



COMMONWEALTH OF PENNSYLVANIA

August 2, 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 Motion to Open Record and Exhibit, filed 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,

A handwritten signature in blue ink that reads "Erin K. Fure".

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

*Enclosures*

cc: Robert D. Knecht  
Brian Kalcic  
Parties of Record



Pennsylvania Wastewater, Inc. (“Aqua PA Wastewater”) (collectively, “Aqua”) filed the above captioned Joint Application requesting approval from the Commission for a change in control of Peoples by means of Aqua America’s purchase of all of LDC Funding LLC’s membership interests (“*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* filed by Aqua and Peoples (collectively, the “Joint Applicants”).
3. On June 11, 2019, an evidentiary hearing was held before ALJ Mary D. Long. The direct and surrebuttal testimony of OSBA witness Mr. Robert D. Knecht were admitted into the record at that June 11, 2019 hearing.
4. The Joint Applicants reached a settlement with certain parties, including the OCA, and filed a *Joint Petition for Approval of Non-Unanimous, Complete Settlement Among Most Parties* on June 26, 2019 (“*Non-Unanimous Settlement*”). Neither the OSBA nor the Bureau of Investigation of Enforcement (“I&E”) are signatories to this settlement.
5. Consistent with the procedural schedule set forth in this proceeding, Main Briefs were submitted on July 10, 2019, and Reply Briefs were submitted on July 25, 2019.
6. An Interim Order Closing the Record was entered on July 30, 2019.
7. The OCA did not submit a Main Brief. The OCA did submit a Reply Brief on July 25, 2019.
8. The OCA Reply Brief contains new and novel arguments, including the argument that the economics of the proposal to rehabilitate the G/T Systems should be ignored.

9. The OCA, in its Reply Brief, also argued, for the first time, that the ALJ and the Commission only have two choices when addressing the repair of the G/T Systems.
10. The OCA, in its Reply Brief, frequently cited to the opposition of OSBA to the proposed resolution for the G/T Systems, but inappropriately and grossly mischaracterized OSBA's position as advocating for the abandonment of more than 1,000 customers currently receiving service on the G/T Systems.
11. Under the Commission's regulations, "[a]fter the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion." 52 Pa. Code § 5.431(b).  
Additionally, pursuant to 52 Pa. Code § 5.571(a), "[a]t any time after the record is closed by before a final decision is issued, a party may file a petition to reopen the proceeding for the purpose of taking additional evidence."
12. Grounds for reopening the record may include "material changes of fact or of law alleged to have occurred since the conclusion of the hearing." 52 Pa. Code § 5.571(b). It is appropriate to reopen the record "if there is reason to believe that conditions of fact or of law have so changed as to require, *or that the public interest requires*, the reopening of the proceeding." 52 Pa. Code § 5.571(d). (emphasis added).
13. Because OCA's new and novel arguments, including the gross inaccuracy of OSBA's position on a highly contentious issue, were raised for the first time in OCA's Reply Brief, public interest and fairness dictate that other parties be given a chance to respond.
14. OSBA submits that at minimum, and in order for the Commission to have a complete, *accurate* record of parties' positions on an important issue in this proceeding, it be given a chance to clarify its position and correct OCA's inaccuracies.

WHEREFORE, for the foregoing reasons, the Office of Small Business Advocate respectfully requests that this Motion be granted and the record in this proceeding be reopened for the limited purpose of admitting into evidence its Supplemental Reply Brief, attached.

Respectfully submitted,



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Dated: August 2, 2019

# EXHIBIT

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**SUPPLEMENTAL REPLY BRIEF**

**OF**

**THE OFFICE OF SMALL BUSINESS ADVOCATE**

**TABLE OF CONTENTS**

I. Introduction.....1

II. The Legal Basis for the OSBA Supplemental Reply Brief .....1

III. Summary of Argument .....3

IV. Argument .....4

    A. The OCA’s Argument to Abandon an Economic Test should be Rejected...4

    B. The OCA is wrong that there are only Two Choices to address the  
        Goodwin/Tombaugh Systems.....5

    C. The OSBA does not support the Abandonment of G/T Sysetms.....6

V. Conclusion .....8



## SUPPLEMENTAL REPLY BRIEF OF OFFICE OF SMALL BUSINESS ADVOCATE

### 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 Pennsylvania, Inc., and Aqua Pennsylvania Wastewater, Inc. (collectively, with Peoples, the “Joint Applicants”) filed a Joint Application requesting approval from the Pennsylvania Public Utility Commission (“Commission”) for a change in control of Peoples by means of Aqua America’s purchase of all of LDC Funding LLC’s membership interests 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) (“*Joint Application*”).

