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February 16, 2012

Via Overnight Mail

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

RECEIVED

FEB 16 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

RE: Application of Leatherstocking Gas Company, LLC for approval to Supply Natural Gas Service to the Public in Northern Susquehanna County, in the Townships of Bridgewater, Forest Lake, Great Bend, Harmony, New Milford and Oakland, and in the Boroughs of Great Bend, Hallstead, Lanesboro, Montrose, New Milford, Oakland and Susquehanna, in Susquehanna County, Pennsylvania; Docket No. A-2011-2275595; **PRELIMINARY OBJECTIONS TO AMENDED PROTEST**

Dear Ms. Chiavetta:

Enclosed, for filing with the Pennsylvania Public Utility Commission (Commission), are an original and three (3) copies of the Preliminary Objections of Leatherstocking Gas Company, LLC in response to the Amended Protest filed by UGI Penn Natural Gas, Inc. in the above-captioned Application matter.

A copy of the enclosed Preliminary Objections has been served as indicated on the attached Certificate of Service.

MAILING ADDRESS: P.O. BOX 1778 HARRISBURG, PA 17105

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
February 16, 2012
Page Two

If you have any questions, please feel free to contact any of the undersigned. Thank you for your attention to this matter.

Very truly yours,



Thomas J. Sniscak
Todd S. Stewart
Janet L. Miller

Counsel for Leatherstocking Gas Company, LLC

JLM/das
Enclosure

cc: Honorable David A. Salapa
Per Certificate of Service

RECEIVED

FEB 16 2012

**PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU**

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Leatherstocking Gas Company,
LLC for approval to Supply Natural Gas Service
to the Public in the Townships of Bridgewater,
Forest Lake, Great Bend, Harmony, New
Milford and Oakland, and in the Boroughs of
Great Bend, Hallstead, Lanesboro, Montrose,
New Milford, Oakland and Susquehanna in
Susquehanna County, Pennsylvania

Docket No. A-2011-2275595

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FEB 16 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

NOTICE TO PLEAD

TO: Michael W. Hassell, Esquire
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601

Mark C. Morrow, Esquire
UGI Corporation
460 North Gulph Road
King of Prussia, PA 19406

Pursuant to 52 Pa. Code §5.101(b), you are hereby notified that, if you do not file a written response to the enclosed Preliminary Objections within ten (10) days from service of this notice, the facts set forth in the Preliminary Objections may be deemed to be true, thereby requiring no other proof and allowing an Administrative Law Judge to rule upon the Preliminary Objections without additional input. All pleadings, such as a Reply to the enclosed Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the presiding Administrative Law Judge and the parties to this proceeding.

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DATED: February 16, 2012

Counsel for Leatherstocking Gas Company, LLC

RECEIVED

FEB 16 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

**PRELIMINARY OBJECTIONS OF LEATHERSTOCKING GAS COMPANY, LLC
TO AMENDED PROTEST FILED BY UGI PENN NATURAL GAS, INC.**

Leatherstocking Gas Company, LLC (Leatherstocking or Company), by its attorneys, Hawke McKeon & Sniscak LLP, and pursuant to 52 Pa. Code § 5.101,¹ hereby files these Preliminary Objections in the nature of a motion to dismiss the “second” or Amended Protest of UGI Penn Natural Gas, Inc. (PNG) filed on January 27, 2012 (Amended Protest). PNG’s Amended Protest attempts to cure its lack of standing at the time protests were due and thus is a late-filed protest that need not be entertained. At the time of the initial Protest filing, PNG was neither certificated to provide, nor did it provide, service within the relevant service territory, nor was it even an applicant to provide such service. PNG’s subsequent application to provide natural gas service in the same territory as requested by Leatherstocking and its second and late-filed protest – filed respectively 22 and 30 days after the deadline for protests to the Company’s Application – cannot cure PNG’s lack of standing at the time of the protest deadline.

¹ Pa. Code §§ 5.101(a)(4) (“Legal insufficiency of a pleading”) and (5) (“Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action”).

Therefore, the second or Amended Protest must be dismissed as late-filed and Leatherstocking's Preliminary Objections to both the Protest and the Amended Protest should be granted.

Dismissal of PNG's Amended Protest will advance the public interest by providing expeditious access to Marcellus Shale natural gas service in areas of the Commonwealth that do not currently have such service. By protesting Leatherstocking's Application, PNG demonstrates that it does not share this public interest goal. PNG is apparently in no hurry to construct its own facilities or to provide service in Susquehanna County. On the contrary, PNG candidly admits that it is seeking burdensome, protracted and unnecessary litigation – taking approximately a year or more² – before natural gas franchises are awarded in the areas of Susquehanna County covered by Leatherstocking's Application.³ This could delay the commencement of service by as much as two years as construction would occur after certification and a final order. Yet PNG, with less detailed application filings, has itself been the beneficiary of the Commission's more expedited non-litigated staff review or "modified procedure."

For instance, on September 30, 2011, PNG applied for authority to provide natural gas distribution service in counties (Lackawanna and Wayne) adjacent to Susquehanna County.⁴ This authority was granted on December 16, 2011, a little more than two months after PNG's September 30th filing.⁵ Thus PNG or UGI's contention here that litigation is the only way that

² Answer to Preliminary Objections at pp. 20-22, ¶¶ 32-33.

³ In PNG's Answer to Preliminary Objections, PNG opposed Leatherstocking's request to expedite this case and cites an application proceeding that took seventeen months as an "example" of the length of a contested proceeding on a service application. Answer to Preliminary Objections at p. 22. In its prehearing memo, perhaps sensing that its example might prove unpopular, PNG did propose a schedule but without an ultimate point for Commission decision.

⁴ *Amended Application of UGI Penn Natural Gas, Inc. for Approval to Begin to Offer, Render, Furnish or Supply gas utility service to the public in the additional territories of Grugan and Wayne Townships, Clinton County; Jessup Borough, Lackawanna County; Dingman Township, Pike County; Lewis Township, Union County and Clinton Township, Wayne County*, Docket No. A-2011-2264538; Order entered December 16, 2011 (2011 Application).

⁵ Leatherstocking notes that PNG did not include in its September 30, 2011 application a request to serve the areas of Susquehanna County it now covets, even though it applied for authorization to serve adjacent areas.

the Application can be evaluated and determined to be in the public interest is not true. The Commission staff has and continues to be able to evaluate and make recommendations to the Commissioners regarding applications, including appropriate conditions, and certainly the Commissioners and their staffs have been able to determine what is or is not in the public interest in such matters. Thus, PNG's insistence on the slow litigation process as the only way to determine what is or is not suitable under Section 1103 of the Public Utility Code⁶ is both self-serving and patently incorrect.

At the heart of the public interest question is whether the public is better or worse off by the delay PNG is causing for the provision of natural gas service by Leatherstocking in Susquehanna County. PNG is the only party protesting Leatherstocking's Application and requesting a lengthy litigation process.⁷ Perhaps the only point upon which Leatherstocking and PNG agree is that there is a need for customers to have the availability of natural gas service.⁸ To reach that goal, the public interest is better served by denying the Amended Protest, moving the matter to the non-litigated "modified procedure" permitted by the Commission, and having Leatherstocking work with Commission staff and the other intervenors to identify and resolve any questions about the Application. This procedure, which is how PNG's applications were treated last year, would result in a much quicker and less expensive process and, more importantly, will allow customers in the rural areas of northern Susquehanna County to more quickly receive the benefits of low cost Pennsylvania Marcellus Shale gas as opposed to the more

⁶ 66 Pa.C.S. §1103.

⁷ At the Prehearing Conference held on February 14, 2012, counsel for the Commission's Bureau of Investigation and Enforcement stated that it presently sees a need to hold a hearing but did not rule out the matter being returned to the modified procedure following its completion of discovery.

