



100 Pine Street • PO Box 1166 • Harrisburg, PA 17108-1166
Tel: 717.232.8000 • Fax: 717.237.5300

Teresa K. Schmittberger
Direct Dial: 717.237.5270
Direct Fax: 717.260.1688
tschmittberger@mwn.com

September 16, 2013

Honorable Elizabeth H. Barnes
Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17015

VIA E-MAIL AND FIRST CLASS MAIL

RE: Joint Petition for Generic Investigation or Rulemaking Regarding "Gas-on-Gas" Competition Between Jurisdictional Natural Gas Distribution Companies; Docket No. P-2011-2277868

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

Dear Judge Barnes:

Enclosed please find the Brief in Support of the Petition for Interlocutory Review on behalf of the Industrial Energy Consumers of Pennsylvania ("IECPA") which was filed electronically with the Pennsylvania Public Utility Commission in the above-referenced proceeding.

As evidenced by the attached Certificate of Service, copies of the Brief have been duly served upon the participants in this proceeding. Please contact us if you have any questions regarding the enclosed documents. Thank you.

Very truly yours,

McNEES WALLACE & NURICK LLC

By 
Teresa K. Schmittberger

Counsel to the Industrial Energy Consumers of Pennsylvania

TKS/sar

Enclosures

c: Rosemary Chiavetta, Secretary (Via Electronic Filing)
Certificate of Service

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant).

VIA E-MAIL AND FIRST CLASS MAIL

Allison Kaster, Esquire
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street, 2nd Floor West
Harrisburg, PA 17105
akaster@pa.gov

Aron J. Beatty, Esquire
Darryl A. Lawrence, Esquire
Pennsylvania Public Utility Commission
Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101
abeatty@paoca.org
dlawrence@paoca.org

Elizabeth Rose Triscari, Esquire
Sharon E. Webb, Esquire
Pennsylvania Public Utility Commission
Office of Small Business Advocate
300 North Second Street, Suite 1102
Harrisburg, PA 17101
etriscari@pa.gov
swebb@pa.gov

Theodore J. Gallagher, Esquire
Nisource Corporate Services Company
121 Champion Way, Suite 100
Canonsburg, PA 15317
tjgallagher@nisource.com
Counsel for Columbia Gas of Pennsylvania, Inc.

Mark C. Morrow, Esquire
Melanie J. Elatieh, Esquire
UGI Corporation
460 North Gulph Road
King of Prussia, PA 19406
morrowm@ugicorp.com
elatiehm@ugicorp.com

William H. Roberts, II, Esquire
Peoples Natural Gas Company LLC
375 North Shore Drive, Suite 600
Pittsburgh, PA 15212
william.h.roberts@peoples-gas.com

David P. Zambito, Esquire
Cozen O'Connor
305 North Front Street, Suite 400
Harrisburg, PA 17101
dzambito@cozen.com
Counsel for Peoples Natural Gas Company LLC

Jennifer L. Petrisek, Esquire
Peoples TWP
375 North Shore Drive, Suite 600
Pittsburgh, PA 15212
jennifer.petrisek@peoples-gas.com

Maureen Geary Krowicki, Esquire
National Fuel Gas Distribution Corporation
PO Box 2081
1100 State Street
Erie, PA 16512
krowickim@natfuel.com

Bruce V. Miller, Esquire
Cullen and Dykman LLP
100 Quentin Roosevelt Blvd
Garden City, NY 11530
bmiller@cullenanddykman.com
Counsel for National Fuel Gas Distribution Corporation

Thomas J. Sniscak, Esquire
William E. Lehman, Esquire
Hawke McKeon Sniscak LLP
100 North Tenth Street
P.O. Box 1778
Harrisburg, PA 17105
tjsniscak@hmslegal.com
welehman@hmslegal.com
Counsel for The Pennsylvania State University

Amy Neufeld, Esquire
Exelon Business Services Company
500 North Third Street, Suite 800
Harrisburg, PA 17110
amy.neufeld@exeloncorp.com

Michael S. Swerling, Esquire
Exelon Business Services Company
2301 South Market Street, S23-1
Philadelphia, PA 19101
michael.swerling@exeloncorp.com
Counsel for PECO Energy Company

