**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held August 30, 2012

Commissioners Present:

Robert F. Powelson, Chairman

John F. Coleman, Jr., Vice Chairman

Wayne E. Gardner

James H. Cawley

Pamela A. Witmer

Application of Leatherstocking Gas Company, LLC, A-2011-2275595 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

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of UGI Penn Natural Gas, Inc. (UGI) filed on July 30, 2012, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) David A. Salapa issued on March 20, 2012, in the above-captioned proceeding.[[1]](#footnote-1) Reply Exceptions were filed by Leatherstocking Gas Company, LLC (Leatherstocking) on August 6, 2012. The Bureau of Investigation and Enforcement (I&E) filed a Letter in Lieu of Reply Exceptions on August 6, 2012, and a Motion to Strike portions of Leatherstocking’s Reply Exceptions on August 15, 2012. Leatherstocking filed an Answer to I&E’s Motion to Strike on August 23, 2012.

For the reasons stated below, we will deny UGI’s Exceptions and adopt the ALJ’s Initial Decision, consistent with this Opinion and Order.

**History of the Proceeding**

On November 23, 2011, Leatherstocking filed the above-captioned Application for a certificate of public convenience to supply natural gas service to the public in portions of Susquehanna County. Leatherstocking is a New York limited liability company that has been authorized by the Pennsylvania Department of State to conduct business in Pennsylvania. No other entity provides, or has the right to provide, natural gas service in Leatherstocking’s proposed service territory.

Notice of the filing of the Application was published in the *Pennsylvania Bulletin* on December 10, 2011, at 41 *Pa. B.* 6753. The notice specified a deadline of December 27, 2011, for filing protests to the Application.

On December 27, 2011, UGI filed a timely Protest to the Application (Original Protest), asserting that it intended to file its own application to provide natural gas service in the proposed service territory in the near future. Also on December 27, 2011, the Office of Consumer Advocate (OCA) filed a notice of intervention and Williams Field Services Company, LLC (Williams) filed a Petition to Intervene.[[2]](#footnote-2) On January 11, 2012, I&E filed a notice of appearance.

On January 17, 2012, Leatherstocking filed Preliminary Objections requesting that the Commission dismiss UGI’s Original Protest for lack of standing. On January 27, 2012, UGI filed an Answer to Leatherstocking’s Preliminary Objections, as well as an Amended Protest, alleging that UGI had filed its own application on January 18, 2012, to provide natural gas service in the proposed service territory.[[3]](#footnote-3) On February 10, 2012, UGI filed a Motion to Consolidate Leatherstocking’s Application proceeding with its application proceeding at Docket No. A-2012-2284831.

At the prehearing conference on February 14, 2012, Leatherstocking indicated that it would be filing Preliminary Objections to UGI’s Amended Protest, and UGI indicated that it would file an Answer to Leatherstocking’s Preliminary Objections. The Parties agreed that the litigation of this matter should be stayed pending the resolution of Leatherstocking’s Preliminary Objections. The ALJ determined that a ruling on UGI’s Motion to Consolidate should be held in abeyance pending the resolution of the Preliminary Objections. I.D. at 5.

On February 16, 2012, Leatherstocking filed Preliminary Objections to UGI’s Amended Protest. On February 27, 2012, UGI filed an Answer to Leatherstocking’s Preliminary Objections. On March 20, 2012, ALJ Salapa issued an Initial Decision that granted Leatherstocking’s Preliminary Objections, dismissed UGI’s Original Protest for lack of standing, and dismissed UGI’s Amended Protest as late-filed.

Following several extensions of time, the Commission issued a Secretarial Letter on July 20, 2012, that established a deadline of July 30, 2012,for the filing of Exceptions and August 6, 2012, for the filing of Reply Exceptions. The Secretarial Letter acknowledged the filing, *inter alia*, of a Joint Stipulation in Settlement (Stipulation) on June 21, 2012, and a Motion to Strike on June 27, 2012. However, the Parties were instructed to confine their Exceptions and Reply Exceptions to the issues raised by the ALJ’s Initial Decision.

As stated above, UGI filed Exceptions to the ALJ’s Initial Decision on July 30, 2012, and Leatherstocking filed Reply Exceptions on August 6, 2012. I&E filed a Letter in Lieu of Reply Exceptions on August 6, 2012, and a Motion to Strike portions of Leatherstocking’s Reply Exceptions on August 15, 2012. Leatherstocking filed an Answer to I&E’s Motion to Strike on August 23, 2012.