On January 24, 2019, Administrative Law Judge (“ALJ”) Mary D. Long issued a Prehearing Order, which included a Litigation Schedule. On July 10, 2019, the Office of Small Business Advocate (“OSBA”), Joint Applicants, and the Commission’s Bureau of Investigation and Enforcement (“I&E”) submitted Main Briefs.

On July 25, 2019, the OSBA, I&E, the Joint Applicants, the Office of Consumer Advocate (“OCA”), and the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (“CAUSE-PA”) submitted Reply Briefs.

The OSBA submits this Supplemental Reply Brief in response to the OCA’s Reply Brief.

### II. The Legal Basis for the OSBA Supplemental Reply Brief

In its Reply Brief, the OCA included new arguments not previously raised by the OCA in this proceeding. It is well-established that the purpose of a brief is not to introduce new, or additional evidence or to offer rejoinder testimony. The Commission has held that use of a brief for such purposes in a contested proceeding is a violation of due process. *Enron Capital & Trade Resources Corporation v. The Peoples Natural Gas Company, et al.*, Docket No. R-

00973928C000I, 1998 Pa. PUC LEXIS 199 (August 24, 1998); *see also Dee-Dee Cab, Inc. v. Pa. PUC.*, 817 A.2d 593,598 (Pa. Cmwlth. 2003), *appeal denied*, 575 Pa. 698,836 A.2d 123 (2003) (“For matters coming before an administrative agency, procedural due process, however, requires that a party be afforded reasonable notice of the issues raised and the agency’s rulings on those issues, so that the party has an opportunity to present any response or objection.”).

By raising new arguments in its Reply Brief, the OCA deprives all parties of the opportunity to respond to the OCA’s arguments, is prejudicial to all other parties, and distorts the record evidence. Accordingly, the OSBA finds it necessary to submit this Supplemental Reply Brief to respond to the arguments raised, for the first time, by the OCA in its Reply Brief, and to clarify the OSBA’s position in this proceeding.

Under normal circumstances, the OSBA would file a Motion to Strike the OCA’s Reply Brief. However, the OSBA respectfully submits that filing this Supplemental Reply Brief is a more reasonable course of action. This Supplemental Reply Brief will render the record complete, accurate, and will assist the ALJ and the Commission when evaluating the issues presented by the *Joint Application*, as well as the *Joint Petition for Approval of Non-Unanimous, Complete Settlement Among Most Parties* (“*Non-Unanimous Settlement*”),

### **III. Summary of Argument**

The OCA improperly argued in its Reply Brief that only two possible resolutions of the G/T Systems exist. The OCA had never previously argued that resolution of the G/T Systems must be viewed as an either/or paradigm. Nor has the OCA ever argued previously in this proceeding that the economic test contained in the 2013 Peoples/Equitable Settlement should be abandoned. As these arguments were presented for the first time in the OCA’s Reply Brief, no consideration should be granted to these arguments as no parties have had the opportunity to fully respond to

these arguments, and consideration of a one-sided position would be prejudicial to all other parties in the proceeding.

In addition, the OCA's Reply Brief grossly mischaracterizes the OSBA's position with respect to the G/T Systems. In stark contrast to OCA's assertions: (1) the OSBA is not in favor of wholesale abandonment of customers served by the G/T Systems; (2) the OSBA is in favor of solving the issues posed by the G/T Systems in an expedient, economic, and safe manner; and (3) the OSBA concludes that the *Non-Unanimous Settlement*, by forcing all customers to rehabilitate these Systems without a single dollar coming from Peoples or SteelRiver, is unreasonable, imprudent, and unconscionable. Accordingly, the OSBA opposes the *Joint Application*, this *Non-Unanimous Settlement* provision, as well as the rest of the *Non-Unanimous Settlement*.

