



PEOPLES NATURAL GAS™



PEOPLES TWP

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**Via Electronic Filing**

October 1, 2012

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

Re: Generic Investigation Regarding Gas-On-Gas Competition  
Between Jurisdictional Natural Gas Distribution Companies  
Docket No. I-2012-2320323

Dear Secretary Chiavetta:

Please accept for electronic filing in the above-referenced matters the enclosed Comments of Peoples Natural Gas Company LLC.

If you have any questions or concerns regarding this matter, please do not hesitate to contact me.

Very truly yours,

Counsel for Peoples Natural  
Gas Company LLC

cc: The Honorable Elizabeth H. Barnes  
Certificate of Service



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### CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

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William H. Roberts II

Dated this 1<sup>st</sup> day  
of October, 2012

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joint Petition for Generic Investigation or	:	
Rulemaking Regarding “Gas-On-Gas” Competition	:	
Between Jurisdictional Natural Gas Distribution	:	Docket No. P-2011-2277868
Companies	:	
	:	
Generic Investigation Regarding Gas-On-Gas	:	
Competition Between Jurisdictional Natural	:	Docket No. I-2012-2320323
Gas Distribution Companies	:	

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**COMMENTS OF PEOPLES NATURAL GAS COMPANY LLC**

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**TO THE HONORABLE ADMINISTRATIVE LAW JUDGE ELIZABETH H. BARNES:**

Peoples Natural Gas Company LLC (Peoples) hereby submits Comments in these dockets in accordance with the Prehearing Order issued August 31, 2012 (“Prehearing Order”).

**I. INTRODUCTION**

This proceeding was initiated by the filing on December 8, 2011, by the Bureau of Investigation and Enforcement (BI&E), the Office of Consumer Advocate (OCA), Office of Small Business Advocate (OSBA), Peoples TWP LLC (PeoplesTWP) and Peoples Natural Gas Company LLC (Peoples) (together “Joint Petitioners”) of a petition (Joint Petition) in which they requested the Commission institute an investigation or rulemaking to address distribution base rate discounting among natural gas distribution companies (NGDCs) with overlapping service territories, often referred to as “gas-on-gas” competition.

On July 25, 2012, the Commission issued a Secretarial Letter (Secretarial Letter) stating that the Commission has determined that separately resolving NGDC gas-on-gas competition

issues in each of the NGDC's next individual base rate proceedings could lead to inequitable results. The Commission further stated that it agrees with Joint Petitioners that the issues related to a NGDC's flexing of distribution rates to meet the lower rates from other NGDCs and the treatment of flexed revenues for ratemaking purposes in future ratemaking proceedings should be resolved through a generic investigation. The Commission assigned this matter to the Office of Administrative Law Judge (OALJ) for disposition and resolution and invited other interested parties to file interventions in order to participate in these proceedings.

On August 31, 2012, an Initial Prehearing Conference was convened. In addition to addressing standard procedural issues, there was much discussion at the Prehearing Conference of the intended scope of this generic proceeding, which discussion was duly noted at pages 3-4 of the Prehearing Order, wherein Your Honor concluded that "The scope of procedure and issues is so critical to the advancement of the generic investigation that I am directing the parties to file formal comments regarding what the scope of the generic investigation should be and to specify the exact issues to be involved in a generic investigation in the case within thirty (30) days from the entry date of this order." These Comments address this issue.

## **II. COMMENTS ON THE SCOPE OF THE PROCEEDING**

Peoples submits that the procedural goal of the parties should be to discern the Commission's intended scope of this generic proceeding. While the contents of the Joint Petition should be relevant to this determination, they certainly are not controlling. Rather, the controlling document is the Secretarial Letter, and it should be applied to the extent that it is clear and unambiguous. To the extent that it is not clear and unambiguous, it should be interpreted. To the extent that one cannot interpret the Secretarial Letter to discern the Commission's intent, then Your Honor should consider utilizing the procedures made available

in the Commission's regulations (52 Pa. Code § 5.305) for having the Commission answer a material question that will prevent prejudice or expedite the conduct of a proceeding.

**A. The Joint Petition Itself Is Not Controlling**

In the Joint Petition the Joint Petitioners requested, in accordance with the settlement of Peoples' base rate case (Docket No. R-2010-2201702), that the Commission initiate a generic investigation or rulemaking with regard to competition among NGDCs, flexing of distribution rates to meet such competition, and treatment of flexed revenues for ratemaking purposes in future ratemaking proceedings. The Joint Petitioners further requested that the Commission institute a generic investigation or rulemaking concerning competition among NGDCs to determine the appropriateness and conditions of future competition. (Joint Petition at page 8.)