A Tentative Opinion and Order, adopted contemporaneously with the instant Opinion and Order, addresses the Joint Stipulation in Settlement and related filings.

**ALJ’s Initial Decision**

On March 20, 2012, ALJ Salapa issued an Initial Decision that granted Leatherstocking’s Preliminary Objections, dismissed UGI’s Original Protest for lack of standing, and dismissed UGI’s Amended Protest as late-filed. I.D. at 19.

Although the ALJ held that, under 52 Pa. Code § 5.101(a), lack of standing is not among the limited grounds available for filing preliminary objections, the ALJ disregarded Leatherstocking’s procedural error in order to secure a just, speedy and inexpensive resolution of the proceeding pursuant to 52 Pa. Code § 1.2(a). Accordingly, the ALJ treated Leatherstocking’s Preliminary Objections as a Motion for Summary Judgment under 52 Pa. Code § 5.102. I.D. at 7-8.

The ALJ concluded that there is no issue of material fact for trial and that, as matter of law, Leatherstocking is entitled to judgment on the issue of UGI’s standing to file its Original Protest on December 27, 2011. *Id*. at 10. Specifically, the ALJ held that “[a] protestant must have some operating authority in actual, or potential, conflict with the authority sought by an applicant to have the requisite standing to protest an application.” *Id*. at 11. Since, at the time that UGI filed its Protest on December 27, 2011, it (1) did not have operating authority in conflict with the authority sought by Leatherstocking, and (2) had not filed a competing application, the ALJ concluded that it did not have standing to file its Original Protest to the Application. *Id*. at 12-13. The ALJ rejected UGI’s argument that it had standing to protest Leatherstocking’s Application because it was contemplating filing its own application. *Id*. at 12. The ALJ reasoned that, when UGI filed its Original Protest, any adverse impact on UGI’s future plans would have been “mere conjecture about future harm, and did not constitute a direct interest” in this proceeding. *Id.* at 13.

The ALJ further reasoned that the filing of UGI’s own application on January 18, 2012, after the deadline for filing protests to Leatherstocking’s Application had passed, did not cure the defect in UGI’s Original Protest, and did not confer standing on UGI retroactively. *Id*.

The ALJ rejected UGI’s argument that the filing of its Amended Protest on January 27, 2012, rendered Leatherstocking’s Preliminary Objections moot. The ALJ concluded that the filing of an amended protest is not permitted under 52 Pa. Code

§ 5.91, pertaining to amendments of pleadings. I.D. at 15-16. In addition, the ALJ reasoned that, if UGI were allowed to file an amended protest after the filing deadline of December 27, 2011, the Commission would be allowing UGI to circumvent the requirement that protests be filed within the time specified in the published notice of the application. 52 Pa. Code § 5.53. *Id.* at 16. Accordingly, the ALJ rejected UGI’s Amended Protest as late-filed. *Id*. at 17.

The ALJ noted that, while late-filed protests are not permitted by the Commission’s Regulations, the Commission may accept late-filed protests at its discretion. In *Application of Artesian Water Pennsylvania, Inc.*, Docket No.

A-210111F0003 (Order entered June 24, 2004) (*Artesian Water*), the Commission set forth four standards for determining whether to accept a late-filed protest. The ALJ stated that the Commission requires that a party requesting that the Commission accept a late-filed protest address all four standards in order to establish good cause for the late filing. The ALJ noted that the Commission applies this requirement to fixed utility applications in addition to motor transportation proceedings. *Application of Douglasville Water Co.*, Docket No. A-210760 (Order entered August 24, 1990). The ALJ stated that UGI failed to address any of the standards, and recommended that the Commission not accept UGI’s late-filed Amended Protest in the absence of any allegations of good cause. I.D. at 17-18.

**Discussion**

The ALJ made eight Findings of Fact and reached five Conclusions of Law. I.D. at 6, 18. The ALJ’s Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

Before addressing the Exceptions, we note that any issue or Exception that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Wheeling & Lake Erie Railway Co. v. Pa. PUC*, 778 A.2d 785 (Pa. Cmwlth. 2001); *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); s*ee, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

**Legal Standards**

The rules regarding preliminary objections are simple and specific:

**§ 5.101. Preliminary objections.**

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

1. Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
2. Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
3. Insufficient specificity of a pleading.
4. Legal insufficiency of a pleading.
5. Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
6. Pendency of a prior proceeding or agreement for alternative dispute resolution.

