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August 12, 2019

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: 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 and A-2018-3006063**

Dear Secretary Chiavetta:

Enclosed for filing please find Joint Applicants' Reply to the Office of Small Business Advocate's Motion to Reopen the Record in the above-referenced proceedings. Copies will be provided per the attached Certificate of Service. Thank you.

Sincerely,

Michael W. Hassell

MWH/kl
Enclosures

Rosemary Chiavetta, Secretary
August 12, 2019
Page 2

cc: Honorable Mary D. Long
Honorable Emily DeVoe
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joint Application of Aqua America, Inc., :
Aqua Pennsylvania, Inc., Aqua Pennsylvania :
Wastewater, Inc., Peoples Natural Gas : Docket Nos. A-2018-3006061
Company LLC and Peoples Gas Company : A-2018-3006062
LLC For All Of The Authority And : A-2018-3006063
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 LDC Funding :
LLC's Membership Interests By Aqua :
America, Inc. :

**ANSWER OF THE JOINT APPLICANTS TO
THE OFFICE OF SMALL BUSINESS ADVOCATE'S
MOTION TO REOPEN THE RECORD**

TO ADMINISTRATIVE LAW JUDGES MARY D. LONG AND EMILY I. DEVOE:

Pursuant to 52 Pa. Code §§ 5.61(a)(1) and 5.571(c), the Joint Applicants¹ hereby submit their Answer to the Motion to Reopen the Record (“Motion”) filed by the Office of Small Business Advocate (“OSBA”) on August 2, 2019, in the above-captioned proceeding.

Administrative Law Judges Mary D. Long and Emily I. Devoe (the “ALJs”) should deny OSBA’s Motion. OSBA asserts that its Motion is necessary to respond to new and novel arguments in OCA’s Reply Brief (Motion ¶¶ 8-9) and respond to the characterization of OSBA’s position regarding the Goodwin and Tombaugh Gathering Systems (“G/T systems”) (Motion ¶

¹ The Joint Applicants are Aqua America, Inc. (“Aqua America”), Aqua Pennsylvania, Inc. (“Aqua PA”), Aqua Pennsylvania Wastewater, Inc. (“Aqua PA Wastewater”), Peoples Natural Gas Company LLC (“Peoples Natural Gas”) and Peoples Gas Company LLC (“Peoples Gas”). Aqua America, Aqua PA and Aqua PA Wastewater are collectively referred to as “Aqua.” Peoples Natural Gas and Peoples Gas are collectively referred to as the “Peoples Companies.”

10). The OSBA includes as an Exhibit to the Motion a Supplemental Reply Brief that sets forth OSBA's responses.

As explained herein, OSBA's Motion should be denied. The arguments raised in OCA's Reply Brief are fundamentally the same arguments raised in the Joint Applicants' Main Brief and are based upon evidence admitted into the record at hearing in this proceeding. Even OSBA's proposed Supplemental Reply Brief admits that I&E addressed some of the OCA's arguments in its Main Brief and Reply Brief. As such, the OSBA has not shown that there have been "material changes of fact or of law" that "have occurred since the conclusion of the hearing" or that the "public interest requires" OSBA's requested relief. 52 Pa. Code § 5.571(b), (d). In addition, as OCA's Reply Brief raised the same arguments set forth in the testimony presented in this proceeding and/or the Joint Applicants' Main Brief, OSBA has not shown "good cause" for the acceptance of its Supplemental Reply Brief. 52 Pa. Code § 5.431(b). Accordingly, OSBA's Motion is neither permitted nor appropriate under these circumstances. Additionally, the ALJs are perfectly capable of discerning OSBA's position, regardless of OCA's description of it. Furthermore, OSBA is in no position to complain that OCA raised arguments for the first time in its Reply Brief; OSBA also raised new arguments in its Reply Brief, and proposes to raise even more new arguments in its proposed Supplemental Reply Brief. Rather than granting one party to this case an opportunity to submit an additional brief responding to alleged "new arguments," the ALJs should bring the briefing to conclusion by denying OSBA's Motion.

As summarized above, OSBA has not justified the submission of a Supplemental Reply Brief. However, if any "remedy" were appropriate, which there is not, OSBA's Motion seeks the wrong relief. If OCA's Reply Brief inappropriately included new arguments, the appropriate relief would have been to strike those portions of OCA's Reply Brief. There is no basis for

permitting OSBA to file an additional responsive brief. The ALJs can evaluate OCA's Reply Brief and assess whether inappropriate arguments were presented, but in no event should the ALJs or the Commission entertain new arguments through the filing of a new brief by OSBA.