Charles E. Thomas, Jr., Esquire
Thomas T. Niesen, Esquire
Thomas, Long, Niesen & Kennard
212 Locust Street
P. O. Box 9500
Harrisburg, PA 17108-9500
cthomasjr@thomaslonglaw.com
tniesen@thomaslonglaw.com
Counsel for Equitable Gas Company, LLC

David W. Gray, Esquire
Equitable Gas Company, LLC
225 North Shore Drive
Pittsburgh, PA 15212
dgray@equitablegas.com

Kevin J. Moody, Esquire
Pennsylvania Independent Oil & Gas Association
212 Locust Street, Suite 300
Harrisburg, PA 17101
kevin@pioga.org

Tishekia Williams, Esquire
Duquesne Light Company
411 Seventh Avenue, 16th Floor
Pittsburgh, PA 15219
twilliams@duqlight.com

CONSULTANTS

Brian Kalcic, Consultant
Excel Consulting
222 S. Meramec Avenue, Suite 720-T
St. Louis, MO 63105
excel.consulting@sbcglobal.net

Robert D. Knecht
Industrial Economics Incorporated
2067 Massachusetts Avenue
Cambridge, MA 02140
rdk@indecon.com

Glenn A. Watkins, Executive/VP Consultant
Technical Associates, Inc.
9030 Stony Point Parkway
Suite 580
Richmond, VA 23235
watkinsg@tai-econ.com

Diane Meyer Burgraff
19 Westwind Drive
Lemoyne, PA 17043
dmburgraff@epix.net

VIA E-MAIL ONLY

Donna M.J. Clark, Esquire
Energy Association of Pennsylvania
800 North Third Street, Suite 205
Harrisburg, PA 17101
dclark@energypa.org
(Courtesy copy; EAP is not a party)

James L. Crist
JLCrist@aol.com


Teresa K. Schmittberger

Counsel to the Industrial Energy Consumers of
Pennsylvania

Dated this 16th day of September, 2013, at Harrisburg, Pennsylvania

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**BRIEF OF THE
INDUSTRIAL ENERGY CONSUMERS OF PENNSYLVANIA**

Charis Mincavage (PA I.D. No. 82039)
Teresa K. Schmittberger (PA I.D. No. 311082)
McNees Wallace & Nurick LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
Phone: (717) 232-8000
Fax: (717) 237-5300

Counsel to the Industrial Energy Consumers of
Pennsylvania

Dated: September 16, 2013

I. INTRODUCTION

On September 9, 2013, the Industrial Energy Consumers of Pennsylvania ("IECPA") submitted a Petition for Interlocutory Review of a Material Question of Law ("Petition" or "Petition for Interlocutory Review") to Administrative Law Judge ("ALJ") Elizabeth H. Barnes. The material question states: "whether, as a matter of law, a party to a proceeding may ask interrogatories from individual business entities (including their representatives) that are not parties to the same proceeding, specifically when the individual business entities are only involved in the proceeding as members of a corporation that is a party to the proceeding." Petition, pp. 1-2. The Petition requested that ALJ Barnes certify the foregoing material question for consideration by the Pennsylvania Public Utility Commission ("PUC" or "Commission").

As explained further herein, certifying this material question for interlocutory review will prevent substantial prejudice to IECPA and avoid irreparable harm to the discovery process in the instant proceeding. In addition, because of the significant and substantive issues involved with this Petition, IECPA is also requesting a stay. Consistent with 52 Pa. Code § 5.304(d), IECPA now submits the following Brief to support the ALJ's certification to the Commission.

II. BACKGROUND

The instant proceeding was initiated on December 8, 2011, by the Bureau of Investigation and Enforcement ("I&E"), Office of Consumer Advocate ("OCA"), Office of Small Business Advocate ("OSBA") (collectively, "State Advocates"), and Peoples Natural Gas Company, LLC ("Peoples"), all of which collectively filed a Joint Petition at the PUC requesting an investigation or rulemaking into gas-on-gas competition. On December 28, 2011, IECPA filed an Answer not opposing an investigation or rulemaking regarding gas-on-gas competition, arguing that public utility law and policy supports the continued offering of customer-specific

discount rates. Approximately seven months later, the PUC instituted the above-referenced investigation. In response, IECPA filed its Petition to Intervene on August 28, 2012. At the initial prehearing conference on August 31, 2012, after no parties objected, Administrative Law Judge ("ALJ") Elizabeth H. Barnes approved IECPA's Petition to Intervene. After resolving initial procedural issues in the proceeding, ALJ Barnes adopted a procedural schedule at a prehearing conference on January 24, 2013, which was subsequently modified via Order on May 16, 2013.