52 Pa. Code § 5.101(a).

As discussed above, the ALJ concluded that lack of standing is not among the limited grounds available for filing preliminary objections; rather, it is an affirmative defense that properly is raised only in new matter. To secure a just, speedy and inexpensive resolution of this proceeding, 52 Pa. Code § 1.2(a), the ALJ determined that Leatherstocking’s Preliminary Objections should be considered as a Motion for Summary Judgment. Motions for summary judgment are governed by Section 5.102 of our Regulations, which provides in relevant part as follows:

**§ 5.102. Motions for summary judgment and judgment on the pleadings.**

**\* \* \***

(d) *Decisions on motions.*

1. *Standard for grant or denial on all counts*. The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

52 Pa. Code § 5.102.

Summary judgment is available when the pleadings, depositions, and other documents show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment should be granted only when the right to relief is clear and free from doubt. In determining the absence of a genuine issue of material fact, the Commission must view the record in the light most favorable to the non-moving party and resolve any doubts against the entry of the judgment. *Day v. Volkswagonwerk Aktiengesellschaft*, 464 A.2d 1313, 1316 (Pa. Super. 1983). In this proceeding, Leatherstocking bears the burden of demonstrating clearly that there is no genuine issue of material fact; however, as the non-moving party UGI must allege facts showing that an issue for trial exists. *First Mortgage Co. of Pennsylvania v. McCall*, 459 A.2d 406 (Pa. Super. 1983); *Commonwealth v. Diamond Shamrock Chemical Co*., 391 A.2d 1333 (Pa. Cmwlth. 1978).

**Exceptions and Reply Exceptions**

UGI has filed two Exceptions to the ALJ’s Initial Decision. First, UGI disputes the ALJ’s conclusion that UGI did not have standing because, at the time that it filed its Original Protest, UGI did not have a certificate of public convenience authorizing it to serve the proposed service territory. Second, UGI disputes the ALJ’s conclusion that UGI was not entitled to file its Amended Protest after the close of the protest period.

**Exception No. 1**

In its first Exception, UGI argues that the ALJ did not give sufficient weight to the fact that, at the time UGI filed its Original Protest, it was actively taking steps to apply for a certificate to serve the proposed service territory in Susquehanna County. UGI argues that it clearly indicated that it would be filing a competing application in the near future. UGI submits that nothing in the Public Utility Code, 66 Pa. C.S. §§ 101 *et seq*. (Code), the Commission’s Regulations or prior Commission Orders requires that a utility hold a certificate of public convenience to serve the same territory proposed in an application in order to have standing to protest that application. Exc. at 6. UGI submits that standing is determined based on whether a person or entity has an interest in the subject matter of a proceeding that is “direct, immediate and substantial,” citing *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975). *Id*. at 8.

UGI submits that the cases cited by the ALJ are distinguishable from the instant proceeding. First, UGI argues that the Commission’s decision in *Application of Glen Alsace Water Co*., 45 Pa. P.U.C. 472 (Order entered July 26, 1971) does not stand for the proposition that, in order to have standing, a protestant must be authorized to serve the service territory proposed in an application. Rather, UGI argues that the case stands for the proposition that entities that do not hold a certificate to serve an area other than that proposed in an application (e.g., non-utilities) do not have standing to protest an application. UGI submits that the instant case is distinguishable because UGI is a utility that is certificated to serve other areas. Based on the fact that UGI is a utility, UGI argues that it has standing to protest an application to serve an area that it is not part of its service territory. Exc. at 9-10. Second, UGI argues that the Commission’s decision in *Application of Consumers Pennsylvania Water Co. - Shenango Valley Division*, 2001 Pa. PUC LEXIS 1 (Order entered January 11, 2001) (*Shenango Valley*) is distinguishable because the protestant in that case did not allege any intention of filing a competing application; rather, the protestant asserted only that it was actively exploring the possibility. Exc. at 10.

