



September 16, 2013

VIA HAND DELIVERY

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

Re: **Joint 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

RESPONSIVE BRIEF OF PEOPLES NATURAL GAS COMPANY LLC TO INDUSTRIAL ENERGY CONSUMERS OF PENNSYLVANIA'S PETITION FOR INTERLOCUTORY REVIEW OF A DISCOVERY MATTER

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is Peoples Natural Gas Company LLC's Responsive Brief to the Petition of the Industrial Energy Consumers of Pennsylvania for Interlocutory Review of a Discovery Matter in the above-referenced proceeding.

A CD-Rom of the filing is also enclosed for your convenience. Copies of the Brief are being served on the Presiding Officer, Administrative Law Judge Elizabeth H. Barnes, and on all parties, as indicated on the enclosed Certificate of Service.

If you have any questions regarding this filing, please direct them to me. Please date-stamp the extra copy and return it with our courier. Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

By: David P. Zambito
Counsel for Peoples Natural Gas Company LLC

DPZ/kmg
Enclosures
cc: Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Administrative Law Judge
Elizabeth H. Barnes

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

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

**RESPONSIVE BRIEF OF
PEOPLES NATURAL GAS COMPANY LLC TO
INDUSTRIAL ENERGY CONSUMERS OF PENNSYLVANIA'S
PETITION FOR INTERLOCUTORY REVIEW
OF A DISCOVERY MATTER**

AND NOW COMES Peoples Natural Gas Company LLC ("Peoples") and files, pursuant to 52 Pa. Code § 5.304(d), this Responsive Brief to the "Petition for Interlocutory Review of a Material Question of Law" filed by the Industrial Energy Consumers of Pennsylvania ("IECPA") on September 9, 2013 ("Petition").¹ In opposition to IECPA's Petition, Peoples argues as follows:

¹ While IECPA made its filing under 52 Pa. Code § 5.304 ("Interlocutory review of discovery matters"), it termed its filing a "Petition for Interlocutory Review of a Material Question of Law." Because the filing involves a *discovery dispute*, the applicable Commission Rules of Practice and Procedure are contained in Section 5.304 -- as opposed to Section 5.302 ("Petition for interlocutory Commission review and answer to a material question).

I. BACKGROUND

On July 8, 2013, Peoples propounded its Set II Interrogatories on IECPA (“Peoples-to-IECPA Set II”), consisting of 41 interrogatories, in the above-captioned proceeding. On July 15, 2013, IECPA formally objected to 33 of the 41 interrogatories asked in Peoples-to-IECPA Set II. IECPA took the position that its individual members should be immune from having to respond to interrogatories and objected, *inter alia*, to the following interrogatories: Peoples-to-IECPA Set II, Nos. 9, 10, 13, 16, 17, 18, 19, 21, 27, 28, 29, 30, 31, 32, 33, 35, 39, 40, and 41 (hereinafter, the “Disputed Interrogatories”).² On July 25, 2013, Peoples filed a Motion to Compel responses to the Disputed Interrogatories and, on July 30, 2013, IECPA filed an Answer to the Motion to Compel.

By Order dated September 5, 2013 (“Discovery Order”), the Honorable Administrative Law Judge Elizabeth H. Barnes (the “Presiding Officer”) found that the Disputed Interrogatories are relevant to the proceeding and that individual members of IECPA should be required to respond. On September 9, 2013, IECPA filed its Petition.

II. SCOPE OF REVIEW

IECPA has muddled the scope of review in its Petition. IECPA repeatedly requests that the Presiding Officer certify a “material question of law” to the full Commission. *See* Petition at the Heading, the Introductory Paragraph, ¶ 3, and the Wherefore Paragraph. However, there is no “material question of law” properly before the Presiding Officer for certification to the full Commission. Instead, IECPA should have requested the Presiding Officer to certify the current discovery dispute to the Commission for review. *See* 52 Pa. Code § 5.304(a) (“Interlocutory

² IECPA also objected to certain other interrogatories on different bases but those interrogatories are not a subject matter of IECPA’s Petition.

review of discovery matters”)(explaining that rulings of presiding officers on discovery are not subject to review except when (1) ordered by the Commission, (2) certified by the presiding officer, or (3) where the subject matter is deposing of a Commissioner or Commission employee); *compare id.* § 5.302 (“Petition for interlocutory Commission review and answer to a material question”). There is no legal question that would impact the substantive outcome of the instant proceeding and, therefore, there is no “material question of law” for certification. This is purely a discovery dispute.

