸ *Joint Application*, at 30, ¶99.

⁴⁹ OSBA Statement No. 1, at 12.

4. LTIP Acceleration

In its original filing, the Joint Applicants stated that Aqua America would maintain the current pace of Peoples asset replacement spending in its Long-Term Infrastructure Improvement Plans (“LTIPs”) but would look for opportunities for further acceleration of that spending.⁵⁰ However, the Joint Applicants *now* offer to commit to a specific acceleration of the LTIP spending in the amount of \$30 million per year.⁵¹ As discussed below, this commitment does not constitute an affirmative public benefit for three reasons. First, the Joint Applicants have made no demonstration that the acceleration of the spending would be cost-effective and reasonable. Second, while the acceleration may not be a benefit to the public, it is assuredly a benefit to the shareholders of the utility. Third, since Commission approval of a modification of the LTIP would be required, the Joint Applicant’s commitment is nothing more than agreement that Aqua America will file a new LTIP in the near future.⁵² Thus, the proposed acceleration of LTIP spending should not be viewed as an affirmative public benefit.

In evaluating the Joint Applicants’ proposed acceleration, it must be recognized that Pennsylvania LTIPs necessarily reflect a balancing of factors (including the obsolescence of the plant in place, safety concerns, number of affected customers, cost efficiency, and rate stability). The Commission considers all these factors in its evaluations of these plans. However, with respect to the new proposal, the Joint Applicants do not offer any detailed analysis of the impact of the proposed acceleration in spending on these tradeoffs.⁵³ It appears that Aqua America, not

⁵⁰ Joint Applicants’ Statement No. 1 Revised, at 11; Joint Applicants’ Statement No. 5 Revised, at 14, and Joint Applicants’ Statement No. 4 Revised, at 18.

⁵¹ *Non-Unanimous Settlement*, at 13-14, ¶69.

⁵² *Non-Unanimous Settlement*, at 13-14, ¶69. *See also*, Transcript of Initial Evidentiary Hearing, held June 11, 2019, at 175.

⁵³ OSBA Statement No. 1-S, at 12.

being technically competent in natural gas operations, has not undertaken any systematic evaluation of the current high cost of mains replacement in Pennsylvania, or the feasibility of accelerating replacement infrastructure given the limited availability of qualified workers.⁵⁴ Moreover, the I&E technical expert in this matter concluded that, in all likelihood, any acceleration of spending would be “difficult if not impossible.”⁵⁵

In addition, while the benefits to the public of LTIIP acceleration are uncertain, it is clear that Aqua America has a strong financial interest in accelerating LTIIP spending. As set forth above, Aqua America proposes to purchase approximately \$1 billion in Peoples’ book equity for \$3 billion.⁵⁶ As part of the Proposed Transaction, Aqua America will receive \$2 billion in goodwill – upon which it will *not* seek recovery.⁵⁷ Furthermore, Peoples’ equity is currently generating a return of approximately 3 percent on this market value.⁵⁸ However, for every additional dollar in equity financing, Aqua America expects to earn above 9 percent.⁵⁹ Thus, by accelerating LTIIP spending, Aqua America can partially offset the dilutive effect of the Proposed Transaction more quickly.⁶⁰ Moreover, by accelerating the spending in the near term when mains replacement costs are extremely high, Aqua America can obtain an additional financial bonus in the form of high-priced assets, upon which it can earn the much higher

⁵⁴ OSBA Statement No. 1-S, at 15.

⁵⁵ I&E Statement No. 3, at 8-9.

⁵⁶ OSBA Statement No. 1-S, at 13.

⁵⁷ Transcript of Initial Evidentiary Hearing held June 11, 2019, at 82.

⁵⁸ OSBA Statement No. 1-S, at 13. Per OSBA Witness Mr. Knecht in footnote 15 of OSBA Statement No. 1-S, “Appendices J and K [of the *Joint Application*] show return on book equity for the Pennsylvania Peoples companies of 8.4 percent in 2017. With a 3:1 market to book ratio, the implied return on market value is below 3 percent.”