⁸ Application at p. 4 ¶10, Protest at p. 5 ¶ 9, Amended Protest at pp. 3-4 ¶11.

expensive fuel oil and propane options. Thus, to the extent the Commission's policy or discretion factor into determining whether PNG's demand for hearings should be granted, such policy or discretion should be exercised to properly find that PNG's interest was insufficient and unripe at the time protests were due, and that its second Amended Protest was late-filed as it was an attempt to inappropriately cure a defective protest after the Commission established deadline. That is not the death knell for PNG's alleged future interests, as granting Leatherstocking's Application may not preclude the Commission from also considering, and if appropriate, granting PNG's competing application, should the Commission choose to do so. On the other hand, should PNG continue with its actions to slow Leatherstocking's proposed service, the Commission properly may consider that as a basis to deny PNG's application.

For the reasons discussed above, Leatherstocking requests that the Amended Protest be dismissed preliminarily on the grounds that (a) the second or Amended Protest was filed after the deadline for protests and interventions set by the Commission; (b) PNG lacked standing at the time its initial Protest was filed and its belated filing of a retaliatory application for service long after the protest date cannot cure that lack of standing; (c) PNG's implied claim that it – not Leatherstocking – should solely be certified to provide service in Susquehanna County is legally insufficient to support the initial or amended protests because the Commission has the power to grant overlapping franchises if it chooses to do so. Though not integral to dismissing PNG's first incomplete and second tardy protest, PNG has failed to state any claim to refute the ability or fitness of Leatherstocking to provide the requested service. Moreover, its claim that there is no need or demand for service is refuted by its own application filing.

Notwithstanding the above, Leatherstocking continues to request that, if the Amended Protest is not dismissed, an expedited litigation schedule be established in this proceeding so that the Commission can enter a final Order approving the Company's Application by no later than

June or July of 2012, in time for construction of facilities to be commenced during the late summer and early fall construction season so the provision of the applied-for natural gas service to residents of northern Susquehanna County can begin as soon as possible.

In support of its Preliminary Objections, Leatherstocking avers and represents as follows:

I. PROCEDURAL BACKGROUND

1. On November 23, 2011, Leatherstocking filed an application with the Commission requesting approval to supply natural gas service to the public in the Townships of Bridgewater, Forest Lake, Great Bend, Harmony, New Milford and Oakland, and in the Boroughs of Great Bend, Hallstead, Lanesboro, Montrose, New Milford, Oakland and Susquehanna, all in northern Susquehanna County, Pennsylvania. The Application was assigned Docket No. A-2011-2275595.

2. In the Application, Leatherstocking stated it is a New York limited liability company whose partners include Corning Natural Gas Corporation (Corning) and Mirabito Holdings Inc. (Mirabito), with each partner owning and controlling a 50% share.⁹ Both Corning and Mirabito have extensive experience providing natural gas distribution services or energy services in New York State.¹⁰

3. If the Application is approved, Leatherstocking's primary business in Pennsylvania will be "to construct, build, own and operate natural gas distribution and transportation facilities and to provide distribution and transportation services to residential, commercial and industrial customers."¹¹ At the present time, no public utility or other provider offers these services to residents of northern Susquehanna County.¹²

⁹ Application at p. 2, ¶ 3.

¹⁰ Application at pp. 3-4, ¶¶ 6-8.

¹¹ Application at p. 2, ¶ 3.

¹² Application at p. 4, ¶ 10.

4. PNG filed its initial Protest on December 27, 2011, the deadline the Commission set for protests or petitions to intervene. On that same date, the Pennsylvania Office of Consumer Advocate filed a Notice of Intervention and Public Statement and Williams Field Services Company, LLC filed a Petition to Intervene. The Commission's Bureau of Investigation and Enforcement filed a Notice of Appearance on January 11, 2012. Based on these filings, PNG is the only party who has challenged the Application.

5. On January 17, 2012, Leatherstocking filed Preliminary Objections to PNG's Protest, arguing *inter alia* that PNG lacked standing because it was not certificated to provide service, did not provide service and had not filed an application seeking to provide service within the proposed area identified in Leatherstocking's Application; thereby lacking the direct and substantial interest needed to establish standing to participate in this proceeding.¹³

6. On January 18, 2012, PNG attempted to cure its lack of standing by filing a retaliatory application to provide service in the same portions of Susquehanna County that are the subject of this Application. PNG's application was published in the *Pennsylvania Bulletin* on February 4, 2012, and protests and interventions are due by February 21, 2012.¹⁴

7. On January 27, 2012, PNG filed its "second" or Amended Protest.¹⁵ While claiming that it "does not admit that the initial Protest was in any way insufficient," PNG nonetheless updated its Protest to reflect its newly filed application for service authority. PNG further claimed that, as a result of the filing of its Amended Protest, Leatherstocking's

¹³ Preliminary Objections at pp. 1-2.

¹⁴ Leatherstocking intends to file a protest in PNG's application proceeding; however, the Company is willing to withdraw its protest if PNG will agree to withdraw from this case and accept, as would Leatherstocking, a non-exclusive service territory in Susquehanna County, Pennsylvania. Moreover, if the Commission grants the Company's Preliminary Objections by final and unappealed order, Leatherstocking would similarly withdraw its protest to the PNG application.

¹⁵ With the exception of references to its January 18, 2012 application filing (Amended Protest at pp. 2-4), the initial Protest and the Amended Protest are almost identical.

Preliminary Objections should be deemed moot.¹⁶ As set forth below, that should not occur in the unique and specific context of protest deadlines which, under PNG's proposed interpretation, would be rendered meaningless if a party without standing could interpose a "placeholder" protest, and then hustle to manufacture standing after the deadline date has passed.

8. As in its initial Protest, PNG requests that Leatherstocking's Application be dismissed or denied in its entirety for the following reasons: (a) Leatherstocking did not demonstrate a public need for the proposed service, while PNG has had "substantial contact and outreach with customers in Susquehanna County" concerning potential service; (b) Leatherstocking did not demonstrate that it possesses the legal, technical and managerial fitness required to be certificated and to operate as a public utility in Pennsylvania; and (c) Leatherstocking did not provide "any meaningful commitments or any specific details about the benefits" to be provided to customers if the Application is approved by the Commission.¹⁷

9. The Company does not agree or concede that (a) PNG can create the standing necessary to protest Leatherstocking's Application through the filing of its application and Amended Protest after the protest deadline, or (b) the Company's initial Preliminary Objections are in fact moot. Nonetheless, Leatherstocking is filing these Preliminary Objections to the Amended Protest.¹⁸

II. PRELIMINARY OBJECTIONS

10. The Commission's Rules of Administrative Practice and Procedure¹⁹ require that a protest objecting to the approval of an application filed with the Commission must indicate

¹⁶ Amended Protest at p. 2.

¹⁷ Amended Protest at p. 3.

¹⁸ Leatherstocking incorporates herein by reference the arguments set forth in its January 17, 2012 Preliminary Objections.

¹⁹ 52 Pa. Code §§ 1.1, *et seq.* (herein Regulations).

(a) the clear and concise facts from which the protestant's "alleged interest or right" can be determined; (b) the grounds supporting the protest; and (c) the basis of the protestant's standing.²⁰

11. The Regulations permit the filing of preliminary objections when a filed pleading is legally insufficient or when the filing party lacks the capacity to sue.²¹ Preliminary objections allowed by 52 Pa. Code § 5.101 are comparable to a demurrer in a civil case, which is authorized by Rule 107(b) of the Pennsylvania Rules of Civil Procedure.²² The Commission has adopted this standard.²³ The purpose of a demurrer is to save the Commission and the parties the time and expense of preparing for and holding a hearing, when no hearing is required. All of the material facts necessary to dismiss PNG's Protest and its Amended Protest appear in the text of those documents and, as such, these Preliminary Objections should be considered and granted by the Commission.

A. PNG's Amended Protest Was Filed After The Date Set By The Commission For Filing Protests And Must Be Dismissed As Tardy.