In support of the requested relief, the Joint Petitioners quoted from the settlement agreement approved by the Commission in Docket No. R-2010-2201702, as follows:

OTS, OCA, OSBA, and Peoples agree to request, by separate filing made within 60 days of the Commission's approval of this Settlement, that the Commission (a) initiate within six months of such request a generic investigation or rulemaking to address whether NGDC to NGDC competition should be permitted to continue and, if permitted to continue, under what circumstances it will be considered appropriate, and (b) proceed expeditiously to conclude such investigation or rulemaking. Other parties reserve the right to challenge the necessity for any such investigation or rulemaking. The Joint Petitioners acknowledge and agree that the terms and conditions of this Settlement are in no way conditioned upon the Commission commencing the requested generic investigation or rulemaking, and that the Joint Petitioners will continue to fully support the remaining terms and conditions of this Settlement notwithstanding whether the Commission commences the requested generic investigation or rulemaking.

The Joint Petition also included quoted terms from settlements approved in rate cases involving Equitable Gas Company and Columbia Gas of Pennsylvania, Inc., and in the acquisition case involving T.W. Phillips Gas and Oil Co. (now Peoples TWP LLC). The Columbia and Peoples TWP settlement language was very similar to the Peoples settlement language. The Equitable

settlement language provided simply that Equitable would join with the OCA in a petition to open a generic investigation concerning gas-on-gas competition in western Pennsylvania.

Thus, the relief requested in the Joint Petition did not have any stated limits. Rather, it was broad in its scope – to initiate an investigation or rulemaking “concerning competition among natural gas companies.” However, the scope of the requested relief does not necessarily determine the scope of the investigation. For example, in *Generic Investigation Re Verizon Pennsylvania, Inc.’s Unbundled Network Element Rates*, Docket No. R-00016683, by order entered August 31, 2001, the Commission, in response to a party’s motion to initiate a rate proceeding, granted the motion and initiated the proceeding but under terms different from those requested by the moving party.<sup>1</sup> In this current proceeding, the Commission issued a Secretarial Letter rather than an order initiating the proceeding, and it is to the Secretarial Letter, in addition to the Joint Petition, that we should look to find guidance on the scope of this proceeding.

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<sup>1</sup> The terms and conditions setting forth the scope of the proceeding at pages 10 – 12 of the order are set forth below as an example of how the scope of an investigation has been defined, in detail, by Commission order in another proceeding:

The new generic UNE rate proceeding shall commence on September 17, 2001. The scope of the proceeding will include cost model issues and input element issues to better conform the resulting rates to applicable pricing principles. Issues regarding the input elements may include, for example, Verizon’s inclusion of broadband facilities costs, depreciation live assumptions, repair and maintenance factors, investment in distribution cable, and digital loop carrier cost assumptions.

Due to our desire to keep the proceeding moving apace, and consistent with our express goal to review existing rates, the proceeding will consider rate issues only [footnote omitted] and will consider neither whether any additional network elements should be unbundled nor whether any access to any currently unbundled network elements should be denied. Should any party wish to add or remove any UNE, then, the party is free to pursue that issue in the normal course of negotiation or arbitration with Verizon.

The OALJ shall insure that the recommended decision is completed in the appropriate time frame. The OALJ shall also insure that the recommended decision includes reference to the existing rate, the Verizon proposed rate, the alternative proposed rates, and the recommended rate for each UNE.

By its motion, MCI has proposed a schedule for completion of the proceeding. The recommendation cannot be adopted at this juncture because some of the proposed dates have past. We will not impose a schedule in this order, leaving it to the presiding ALJ and parties to work out the appropriate details

**B. The Secretarial Letter seems to indicate a limited scope of proceeding.**

In contrast to the order in the investigation case cited above, which includes a detailed scope of the proceeding, the Secretarial Letter was brief and can be quoted in its entirety:

On December 8, 2011, the Bureau of Investigation and Enforcement (BI&E), the Office of Consumer Advocate (OCA), Office of Small Business Advocate (OSBA), Peoples TWP LLC (TWP) and Peoples Natural Gas Company (Peoples) (together “Joint Petitioners”) jointly filed a petition in which they requested the Pennsylvania Public Utility Commission (Commission) to institute an investigation or rulemaking proceeding to address distribution base rate discounting among natural gas distribution companies (NGDCs) with overlapping service territories, often referred to as “gas-on-gas” competition.