⁵⁹ OSBA Statement No. 1-S, at 12.

⁶⁰ OSBA Statement No. 1-S, at 13.

return.⁶¹ In effect, it is in Aqua America's shareholders' interest for Aqua America to include every dollar of investment spending that it can prudently manage in its LTIP.⁶² Such financial manipulation, to the benefit of Aqua America and its shareholders, is not just and reasonable, and should be rejected by the Commission.

While the shareholders of Aqua America will materially benefit from the acceleration of LTIP spending, it is certainly not in the interest of ratepayers to accelerate LTIP spending as now proposed by the Joint Applicants. Unsurprisingly, the Joint Applicants will seek to recover the costs of the LTIP, including the increased spending, in rates.⁶³ Significantly, Aqua America is generally not willing to invest in physical utility assets on which it will not earn a return (although it is apparently willing to pay the SteelRiver Companies some \$2 billion for a goodwill asset that produces no return at all).⁶⁴ Additionally, the increases in the LTIP for general distribution mains at Peoples would be eligible to be recovered through a Distribution System Improvement Charge.⁶⁵ When viewed from a ratepayer perspective, the Joint Applicants are proposing to impose higher costs on ratepayers (\$30 million more per year), in a shorter amount of time, to replace old pipe which Peoples is already committed to and is required to do. Consequently, accelerating LTIP spending as proposed by the Joint Applicants is not an affirmative public benefit and may even be looked upon as a penalty to ratepayers. However, the

⁶¹ *Id.*

⁶² OSBA Statement No. 1-S, at 12.

⁶³ Transcript of Initial Evidentiary Hearing held June 11, 2019, at 78.

⁶⁴ *Id.* Since water is not an explosive compound like natural gas, this heavily argues against Aqua being technically fit to operate a natural gas distribution company.

⁶⁵ Transcript of Initial Evidentiary Hearing held June 11, 2019, at 78.

Joint Applicants' proposal to accelerate LTIP spending will certainly benefit Aqua America's shareholders.

Furthermore, the commitment that Aqua America makes is only to *file* a modified LTIP.⁶⁶ Since the modified LTIP filing may ultimately be denied by the Commission, this commitment cannot be viewed as an affirmative public benefit. In fact, as explained above, the Joint Applicants' revised proposal is self-serving, an intent to play on the Commission's desire to remove cast iron and bare steel as quickly as possible, and unsupported by any credible record evidence of its necessity or even of its feasibility.⁶⁷ These conclusions are made even more evident by the fact that this commitment was only introduced in rebuttal testimony (and placed in the *Non-Unanimous Settlement*), rather than included as part of the original *Joint Application*.

5. Goodwin and Tombaugh Gathering Systems

In 2013, Peoples acquired the G/T Systems in the acquisition/merger proceeding with Equitable Gas Company, LLC ("Equitable") at Docket Nos. A-2013-2353647, A-2013-2353649, and A-2013-2353651 ("Equitable Merger").⁶⁸ A process was established in the partial settlement reached in the Equitable Merger ("2013 Peoples/Equitable Settlement"), whereby Peoples agreed to undertake various economic evaluations related to the G/T Systems.⁶⁹ As part of the 2013 Peoples/Equitable Settlement, Peoples agreed that if the economic test was not satisfied, that

⁶⁶ *Non-Unanimous Settlement*, at 13-14, ¶69.

⁶⁷ OSBA Statement No. 1-S at 15.

⁶⁸ OSBA Statement No. 1-S, at 16.

⁶⁹ *Id.*

Peoples would recommend not investing further in the G/T Systems.⁷⁰ The Commission approved the 2013 Peoples/Equitable Settlement by Order on November 14, 2013.