UGI also refers to the Commission’s recent decision in *Joint Application of Columbia Water Co. and Marietta Gravity Water Co.*, Docket Nos. A-2012-2282219 *et al*. (Order entered July 20, 2012) (*Columbia Water*), where the Commission dismissed the protest of the City of Lancaster to a transfer application after concluding that the City lacked standing. The Commission held that “entities which do not have, or have not applied for, overlapping territory in conflict with the territory sought do not have standing to protest an application.” Order at 12. UGI argues that this case also is distinguishable from the present case because the City did not allege that it intended to file its own application to acquire Marietta Gravity Water Co. Exc. at 11-12.

UGI argues that, under the ALJ’s theory, parties that have filed competing applications would not have standing to protest one another’s application because neither would hold a certificate for the territory sought. UGI submits that this theory is at odds with prior Commission decisions, citing *Application of Audubon Water Co.* and *Application of Citizens Utilities Home Water Co*., Docket Nos. A-00101797F.2 and

A-00101852F.2, 69 Pa. P.U.C. 88 (Order entered January 4, 1989) (*Audubon/Citizens*). In this proceeding, two competing applications were consolidated for purpose of hearing and decision. According to UGI, this case demonstrates that competing applications provide a basis for standing. Exc. at 13.

UGI submits that a protestant’s standing should be based on the totality of the circumstances to determine whether it has a direct, immediate and substantial interest that will be affected by the outcome of a proceeding. UGI argues that the Initial Decision would set up a proverbial “race to the courthouse steps” that would favor haste over the public’s interest in the adoption of the best overall plan to provide service to a proposed service territory. UGI argues that it has a direct, immediate and substantial interest in this proceeding because approval of Leatherstocking’s Application could result in the denial of its own application. According to UGI:

[UGI] desires to serve areas that are adjacent to areas it presently serves. [UGI] believes it can demonstrate that it is better positioned to serve the requested service territory, by virtue of its experience as a Pennsylvania utility, its existing facilities located near the proposed service territory, and its vastly superior financial resources. With both applications pending before it, the Commission is presented with a clear issue of whether to certificate only one fixed utility to serve an area, or to certificate overlapping utilities, or to split the requested service territory between the two competing applicants. These are important factual and policy issues that should be carefully examined through a fully-developed record. If the Commission decides that only one entity will be certificated in the proposed service territory at this time, then the Commission must also decide, as between an existing Pennsylvania utility and a new entity, which should be certificated to serve the area in question. This, of course, will require the development of a sufficient record. Unless [UGI] is permitted the right to due process, it will be denied an opportunity to prove that it is the best option for providing natural gas service in the additional portions of Susquehanna County.

Exc. at 15-16 (footnote omitted).

UGI also argues that its interest is substantial, and that it is not merely asserting a general interest in Leatherstocking’s Application. UGI submits that, if given the opportunity, UGI would establish that it was investigating the best means of extending its service within Susquehanna County before the instant Application was filed. These efforts included investigation of necessary supply arrangements and the identification of specific customer loads. UGI asserts that it engaged in substantial contact and outreach with customers in Susquehanna County, as well as natural gas gatherers and local producers, to determine interest and costs involved in expanding service into additional portions of Susquehanna County. These preliminary steps were necessary prior to the filing of its own application. UGI points out that it filed its application with the Commission on January 18, 2012, less than one month after filing its Original Protest. *Id*. at 16-17.

UGI concludes that, based on the foregoing, its interest in this proceeding is not speculative or conjectural, but immediate and direct. On this basis, UGI argues that the Initial Decision should be reversed, and it should be granted standing to protest Leatherstocking’s Application. *Id*. at 17.

In response to UGI’s Exception No. 1, Leatherstocking argues that adopting the ALJ’s Initial Decision is important to prevent placeholder and unripe protests, such as the one filed by UGI, which has greatly delayed Leatherstocking’s getting service to customers. According to Leatherstocking, if retroactive attempts to backfill defects in “placeholder” protests are allowed, then a protest deadline would become meaningless. R.Exc. at 2. Leatherstocking submits that preliminary interest, exploratory steps and potential intent do not constitute a direct, immediate and substantial interest that is necessary to confer standing.

Leatherstocking argues that standing to protest an application is determined when a protest is filed, and not at a later point in time. All elements required to establish standing must exist at the time that a protest is filed. R.Exc. at 7. UGI “cannot, as it attempted to do in this case, cure its lack of standing by filing a ‘placeholder’ protest within the proper time period, later file its application to provide service, and then rely on its late-filed application to create, retroactively, standing to participate in the Leatherstocking proceeding.” *Id*. According to Leatherstocking, this would render the requirement to file a timely protest meaningless.