12. PNG's Amended Protest was filed on January 27, 2012, one month after the December 27, 2011 deadline set by the Commission for the filing protests. The Commission sets firm deadlines for protests where, as here, it seeks to expedite service to unserved customers. These deadlines are strictly construed. Commission Regulations provide that protests filed after the filing deadline shall be "a bar to subsequent participation ... except as permitted by the

²⁰ 52 Pa. Code § 5.52(a).

²¹ 52 Pa. Code §§ 5.101(a)(4) and (5). PNG's Answer to Leatherstocking's Preliminary Objections claims that they do not comply with the rules pertaining to preliminary objections (Answer at p. 4), but that is plainly not the case. Leatherstocking's Preliminary Objections relate to lack of standing (5) and legal insufficiency due to lack of standing (4).

²² A *demurrer* is an assertion that the complaint does not set forth a cause of action upon which relief can be granted, and it admits, for purposes of testing the sufficiency of the complaint, all properly pleaded facts, but not conclusions of law. *Estate of Cletus J. Hollywood v. First National Bank of Palmerton*, 859 A.2d 472, *reargument denied*, 876 A.2d 396 (Pa. 2005); *Walter Balsbaugh v. James H. Rowland*, 290 A.2d 85 (Pa. 1972); *Milton Engle v. Friend's Hospital, et al.*, 266 A.2d 685 (Pa. 1970) (Pa. Super. 2004).

²³ *Application of Main Line Transit Service, Inc.*, Docket No. A-00116172, Order entered October 3, 2002.

Commission for good cause shown....”²⁴ PNG has provided no good cause for its late filing and, on this basis alone, PNG’s Amended Protest should be dismissed.

13. PNG apparently seeks to avoid, if not nullify, the strict protest deadline by taking advantage of Section 5.91(b) of the Regulations, which permits the filing of amendments to pleadings within 20 days of service of preliminary objections “as of course.”²⁵ This general provision should not be interpreted to trump the more specific provision of the Regulations requiring a valid and timely protest.²⁶ Moreover, such amendments should be permitted only to correct matters of form, not to permit a party to manufacture standing that did not exist when it filed its original protest. To interpret this Regulation in any other way would be akin to permitting a party with no justiciable interest in a matter to file protests as “placeholders” to beat the established deadline and thereafter engage in activities needed to establish standing that did not previously exist. This would not only make a mockery of protest deadlines, it could also result in major delay in expanding utility service in Pennsylvania, which Leatherstocking submits is not in the greater public interest. The Commission has interpreted the analogous Regulation at 52 Pa. Code § 5.101(h), which permits amended pleadings when a preliminary objection is granted, to be applicable only to matters of form. The Commission has stated that “Section 5.101(f) ... applies to pleadings which are struck as insufficient in form ... [and] has no application where ... a litigant has been dismissed ... for lack of standing.”²⁷

²⁴ 52 Pa. Code § 3.502(d).

²⁵ 52 Pa. Code § 5.91, Amended Protest at p. 2 n. 1,

²⁶ 1 Pa.C.S. § 1933 (“If the conflict between ... [a general provision and a special provision] in the same or different statutes] is irreconcilable, the special provisions shall prevail....”).

²⁷ *Application of Consumers Pennsylvania Water Company – Shenango Valley Division*, Docket No. A-212750F0007, Order entered January 11, 2001 (*Consumers – Shenango Valley*), Order at 9; *Joint Application of Philadelphia Suburban Water Company, et al.*, Docket Nos. A-212370F0061 and A-211040F2000), Orders entered April 19, 2001 and May 25, 2001 at 5-6.

14. Tellingly, PNG's Amended Protest does not attempt to amplify its standing *as of the time it filed its initial Protest*, but instead seeks to invoke events that took place *after* that date (here, PNG's application filing) to manufacture standing that did not previously exist. Such amendments stray far beyond matters of form and should not be permitted. To rule otherwise would essentially permit parties to circumvent the Commission's established deadline for the filing of protests, thereby delaying needed service to customers.

B. PNG Lacked Standing To Participate In This Proceeding At The Time It Filed Its Protest And The Subsequent Filing Of Its Application Cannot Cure This Deficiency.

15. In support of its initial Protest, PNG claimed the approval of Leatherstocking's Application "will have a direct, immediate, and substantial impact on the contemplated extension of PNG's existing facilities and certificated territory to serve additional areas within Susquehanna County."²⁸ However, as discussed in further detail below, PNG failed to establish that it had standing to protest the Application at the time of its initial filing and this deficiency cannot be cured by the filing of an application for service after the protest deadline has passed.

(a) PNG Lacked Standing At The Time It Filed Its Initial Protest.

16. In its decision in *William Penn Parking Garage Inc. v. City of Pittsburgh*,²⁹ the Pennsylvania Supreme Court set forth three elements a party must meet in order to participate in an adjudicatory proceeding. *First*, the party's interest must be "substantial." The Court explained this to mean that the party's "interest must have substance - there must be some discernible adverse interest other than the abstract interest of all citizens in having others comply

²⁸ Protest at p. 3 ¶ 5. At pages 4-5, ¶ 6 of its Amended Protest, PNG expanded the quoted language to add that the approval of Leatherstocking's Application also would directly, immediately and substantially impact the PNG Application.

²⁹ 346 A.2d 269 (Pa. 1975).

with the law.”³⁰ *Second*, the party’s interest must be “direct.” That is, “the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains.”³¹ *Finally*, the party’s interest must be “immediate.” This means there must be a “causal connection between the action complained of and the injury to the person challenging” that action.³² In discussing the elements of standing, the Commission also has stated that “[m]ere conjecture about possible future harm does not confer a direct interest in the subject matter of a proceeding.”³³ These requirements help avoid “frivolous, harassing lawsuits whose costs are ultimately borne, at least in part, by utility ratepayers.”³⁴

17. PNG’s initial Protest failed to satisfy any of the three elements needed to establish its standing to participate in this proceeding. At that time, PNG’s interest was neither direct nor immediate but, rather, was wholly speculative. PNG was neither an existing nor a potential customer of the service that Leatherstocking proposes to provide. PNG admitted that, at the time it filed its initial Protest, it had (a) no current authority to provide natural gas service within the requested territory; (b) no lines or other facilities in the ground or available with which such service could be provided; and (c) no application pending before the Commission for authority to provide such service.³⁵ Because it did not satisfy any of the required attributes, PNG’s Protest did not establish its standing.

³⁰ *Id.* at 282.

³¹ *Id.*

³² *Id.* at 283. *See also, ARIPPA v. Pennsylvania Public Utility Commission*, 792 A.2d 636 (Pa. Cmwlth. 2002), *alloc dn*, 815 A.2d 635 (Pa. 2003) (“A party is aggrieved when adversely, directly, immediately and substantially affected by a judgment, decree or order.”)

³³ *Application of Consumers Pennsylvania Water Company – Shenango Valley Division*, Docket No. A-212750F0007, Order entered January 11, 2001 (*Consumers – Shenango Valley*), Order at 9; *Joint Application of Philadelphia Suburban Water Company, et al.*, Docket Nos. A-212370F0061 and A-211040F2000), Orders entered April 19, 2001 and May 25, 2001 at 5-6.

³⁴ *Pennsylvania Public Utility Commission v. National Fuel Gas Distribution Corporation*, 73 Pa. P.U.C. 552 (1990).

³⁵ Protest at pp. 2-3 ¶¶ 1-5.

18. The only basis on which PNG could assert standing at the time it filed its initial Protest was its claim that it had engaged in wholly exploratory marketing activities within the proposed service territory.³⁶ As established in Leatherstocking's Preliminary Objections to the initial Protest, however, Commission decisions support that such activities are not sufficient to provide PNG with standing to protest the Application or to raise its right to provide the requested service over the right of Leatherstocking to do so.³⁷ These exploratory activities create no tangible interest that will be adversely affected by the approval of the Application and they are therefore insufficient to grant protestant standing to PNG.³⁸

19. Furthermore, the Commission has held that even the listing of a municipality in the tariff of a public utility, without the concomitant issuance of a certificate of public convenience granting authority to serve, is insufficient to establish standing to protest an application filed by another utility.³⁹ Aqua Pennsylvania, Inc. (Aqua PA) filed an application on June 27, 2007 for authority to offer service in an additional portion of Dallas Township, Luzerne County in order to provide water to a new residential development. United Water Pennsylvania, Inc. (United) filed a protest in which it claimed, *inter alia*, that United had prior Commission approval to serve the applied-for territory. In its motion for summary judgment, Aqua PA asserted that United lacked standing to protest the application because the only support it provided for its alleged authority to serve was its tariff, which included Dallas Township,

³⁶ Protest at pp. 1, 4.