Peoples was obligated under the 2013 Peoples/Equitable Settlement to complete system-wide assessments of the G/T Systems and then present a plan to the Commission estimating the additional funds necessary to provide safe and reliable service from the G/T Systems.⁷¹ The system-wide assessments *began* in 2017 and continued through 2018.⁷² Based on the results of the assessments, Peoples examined options and scenarios for additional analysis, and determined that only one scenario (“Scenario 3”) would meet the economic test in the 2013 Peoples/Equitable Settlement.⁷³ “Under Scenario 3, Peoples would retain 66 miles (40 miles of bare steel) and 732 customers (43%) and abandon 325 miles (280 miles of bare steel) and convert 972 customers (57%) to alternative fuel sources.”⁷⁴ In addition, Peoples would provide an allowance to customers being converted to alternative fuel sources to assist those customers in making conversions.⁷⁵

Peoples, having unenthusiastically performed assessments and analyses that took nearly five years, concluded that only a partial rehabilitation of the G/T Systems was financially sound according to the economic test in the 2013 Peoples/Equitable Settlement.

⁷⁰ Transcript of Initial Evidentiary Hearing held June 11, 2019, at 138.

⁷¹ Joint Applicants’ Statement No. 6-R, at 6-8.

⁷² Joint Applicants’ Statement No. 6-R, at 8.

⁷³ Joint Applicants’ Statement No. 6-R at 8-12; Transcript of Initial Evidentiary Hearing held June 11, 2019, at 138, 139, 143. Pursuant to the 2013 Peoples/Equitable Settlement, “The parties agree that the remainder of the EQT contribution, the \$12 million conversion cost and the estimated \$6 million in customer revenues comprise the economic test of whether the [G/T Systems] are transferred to Peoples.” 2013 Peoples/Equitable Settlement at 18, ¶65(f)(i).

⁷⁴ Joint Applicants’ Statement No. 6-R, at 11-13.

⁷⁵ Transcript of Initial Evidentiary Hearing held June 11, 2019, at 152.

In addition, Peoples analyzed the cost of replacing the entire G/T Systems. Based upon that analysis, Peoples estimated that, for a full system replacement of the G/T Systems, it would cost \$121.6 million, avoid costs of \$10.2 million by converting G/T Systems customers to Propane, and create an additional rate base investment supported by revenues of \$17 million.⁷⁶ Therefore, the cost of full system replacement (\$121.6 million), *less* avoided costs (\$10.2 million), *less* the benefit of additional rate base (\$17 million), and *less* the remaining contribution from Equitable required by the 2013 Peoples/Equitable Settlement (\$2.7 million) would result in \$91.7 million in costs to be recovered from ratepayers for full G/T Systems replacement after it is placed into rate base.⁷⁷ Under questioning by ALJ Long, the Joint Applicants admitted that the costs associated with the replacement of these assets will be reflected in the regular base rates process, subject only to any “stayout” restrictions that might result from the current Peoples base rate proceeding.⁷⁸

The *Non-Unanimous Settlement* estimates that complete rehabilitation of the bare steel in the G/T Systems will cost \$120 million in present value dollars, although the *Non-Unanimous Settlement* notes that the final total cost may exceed this estimated amount.⁷⁹ The cost per customer to replace, over five years, the entirety of the G/T Systems and to maintain service to all customers on those systems would be roughly \$72,000.⁸⁰ While Aqua America proposes to give a one-time, minimal rate credit of \$13 million to Peoples’ customers, the *Non-Unanimous*

⁷⁶ Transcript of Initial Evidentiary Hearing held June 11, 2019, at 146; Joint Applicants’ Exhibit JAG-3R, attached to Joint Applicants’ Statement No. 6-R.

⁷⁷ Transcript of Initial Evidentiary Hearing held June 11, 2019, at 146; Joint Applicants’ Exhibit JAG-3R.

⁷⁸ Transcript of Initial Evidentiary Hearing held June 11, 2019, at 90-91.

⁷⁹ *Non-Unanimous Settlement*, at 6-7, ¶33.

⁸⁰ Transcript of Initial Evidentiary Hearing held June 11, 2019, at 135.