III. STANDARD OF REVIEW

IECPA has likewise muddled the standard of review in its Petition by attempting to apply the standard of review for interlocutory review of a material question of law, which is much broader than the standard of review for interlocutory review of a discovery matter.³ The actual standard of review for interlocutory review of a discovery matter is simple and straight-forward: “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)(“Standard for certification”); *see also* 66 Pa. C.S. § 333(h) (“Certification of interlocutory appeal”)(“[A]n interlocutory appeal from a ruling of the presiding officer on discovery shall be allowed only upon certification by the presiding officer that the ruling involves an important question of law or policy which should be resolved at that time.”).⁴

³ The standard of review for interlocutory review of a material question of law is found at 52 Pa. Code § 5.305(a)(1) (“[I]nterlocutory review will prevent prejudice or expedite the conduct of the proceeding.”).

⁴ Interestingly, in the two cases cited by IECPA regarding the standard of review, the Commission denied the petitions for interlocutory review of discovery matters. *See MCI WorldComm Communications, Inc. v. Verizon Pa., Inc.*, 2001 WL 36256566, Pa. PUC Docket No. C-00015149 (Order entered Nov. 13, 2001); *In re: Application of Knights Limousine Service, Inc.*, 1985 Pa. PUC LEXIS 46, 59 Pa. PUC 538 (Order entered Jul. 22, 1985). In both cases, the Commission found that the petitioners failed to present an “extraordinary or compelling reason for

Interlocutory review, generally, is not granted except upon a showing by the petitioner of extraordinary circumstances or compelling reasons. Such showing may be accomplished by a petitioner proving that, without interlocutory review, some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now rather than later, or that granting interlocutory review would prevent substantial prejudice or expedite the proceeding. See *Re: Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, Docket No. M-00001353 (Order entered Jul. 20, 2000).

IV. COUNTER-STATEMENT OF QUESTION TO BE CERTIFIED

IECPA presents the following question for certification by the Presiding Officer to the full Commission: “[W]hether 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.” The Presiding Officer should not certify the question for three basic reasons.

First, the question improperly incorporates an assumption that IECPA operates as a *bona fide* non-profit corporation. In other words, the question is based on a factual premise that may prove false. As explained below, legitimate questions exist as to IECPA’s corporate status.

Second, the question exceeds the scope of review. The question presents a broad material question of law, as opposed to a limited question regarding whether the Presiding Officer erred in resolving a discovery dispute.

interlocutory review” – language that IECPA conveniently omitted by selective quotation when presenting its version of the standard of review in the instant Petition.

Third, the question fails to satisfy the standard for certification – that is, that the ruling involves an important question of law or policy. Instead, the ruling involves a factual question of whether IECPA is a *bona fide* corporate entity or an *ad hoc* litigation group. Indeed, Peoples agrees, and encourages the Presiding Officer to find, that individual owners, representatives, and members of a *bona fide* corporation or similar entity that has a legal existence separate from its owners or members and that has intervened in a Commission proceeding should generally not be subject to discovery requests. Accordingly, because there is no dispute as to the legal question, IECPA’s Petition does not present an important question of law or policy that warrants interlocutory review by the full Commission.

If the Presiding Officer elects to certify the discovery matter to the full Commission (which she should not), the appropriate question would be:

Did the Presiding Officer err in ruling that individual members of an intervening group are subject to discovery where the group failed to present evidence in a timely manner that it is acting as a bona fide corporation rather than an ad hoc litigation group?

Suggested Answer: No.

The Presiding Officer acted reasonably in finding that individual members of IECPA should not be immune from discovery.

V. SUMMARY OF ARGUMENT

IECPA has failed to present an “important question of law or policy” for certification of this discovery matter to the full Commission. Peoples has not argued, and the Presiding Officer has not held, that individual members of a *bona fide* corporation are subject to discovery. Instead, the Presiding Officer has simply held that IECPA failed to establish that it is anything other than an *ad hoc* affiliation of natural gas customers and that it operates as a *bona fide*

corporation. IECPA's members will suffer no irreparable harm if they are required to provide information that is clearly relevant to this proceeding.

Failure to produce copies of publicly-available records and IECPA's apparent non-compliance with its bylaws suggest that it does not operate as a *bona fide* corporation. Indeed, facts point to the conclusion that IECPA is, for all intents and purposes, an *ad hoc* affiliation of natural gas customers with a common interest in the proceeding.

Even if IECPA is now given a further opportunity to prove that it, in fact, operates as a *bona fide* corporation (which it should not be), such a factual issue cannot be properly certified to the full Commission for interlocutory review. Instead, the Presiding Officer should hold hearings to build an evidentiary record of IECPA's *bona fides*. The Commission's Rules of Practice and Procedure provide that a certified discovery question should be accompanied by extracts from the record that will assist the Commission in reaching a decision.

A stay of this proceeding is warranted only if the discovery matter is certified to the Commission or if an evidentiary hearing is held as to whether IECPA operates as a *bona fide* corporation. IECPA suffers no irreparable harm if its individual members are required to respond to relevant discovery requests. In fact, responses by IECPA's members (large, sophisticated corporations) would help to build a thorough record in this investigation proceeding. In contrast, Peoples and other parties would suffer irreparable harm to their due process rights if they were denied the opportunity to pursue material discovery from IECPA's individual members.