On July 5, 2013, Peoples Natural Gas Company, LLC, ("Peoples") submitted its Set II Interrogatories to IECPA, which consisted of 41 interrogatories. On July 15, 2013, IECPA submitted Objections to 33 of those Interrogatories. Although some of the issues in IECPA's Objections were resolved informally among Peoples and IECPA, 19 interrogatories remained outstanding and subject to Peoples' Motion to Compel.¹

The main reason for IECPA's continued objection to the remaining 19 Peoples' interrogatories was the requirement within 17 of these interrogatories² that IECPA not provide an answer on behalf of IECPA as an entity, but rather, from each of IECPA's individual members.³ On July 25, 2013, Peoples filed a Motion to Compel related to all outstanding interrogatories. In response, on July 30, 2013, IECPA filed an Answer to this Motion to Compel ("Answer"). IECPA's Answer explained that individual interrogatory responses from IECPA members would be irrelevant, because IECPA, not individual IECPA members, is the party in the above-

¹ On July 25, 2013, IECPA provided interrogatory responses to Peoples for those interrogatories to which IECPA did not object. On August 14, 2013, IECPA submitted responses to interrogatories it had originally indicated in Objections would be answered once IECPA's position was formulated.

² For numerous interrogatories, IECPA argued that they were both irrelevant and inappropriate. For two of the 19 interrogatories, only a relevancy argument existed. While IECPA does not agree that any of the 19 interrogatories are relevant, IECPA's focus in its Petition for Interlocutory Review is whether IECPA, as a party to the proceeding, is the respondent or whether each of IECPA's individual members, all of whom are not parties to the proceeding, are respondents.

³ For purposes of this proceeding, IECPA has 22 members.

referenced proceeding. Answer, p. 3. The Answer further noted that requiring individual IECPA members to provide individual answers to 17 interrogatories would be overly-burdensome and require the expenditure of significant time and resources on behalf of the organization and its members.⁴ *See id.* As a result, IECPA argued that Peoples' Motion to Compel related to these interrogatories should be denied. *Id.* at 4.

On September 5, 2013, ALJ Barnes issued an Order in response, which stated, in relevant part:

It is relevant for Peoples to discover which members support IECPA's position and which ones do not. IECPA has intervened as a collective group but there is no evidence that it is a corporation. It appears to be an ad hoc affiliation of natural gas customers with a common interest in the proceeding, whose standing comes from its individual members' interests.

Order, p. 4. Due to the substantial prejudice this ruling would cause to IECPA, as well as the significant, irreparable harm of this ruling to the discovery process in this proceeding, IECPA filed a Petition for Interlocutory Review on September 9, 2013, requesting certification of the following material question: "whether, as a matter of law, a party to a proceeding may ask interrogatories from individual business entities (including their representatives) that are not parties to the same proceeding, specifically when the individual business entities are only involved in the proceeding as members of a corporation that is a party to the proceeding." Petition, pp. 1-2.

As discussed more fully herein, without the Commission's consideration of the above-stated question at this juncture, IECPA would experience substantial prejudice and potentially all parties subject to discovery in the instant proceeding could experience irreparable harm.⁵ Accordingly,

⁴ IECPA's 22 members would each be required to answer 17 interrogatories, resulting in a total of 374 interrogatory responses.

⁵ Moreover, the precedential effect of this Order could also create irreparable harm to the discovery process in other PUC proceedings.

IECPA submits that its Petition should be granted as it meets the standard required for interlocutory review before the Commission.