#### **IV. Argument**

##### **A. The OCA's Argument to Abandon an Economic Test should be Rejected**

In its Reply Brief, the OCA argued that when the *Joint Application*, conditioned by the *Non-Unanimous Settlement* is adjudicated by the ALJ and the Commission, no economic test should be used in relation to terms concerning the G/T Systems. Specifically, the OCA argued, as follows:

To attempt to single out particular segments of existing customers for individualized economic analyses... would be inconsistent with the public interest and adverse to the basic business models that allow public utility systems to exist.<sup>1</sup>

Not only did the OCA *not* raise this argument in its extensive testimony, but the OCA also did not submit a Main Brief. Curiously, the OCA did not even raise this argument its Statement in Support, attached to the *Non-Unanimous Settlement*. The OCA has presented no legal basis for

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<sup>1</sup> Reply Brief of the Office of Consumer Advocate ("OCA RB"), at 21.

abandoning an economic analysis regarding rehabilitation of the G/T Systems. There is no statute, Commission regulation, Commission case law, or Commonwealth Court decision to support the abandonment of an economic test when committing ratepayer dollars to fix a portion of a utility owned system. While the OCA did attempt to buttress its argument by citing to *Harris* and *Mountain Energy*, neither case is on point. In *Harris*, while the case did involve abandonments and questioning the economic test that was used, the OCA neglected to observe that (i) UGI had abandoned customers without seeking prior permission from the Commission for those abandonments, (ii) the monetary investment in replacing those mains would never be recovered by UGI, and (iii) there was no proposal for a large scale socialization of costs such as exists here.<sup>2</sup> In *Mountain Energy*, the OCA is correct that the case involved a proposed abandonment that took years to resolve. However, as the ALJ and the Commission are well aware, there is no proposal to abandon G/T Systems customers before the Commission.

Simply put, the OCA “no economic test” argument should be summarily rejected by the ALJ and the Commission. There is no legal basis for such an argument; there is no record evidence to support such an argument; acceptance of this argument would encourage reactive, unreasonable, and imprudent spending by Companies to the detriment of customers; and due process requires that the OCA argument be rejected.

**B. The OCA is wrong that there are only Two Choices to address the Goodwin/Tombaugh Systems.**

The OCA Reply Brief argued that there are only two options before the Commission to address the remediation of the G/T Systems: (1) either accept OCA’s position that the lines get fixed in seven years at customers’ expense; or (2) order the abandonment of approximately 1,000

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<sup>2</sup> See Initial Decision issued August 19, 2004, in *Harris, et al. v. UGI Utilities Inc.—Gas Division*, PA P.U.C. Docket No. C-20032233, at 2, 10.

customers, which represents the number of customers connected to the uneconomic portion of the G/T Systems.<sup>3</sup> This argument is absurd and contradicts the record evidence. In response to questioning by ALJ Long, Joint Applicants' witness Mr. Joseph Gregorini testified as follows:

Q: Now, if the Commission does not approve the transaction, is it Peoples' intent to pitch the Scenario 3 to remediate what's going on in the line?

A: Well, as Mr. –

Q: So that's the most likely outcome?

A: Well, I think it would be part of a process that would start with getting together with the state parties and reviewing some of the options there.

It was our intent that we would certainly submit as part of that plan in compliance with the 2013 settlement, but because of the abandonment issues and some of the complications there, you know, it was our intent to explore other options.<sup>4</sup>

I&E's Main and Reply Briefs also demonstrate that there are a multitude of options to address the G/T Systems which do not involve approving uneconomic plans, abandoning customers, or penalizing general ratepayers while rewarding Peoples and SteelRiver<sup>5</sup> Furthermore, as set forth in the OSBA Main and Reply Briefs, there are more options than just the two proffered by the OCA.<sup>6</sup> Simply put, this is not a binary choice that the ALJ and the Commission have to make.

In fact, the record evidence is clear: Peoples is currently bound, by the terms of the 2013 Peoples/Equitable Settlement, to address the G/T Systems, which specifically requires the use of

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<sup>3</sup> See OCA RB, at 17, 18, 21, 22-23, 26.

<sup>4</sup> Transcript of Initial Evidentiary Hearing held June 11, 2019 ("Transcript"), at 150-151.