Leatherstocking submits that UGI has misread the ALJ’s Initial Decision. The fact that UGI did not have a certificate when it filed its Original Protest was not the only factor that the ALJ considered. In addition, the ALJ considered the fact that UGI had not filed a competing application to provide service when it filed its Original Protest. UGI did not file its own application until three weeks after the protest period had closed. *Id*. at 7-8.

Leatherstocking submits that the Commission has held in cases more recent than those cited by UGI, such as the 1989 *Audubon/Citizens* decision, that mere allegations of exploratory activities are not sufficient to confer standing. *Columbia Water, supra*; *Shenango Valley, supra*; *Joint Application of Philadelphia Suburban Water Co. and Geigertown Water Co.*, Docket Nos. A-212370F0061 and A-211040F2000 (Orders entered April 19, 2001, and May 25, 2001) (utility lacked standing to protest because it had no certificated rights in the applied-for territory). *Id*. at 8-10.

**Disposition**

We shall deny UGI’s first Exception. UGI has interpreted the ALJ’s Initial Decision as requiring that a protestant already have a certificate to serve a proposed service territory in order to have standing to protest an application. This would be the correct interpretation of the ALJ’s Initial Decision if one relied exclusively on the following language of the Initial Decision:

… Leatherstocking is correct that UGI Penn lacked standing to protest the application. A protestant must have some operating authority in actual, or potential, conflict with the authority sought by an applicant to have the requisite standing to protest an application. At the time it filed its protest on December 27, 2011, UGI Penn did not have operating authority in conflict with the operating authority sought by Leatherstocking. Since UGI Penn did not have any operating authority at the time it filed its protest, it lacked standing. Its protest will be dismissed.

I.D. at 11 (citations omitted).

The ALJ also stated that “[s]ince UGI Penn does not have a certificate of public convenience authorizing it to provide service to the proposed service territory, Commission approval of Leatherstocking’s application would have no impact on UGI Penn’s existing operations.” *Id.* at 12. Based on this language, UGI’s interpretation of the ALJ’s Initial Decision is understandable.

This narrow interpretation of the standing requirement makes sense in the transportation arena, where multiple carriers can be certificated to provide service to the public in the same area. However, such a requirement effectively would preclude protests to applications for fixed utility service from other potential utilities and/or applicants, given the fact that fixed utility certificates of public convenience nearly always provide an exclusive franchise to serve a given territory in return for a utility’s obligation to serve. In short, if a fixed utility already has a certificate to serve a given territory, it is very unlikely that an application to provide service to the same area would be filed.

In our view, standing in a fixed utility application proceeding is conferred on a protestant when the protestant *either* holds a certificate of public convenience to serve the same area as that proposed in an application, *or* has filed a competing application that permits the filing of a timely protest. Although the Initial Decision is not sufficiently clear on this point, this comports with the ALJ’s observation that the filing by UGI of its own application on January 18, 2012, had the effect of “curing the defect in its standing that existed when it filed its original protest on December 27, 2011.” *Id*. at 16. The ALJ, however, held that UGI’s application, and the subsequent filing of its Amended Protest, occurred too late to cure the defect in its standing within the protest period. For that reason, the ALJ dismissed UGI’s Original Protest for lack of standing, but dismissed UGI’s Amended Protest on the basis that it was late-filed. *Id*. at 19.

We concur. We agree with the ALJ’s conclusion that UGI’s statements of intent to file its own application in the future were not sufficient to create a direct, immediate and substantial interest in this proceeding. I.D. at 13-15. Accordingly, we will deny UGI’s Exception No. 1.[[4]](#footnote-4)

In addition to denying UGI’s Exception, we briefly want to address UGI’s argument that a “first to file” rule would set up a proverbial “race to the courthouse steps” that would favor haste over the public’s interest in the adoption of the best overall plan to provide service to a proposed service territory. First, we are not adopting a “first to file” rule. We are clarifying the ALJ’s Initial Decision as holding that the filing of a competing application within a protest period will confer standing on a protestant. This is materially different than UGI’s interpretation of the Initial Decision as requiring that a protestant must have a certificate of public convenience in order to have standing. Second, we agree with Leatherstocking’s observation that a protestant should not be permitted to cure its lack of standing by filing a ‘placeholder’ protest within the proper time period, later file its own application to provide service, and then rely on its late-filed application to create standing retroactively. This would render the requirement to file a timely protest meaningless. We believe that our decision today strikes the right balance between the interests of an applicant in an orderly and prompt resolution of its application proceeding; the interests of a legitimate competitor in its ability to present its competing application to the Commission; and the interests of the public in expeditious access to utility service. We also note that there was no bar to UGI filing an application prior to the filing by Leatherstocking of the instant Application. The proposed service territory in Susquehanna County previously has not had access to natural gas utility service; potential applicants literally have had decades to file applications to provide utility service to the public in this area.