Settlement proposes ratepayers will be responsible for paying most of the cost of the complete rehabilitation.⁸¹ Specifically, ratepayers will be responsible for paying *at least* \$107 million (\$120 million cost less \$13 million one-time credit) towards the rehabilitation of the G/T Systems. It is unjust and unreasonable to ask ratepayers to make such an enormous contribution when the overall project so miserably fails an economic test. While Aqua was aware of the G/T Systems issues when negotiating a purchase price, Aqua did not appear to incorporate costs for the G/T Systems into the purchase price, instead relying that the resulting combined entity would receive earnings on investing in rehabilitating the G/T System (which is what is proposed in the *Non-Unanimous Settlement*).⁸² Additionally, it must be recognized that Aqua has never remediated a natural gas gathering system because it is a **water and wastewater utility**.⁸³ The proposed G/T Systems complete rehabilitation, even as proposed in the *Non-Unanimous Settlement*, is an affirmative public *detriment*.⁸⁴

Furthermore, the G/T Systems issue should not be part of this proceeding whatsoever.⁸⁵ A process to address the G/T Systems has already been developed and approved by the Commission.⁸⁶ That process is being followed, and Peoples is required (as set forth in the Commission's November 14, 2013 Order) to follow that approved procedure regardless of whether the Proposed Transaction is approved.⁸⁷ Finding a reasonable, cost-effective solution

⁸¹ *Non-Unanimous Settlement*, at 6-7, ¶¶ 30, 33.

⁸² Transcript of Initial Evidentiary Hearing held June 11, 2019, at 165.

⁸³ Transcript of Initial Evidentiary Hearing held June 11, 2019, at 164. There has already been an explosion in the area of the G/T Systems. See Transcript of Initial Evidentiary Hearing held June 11, 2019, at 169.

⁸⁴ OSBA Statement No. 1-S, at 17.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ OSBA Statement No. 1-S, at 17; see also 66 Pa. C.S. § 501(c).

that balances the public interest regarding the G/T Systems and the effects on associated customers remains the responsibility of the Commission.⁸⁸ The G/T Systems issue is not properly part of this proceeding, and the Proposed Transaction must have no impact whatsoever on this particular regulatory problem.⁸⁹

Ultimately, however, approving the *Non-Unanimous Settlement* would have the result that it would subvert the process established in the settlement in the Equitable Merger, implicitly reverse the Commission's approval of the 2013 Peoples/Equitable Settlement, and require Peoples ratepayers to fund the vast majority of the replacement of these systems. This result is neither just nor reasonable. While the OSBA acknowledges that the 1,704 customers served by these systems will benefit, this benefit comes at enormous cost to all other ratepayers.

6. Other Conditions Impacting Peoples Company Customers

As discussed earlier in Section V.A.2 of the OSBA's Main Brief, *****BEGIN

HIGHLY CONFIDENTIAL STATUTORY ADVOCATES ONLY [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL STATUTORY ADVOCATES
ONLY*****

7. Other Conditions Impacting Aqua PA Customers

The only area that offers potential for savings relates to IT systems and specifically the SAP platform; however, use of an SAP system is not an affirmative public benefit. The Joint

⁸⁸ OSBA Statement No. 1-S, at 17.

⁸⁹ *Id.*

Applicants suggest that there may be savings hypothetically achieved by eventually standardizing the use of this technology for both Aqua and Peoples.⁹⁰ The SAP platform is generally deemed to be superior to the existing systems used by Aqua.⁹¹ However, in all likelihood, because of its superiority, it is plausible that Aqua would move toward implementing the SAP platform in the absence of the merger.⁹² Aqua PA commits to conducting a cost, benefit, timetable and rate impact analysis for implementation of the Peoples' SAP system and will submit the report to the statutory advocates prior to implementing such SAP system to Aqua PA.⁹³ Simply put, it is not an affirmative public benefit for Aqua PA to use this proceeding to upgrade its antiquated computer systems, which are, according to Aqua, currently not in need of an upgrade.⁹⁴ Furthermore, hypothetical benefits do not satisfy the *City of York* standard.

8. Other Conditions

In the *Non-Unanimous Settlement*, the Joint Applicants make numerous commitments concerning low-income service programs. Aqua America proposes to have its shareholders contribute to Dollar Energy an additional \$100,000 each year for four years after the closing of

⁹⁰ OSBA Statement No. 1, at 16.