<sup>5</sup> See Main Brief of the Bureau of Investigation and Enforcement ("I&E MB"), at 33-35; see also Reply Brief of the Bureau of Investigation and Enforcement ("I&E RB"), at 18.

<sup>6</sup> See Reply Brief on Behalf of the Office of Small Business Advocate ("OSBA RB"), at 23.

an economic test to evaluate options for moving forward.<sup>7</sup> Apparently, the OCA has forgotten about this 2013 Commission-approved Settlement which required Peoples and SteelRiver to begin to address the G/T Systems beginning *six years ago*. The OCA was a party to that previous proceeding, and a signatory to the 2013 Settlement Agreement. It is now mid-2019, six years later, and Peoples and SteelRiver have not funded *one penny of repair* of the G/T Systems. As a result, both Systems continue to leak an absurd amount of gas (83% and 44%, respectively), are a known safety hazard, and must be addressed.

The OSBA respectfully submits that abandoning the G/T Systems is not a just and reasonable choice, and making ratepayers pay likely more than \$120 million for a seven-year repair plan (after already waiting six years) is neither just nor reasonable. Instead, the ALJ and the Commission should require Peoples and SteelRiver to begin repair of the G/T Systems immediately, with the cost of repair primarily borne by SteelRiver.<sup>8</sup> Upon looking at the safety, economics, and history of these Systems, any other result would be unconscionable and lacks substantial record evidence showing its reasonableness to customers.

**C. The OSBA does not support the Abandonment of the G/T Systems.**

In its Reply Brief, the OCA stated, as follows:

I&E's and OSBA's preferred outcome for the GT System matter is...close to 1000 public utility customers should be abandoned.<sup>9</sup>

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<sup>7</sup> Transcript, at 103-104.

<sup>8</sup> See OSBA RB, at 23. The ALJ and the Commission may want to refer this matter to I&E to re-visit all the promises made by SteelRiver when it took over ownership of Peoples.

<sup>9</sup> OCA RB at 18; *See also*, OCA RB, at 21 (“I&E’s and OSBA’s position as to abandoning close to 1000 existing natural gas customers”); OCA RB, at 22-23 (“I&E’s and OSBA’s abandonment proposal”); OCA RB, at 23 (“I&E’s and OSBA’s recommendations here as to abandoning close to 1000 public utility customers”); OCA RB, at 24 (“OSBA and I&E both support the idea that ... customers ...should be abandoned”);.

First, the OSBA can speak for itself. Second, there is no record evidence that the OSBA has *ever* advocated for the abandonment of customers served on the G/T Systems.

Instead, the OSBA has consistently argued that the Proposed Transaction has no affirmative public benefits.<sup>10</sup> Importantly, the OCA conceded this fact in its Reply Brief when stating, “The Joint Applicants’ initial application did not contain important provisions to address the substantial affirmative benefits standard for acquisitions in the Commonwealth of Pennsylvania.”<sup>11</sup>

Moreover, the OSBA has argued that the terms set forth in the proposed *Non-Unanimous Settlement*, including the proposed solution for the G/T Systems (a seven-year repair plan paid for by all Peoples ratepayers), also do not include any affirmative public benefits, but instead inflict significant public harm.

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<sup>10</sup>See Main Brief on Behalf of the Office of Small Business Advocate (“OSBA MB”), at 2, 6, 7, 13-28, 30-31; OSBA RB, at 3, 9-26.

<sup>11</sup> OCA RB, at 3.



**V. Conclusion**

The only area in which the OSBA agrees with OCA in its Reply Brief regarding this issue is that “there is no easy answer to the GT System matter.”<sup>12</sup> However, as discussed *supra*, for numerous reasons, the G/T System “solution” proffered by the *Non-Unanimous Settlement* is unpalatable to the OSBA, which is charged with the duty of protecting ratepayers. Accordingly, the OSBA does not and cannot support such an outcome.

Therefore, for the reasons set forth in the OSBA’s Main and Reply Briefs, as well as the reasons set forth in this Supplemental Reply Brief, the OSBA respectfully requests that the ALJ and the Commission reject the *Joint Application* and the *Non-Unanimous Settlement*.

Respectfully submitted,



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Dated: August 2, 2019

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<sup>12</sup> OCA RB, at 26





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