III. ARGUMENT

A. **IECPA's Petition Meets the Legal Standard for Interlocutory Review, as Without Interlocutory Review, IECPA Would Experience Substantial Prejudice And the Discovery Process of the Proceeding Would Be Subject to Irreparable Harm.**

The standard for an ALJ's certification of a material question for interlocutory review by the Commission is set forth in 52 Pa. Code § 5.304(b): "A presiding officer may certify that a discovery ruling is appropriate for interlocutory review when the ruling involves an important question of law or policy that should be resolved immediately by the Commission." 52 Pa. Code § 5.304(b). To determine whether the relevant question of law or policy meets this standard, the Commission will consider: (1) whether "interlocutory review is necessary ... to prevent substantial prejudice to any party or to expedite the conduct of the proceeding;" or (2) whether "the relief sought should be granted now rather than later" and "without interlocutory review, some harm would result which would not be reparable through normal avenues." *See MCI WorldComm Comm'ns, Inc. v. Verizon Pa., Inc.*, 2001 WL 36256566 (Pa. P.U.C. 2001); *see also In re Application of Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985)).⁶ The Commission's test for interlocutory review is disjunctive, *i.e.*, if either substantial prejudice would occur *or* if irreparable harm would occur without review now rather than later, then interlocutory review should be granted. *See id.* Finally, if

⁶ Importantly, the correctness of the discovery ruling is not at issue in a Petition for Interlocutory Review, but instead, whether, without review of the question, a party would experience substantial prejudice, and/or resolution of the question must occur now rather than during the normal Commission review process. To that end, the Commission has stated: "In order that we make ourselves perfectly clear, the correctness or erroneousness of the ALJ's ruling on admissibility is not a relevant consideration, either initially in considering a request for certification of a question (except to the extent that such arguments might persuade the ALJ to reverse his or her ruling), or later in considering whether interlocutory review is warranted. The pertinent consideration in both instances is whether interlocutory review is necessary, in order to prevent substantial prejudice, that is that the error and any prejudice flowing therefrom, could not be satisfactorily cured during the normal Commission review process." *MCI WorldComm Comm'ns, Inc. v. Verizon Pa., Inc.*, 2001 WL 36256566 (Pa. P.U.C. 2001) (citing *Application of Academy Bus Tours, Inc.*, Docket No. A-00111330 (Order entered May 5, 1995); *Joint Petition of Breezewood Telephone Co., et al.*, Docket No. P-00940754 (Order entered May 4, 1994)).

the petition for interlocutory review is granted, the "presiding officer or the commission may thereafter stay the proceeding if necessary to protect the substantial rights of any of the parties therein." *See MCI WorldComm Comm'ns, Inc. v. Verizon Pa., Inc.*, 2001 WL 36256566 (Pa. P.U.C. 2001).

Although IECPA is only required to meet one of the foregoing elements to show that its material question of law and policy should be certified to the Commission, IECPA will show that both substantial prejudice to IECPA and irreparable harm would occur if the Commission does not review the instant question now rather than later. First, IECPA will experience substantial prejudice if each of its individual members are required to answer Peoples' interrogatories, because: (a) the Commission's regulations do not require interrogatory responses from non-parties; (b) no other parties have been subject to the same overly-burdensome interrogatory response requirements; and (c) IECPA will experience substantial hardship if required to prepare hundreds of duplicative interrogatory responses.

Second, it is essential that interlocutory review be granted now rather than later to avoid the irreparable harm that would occur to the discovery process in this proceeding if parties may ask members of a corporation to individually answer interrogatory responses. Because interlocutory review would avoid both this substantial prejudice to IECPA and irreparable harm to the discovery process, IECPA submits that its question is an important question of policy or law that must be resolved now by the Commission. Accordingly, IECPA respectfully requests that ALJ Barnes certify this issue for interlocutory review.

B. The Administrative Law Judge Should Grant IECPA's Petition For Interlocutory Review Because it Raises a Material Question of Law that, Without Review, Would Result In Substantial Prejudice to IECPA.

As indicated in Section II.A., *supra*, interlocutory review of a material question is warranted when a party to a proceeding would be subject to substantial prejudice without such

review. IECPA will experience substantial prejudice because, while the Commission's regulations only allow for interrogatories to be asked of parties to a proceeding, IECPA's members would be required to individually respond to interrogatories pursuant to the ALJ's Order. In addition, no other party to the proceeding has been subject to the same burdensome discovery requirement, which results in further prejudice to IECPA upon its submission of responses.⁷ Finally, if individual IECPA members are subject to interrogatory requests, IECPA will experience substantial logistical and financial hardship that would significantly prejudice its ability to participate in the proceeding in any manner other than discovery. As evidenced below, because IECPA would be subject to substantial prejudice unless interlocutory review is granted, IECPA's Petition must be granted in this proceeding.