⁹¹ *Id.* As pointed out by OSBA Witness Mr. Knecht in footnote 46 of OSBA Statement No. 1: "It should be noted that the SAP platform was adopted by [Peoples], while owned by the private SteelRiver entity, while publicly-traded Aqua did not adopt a similarly modern system.... [T]his example indicates that private ownership does not necessarily imply that a private owner is unwilling to make investments for better longer-term efficient performance of the utility, as claimed by the Applicants. See Joint Applicants' Statement No. 3 Revised, at 15-16."

⁹² See Transcript of Initial Evidentiary Hearing held June 11, 2019, at 84. In response to ALJ Long's question whether Aqua would upgrade its computer system even if it was not going to use the Peoples' system, Joint Applicants Witness Christopher Franklin answered, "At some point, some of our systems would reach end of life, and at some point we would upgrade those systems. But today they all operate and meet every standard in the market."

⁹³ *Non-Unanimous Settlement*, at 20, ¶96.

⁹⁴ See Transcript of Initial Evidentiary Hearing held June 11, 2019, at 84. Per, Joint Applicants Witness Mr. Franklin, Aqua's systems, "all operate and meet every standard in the market."

the Proposed Transaction.⁹⁵ The *Non-Unanimous Settlement* also proposes to have Aqua America's shareholders contribute, for 3 years, an additional \$75,000 to the Peoples Companies' Low Income Usage Reduction Program ("LIURP") emergency furnace repair budget.⁹⁶ Aqua PA commits to submitting a rate recoverable universal service proposal in its next base rate case.⁹⁷ Aqua America's shareholders commit to contributing an additional \$50,000 annually for 4 years to the hardship grant component being developed for Aqua PA's Helping Hand Program.⁹⁸ However, Aqua America does not commit to having shareholders continue these minimal contributions beyond the time periods outlined in the *Non-Unanimous Settlement*.⁹⁹ Additionally, the question of whether ratepayers will pay for the costs of a comprehensive universal service program for Aqua PA is open.¹⁰⁰

Regardless of the details of the proposed low-income expenditures, targeting a specific class with benefits (specifically, residential low-income customers) does not satisfy the *City of York* standard, as explained in the *Middletown Township* case.

C. Whether the Proposed Transaction, As Conditioned by the Settlement, Is Likely to Result in Anticompetitive or Discriminatory Conduct

Section 2210(a) of the Public Utility Code requires the Commission to consider whether the Proposed Transaction is likely to be anticompetitive or discriminatory. 66 Pa. C.S. §2210(c). The Joint Applicants argue that the Proposed Transaction will not result in

⁹⁵ *Non-Unanimous Settlement*, at 21, ¶100.

⁹⁶ *Non-Unanimous Settlement*, at 21, ¶101.

⁹⁷ *Non-Unanimous Settlement*, at 23-24, ¶108.

⁹⁸ *Non-Unanimous Settlement*, at 24, ¶109.

⁹⁹ See *Non-Unanimous Settlement*, at 20-24, ¶¶98-111.

¹⁰⁰ Transcript of Initial Evidentiary Hearing held June 11, 2019, at 81-82.

anti-competitive or discriminatory conduct in the retail market for natural gas in Pennsylvania nor would it have an adverse effect on the retail natural gas market in Pennsylvania.¹⁰¹ The OSBA is not contesting the Joint Applicants' claim in this respect.

D. The Effect of Proposed Transaction, as Conditioned by the Settlement, On the Employees of the Peoples Companies

Section 2210(a) of the Public Utility Code requires the Commission to consider what impact the Proposed Transaction has on employees and any authorized collective bargaining agent. 66 Pa. C.S. §2210(c). As explained *supra*, the Joint Applicants assert that the Proposed Transaction would maintain jobs in Pennsylvania and provide expanded job opportunities for both gas and water/wastewater employees.¹⁰² No specific examples of how the Proposed Transaction will provide job opportunities (beyond those in the status quo) were provided by the Joint Applicants. In the *Non-Unanimous Settlement*, Peoples commits to maintain at least the field staffing level for the next 5 years, with the baseline staffing numbers established at closing, provided that the baseline number is not less than 825 employees, of which at least 720 shall be members of the UWUA.¹⁰³ The Joint Applicants also pledge to honor the existing union contracts and pension plans of Peoples.¹⁰⁴ The Joint Applicants also commit to adhere to the collective bargaining agreements in effect as of the closing of the Proposed Transaction.¹⁰⁵ At best, the Joint Applicants commit to maintaining the status quo of the operations already in place at Aqua