The Commission has permitted NGDCs with overlapping service territories to offer distribution service to end users at rates below an incumbent NGDC’s approved maximum tariff rates to compete with lower distribution rate offers from other NGDCs. It has been argued that it is necessary to flex distribution rates to meet lower rate offers from other NGDCs in order to avoid the loss of all revenues that would occur if these customers were to migrate to another NGDC. The Commission has also permitted NGDCs to reflect the lower level of revenue related to this flexing of distribution rates in determining the revenue requirement in base rate proceedings.

The Joint Petitioners assert that it is problematic to attempt to resolve the issues related to gas-on-gas competition in the NGDCs’ individual base rate proceedings. They further assert that a Commission decision in one base rate case that suspends a NGDC’s use of gas-on-gas competition could result in lost revenues for that particular NGDC and higher rates for its remaining customers, especially if another NGDC, in its own subsequent individual base rate proceeding, is permitted to continue engaging in gas-on-gas competition. Consequently, in several recent NGDC proceedings, the statutory parties and the NGDCs have agreed that gas-on-gas competition issues should be uniformly resolved on a statewide basis through a generic investigation or rulemaking.

The Commission has determined that separately resolving NGDC gas-on-gas competition issues in each of the NGDC’s next individual base rate proceedings could lead to inequitable results. We also agree with Joint Petitioners that the issues related to a NGDC’s flexing of distribution rates to meet the lower rates from other NGDCs and the treatment of flexed revenues for ratemaking purposes in future ratemaking proceedings should be resolved through a generic investigation. Accordingly, we will assign this matter to the Office of Administrative Law Judge for disposition and resolution. Other interested parties are invited to file interventions in order to participate in these proceedings.

It is noteworthy from the first paragraph of the Secretarial Letter that the Commission viewed the Joint Petition as a request to “to institute an investigation or rulemaking proceeding to address distribution base rate discounting among natural gas distribution companies (NGDCs) with overlapping service territories, often referred to as “gas-on-gas” competition.” There is no mention of whether the broader issue of the continuation of gas-on-gas competition itself should be investigated.

The second and third paragraphs of the Secretarial Letter address ratemaking issues resulting from gas-on-gas competition and the difficulties faced in attempting to address those issues in individual cases. No mention is made of addressing the larger issue, but these paragraphs seem to be mostly background and do not address the scope of the proceeding.

The fourth and final paragraph of the Secretarial Letter does address the scope of the generic investigation, and the Commission states that the issues related to a NGDC’s flexing of distribution rates to meet the lower rates from other NGDCs and the treatment of flexed revenues for ratemaking purposes in future ratemaking proceedings should be resolved through a generic investigation. Again, however, no mention is made of investigating gas-on-gas competition itself.

An easy and supportable conclusion from the Secretarial Letter would be that the Commission opened this investigation in order to address just the ratemaking issues that arise from gas-on-gas competition.

1. If a broad scope is not clearly the Commission’s intent, then judicial economy weighs in favor of adopting a limited scope of investigation.

Peoples will fully participate in the proceeding regardless of its scope. Because Peoples will be a full participant, Peoples is concerned about the potential complexity of the litigation if

there are no limits to the investigation. More specifically, participants in this proceeding include, among others, NGDCs with whom Peoples competes to serve competitively situated customers, Peoples' own customers who receive competitively priced gas service, and customers of the competing NGDCs who receive competitive pricing from NGDC serving them. The proprietary information of the NGDCs and customers is of the highest sensitivity and confidentiality but is likely to be the very information that litigants will desire to review and analyze in preparing their cases. This raises discovery issues and even antitrust issues. In addition, the evidence (i.e., expert testimony) that would be required in order to address gas-on-gas competition generally is very different from the evidence needed to address ratemaking issues related to that competition. In the former case, parties will probably retain outside economists to opine on competition. In the latter case, if evidence must be taken at all in the more limited scope proceeding, the parties will probably use in-house rates experts or rates consultants that the parties usually retain in rate cases to address the ratemaking issues.

Peoples' position is that Peoples will address the broader scope issues if necessary, but if there is no need to address them, then it is in Peoples' and other participants' interests to avoid the complexity and expense that the broader investigation is likely to entail. Most importantly, once the horse is out of the barn, we will not be able to bring it back. This adage applies broadly in this case: once confidential information is disclosed, it cannot be recalled; once we incur the expense of additional expert witnesses and antitrust legal counsel, the dollars are spent; and once we spend the additional time preparing for and litigating the broad issue of gas-on-gas competition, the time is gone. This weighs in favor of not pursuing the broader investigation unless we are sure that it is what the Commission expects.