As noted previously, Peoples' interrogatory requests are seeking responses from each individual member of IECPA; however, only parties to a proceeding may be served with interrogatories pursuant to the Commission's regulations that: "a party may serve upon another party written interrogatories to be answered by the party served or, if the party served is a public or private corporation, similar entity or a partnership or association, by an officer or agent...." 52 Pa. Code § 5.341(a).⁸ The Commission's regulations do not state that interrogatories may be submitted to anyone other than parties in the proceeding. In fact, a subpoena appears to be the only form of discovery that may apply to non-parties. *See* 52 Pa. Code § 5.421(c)(1).

In addition, the Commission's regulations state that responses should be provided "by an officer or agent" of the party that receives the interrogatories when the receiving party is a "public or private corporation, similar entity, partnership or association." 52 Pa. Code §

⁷ If all IECPA members provide interrogatory responses, then Peoples could request that all IECPA members testify in this proceeding, which would increase the burden on IECPA members.

⁸ Business entities may become parties in PUC proceedings by way of a Petition to Intervene or Complaint. 52 Pa. Code § 5.71(a)(2); 52 Pa. Code § 5.21.

5.341(a). In other words, Commission regulations do not expect interrogatory responses from every officer of every corporation, but rather, recognize that a corporation has a singular view that can be expressed by a singular agent.⁹

Accordingly, Peoples' requirement that IECPA members each provide their own interrogatory responses violates the aforementioned regulations.¹⁰ Because IECPA will imminently be required to answer interrogatories from each of its members in contravention of the PUC's regulations, IECPA will experience substantial prejudice. In fact, this prejudice is enhanced, because no other party to the proceeding is subject to the same overly-burdensome interrogatory response requirements.

IECPA will experience substantial prejudice based on the sheer volume of interrogatory responses when no other party to the proceeding has been subject to the same standard of discovery. Peoples' Set II Interrogatories include 17 questions that request individual member responses. IECPA has 22 members for purposes of this proceeding. As a result, IECPA would be required to provide 374 answers to Peoples' Set II. In addition, on September 16, 2013, Peoples asked Set III Interrogatories of IECPA that consists of 19 interrogatories directed to IECPA, which could require each member to provide an individual position with respect to each interrogatory.¹¹ By contrast, no other party to the proceeding has been required to provide

⁹ Requiring IECPA members to provide individual interrogatory responses would be akin to requiring Peoples to provide individual responses for each of its officers (*i.e.*, President, Vice President, Secretary, Treasurer, etc.).

¹⁰ In addition, the Commission has previously endorsed the practice of allowing a group to intervene in a PUC proceeding to "jointly advocate issues" that are important to the individual members. *In re Commonwealth Telephone Co.*, 2007 WL 542226 (Pa. P.U.C. 2007), p. 16. For example, the Energy Association of Pennsylvania ("EAPA") often participates in proceedings on behalf of all utilities. If EAPA were active in this proceeding, pursuant to the September 5 Order, every utility would have to respond to each interrogatory question separately, even if some of these utilities were not impacted by gas-on-gas competition (*e.g.*, an electric utility).

¹¹ Therefore, Set III could require up to 418 interrogatory responses. Considering that IECPA is not an NGDC, whose rates are the subject of this investigation, to be faced with almost 800 interrogatories (374 responses from Set II and 418 responses from Set III), raises the question of whether these questions and resulting responses rise to the level of abusive discovery tactics in an attempt to remove IECPA from this proceeding altogether.

individual interrogatory responses from dozens of members of their organizations.¹² The statutory advocates have not been asked for a random sample of interrogatory responses from residential or small commercial customers. The Natural Gas Distribution Companies ("NGDCs") have not provided all of the opinions of their officers and shareholders. Each party, other than IECPA, has been permitted to provide a single interrogatory response to each interrogatory that represents the collective answer of the organization. Based on this difference in treatment between IECPA and all other parties to the proceeding to date, IECPA will experience substantial prejudice if it is required to provide responses from each of its members.