³⁷ Preliminary Objections at pp.9-12, which are incorporated herein by reference.

³⁸ *Request of the Pennsylvania-American Water Company and the Newtown Artesian Water Company Under Section 2102(n) of the Public Utility Code for Approval of Contract Between Affiliated Interests*; Docket No. G-2011-2232461, Preliminary Objections of PAWC and NAWC to the Protest, Answer and Petition to Intervene filed by Bucks County Water and Sewer Authority, at pp. 14-15. ("[T]he Authority's averment of a 'potential' effect on its 'economic interests' ... like its speculative averment of an alleged – but unspecified – effect on 'operational interests' is inadequate to confer standing because '[m]ere conjecture about possible future harm does not confer a direct interest in the subject matter of a proceeding,'" citing *Consumers –Shenango Valley*.)

³⁹ *Application of Aqua Pennsylvania, Inc. for Approval to Begin to Offer, Render, Furnish or Supply Water Service to the Public in an Additional Portion of Dallas Township, Luzerne County*; Docket No. A-210104F0080, Order entered May 22, 2008.

Luzerne County is the list of territories served. In recommending that the motion for summary judgment be granted, the ALJ concluded that:

[A] tariff does not authorize a public utility to provide service and that only a certificate of public convenience authorizes service to a particular territory. United did not provide any reference to its certificate of public convenience in its discovery responses, its Protest, or its Answer to the Motion for Summary Judgment. United failed to demonstrate that it had standing to protest Aqua PA's Application....⁴⁰

PNG's exploratory marketing activities in this case demonstrate even less of a justiciable interest than United's claim of standing on the basis of a tariff entry. If the Commission has concluded that standing cannot be conferred by listing a territory in a "Commission-approved" tariff, which Leatherstocking submits shows a definite intent or at least a future interest to provide service in that area, then clearly the exploratory and marketing activities that PNG allegedly has undertaken (and arguably even the filing of its application after the end of the protest period) are insufficient to support its standing in this proceeding. The Amended Protest should be dismissed.

20. The Commission also has addressed the issue of standing in two cases where Pennsylvania American Water Company (PAWC) filed protests to applications filed by other utilities to serve areas where PAWC was not certified. In the first case, Consumers Pennsylvania Water Company (Consumers) filed an application on August 17, 2000 seeking approval to acquire assets and to provide service in Mahoning Township, where Consumers was not yet certificated. PAWC filed a timely protest, which it amended six days later. Consumers filed a motion to strike and/or dismiss the protest and the amended protest on the basis that PAWC lacked standing to participate in the proceeding because it had no authority to provide service in Mahoning Township. In a decision issued on December 4, 2000, the Administrative Law Judge

⁴⁰ *Id.*, Order at 3.

(ALJ) granted Consumers' motion and recommended the protest and amended protest be dismissed for lack of standing. In its January 11, 2001 Order, the Commission adopted the ALJ's analysis of PAWC's lack of standing, concluding that PAWC did not demonstrate a direct interest in the Consumers' application because "PAWC has not shown that it has an interest which is adversely affected by Consumers' proposed service in southern Mahoning Township."⁴¹

21. Similarly, the Commission rejected PAWC's attempt to protest a joint application filed on February 13, 2001 by Philadelphia Suburban Water Company (PSWC) and Geigertown Water Company (Geigertown) seeking Commission authority (a) to transfer Geigertown's assets to PSWC; (b) for Geigertown to abandon its utility service; and (c) for PSWC to begin to provide service in the former Geigertown territory.⁴² In response to the joint application, PAWC filed (i) a petition for extension of time to file a protest; (ii) a protest; and (iii) an amended protest, all of which were filed after the deadline established by the Commission for protests and petitions to intervene. PAWC alleged its late filing was caused by its inability to determine if the joint application sought territory that was beyond Geigertown's certificated area of service (but which PAWC did not serve) until PAWC had examined certain maps that were unavailable until March 29, 2001. PSWC filed a motion to dismiss the protest and amended protest on the basis of lateness and lack of standing. With regard to standing, the Commission held:

[W]e conclude that PAWC has failed to establish its standing to protest PSWC's Joint Application. We reach this conclusion on the basis that PAWC has not demonstrated a direct interest in PSWC's Joint Application proceeding because PAWC has not

⁴¹ *Consumers – Shenango Valley*, Order at 10.

⁴² *Joint Application of Philadelphia Suburban Water Company and Geigertown Water Company for Approval of (1) the Transfer, by Sale, of the Water System Assets of Geigertown Water Company to Philadelphia Suburban Water Company; (2) the Right of Philadelphia Suburban Water Company to Furnish Water Service to the Public in a Described Area of Robeson and Union Townships, Berks County; and (3) the Abandonment by Geigertown Water Company of Water Service to the public in its Current Service Territory*; Docket Nos. A-212370F0061 and A-211040F2000; Orders entered April 19, 2001 and May 25, 2001 (*Joint Application*).

shown that it has an interest which is adversely affected by PSWC's proposed service in Geigertown. PAWC has failed to allege any adverse effect on PAWC stemming from PSWC's Joint Application. As a result, we must dismiss the Protest and Amended Protest of PAWC finding that the subject Protests are contrary to the public interest.⁴³

22. The cases discussed above establish the principle that the future interest and exploratory activities cited by PNG in its initial Protest are insufficient to grant it standing in this matter and, on this basis, the Amended Protest should be dismissed.⁴⁴

(b) **PNG's Subsequent Application And Late-Filed Second Protest Cannot Cure The Lack Of Standing In Its Initial Protest Or Be Cured By Calling It An Amended Protest.**

23. PNG's standing must be judged on its status at the time of the initial Protest, because its second Amended Protest was late-filed. Possibly in recognition of the flaws in its initial Protest, PNG filed an application on January 18, 2012 to serve the same territory in Susquehanna County, and then filed an Amended Protest referencing that filing as a basis for its standing in this case. PNG's attempts to manufacture standing after the protest deadline should be ignored by the Commission and the Amended Protest should be dismissed.

24. The Commission has previously rejected such attempts to use amended pleadings or evidence to remedy defects in standing. In the case of *Re Pennsylvania-American Water Company*,⁴⁵ the Commission dismissed a protest to three PAWC applications on the basis that, although the protests were timely, the protestants had no standing at the time of its filing. This consolidated proceeding involved applications filed by PAWC to purchase the assets and

⁴³ *Id.*, Orders at 6.

⁴⁴ See also, *Joint Application of Aqua Pennsylvania, Inc. and Country Club Gardens Water Company, Inc.*; Docket Nos. A-210104F0066 and A-210620F2000, Order entered April 7, 2006 at 8-9 (The fact that a service provider may be a potential competitor of the utility seeking to offer service is not sufficient to confer standing on that provider to protest an application.)