2. A generic investigation into the ratemaking issues related to gas-on-gas competition may not require evidentiary hearings.

While it may be presumed that a generic investigation, even if limited in scope, would require evidentiary hearings, this is not necessarily the case. The Commission has carried out other investigations using the written comment procedure. See, *Re Investigation of Issuance of Local Telephone Numbers to Internet Service Providers by Competitive Local Exchange Carriers*, Docket No. P-00981404, (Sept. 2, 1998); *Investigation re Transmission Reconciliation Service Charge (TSC) Reconciliation Methods*, Docket No. M-2011-2239714 (May 19, 2012). The comment procedure may be adequate in this case, since an evidentiary hearing is required only where a factual dispute exists.

This has been acknowledged many times by the Commission in the context of motions for summary judgment and judgment on the pleadings, most recently in *Joint Application of Columbia Water Company and Marietta Gravity Water Company for approval of: 1) the transfer of the rights, service obligations, water system and assets used and useful in the operation of the water system of Marietta Gravity Water Company to Columbia Water Company; 2) the abandonment of service by Marietta Gravity Water Company; and 3) all other approvals or certificates as appropriate, including the approval of Securities Certificates*, Docket Nos. A-2012-2282219 and A-2012-2282221 (July 20, 2012) where the Commission at page 7 adopted the following language from the ALJ's recommended decision:

The provision at 52 Pa. Code § 5.102(c) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary 66 Pa. C.S. § 703(b); *Lehigh Valley Power Committee v. Pa. PUC*, 563 A.2d 557 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. Pa. PUC*, 540 A.2d 1006 (Pa. Cmwlth. 1988); *White Oak Borough Authority v. Pa. PUC*, 103 A.2d 502 (Pa. Super. 1954).

This same language has been included in numerous other Commission decisions, and while the Commission cases using this quote deal with motions for summary judgment under §5.102, the cases cited in the quote are more to the point we must deal with in this proceeding. In *Lehigh Valley Power Committee*, one of the issues was whether a hearing was necessary in that rate proceeding, and the Commonwealth Court concluded:

A further distinction flows from that just described. In *Milesburg*, the legal conclusion that the contract rate was just and reasonable rested on the purely *factual* determination by the commission of the value of FAC. Because the determinative question was factual, customers had to be provided some kind of hearing in order to satisfy their due process rights. In the present case, because LVPC is not challenging any factual determination by the commission but rather the propriety of allowing the utility to recover levelized payments before those payments equal or exceed actual avoided cost, the question involved here is a purely *legal* question, as the PUC and the intervenors correctly perceive. This court recently reaffirmed *the fundamental proposition of law that a hearing or trial procedure is necessary only to resolve disputed questions of fact and is not required to decide questions of law, policy or discretion.*

563 A.2d at 563-564. (Emphasis added in last sentence.) Thus, if the issues in the generic investigation are questions of law, policy or discretion and do not involve disputed questions of fact, then an evidentiary hearing is not required.

**C. If the scope of the proceeding cannot be discerned from the Secretarial Letter, then 52 Pa. Code § 5.305 provides a procedure for obtaining guidance from the Commission.**


If Your Honor concludes that the scope of this proceeding is uncertain, then Your Honor might consider utilizing the procedure offered by Section 5.305 of the Commission's regulations governing Formal Proceedings. 52 Pa. Code § 5.305. This regulation provides that during the course of a proceeding, a presiding officer may certify to the Commission for review and answer a material question which has arisen or is likely to arise. It also sets forth the procedure for certifying a material question to the Commission.

It is difficult to discern from Commission decisions exactly what is a “material question.” The Commission has acknowledged, however, that issuance of a Commission decision to properly define the scope of a proceeding is appropriate upon request for interlocutory review of a material question. *In re Pike County Light & Power Co.*, 97 Pa.P.U.C. 165 (2002). In addition, Section 5.305(a)(1) sheds light by requiring that the question be accompanied by an explanation of the compelling reasons why interlocutory review will prevent prejudice or expedite the conduct of the proceeding. The same comments from section B, above, regarding the loss of judicial economy and the prejudice incurred resulting from litigation of unnecessary issues apply here. Thus, Commission review that would define the scope of the proceeding, limit issues and related unnecessary litigation, limit the incurrence of unnecessary expense, and limit the unnecessary disclosure of proprietary information will prevent prejudice and expedite the conduct of the proceeding.

WHEREFORE, Peoples respectfully requests that the Your Honor accept these Comments and give them due consideration in this proceeding.

Respectfully submitted,

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