¹⁰¹ *Joint Application*, at 20, ¶63.

¹⁰² *Joint Application*, at 20-21, ¶¶65, 66; 30, ¶99.

¹⁰³ *Non-Unanimous Settlement*, at 16, ¶76,

¹⁰⁴ *Joint Application*, at 21, ¶67; 30, ¶101.

¹⁰⁵ *Non-Unanimous Settlement*, at 16, ¶77.

and Peoples. Again, without more, the fact that already existing jobs will be maintained fails to demonstrate any affirmative public benefit from this Proposed Transaction.

E. Whether the Settlement is in The Public Interest

The *Non-Unanimous Settlement* is not in the public interest. The Proposed Transaction involves Aqua America paying \$3 billion for \$1 billion in book equity and \$2 billion in goodwill.¹⁰⁶ Aqua America will not seek recovery on any of \$2 billion in goodwill through rates, but this enormous price premium will be detrimental to existing shareholders, debtholders and ratepayers.¹⁰⁷ In addition, the *Non-Unanimous Settlement* proposes to increase LTIIP spending by \$30 million a year, to be paid by ratepayers, and to replace the gathering pipe of the G/T Systems (a project which Peoples' own analysis shows fails a cost-benefit test), the majority of the costs (more than \$100 million) of which will be thrust upon by ratepayers.¹⁰⁸ Essentially, the *Non-Unanimous Settlement* requests the approval of a merger whereby the Aqua pays an enormous premium for its acquisition, which will be financially detrimental, and immediately forces ratepayers to pay for high-cost and uneconomic pipe replacement projects. Additionally, as argued *supra*, Aqua America has not proven it is technically fit to own and operate a natural gas utility.

¹⁰⁶ Transcript of Initial Evidentiary Hearing held June 11, 2019, at 82.

¹⁰⁷ *Id.*

¹⁰⁸ *Non-Unanimous Settlement*, 6-7, ¶¶29, 30, 33; 13-14, ¶69.

VI. CONCLUSION

Wherefore, the OSBA respectfully submits that:

- The Joint Applicants have not met their burden of demonstrating that the Proposed Transaction produces an affirmative public benefit;
- The Proposed Transaction fails to provide any quantifiable or verifiable affirmative public benefits;
- Any affirmative public benefits in the *Non-Unanimous Settlement* are merely a continuation of the status quo or are a vague, illusory, or unenforceable wish list;
- The Joint Applicants seek to manipulate the Commission by posing self-serving commitments as affirmative public benefits, which ultimately will penalize ratepayers if the *Non-Unanimous Settlement* is approved;
- The Proposed Transaction dilutes earnings for Aqua America shareholders;
- The Proposed Transaction increases financial risk for the resulting combined entity by creating higher debt, which may result in higher interest costs for ratepayers;
- The Proposed Transaction will be financially destabilizing for the resulting combined entity;
- Aqua America has not proven, by a preponderance of the evidence, that it is technically fit to provide gas or natural gas services;
- The operation of water and wastewater utilities is in no way similar enough to the operation of gas and natural gas utilities to make one automatically capable of owning another;
- Aqua America is not technically competent to own or operate Peoples;
- Aqua America has no experience owning or operating a natural gas utility; and
- Aqua America has not satisfied its burden of demonstrating that it will be able to maintain safe, reliable service to customers following the closing of the Proposed Transaction.

Therefore, the OSBA respectfully requests that the ALJ and the Commission reject the *Joint Application* and the *Non-Unanimous Settlement* in their entirety.