In support thereof, the Joint Applicants aver as follows:

I. BACKGROUND

1. On November 13, 2018, the Joint Applicants filed the above-captioned Application seeking all necessary approvals from the Commission pursuant to Sections 1102(a)(3) and 2210(a)(1) of the Code, 66 Pa. C.S. §§ 1102(a)(3) and 2210(a)(1), authorizing the change in control of the Peoples Companies to Aqua America by way of the purchase of all of the membership interests of Funding by Aqua America. The Joint Applicants further sought all other approvals or certificates of public convenience that are appropriate, customary, or necessary under the Code to carry out the transaction contemplated in the Application in a lawful manner.

2. The parties engaged in several rounds of testimony, consistent with the Procedural Schedule set forth in this proceeding.

3. On June 11, 2019, an evidentiary hearing was held. The testimony of the Joint Applicants, OCA and OSBA, as well as the testimony of other parties, was admitted into the record at this hearing.

4. A Joint Petition for Approval of Non-Unanimous, Complete Settlement ("Settlement") was reached with certain parties and filed with the Commission on June 26, 2019. The OSBA and the Commission's Bureau of Investigation and Enforcement ("I&E") were not signatories to the Settlement.

5. Main Briefs were submitted on July 10, 2019. Reply Briefs were submitted on July 25, 2019.

6. By Interim Order dated July 30, 2019, the record was closed.

7. On August 2, 2019, the OSBA filed a Motion to Reopen the Record to admit an “Exhibit,” which consists of a Supplemental Reply Brief that replies to the Reply Brief of the OCA.

II. APPLICABLE LEGAL STANDARDS

8. The Commission’s regulations specify that “at any time after the record is closed but before a final decision is issued, a party may file a petition to reopen the proceeding for the purpose of taking additional evidence.” 52 Pa. Code § 5.571(a).

9. Such a petition “must set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.” *Id.* § 5.571(b).

10. Further, “[t]he record may be reopened upon notification to the parties in a proceeding for the reception of further evidence 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.” *Id.* § 5.571(d).

11. The Commission’s regulations also state that “[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.” *Id.* § 5.431(b).

III. ANSWER TO MOTION TO REOPEN THE RECORD

12. The OSBA’s Motion is neither permissible nor appropriate pursuant to Section 5.571(a). That section allows reopening a proceeding “for the purpose of taking additional

evidence.” OSBA here does not seek to introduce additional evidence; it merely requests permission to file another brief. A brief is legal argument, not evidence.

13. The OSBA’s Motion should also be denied pursuant to Section 5.431(b). That section provides: “After 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.” This regulation does not allow the submission of additional briefs. Briefs are not part of the evidentiary record, as demonstrated by Section 5.431(a)’s general rule that “the record will be closed at the conclusion of the hearing” despite the opportunity to submit post-hearing briefs and reply briefs.

14. Even if Section 5.431(b) does apply to this case, the OSBA has failed to establish good cause for reopening the record to allow the submission of a Supplemental Reply Brief.

15. The OSBA first asserts that it has not had the opportunity to respond to the OCA’s argument regarding the appropriateness of applying an economic test in relation to the G/T Systems raised in OCA’s Reply Brief. Motion, Exhibit at pp. 5-6. OSBA argues that OCA did not raise this argument in a Main Brief, its Statement in Support of the Settlement or in its testimony. Motion, Exhibit at p. 5.

16. Contrary to OSBA’s assertion, the argument in OCA’s Reply Brief does not offer anything new; it merely discusses the evidence of record. OCA’s Reply Brief simply argues in favor of the Settlement, which proposes the complete rehabilitation of the G/T Systems. OSBA was well aware of this evidence and the OCA’s position on it, and had the opportunity to address these points in its Main Brief and Reply Brief. OCA did nothing inappropriate by discussing the evidence in its Reply Brief. OCA’s Reply Brief provides no basis for giving OSBA another opportunity to address the evidence in the record.

17. Moreover, the Joint Applicants raised this same argument in their testimony. For example, Joint Applicants' witness Mr. O'Brien testified that while abandonment might be appropriate based upon a pure economic analysis, "[o]ther considerations, as explained by Mr. Barbato, may lead to a decision to rehabilitate Goodwin and Tombaugh...." Joint App. St. 3-R, p. 12. Mr. Barbato went on to explain these concerns in the context of a full-rehabilitation proposal. *See* Joint App. St. 5-R, pp. 14-16.

18. The Joint Applicants then reiterated this argument in their Main Brief. *See* Joint App. MB, Section V.B.5.b.ii. The Joint Applicants argued that a strict, "economic" cost-benefit analysis is not the only factor considered to determine the appropriateness of abandonment, and explained precedent requiring that other factors must be considered. Joint App. MB, pp. 42-44.

19. OSBA was provided the opportunity to respond to the argument raised in OCA's Reply Brief either in response to the Joint Applicants' testimony or as a part of its own Reply Brief responding to Joint Applicants' Main Brief. As such, no good cause exists to reopen the record to permit OSBA another opportunity to respond to this argument 52 Pa. Code § 5.431(b).