⁴⁵ Docket Nos. A-212285F019, A-221285F020 and A-0221285F021 (*PAWC – Three Utilities*), 85 Pa. P.U.C. 548 (1995).

operating rights of three small water utilities (Three Utilities). While the full history of the parties and procedural events is not recounted here, relevant to this case is the filing of three identical protests by Murray F. Freeman and Richard M.S. Freeman (Freemans) claiming that ownership of the Three Utilities previously was transferred to them by the owner of Public Service Water Company (Public Service). PAWC filed motions to dismiss the protests on multiple grounds, one of which was based on lack of standing.⁴⁶ At the hearing, the Freemans attempted to establish standing by introducing into the record (unsuccessfully) a letter from the Pike County Tax Claim Bureau to the Freemans that stated their “bid” for three properties within the service territories at issue had been accepted and then listed the amount to be paid and the payment terms for each property. No evidence of the Freemans’ payment for or transfer of the three properties was provided. Based on the facts of record, the ALJ recommended that the Freemans’ protests be dismissed due, *inter alia*, to lack of standing. The Freemans’ filed an exception to this recommendation. The Commission, quoting the ALJ’s discussion on the issue of standing, stated:

Apparently in realization of their inability to successfully contest these applications as the owners of Public Service Water, the Freemans attempted to acquire standing as customers of one or more of the [Three Utilities] by purchasing, from the Pike County Tax Claim Bureau, property in the service territories ... [involved].... In support of the Freemans’ claim to be customers, Murray Freeman testified that he purchased land in the developments known as Wild Acres and Marcel Lakes.... He was unable to produce deeds for the properties because he had not paid the purchase price until April 21, 1995, only three days before the hearing on April 24, 1995.... Thus, the Freemans, by Murray Freemans’ own testimony, did not have standing as customers to

⁴⁶ The Commission and the Commonwealth Court determined that Public Service had no rights to transfer to the Freemans because the Three Utilities had been improperly transferred from the original owner, Robert Boland, to Public Service without first applying for and receiving a certificate of public convenience approving the transaction. *Id.*, at 552-553, *Public Service Water Company v. Pennsylvania Public utility Commission*, 645 A.2d 423 (Pa. Cmwlth. 1994).

file their protests in these cases, because they could not have been owners of the properties any earlier than three days before the hearing....

85 Pa. P.U.C. at 554-555 (emphasis in original).

PNG's filing of an application to serve customers in portions of Susquehanna County in an effort to manufacture standing in this case is the equivalent of the Freemans purchasing property within the involved service territory after the protest deadline had passed. The Commission did not allow such belated behavior in the *PAWC – Three Utilities* case and, for the same reasons, should not permit such action by PNG here. PNG's standing should be determined at the time it filed its initial Protest and, because no standing existed at that time, the Amended Protest should be dismissed.

25. In the *Consumers – Shenango Valley* case discussed above, the Commission rejected PAWC's filing of a second amended protest in which it attempted to cure its lack of standing by raising new arguments.⁴⁷ In response, the Commission stated:

We note that at pages 16-19 of the Initial Decision, the ALJ considered and discussed at length the issues and claims raised by PAWC in the Second-Amended Protest. Premised on our review of the record as developed in this proceeding, we conclude that the ALJ's dismissal of PAWC's Protest and Amended Protest for lack of standing is well founded. Similarly, we find that PAWC's Second-Amended Protest must also be dismissed. PAWC, whose Protest and Amended Protest have been dismissed for lack of standing, has no right or ability, under Commission regulations, to amend its earlier pleadings to attempt to establish standing.⁴⁸

⁴⁷ PAWC's second amended protest, filed after the January 11, 2001 Order was entered, attempted to create standing by explaining that PAWC (a) expanded its existing service areas "by extending its facilities into adjacent territories"; (b) had allegedly "received requests for service from property owners" in the applied-for territory; (c) was "interested in" and had "explored the possibility" of providing service to these potential customers; (d) had "met with ... [municipal] officials to discuss the possibility" of extending PAWC's facilities; (e) could provide service "simply by constructing an extension ... across the Mahoning River"; and (f) had "the right to seek to provide utility service in Mahoning Township" because it was an already certificated utility. PAWC Second Amended Protest at pp. 2-3.

⁴⁸ *Id.* at 12.

PNG's Amended Protest is akin to PAWC's second amended protest in the *Consumers - Shenango Valley* case. The Commission has not permitted such a post-protest deadline amendment in the past and it should not do so as a way for PNG to cure its lack of standing to participate in this proceeding.

26. The same principle is evident in *Borough of Berwick v. The Quandel Group*⁴⁹ where the Pennsylvania Superior Court rejected the plaintiff's attempt to cure a defect in standing by substituting a new plaintiff after the initial plaintiff was dismissed as lacking a justiciable interest in the case. The Court concluded that "a plaintiff without standing may not commence a suit and then attempt to substitute the proper plaintiff after the statute of limitations has run. The substitution would effectively introduce a new cause of action which is time barred..."⁵⁰ Similarly, PNG's attempt in this case to manufacture standing after the December 27, 2011 protest deadline had passed also should be barred.

27. Moreover, the Commission should not ignore the fact that PNG filed applications to serve counties adjacent to Susquehanna County in September 2011, only two months prior to Leatherstocking's Application. For reasons known only to PNG, it chose not to include territory within Susquehanna County in those applications. Yet, only a few months later, PNG is attempting to block Leatherstocking's provision of natural gas service to residents of northern Susquehanna County, claiming a belated interest in serving the same territory. Given the facts, there is no reason not to hold PNG strictly to the Commission's standing requirements and determine its standing as of the protest filing deadline. PNG's attempt to bank territory (which it and its predecessor have shown no interest in for over 50 years) for the future or to elbow out

⁴⁹ 655 A.2d 606 (Pa. Super. Ct. 1995), *alloc dn*, 664 A.2d 971 (Pa. 1995). The Borough of Berwick attempted to substitute its municipal authority as the plaintiff in a civil case where the authority was the actual owner of the facilities at issue.

⁵⁰ *Id.* at 608.

other providers that would benefit the public interest should not be condoned by the Commission. PNG has plenty of open, unserved and unattended territory including the substantial rural territories it recently obtained, and this Commission should exercise its discretion to deny this late and inadequate attempt by PNG to manufacture standing in this case, and should send a message to PNG to concentrate on developing service in those other areas.

B. PNG's Claim Against Leatherstocking's Application Is Legally Insufficient Because PNG Is Not Precluded From Filing An Application To Provide Service In The Same Areas Of Susquehanna County Even If The Commission Approves The Application.

28. The crux of PNG's claim of "harm" in this proceeding seems to be that granting Leatherstocking's Application would forever preclude PNG from providing service in these areas of northern Susquehanna County. As PNG is well aware, this is not the case. Rather, the Commission has the discretion, which discretion it should exercise in this proceeding, to grant non-exclusive service rights to provide natural gas service to the public.⁵¹

29. Despite PNG's use of the *Equitable* case to support its argument that the Commission does "not favor competition among gas utilities,"⁵² the Commission entered an Order on June 9, 2011 that addressed the issue of NGDC to NGDC competition in a contrary fashion.⁵³ While the context of that case was a rate increase rather than an application, the Recommended Decision of the ALJs includes language that is instructive on the Commission's current position on this matter.⁵⁴ The ALJs stated:

⁵¹ *Re Metropolitan Edison Company, et al.*, Docket Nos. P-00900429, *et al.*, 78 Pa. P.U.C. 617 (1993). ("...[T]he courts and the Commission have consistently stated that service rights are not exclusive.")

⁵² *Application of Equitable Gas Company, a Division of Equitable Resources, for Approval of the Right to Begin to Offer, Render, Furnish and Supply Natural Gas Service to the Public in Beaver, Cambria and Blair Counties, Pennsylvania*, Docket No. A-121100F0003, Order entered August 12, 1999 (*Equitable*).

⁵³ *Pennsylvania Public Utility Commission v. Peoples Natural Gas Company, LLC*, Docket Nos. R-2010-2201702, *et al.*, Order entered June 9, 2011.

⁵⁴ The Commission adopted the ALJs' Recommended Decision without modification in its Order entered on June 9, 2011.