Moreover, in preparing its hundreds of interrogatory responses, IECPA and its members will expend significant time, money, and resources that would substantially prejudice IECPA's ability to participate meaningfully in this proceeding. IECPA members are business entities that operate across Pennsylvania. As a result, IECPA will likely spend significant time coordinating questions among the members, discussing the interrogatories, receiving approvals within the respective organizations relating to the interrogatories, formatting the answers to provide to the parties, following up with members regarding individual interrogatories, obtaining signed verifications from all members, etc. All of this effort will likely be associated with significant costs for the organization and members so much so that engaging in discovery could be cost-prohibitive for IECPA.

Importantly, IECPA members intervened in this proceeding as part of a single group to conserve the costs associated with participating in a PUC proceeding individually. Fran Mansberger, IECPA's Executive Director, is prepared to answer interrogatories on behalf of IECPA, as acting as a representative of IECPA is one of her official, professional duties. Interrogatory responses from

¹² As discussed in Section II.C., *infra*, although it is possible that the ALJ's Order could be interpreted to apply to more entities in this proceeding, the Order is directed at IECPA. As a result, IECPA would be subject to substantial prejudice immediately upon enforcement of the ruling without interlocutory review by the Commission.

IECPA's Executive Director are analogous to interrogatory responses provided by an NGDC's officer, because, in both instances, it is the officer's job responsibility to represent the interests of the organization. Conversely, individual IECPA members are not employees of IECPA, but instead have their own jobs running their own companies. Therefore, requiring individual IECPA members to take the time away from their own professional responsibilities is significantly more costly and challenging for IECPA members than it might be for officers of an NGDC who provide interrogatory responses as part of their job responsibilities.

Accordingly, in order to participate in such extensive discovery, IECPA's ability to present a substantive case in this proceeding will be severely hindered. IECPA will need to allocate a significant portion of its resources to discovery rather than to developing its substantive arguments for testimony and briefing. As a result, IECPA will experience substantial prejudice in its ability to participate in this case if each of its members may be asked individual interrogatories.

Because IECPA will experience substantial prejudice if its members are required to individually answer interrogatories, the question of whether parties may submit interrogatory requests from more than one member within another intervening organization is an important question of law and policy that must be resolved immediately. Without interlocutory review at this time, IECPA will be required to imminently provide hundreds of interrogatory responses and experience a significant waste of its time, money, and resources when no other parties would be required to do so. Accordingly, because its Petition meets the standard for interlocutory review to the Commission, IECPA respectfully requests that its Petition be granted to prevent this substantial prejudice and hardship.

C. The Administrative Law Judge Should Grant IECPA's Petition For Interlocutory Review Because It Raises a Material Question of Law That Must Be Resolved Now Rather Than Later To Avoid Irreparable Harm to the Discovery Process in the Instant Proceeding.

Interlocutory review is justified when consideration of a material question by the Commission is important now rather than later to avoid irreparable harm that cannot be resolved through normal avenues. *See* Section II.A., *supra*. As indicated further below, it is imperative that this question be resolved now by the Commission in order to avoid irreparable harm to the discovery process in this proceeding by establishing an inefficient and overwhelmed discovery process for IECPA and potentially many other parties. Without resolution of this issue at this time, any corporation could be subject to duplicative interrogatories directed at any number of its officers and shareholders, requiring a significant allocation of resources to the discovery process that would generally not be required. As a result, this question is an important question of law and policy that must be reviewed now rather than later to avoid this irreparable harm, preserve parties' resources, and protect the integrity of the discovery process in this case.