20. OSBA next argues that there is good cause to reopen the record because OCA's Reply Brief argues that there are only two choices for addressing the G/T Systems. OSBA's proposed Supplemental Reply Brief, however, itself argues that the OCA's argument is contradicted by I&E's Main Brief and Reply Brief. If the briefs previously filed in this case already contradict the OCA's argument, there is no good cause to reopen the record to allow yet another brief into the record to contradict it. Moreover, if I&E could address this argument in its Main Brief and Reply Brief, so could OSBA. There is no good cause to give OSBA another opportunity to address the argument it could have addressed in its briefs.

21. OSBA's next argument is that its Supplemental Reply Brief is necessary to respond to OCA's characterization of OSBA's position regarding the G/T Systems. OSBA states there is no record evidence that it has advocated for the abandonment of customers on the G/T Systems. Motion, Exhibit at pp. 8-9. Again, the OSBA's argument fails to establish good cause to reopen the record.

22. First, the ALJs are perfectly capable of discerning OSBA's position, regardless of OCA's description of it.

23. Second, the OCA's Reply Brief does not "grossly mischaracterize" OSBA's position. In its Main Brief, the OSBA states that "[t]he proposed G/T Systems complete rehabilitation, even as proposed in the Non-Unanimous Settlement, is an affirmative public *detriment*." OSBA MB, p. 25 (emphasis in original). OSBA further stated in its Reply Brief that "it is OSBA's position that remediation of the G/T Systems as contemplated in the *Non-Unanimous Settlement* is an uneconomic project...." OSBA RB, p. 19. The implication of this statement, however, is that where repair or rehabilitation of facilities serving a customer or customers is "uneconomic" it is appropriate to abandon and convert the customer(s) to an alternative fuel source. *See* Joint App. MB, p. 42. Furthermore, the 2013 Peoples/Equitable Settlement, which OSBA references for the "economic test" in its proposed Supplemental Reply Brief, specifically references abandonment of customers if G/T facilities are not rehabilitated and transferred to Peoples Natural Gas. I&E St. 1, p. 7.

24. Third, the Joint Applicants raised arguments in their testimony and Main Brief substantially the same as OCA's argument in its Reply Brief that abandonment of nearly 1,000 customers on the G/T systems is not appropriate. Therefore, the OSBA was already provided the opportunity to respond to arguments in favor of or against proposals addressing the G/T Systems

that would necessitate abandonment during the course of this proceeding, and no good cause to reopen the record has been shown to exist. 52 Pa. Code § 5.431(b). As such, OSBA's Motion should be denied.

25. OSBA is in no position to complain that the OCA's Reply Brief contained new arguments. OSBA offered a new argument in its Reply Brief. Specifically, OSBA argued that Peoples should be fined for not addressing the G/T Systems since it acquired them. OSBA Reply Brief p. 23. The Joint Applicants could have requested that this argument be stricken from OSBA's Reply Brief, but did not do so because it did not wish to delay this proceeding by engaging in motion practice at this late date. In any event, OSBA has unclean hands with regard to its claim that OCA inappropriately raised new arguments in its Reply Brief.

26. Furthermore, OSBA's proposed Supplemental Reply Brief expands on the above-referenced new argument by suggesting that the Commission should "re-visit" the promises made by SteelRiver when it took over ownership of Peoples. OSBA proposed Supplemental Reply Brief p. 8 n.8. OSBA presents this new contention despite the fact that its own witness acknowledged, in Surrebuttal testimony, that the 2013 Peoples/Equitable Settlement did not contain firm dates for actions and in disregard of record evidence that substantial preliminary work was required before Peoples could analyze rehabilitation options for the G/T systems. (OSBA St. 1-SR, p. 16.) If the ALJs would grant the OSBA's Motion, and accept OSBA's Supplemental Reply Brief, they would deny Joint Applicants' rights to respond to OSBA's new arguments.

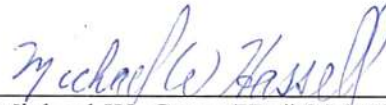
27. The Joint Applicants respectfully submit that the submission of a Supplemental Reply Brief is in no event a proper remedy. The proper remedy for improperly including material in a Reply Brief, under the Commission's Rules of Administrative Practice and

Procedure, would be to strike the offending portions of that Reply Brief, not allow one party to the case to file a supplemental responsive brief. Furthermore, the ALJs have the discretion to disregard arguments that are not timely presented. As explained above, Joint Applicants do not believe that striking any portion of OCA's Reply Brief would be appropriate, as OCA did not present arguments that were substantively different from the arguments presented in testimony and Joint Applicants' briefs. However, OSBA should not be permitted to embellish prior arguments or present new arguments through the submission of an additional brief.

IV. CONCLUSION

WHEREFORE, the Joint Applicants respectfully submit that the Office of Small Business Advocate's Motion to Reopen the Record be denied.

Respectfully submitted,



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Date: August 12, 2019



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Date: August 12, 2019

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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