There is no valid, enforceable regulation, rule, order or policy of the Commission prohibiting competition between natural gas public utilities where authorized service territories overlap. The Commission has stated in a number of decision that its policy is not to prohibit competition between non-carrier public utilities in such situations.⁵⁵

30. Likewise, PNG's claim that the Commission has rejected "competitive markets" for natural gas because of issues of "rate flexing" is simply not correct.⁵⁶ Review of flex pricing by the Commission was precipitated by the actions of a few gas utilities who in rate cases, presumably for some *quid pro quo*, decided to agree in settlement with other parties who do not like flex pricing that the Commission should examine the subject.⁵⁷

31. PNG itself has taken advantage of the ability of two public utilities to serve the same territory. In an application filed on September 29, 2010, PNG sought additional territory in Clinton, Union and Luzerne Counties even though UGI Central Penn Gas, Inc. (CPG) already possessed certificates of public convenience to serve 11 of the 12 municipalities included in the

⁵⁵ *Id.*, Recommended Decision at 40, citing *Re Montefiore Hospital Association of Western Pennsylvania*, Docket Nos. E-77124006, *et al.*, 54 Pa. P.U.C. 566, 567 (January 9, 1981), *Columbia Gas of Pennsylvania, Inc. v. Peoples Natural Gas Company*, 44 Pa. P.U.C. 308 (1969), *Borough of Aspinwall v. Duquesne Light Co.*, 41 Pa. P.U.C. 301 (1964), *Columbia Gas of Pennsylvania, Inc. v. T.W. Phillips Gas and Oil Company*, Docket No. C-823387, Order entered December 15, 1986 at 34, 41, *Peoples Natural Gas Co., v. Apollo Gas Company*, Docket No. C-850521, Order entered September 2, 1986 at 41. *See also*, *Columbia Gas Company of Pennsylvania, Inc. v. Carnegie Natural Gas Company*, 61 Pa. P.U.C. 313 (1986) ("[W]e wish to advise all jurisdictional gas distribution utilities that it shall be our policy not to prohibit competition between gas utilities where authorized service territories may overlap."), *Equitable Gas Company*, 62 Pa. P.U.C. 133, 135 (1986)(... "[I]t would be [the Commission's] policy not to prohibit competition between gas utilities where authorized...service territories overlap."), *The Peoples Natural Gas Company v. Pennsylvania Public Utility Commission*, Docket No. C-860644, Order entered August 24, 1987, *aff'd*, 554 A.2d 585 (1989); *Equitable Gas Company v. T.W. Phillips Gas and Oil Company*, Docket No. C-850244, 82 Pa. P.U.C. 615, 620-621, Order entered August 24, 1994, ("[W]e consider the current ability of LDC's to compete in overlapping service territories [to be] in the public interest....").

⁵⁶ Answer to Preliminary Objections at p. 14.

⁵⁷ *Peoples Rate Case, Pennsylvania Public Utility Commission v. Columbia Gas of Pennsylvania*, Docket Nos. R-2010-2215623 and R-2010-2201974, Order entered October 14, 2011 (The Pennsylvania State University, Columbia Industrial Intervenors, NGS parties, as well as others, did not join in the request that the Commission examine flex pricing in a future proceeding.)

proposed territory.⁵⁸ CPG filed an almost identical application on the same date seeking to provide service in territories in which PNG already was certificated.⁵⁹ Both PNG and CPG argued that the availability of two service providers gave customers “the right to obtain the more efficient option ... for their gas service” because (a) potential customers would not have to “consider less efficient, competing fuels to supply their energy needs,” and (b) the public convenience would be served because PNG would be able to “serve a larger population base and provide that population with a more efficient and more environmentally sound source of energy for their energy requirements compared to other available alternatives.”⁶⁰

32. In its Order, the Commission summarized the arguments made by PNG and CPG for the granting of “mutual service territories” by saying:

In the Applications, the Companies acknowledge that approval of the proposed expansions would result in CPG and PNG being certificated in a number of the same geographic locations.... The Companies claim they do not believe this scenario raises any competitive concerns, as both CPG and PNG are wholly-owned subsidiaries of UGI Utilities, Inc.

The Companies also aver that approval of these Applications would not be the first instance in which both Companies are certificated in the same territory. CPG is presently franchised to serve all of Pittston Township in Luzerne County while PNG is franchised to service a part of Pittston Township. Additionally, both CPG and PNG are presently certificated in the City of Sunbury, Northumberland County.

The Companies set forth that any potential new customers residing in territories where both CPG and PNG are certificated will be

⁵⁸ *Application of UGI Penn Natural Gas, Inc. for Approval to Begin to Offer, Render, Furnish or Supply Gas Utility Service to the Public in the Service Territories of Pine Creek Township, Clinton County, Buffalo, West Buffalo, East Buffalo, Kelly and Union Townships, Union County; Pittston and Jenkins Townships, Luzerne County; the Boroughs of Exeter, Laflin and Yatesville, Luzerne County; and the City of Pittston, Luzerne County*, Docket No. A-2010-2202547; Order entered February 14, 2011 (2010 Application).

⁵⁹ *Application of UGI Central Penn Gas, Inc. for Approval to Begin to Offer, Render, Furnish or Supply Gas Utility Service to the Public in the Service Territories of Upper Augusta, Point, West Chillisquaque and East Chillisquaque Townships, Northumberland County, Buffalo, East Buffalo and Kelly Townships, Union County; Wolf Township, Lycoming County; the Borough of Yatesville, Luzerne; and Pittston Township, Luzern County* Docket No. A-2011-2202545, Order entered February 14, 2011.

⁶⁰ *Id.*, Order at 6.-7.

apprised of their options between CPG and PNG. The Companies will then review with these potential customers the rates charged by each utility and the contribution for extension of gas service facilities that would be required by each utility. Consequently, the Companies indicate that customers would then be free to choose the combinations of rates and line extension costs which would best suit their needs. The Companies also asserted that there is no difference between the main extension provisions for CPG and the main extension provisions for PNG.

* * *

The Commission believes that approval of these Applications could provide benefits for end use customers. Such benefits would come in the form of expanded availability of natural gas distribution service as well as more financially acceptable options for utility service. Additionally, the increased availability of natural gas distribution service may very well contribute to the economic development and growth in the territories addressed in these Applications. For these reasons, the Commission concludes that approval of these Applications is in the public interest, and necessary or proper for the convenience of the public....⁶¹

33. The same benefits will occur here if the Commission approves Leatherstocking's Application and later approves an application by PNG to provide service in portions of the same territory – *i.e.*, customers in northern Susquehanna County will be able to choose from a “more expanded availability of natural gas distribution service as well as more financially acceptable options for utility service.”⁶² Provision of competitive choice to natural gas customers is a public benefit that can and should be fostered by granting Leatherstocking's Application.

34. Despite the arguments made by PNG and CPG in their 2010 applications regarding the benefits of two utilities serving in the same territory, both utilities also claimed no competitive concerns were raised because PNG and CPG were “not natural competitors” as they were “wholly-owned subsidiaries of UGI Utilities.”⁶³ PNG echoes this argument in its Answer to the Preliminary Objections:

⁶¹ *Id.* at 4-5.

⁶² *Id.* at 5.

⁶³ 2010 Application at p. 7 ¶10.

Leatherstocking's reference to a 2010 application by PNG to provide service in an area previously certificated to UGI Central Gas Company ("CPG") is clearly distinguishable. Two affiliated companies have no incentive to flex rates in competition with each other to serve as [sic] customer, as there is no revenue benefit from discounting a rate in competition with an affiliate.⁶⁴

What really distinguishes this case from the situation that was created by approval of the PNG and CPG 2010 applications, however, is that approval of applications for both Leatherstocking and PNG to serve portions of Susquehanna County actually will *create* competition, which will benefit individual customers and the general public. True competitive gas service requires that customers have a real opportunity to compare the service rates of two companies in order to choose the best and least expensive service that fits that particular customer's needs.

35. PNG's argument that two affiliated companies "have no incentive" to compete with each other because "there is no revenue benefit" for either of those affiliates essentially means the two affiliated utilities will act in concert to make sure they do not compete with each other. While this may benefit UGI, it certainly does not benefit customers because there would be no true competition. This type of activity also runs afoul of the clear intent of the Orders cited in Paragraph 32 above, which clearly indicate that the Commission sees a benefit in having more rather than less competitive options available to the public.