**Exception No. 2**

In its second Exception, UGI argues that the ALJ erred in concluding that it was not entitled to file its Amended Protest, and that UGI was required to establish good cause for filing its Amended Protest after the close of the protest period. Exc at 17. Specifically, UGI argues that (1) its Amended Protest was unequivocally permitted under 52 Pa. Code § 5.91(b); and (2) UGI should have been permitted to show good cause to file its Amended Protest after the ALJ *sua sponte* converted Leatherstocking’s Preliminary Objections into a Motion for Summary Judgment. *Id*. at 18.

52 Pa. Code § 5.91(b) provides as follows:

(b) *Amendments in response to preliminary objections*. A party may file an amended pleading as of course within 20 days after service of a copy of a preliminary objection filed under § 5.101 (referring to preliminary objections). If a party has filed an amended pleading as of course, the preliminary objections to the original pleading shall be deemed moot.

52 Pa. Code § 5.91(b). UGI submits that the plain and unambiguous language of Section 5.91(b) clearly entitles a party to file an amended protest, as a matter of course, in response to *all* preliminary objections filed under Section 5.101 of the Commission’s regulations. UGI disputes the ALJ’s conclusion that amended pleadings are not permitted as a matter of right in response to all preliminary objections, but only in response to preliminary objections alleging insufficient specificity under 52 Pa. Code

§ 5.101(e). *Id*. at 18-21.

UGI also argues that, contrary to the ALJ’s conclusion, lack of standing is a permissible ground for preliminary objections under 52 Pa. Code § 5.101(a)(4), under which the legal insufficiency of a pleading is a permissible ground for a preliminary objection. UGI submits that the failure to set forth facts sufficient to establish standing would render a protest “legally insufficient” under 52 Pa. Code § 5.52, which requires a protest to set forth the facts establishing a protestant’s standing. Therefore, UGI submits that preliminary objections to a protest properly may raise the issue of standing. *Id*. at 22-23.

UGI further argues that the ALJ should have provided notice to the Parties that he was going to treat Leatherstocking’s Preliminary Objections as a Motion for Summary Judgment. Had such notice been provided, UGI submits that it would have been permitted to supplement its Answer to Leatherstocking’s Preliminary Objections with an affidavit that it had filed its own application on January 18, 2012, under 52 Pa. Code § 5.102(b), which pertains to answers to motions for summary judgment. According to UGI, such an affidavit would have served the same purpose as an Amended Protest, and would have established UGI’s standing to protest Leatherstocking’s Application. UGI submits that, by *sua sponte* converting Leatherstocking’s Preliminary Objections into a Motion for Summary Judgment, the ALJ interfered with UGI’s due process rights. *Id*. at 22.

Finally, UGI argues that the ALJ’s conclusion that UGI was not entitled to file an Amended Protest, and instead was required to establish “good cause” for filing an Amended Protest after the close of the protest period, deprived UGI of the opportunity to address the standards for allowing late-filed protests. UGI submits that it meets the standards for filing a late-filed protest, and that it filed its Amended Protest after the deadline because, *inter alia*, it takes time to compile the information necessary to prepare and file a proper application. *Id.* at 23-25.

Leatherstocking argues that UGI’s Exception actually argues that it should be able to establish standing retroactively after the protest deadline through a subsequent “retaliatory application.” R.Exc. at 12. Leatherstocking again argues that “allowing a utility to establish its proper standing well after the protest periods have passed and then to ‘backfill’ its insufficient protest makes a mockery of the protest deadline.” *Id*. at 13. Leatherstocking submits that this type of action would render protest periods meaningless and invite delay and litigation of virtually every utility application. *Id*. If the logic of UGI’s arguments is accepted, Leatherstocking submits that a party could file a protest without having the standing to do so, subsequently create new evidence of standing, and then use its automatic right to amend its protest to incorporate the new evidence of standing that was created after the protest period had passed. Leatherstocking submits that the Commission should not allow this practice. “The purpose of setting protest deadlines is to establish some certainty in an application proceeding and to prevent unnecessary delay that would be caused if a party could file a protest at any time.” *Id*. Leatherstocking submits that a party either does or does not have standing at the time of the protest deadline, and that UGI did not have standing on December 27, 2011. *Id.* at 14.