If IECPA is required to provide individual interrogatory responses from all members, IECPA will experience the irreparable harm of exhausting a significant amount of resources in discovery in this proceeding. Because IECPA is a corporation, IECPA should be protected from the need to provide interrogatory responses from each of its members. As part of this proceeding, IECPA has provided both its bylaws and its Certificate of Good Standing to reinforce its status as a corporation.¹³ Despite this status, however, the ALJ's Order has required individual members of IECPA, who are akin to shareholders and/or officers of the organization,

¹³ *See* IECPA's Answer, Appendix B; *see also* IECPA's Petition, Appendix A. No other parties that have claimed they are corporations have been subject to similar scrutiny regarding their corporate status. For example, Peoples' Vice President of Rates and Regulatory Affairs, Joseph A. Gregorini, answered many similar interrogatories from IECPA on behalf of Peoples, and IECPA accepted these responses without further scrutiny either as to Peoples' corporate status or whether Peoples' other officers held different opinions than those proffered by Mr. Gregorini.

to each answer the same interrogatories in this proceeding. Therefore, resolution of the question of whether a corporation may be required to provide interrogatory responses from its individual members is necessary now rather than later to avoid the irreparable harm of exhausting IECPA's resources in this case throughout the discovery period.¹⁴

In addition, without interlocutory review of this question at this time, this Order could similarly result in irreparable harm to all corporations participating in the discovery process of this proceeding, as well as future proceedings. First, this Order could apply to those organizations that regularly participate in PUC proceedings on behalf of other member organizations such as IECPA, the Pennsylvania Independent Oil and Gas Association ("PIOGA"), the Energy Association of Pennsylvania ("EAPA"), and the Retail Energy Supply Association ("RESA").¹⁵ In addition, this Order could be interpreted to apply to all NGDCs that have intervened in this proceeding, including Peoples, Equitable Gas Company, LLC, Columbia Gas of Pennsylvania, Inc., UGI Corporation, Peoples TWP, National Fuel Gas Distribution Corporation, and PECO Energy Company, each of whom would then be subject to duplicative interrogatories directed to its shareholders and/or officers.¹⁶

Without consideration of this question by the Commission now, all corporations could be subject to this ruling, which would result in irreparable harm throughout the discovery process in the instant proceeding due to the ability to send duplicative interrogatories to any number of officers, shareholders, and members of these organizations. Pursuant to this Order, IECPA and each of these organizations would expend a significant amount of resources to answer these

¹⁴ IECPA has already expended resources preparing the instant Brief and its Petition for Interlocutory Review.

¹⁵ Both IECPA and PIOGA are parties to this investigation, while EAPA has been actively monitoring this investigation. The involvement of these organizations in PUC proceedings on behalf of their individual members creates efficiencies and preserves resources that would be eliminated by this ruling.

¹⁶ Peoples has provided a number of interrogatory responses to IECPA from Joseph A. Gregorini, its Vice President of Rates and Regulatory Affairs. If the perspectives of more than one representative of Peoples are deemed relevant in this proceeding, however, IECPA will likely need to ask the same questions of all of Peoples' officers and possibly its shareholders.

massive interrogatory requests. The regular Commission review process cannot prevent the significant resources that IECPA and potentially all corporations in this proceeding would need to contribute towards discovery as a result of this ruling. Thus, interlocutory review is necessary now rather than later to ensure the discovery process does not become highly inefficient and overly-burdensome through the remainder of the proceeding.

Accordingly, interlocutory review is crucial now rather than later to resolve the question of whether interrogatories may be asked of members of an organization instead of the organization itself. Commission review of this question at this point is necessary to prevent irreparable harm to IECPA and all corporations caused by overly-burdensome discovery requirements during the remainder of discovery in this proceeding. As a result, IECPA's material question should be certified to the Commission to avoid irreparable harm to the discovery process in the instant proceeding.

D. Considering the Significant Issues Associated with IECPA's Petition, a Stay Is Warranted.

Pursuant to 52 Pa. Code § 5.304(d)(3), due to the potential for substantial prejudice and irreparable harm that would occur without interlocutory review, IECPA submits that a stay is warranted until the Commission resolves this material question.

IV. CONCLUSION

WHEREFORE, for all the foregoing reasons, the Industrial Energy Consumers of Pennsylvania respectfully requests that Your Honor grant its Petition for Interlocutory Review allowing for the Pennsylvania Public Utility Commission to review the material question discussed herein.

Respectfully submitted,
McNEES WALLACE & NURICK LLC

By 

Charis Mincavage (PA I.D. No. 82039)
Teresa K. Schmittberger (PA I.D. No. 311082)
McNees Wallace & Nurick LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
Phone: (717) 232-8000
Fax: (717) 237-5300

Counsel to the Industrial Energy Consumers of
Pennsylvania

Dated: September 16, 2013