36. Stripped to its essentials, PNG's filing of its own retaliatory application to serve Susquehanna County while attempting to keep Leatherstocking out points out that what PNG wants is a monopoly for service in that area so customers can never have the true benefits of competition driven by lower cost Marcellus Shale gas. That notion should be rejected. PNG should not be allowed to use such claims to short-circuit or restrain a developing market for energy services.

⁶⁴ Answer to Preliminary Objection at p. 14, n. 5.

37. The Commission is not bound by any particular standard in determining what is or is not in the public interest in granting a certificate of public convenience.⁶⁵ Indeed, the

Commission can, as it has for other industries,⁶⁶ do away with the public need or inadequacy of existing service requirement for areas in Pennsylvania within the Marcellus Shale play that have no present natural gas service and require only basic fitness to be shown by an applicant. Moreover, the law clearly does not confer any utility a never-ending monopoly franchise as such franchise is a privilege not a property right.⁶⁷

38. Thus, PNG's attempt to erect a barrier based upon a requirement that one and only one natural gas utility provide service in a particular area, as it posits in its Protest, Amended Protest and application, is unsupported by law and should be no impediment for the Commission to proceed with Leatherstocking's Application under the modified procedure.

C. Leatherstocking's Application Satisfies The Commission's Regulations.

39. Even if PNG had standing to participate in this proceeding, which it does not, it has presented nothing in the Protest or Amended Protest to support its request that the Commission deny the Application. Instead, PNG makes general and over-reaching statements that in no way refute or contradict Leatherstocking's ability or fitness to provide "adequate,

⁶⁵ *Seaboard Tank Lines v. Pennsylvania Public Utility Commission*, 502 A.2d 762, 765 (Pa. Cmwlth. 1985) (In promulgating Section 1102 of the Public Utility Code, 66 Pa.C.S. § 1102, "[t]he legislature ... provided no definition of specifically what the criteria were to be in determining the propriety of granting a certificate [of public convenience], leaving the formulation of such criteria to the PUC.") See also, *Morgan Drive Away, Inc. v. Pennsylvania Public Utility Commission*, 515 A.2d 1048, 1049 (Pa. Cmwlth. 1986) ("[I]n revising the evidentiary criteria for certificates of public convenience, [this Court previously held] the PUC properly exercised its discretion in eliminating an applicant's traditional burden of demonstrating the inadequacy of existing services."), *Elite Industries, Inc. v. Pennsylvania Public Utility Commission* 832 A.2d 428, 432 (Pa. 2003), *Robert Rohrbaugh v. Pennsylvania Public Utility Commission*, 727 A.2d 1080 (Pa. 1999).

⁶⁶ *Mobilefone of Northeastern Pennsylvania, Inc. v. Pennsylvania Public Utility Commission*, 458 A.2d 1030, 1033-1034 (Pa. Cmwlth. 1983) ("Our court, in *Gettysburg Tours, Inc. v. Pennsylvania Public Utility Commission*, 42 Pa. Commonwealth Ct. 399, 400 A.2d 945 (1979)... held ... that where the proposed service is different than the existing service, the applicant need not establish inadequacy of existing service ... and that proof of public necessity for the service alone may support the certificate.")

⁶⁷ *William Fiore v. Commonwealth of Pennsylvania*, 668 A.2d 1210, 1216 (Pa. Cmwlth. 1995) ("A certificate of public convenience is a privilege granted by the PUC....")

efficient, safe, and reasonable service at just and reasonable rates” or that demonstrate Leatherstocking has not satisfied the elements required for the issuance of a certificate of public convenience.⁶⁸

40. Contrary to PNG’s claims, each of the requirements for issuance of a certificate of public convenience has been met by the information provided in Leatherstocking’s Application and, as described below, the detail of support that PNG seeks to have Leatherstocking surmount in order to be granted a certificate of public convenience in this case has not been met by PNG in its own very recent applications. PNG itself admits the area that Leatherstocking proposes to serve “is comprised of rural areas that currently lack natural gas service” and that “development of natural gas infrastructure [in this area] ... would be a significant public benefit.”⁶⁹ Given this admission, it is clear the first element required for issuance of a certificate - public need - has been met by Leatherstocking and cannot be contested by PNG. It also is clear that the absence of facilities to provide natural gas service in the proposed territory satisfies the second requirement - that the existing facilities are inadequate.

41. Indeed, PNG has itself submitted applications, one of which the Commission has just recently approved, in which it provided only a general description of potential customers and in which it provided no support from specific customers that might be served in the applied-for territories. Nor did the PNG applications contain “any meaningful commitments or any specific details about the benefits” that PNG claims are lacking in Leatherstocking’s Application.⁷⁰

42. For instance, through an Application filed on September 23, 2011 and amended on September 30, 2011, PNG added substantial rural territories in Clinton, Lackawanna, Pike and

⁶⁸ Protest at p. 5 ¶ 10; Amended Protest at p. 6 ¶ 11.

⁶⁹ Protest at p. 5 ¶ 9; Amended Protest at p. 6 ¶ 10.

⁷⁰ Protest at p. 2.

Union Counties.⁷¹ In discussing the public need for the proposed service, PNG stated the following:

11. PNG reasonably believes that if it obtains authority to provide natural gas distribution service [to customers residing] in the areas identified in this application, there will be future opportunities to provide natural gas distribution service to customers residing in these areas, and that the availability of natural gas distribution service may foster industrial, commercial and residential development....⁷²

* * *

14. Granting the authority requested in this application is in the public interest in that it will provide the residents of the affected areas [with] access to an environmentally beneficial, cost-effective, energy source choice that is being produced in increasing quantities in Pennsylvania to the benefit of Pennsylvania's economy. The availability of natural gas distribution service should also foster the economic development of the affected townships and boroughs, and will enhance the possibilities for displacing other less efficient energy sources such as fuel oil, electricity and wood.⁷³

In other words, PNG had no specific proof of demand for services at the time it filed its 2011 Application; just a belief that there might be customers if its application was approved and that replacing natural gas for fuel oil, wood and electricity would be in the public interest. Both of these "conclusions" are obvious and can be said about any unserved territory in Pennsylvania. In its Order, which was entered only two months after the 2011 Application was filed, the Commission accepted these general assertions as sufficient to show that a public need and benefit existed.⁷⁴

⁷¹ *Amended Application of UGI Penn Natural Gas, Inc. for Approval to Begin to Offer, Render, Furnish or Supply Gas Utility Service to the Public in the Additional Territories of Grugan and Wayne Townships, Clinton County; Jessup Borough, Lackawanna County; Dingman Township, Pike County; Lewis Township, Union County and Clinton Township, Wayne County*, Docket No. A-2011-2264538; Order entered December 16, 2011 (2011 Application).

⁷² *Id.*, Order at 3.

⁷³ *Id.* at 4.

⁷⁴ 2011 Application, Order at 3-5.

43. PNG's 2010 Application likewise included only general statements as to public need and benefits. Here, PNG stated:

... PNG is aware of potential customers along its facilities that may be willing or able to accept service by UGI PNG, but it has not pursued these marketing opportunities because it is not certificated in these areas. If granted the franchise rights, UGI PNG plans to pursue these marketing opportunities and, where prudent to do so, will make an economic investment in the expansion of its facilities....⁷⁵

* * *

UGI PNG believes that its entry as a distribution provider in the service territories identified in this Application is consistent with the public convenience because it will enable UGI PNG to serve a larger population base and provide that population with a more efficient and more environmentally sound source of energy for their energy requirements compared to other available alternatives.⁷⁶

Again accepting PNG's arguments as a sufficient showing of the need for and the benefits to be provided by the proposed service, the Commission approved the application.⁷⁷

44. Given the generality of the statements and the minimum thresholds that PNG itself has argued in past applications with regard to the need and benefits that are in the public interest, and the fact that the Commission has accepted those general statements as sufficient to meet the requirements for approval of the applications, PNG cannot now claim that Leatherstocking's Application should be denied because specific customers have allegedly not been identified or that it is unclear if natural gas service is needed in and will provide a benefit to the proposed territory.