Second, Leatherstocking disputes UGI’s assertions that it met the standards used to establish good cause for the filing of a late protest. Leatherstocking submits that, contrary to UGI’s assertions, allowing its Amended Protest to stand would change the scope of and delay the proceeding. Leatherstocking notes that none of the intervenors in this proceeding oppose its Application; therefore, its Application can be considered via modified procedure without an evidentiary hearing if UGI’s Amended Protest is dismissed. *Id.* at 14-16.

Finally, Leatherstocking disputes UGI’s contention that the ALJ’s treating Leatherstocking’s Preliminary Objections as a Motion for Summary Judgment violated UGI’s due process rights. Leatherstocking argues that addressing the substance of pleadings although styled differently by a party is a routine practice. Leatherstocking argues that UGI had the opportunity to, and did, respond to the Preliminary Objections, and that UGI’s Original Protest, Amended Protest, and Answer to Preliminary Objections contained all the material facts necessary to support the ALJ’s dismissal of UGI’s Original Protest for lack of standing. The material facts would have been the same had Leatherstocking filed a Motion for Summary Judgment rather than Preliminary Objections. *Id.* at 16-17.

**Disposition**

We shall deny UGI’s Exception No. 2. We agree with Leatherstocking’s argument that UGI’s Exception No. 2 places form over substance. Regardless of the vehicle used by the ALJ to consider the issue of UGI’s standing, UGI does not possess a certificate to serve the proposed service territory and did not file its own application until three weeks after the protest deadline. Accordingly, UGI did not possess the requisite standing to protest Leatherstocking’s Application at the close of the protest period on December 27, 2011.

Although the Commission could exercise its discretion and allow UGI to file an Amended Protest, given our resolution of Exception No. 1, no purpose would be served by going through this exercise. We do not believe that it would be in the public interest to allow an entity to create standing after the expiration of a protest period by filing a competing application, and then allow it to file an amended protest that relies on the newly-created standing. Such a practice would discourage the filing of applications for certificates to provide fixed utility service, and would burden applicants with the time and expense of evidentiary hearings that otherwise may not be necessary.

Regardless of the procedural vehicle used to address UGI’s arguments, the substantive issue to be addressed remains unchanged; namely, whether UGI had standing at the end of the protest period. Given the irrelevancy of whether or not UGI’s standing on December 27, 2011, is determined via preliminary objections or a motion for summary judgment, there is no need to address the detailed procedural arguments in UGI’s Exceptions. Accordingly, we will exercise judicial restraint and deny Exception No. 2 without reaching the merits of UGI’s procedural arguments.

**I&E’s Letter in Lieu of Reply Exceptions and Motion to Strike**

On August 6, 2012, I&E submitted a Letter in lieu of Reply Exceptions. I&E avers that UGI addressed matters outside the scope of the ALJ’s Initial Decision in the “Introduction and Background” section of its Exceptions, in direct breach of the Commission’s instructions in its Secretarial Letter of July 20, 2012. In this Secretarial Letter, the Commission instructed the Parties to confine their Exceptions and Reply Exceptions to the issues raised by the ALJ’s Initial Decision. I&E requests that the Commission reiterate that compliance with Commission rules, directives and orders is mandatory, and that noncompliance is subject to “remedial Commission action.”

On August 15, 2012, I&E filed a Motion to Strike portions of Leatherstocking’s Reply Exceptions. I&E states that Leatherstocking also included matters beyond the scope of the ALJ’s Initial Decision in its filing. I&E states that Leatherstocking’s language is particularly egregious, and moves to strike portions of those Reply Exceptions. I&E also renews its request that the Commission reiterate that demonstrated noncompliance with Commission rules, directives and instructions is subject to remedial Commission action.