Sincerely,



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

APPENDIX A – Proposed Findings of Fact

1. Aqua America proposes to purchase all of the membership interests in Funding, the indirect parent company of Peoples, which would result in the Peoples Companies becoming indirect subsidiaries of Aqua America. (*Joint Application*, 10-11, ¶¶26, 27.
2. In order to consummate the Proposed Transaction, the Joint Applicants must obtain a certificate of public convenience from the Commission. (66 Pa. C.S. § 1102(a)(3)).
3. The Commission may issue a certificate of public convenience for the Proposed Transaction only if it finds that the granting of the certificate is necessary or proper for the service, accommodation, convenience or safety of the public. (66 Pa. C.S. § 1103 (a)).
4. The Commission may issue a certificate of public convenience for the Proposed Transaction only if it finds that the Proposed Transaction will affirmatively promote the service, accommodation, convenience or public safety in a substantial way. (*City of York*, 449 Pa. 136, 142, 295 A.2d 825, 827 (Pa. 1972)).
5. In their direct case, the Joint Applicants did not meet their burden of proving the Proposed Transaction will affirmatively promote the service, accommodation, convenience or public safety in a substantial way.
6. Aqua America is not presumed to be technically, financially, and legally fit to own Peoples.
7. Aqua America failed to demonstrate it is technically, financially, and legally fit to own Peoples.

APPENDIX B – Proposed Conclusions of Law

1. Aqua PA is a “public utility,” as defined in Sections 102 of the Public Utility Code, 66 Pa.C.S. § 102, , and, therefore, is subject to regulation by the Commission. *Joint Application*, at 6, ¶12.

2. Peoples Natural Gas is a “public utility,” and a “natural gas distribution company” as those terms are defined, respectively, in Sections 102 and 2202 of the Public Utility Code, 66 Pa.C.S. §§ 102, 2202, and, therefore, is subject to regulation by the Commission. *Joint Application*, at 8, ¶16.

3. Peoples Gas is a “public utility,” and a “natural gas distribution company” as those terms are defined, respectively, in Sections 102 and 2202 of the Public Utility Code, 66 Pa.C.S. §§ 102, 2202, and, therefore, is subject to regulation by the Commission. *Joint Application*, at 9, ¶19.

4. Section 1102(a)(3) of the Public Utility Code, 66 Pa. C.S. § 1102(a)(3), requires the Joint Applicants to obtain a certificate of public convenience before they consummate the Proposed Transaction in Pennsylvania.

5. Section 1103(a) of the Public Utility Code, 66 Pa. C.S. § 1103(a), allows the Commission to issue a certificate of public convenience for the Proposed Transaction only if the Commission finds or determines that granting the certificate is “necessary or proper for the service, accommodation, convenience, or safety of the public.”

4. Section 1103(a) allows the Commission to impose upon its issuance of a certificate of public convenience for the proposed merger “such conditions as it may deem to be just and reasonable.”

5. Under *City of York v. Pennsylvania Public Utility Commission*, 449 Pa. 136, 142, 295 A.2d 825, 827 (Pa. 1972), the Commission may issue a certificate of public convenience for the proposed merger only if the Commission determines that the proposed merger will “affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way.”

6. The Joint Applicants did not demonstrate that the Proposed Transaction, as conditioned by the *Non-Unanimous Settlement*, would result in an affirmative public benefit, as required under Section 1103(a) of the Public Utility Code, 66 Pa. C.S. § 1103(a), and under *York*, 449 Pa. at 141, 295 A.2d at 828.

APPENDIX C – Proposed Ordering Paragraphs

1. Because the Joint Applicants failed to meet their burden of proving that the Proposed Transaction affirmatively promotes the service, accommodation, convenience, or safety of the public in some substantial way, the *Joint Application* is denied in its entirety.
2. Because the *Non-Unanimous Settlement* does not assure that the Proposed Transaction affirmatively promotes the service, accommodation, convenience, or safety of the public in some substantial way, the *Non-Unanimous Settlement* is not in the public interest and is denied in its entirety.

**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.	:	

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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