45. With regard to fitness, PNG claims there is no detail to support a finding that "Leatherstocking or its affiliates have any expertise in owning or operating a Pennsylvania

⁷⁵ 2010 Application, Order at 6.

⁷⁶ *Id.*

⁷⁷ 2010 Application, Order at 3, 5.

regulated NGDC.”⁷⁸ PNG’s attempt to limit the Commission’s examination of the ownership and operational expertise of Leatherstocking and its affiliates to a Pennsylvania entity is improper and should be ignored. Corning, a longstanding New York State public utility and certified natural gas distribution company, and Mirabito, a diversified energy company, which are equal partners (or affiliates) of Leatherstocking, have been in the natural gas and energy business since 1904 and 1927, respectively.⁷⁹ As to operational or managerial fitness, the fact that their business operations have been in New York rather than in Pennsylvania is irrelevant to the question of whether Corning and Mirabito will provide Leatherstocking with the managerial and technical expertise and the financial support needed for it to own and operate a natural gas distribution system to serve residents of northern Susquehanna County. Corning’s CEO is the CEO of Leatherstocking and his vast experience includes Senior Vice President at Southern Union Gas with responsibility for three utilities including PG Energy, a regulated Pennsylvania natural gas local distribution utility. He also was President of NYSEG, a combination utility operating just north of Susquehanna County. During his tenure with NYSEG, he was responsible for a joint venture with PG Energy that constructed a power plant in Archibald, Pennsylvania. Further, employees will provide services to Leatherstocking that are the same or similar to the services those individuals currently provide to Corning and Mirabito.⁸⁰ These employees include, *inter alia*, the three individuals identified below who have 75 years of combined experience in their respective areas of expertise: Russ Miller, Vice President – Gas Supply & Marketing; Matt Cook, Vice President – Operations & Engineering; and Firouzeh Sarhangi, Chief Financial Officer. It also should be noted that Corning has the most aggressive safety and

⁷⁸ Protest at p. 5 ¶ 10, amended Protest at p. 6 ¶ 11.

⁷⁹ Application at pp. 3-4 ¶¶ 7-8.

⁸⁰ Application at p. 5 ¶ 12.

reliability program in the country. Corning is currently in its sixth year of a fifteen-year program to replace all bare steel mains and services in its system.⁸¹ In addition, Corning has recently completed a new franchise in Virgil, New York, with facilities that are very similar in make up to what is proposed for Susquehanna County. Corning receives over one-half of its gas supply directly from local producers. Corning provides its firm and transportation customers access to some of the lowest cost natural gas in the nation. Eighty percent (80%) of the annual throughput on the Corning system is gas transported for others.⁸² Corning runs an open access system, which supports competition. Finally, Corning has no affiliate supply operations and will employ this same template for supply in Susquehanna County.

46. Similarly, PNG's argument that Leatherstocking lacks financial fitness wholly lacks merit. PNG, to delay this Application, inappropriately posits that the Commission ignore Corning and Mirabito's combined 191 years of financial soundness in the provision of natural gas utility and energy services.⁸³ This should not be done. Nor should the Commission ignore the fact that Corning, one of Leatherstocking's two partners, had a net income of over \$2.3 Million as of the end of its 2010 fiscal year and an equity balance of over \$13.6 Million as of that same date.⁸⁴ All of the facts cited above, which were included in the Application, amply demonstrate Leatherstocking's fitness to provide the requested service and PNG has raised nothing in its Amended Protest that refutes or contradicts these facts, even if it had standing - which it does not.

47. The public interest is better served in this proceeding by denying the Amended Protest, moving the matter to the non-litigated "modified procedure" permitted before the

⁸¹ Corning has no cast iron or cast steel mains.

⁸² Application, Exhibit C (2010 Corning Annual Report) at p. 9, Item 6.

⁸³ Application at pp. 3-4 ¶¶ 7-8.

⁸⁴ Application at p. 6 ¶ 18 and Exhibit C.

Commission, and having Leatherstocking work with Commission staff and the intervenors not requesting a hearing to identify and resolve any questions about the Application. This procedure is a much quicker and less expensive process and, more importantly, will allow customers in the rural areas of northern Susquehanna County to more quickly receive the benefits of low cost Pennsylvania Marcellus Shale gas.

D. An Expedited Procedural Schedule Should Be Established If PNG's Amended Protest Is Not Dismissed.

48. If the Commission determines that PNG's Amended Protest should not be dismissed, Leatherstocking requests that an expedited procedural schedule be established in this proceeding so that construction of necessary facilities can be completed during the 2012 construction season. Without entry of a final Order approving Leatherstocking's Application prior to June or July of 2012, Leatherstocking will miss all or most of its ability to install any facilities prior to 2013. Delaying the ability of customers in northern Susquehanna County to access low cost natural gas service would not be in the public interest and the Commission should prevent such a delay if PNG is permitted to prosecute its protests to the Application and evidentiary hearings are required in this proceeding.

49. Incredibly, PNG opposes an expedited schedule, cynically claiming that a "desire to quickly commence construction" is not a basis for an abbreviated schedule. PNG instead suggests that a lengthy and expensive fully-litigated process is needed in order to develop a record.⁸⁵ By making that suggestion, it is apparent that PNG has no desire to move quickly to construct its own facilities or to provide less costly natural gas service in Susquehanna County. Nothing precludes a "fully developed record" from being completed in a very short period, particularly when PNG's

⁸⁵ Answer to Preliminary Objections at 21-20.

arguments such as a lack of need or demand (refuted by the filing of its own application) are discounted as worthy of no weight.

50. Thus, if the Commission should find that dismissal of the Amended Protest is not appropriate, it should require that an expedited procedural schedule be set so that a final order on Leatherstocking's Application can be entered by the Commission by June or July of 2012.

WHEREFORE, for all the reasons set forth above, Leatherstocking Gas Company, LLC respectfully requests that the Amended Protest filed by UGI Penn Natural Gas, Inc. at Docket No. A-2011-2275595 be dismissed preliminary on the grounds set forth in these Preliminary Objections. Should the Commission determine that dismissal is not appropriate, Leatherstocking requests that an expedited procedural schedule be established in this proceeding that will allow the Commission to enter a final Order approving the Application by no later than June or July of 2012 to enable Leatherstocking to meet this year's construction season and provide customer benefits without unnecessary delay.

Respectfully submitted,

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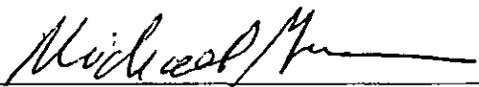
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DATED: February 16, 2012

Counsel for Leatherstocking Gas Company, LLC

VERIFICATION

I, Michael I. German, Chief Executive Officer of Leatherstocking Gas Company, LLC, hereby state that I am authorized to make this Verification on behalf of Leatherstocking Gas Company, LLC, that the facts and statements contained in the foregoing document are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same should a hearing be held in this matter. I understand that the statements made herein and in the foregoing document are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).



Michael I. German, Chief Executive Officer
Leatherstocking Gas Company, LLC

DATED: February 15, 2012

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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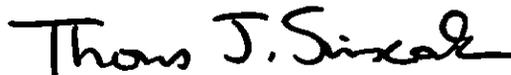
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Thomas J. Sniscak
Todd S. Stewart
Janet L. Miller

Dated this 16th day of February, 2012

Counsel for Leatherstocking Gas Company, LLC

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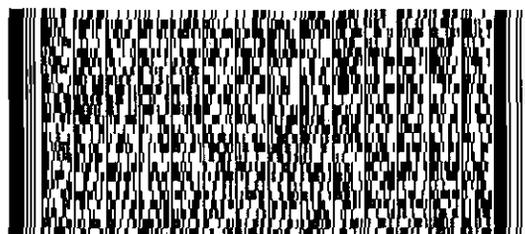
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