On August 23, 2012, Leatherstocking filed an Answer to I&E’s Motion to Strike. Leatherstocking’s Answer does not address the issue of whether its Reply Exceptions comport with the instructions in the Commission’s July 20, 2012 Secretarial Letter. Instead, Leatherstocking essentially takes exception to the Commission’s instructions by arguing that the proposed Stipulation should be considered in conjunction with the Exceptions and Reply Exceptions. Answer at 1-2. Second, Leatherstocking argues that I&E should be estopped from raising arguments about strict compliance with procedural rules because I&E itself allegedly has filed documents that do not comply with the Commission’s Rules of Practice and Procedure. *Id*. at 2. Finally, Leatherstocking requests that the Commission “cut to the important merits” of Leatherstocking’s Application so that its Application can be decided as soon as possible. *Id*. at 4.

**Disposition**

Our Secretarial Letter of July 20, 2012, specifically instructed the Parties to confine their Exceptions and Reply Exceptions to the issues raised by the ALJ’s Initial Decision. Upon reviewing these documents, it is self-evident that portions of UGI’s Exceptions and Leatherstocking’s Reply Exceptions went beyond the scope of the ALJ’s Initial Decision to address the merits of the Joint Stipulation in Settlement. Rather than granting I&E’s Motion to Strike, we simply will not consider these portions of the Exceptions and Reply Exceptions in rendering this Opinion and Order. Specifically, we will not consider the following language:

UGI Exceptions:

Page 5 – first full paragraph beginning “The Commission’s disposition .…”

Page 5 – last sentence of last paragraph beginning “Alternatively ….”

Leatherstocking Reply Exceptions:

Page 2 – last sentence of first paragraph beginning “In the alternative ….”

Page 2 – first full paragraph beginning “At the outset ….”

Pages 3&4 – paragraph beginning “Alternatively ….”

Page 5 – paragraph beginning “Finally ….”

Page 19 – language beginning “that the Joint Stipulation” and ending “filed at Docket No. A-2012-2284831”.

**Joint Stipulation in Settlement and Motion to Strike the Joint Stipulation**

Our Secretarial Letter of July 20, 2012 stated that we intended to address the Joint Stipulation in Settlement, and the Motion to Strike the Joint Stipulation in Settlement, after resolving any Exceptions to the ALJ’s Initial Decision. Having addressed the Exceptions to the ALJ’s Initial Decision in this Opinion and Order, we shall address the Joint Stipulation in Settlement and the related Motion to Strike in a separate Tentative Opinion and Order that we are issuing for comment.

**Conclusion**

For the reasons stated above, we conclude that UGI did not have standing to protest Leatherstocking’s Application at the close of the protest period on December 27, 2011; **THEREFORE,**

**IT IS ORDERED:**

1. That the Exceptions of UGI Penn Natural Gas, Inc. filed on July 30, 2012, to the Initial Decision of Administrative Law Judge David A. Salapa issued on March 20, 2012, are denied.

2. That the Initial Decision of Administrative Law Judge David A. Salapa issued on March 20, 2012, is adopted, consistent with this Opinion and Order.

3. That the preliminary objections/motion for summary judgment of Leatherstocking Gas Company, LLC, at Docket No. A-2011-2275595 is granted.

4. That the protest of UGI Penn Natural Gas, Inc., filed on December 27, 2011, at Docket No. A-2011-2275595 is dismissed for lack of standing.

5. That the amended protest of UGI Penn Natural Gas, Inc., filed on January 27, 2012, at Docket No. A-2011-2275595 is dismissed as late-filed.

 **BY THE COMMISSION**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: August 30, 2012

ORDER ENTERED: August 30, 2012

1. As discussed further herein, the Commission granted several extensions for filing Exceptions and Reply Exceptions. [↑](#footnote-ref-1)
2. The ALJ granted Williams’ Petition to Intervene by Order dated February 15, 2012. [↑](#footnote-ref-2)
3. UGI’s Application was docketed at A-2012-2284831. [↑](#footnote-ref-3)
4. We do not completely accept Leatherstocking’s argument that standing to protest an application must be determined *at the time that a protest is filed*. In our view, if defects in standing are cured within an established protest period, a protest filed prior to the end of the protest period should not be dismissed for lack of standing. In other words, if UGI had filed its own application on or before December 27, 2011, it would have had standing to protest Leatherstocking’s Application even if it had filed its protest on an earlier date. Because it had not cured the defect in its standing before the end of the protest period, it did not have standing to protest Leatherstocking’s Application. [↑](#footnote-ref-4)