VI. ARGUMENT

A. The Petition presents no “important question of law or policy.”

In her Discovery Order, the Presiding Officer found: “IECPA has intervened as a collective group but *there is no evidence* that it is a corporation.” Discovery Order, p. 4 (emphasis added). This finding is fundamentally different than a legal conclusion (as IECPA has suggested that the Presiding Officer made) that individual members of a corporation are subject to discovery.

The Presiding Officer’s finding was properly based on the evidence before her at the time of issuance of the Discovery Order.⁵ There is no certification that the bylaws submitted by IECPA are of legal force and effect. Furthermore, the bylaws state that those persons comprising the Board of Directors shall have the power to conduct, manage and direct the property, business and affairs of IECPA. The bylaws also mention the positions of President, Vice President, Secretary and Treasurer, and state that the President shall have general supervision over the activities and operations of IECPA. IECPA, however, has not identified in this proceeding its Board of Directors or its President or other officers. The only official that IECPA identified is its Executive Director. The bylaws, however, do not provide for an Executive Director, which begs the question of what authority, if any, the Executive Director possesses. In fact, IECPA had failed to present any substantive evidence of its incorporation until it filed the instant Petition and attached a “Subsistence Certificate” (dated September 6, 2013) from the Pennsylvania

⁵ The only evidence that IECPA submitted of its incorporation was purported Bylaws of IECPA (dated 2006) that IECPA attached to its Answer to Peoples’ Motion to Compel. Up until that point, IECPA referred to itself in a general manner as a “collective group” or “trade association.”

Department of State – which, in and of itself, does not demonstrate that IECPA operates as a *bona fide* corporation.⁶

This discovery dispute does not present the issue of whether individual members of a *bona fide* corporation are subject to discovery.⁷ Peoples has never made such a contention; likewise, the Presiding Officer has never made such a conclusion of law. Accordingly, there is no “important question of law or policy” for certification to the full Commission and IECPA’s Petition should be denied.

B. Available evidence suggests that IECPA is an *ad hoc* affiliation of customers.

The Presiding Officer properly concluded that IECPA “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.” Discovery Order, p. 4. IECPA presented no evidence to demonstrate that IECPA operates as a *bona fide* corporation and that its participation in this proceeding is “organizational” as opposed to “representational” in nature. Accordingly, it was reasonable to conclude that IECPA is acting in this proceeding on behalf individual members for the purposes of mitigating litigation expenses and shielding such members from discovery.⁸

⁶ A “Subsistence Certificate” means only that the corporation is still in existence as a matter of record in the Office of the Secretary of the Commonwealth. See PA Dep’t of State Website: http://www.portal.state.pa.us/portal/server.pt/community/corporations/12457/x_good_standing_or_subsistence_certificates/571868. It does not certify that a registered corporation has been operating as a *bona fide* corporation or that it has acted in compliance with applicable legal requirements.

⁷ IECPA suggests that other *bona fide* corporations such as the Pennsylvania Independent Oil & Gas Association (“PIOGA”), the Energy Association of Pennsylvania (“EAP”), and the Retail Energy Supply Association (“RESA”) should be concerned about the Discovery Order. They should not. Such organizations are *bona fide* corporations that appear to be acting in compliance with applicable legal requirements. Their websites indicate that they have broad-based missions on behalf of certain interest groups. In contrast, IECPA does not even have a website.

⁸ To allow IECPA to participate in its desired manner would set a very dangerous precedent in Commission proceedings. An organization could theoretically represent one customer in a proceeding under the guise of a registered corporation and allow that one customer from being subject to discovery. Moreover, that same customer could then intervene on its own behalf and effectively have “two bites at the apple.” The only way to prevent this possibility is to ensure that intervening corporations in fact act as *bona fide* corporations in compliance with applicable legal requirements. If the corporation is not *bona fide*, its members should not be immune from

Evidence of IECPA's *bona fides* should be readily available but was not presented. A Pennsylvania nonprofit corporation is required to file a Decennial Filing with the Bureau of Corporations and Charitable Organizations ("Corporations Bureau") of the Pennsylvania Department of State.⁹ IECPA could have provided a copy of such a filing but has not. Likewise and perhaps more importantly, IECPA could have provided copies of the "Annual Statement" filings as required by 15 Pa. C.S. § 5110. An Annual Statement is required to be filed with the Corporations Bureau on or before April 30th of each year where there has been a change in corporate officers during the preceding calendar year. The purpose of the filing requirement is, among other things, to provide public information on who is actually operating and responsible for a nonprofit corporation.¹⁰ IECPA's failure to submit copies of required filings that should be readily available supports the conclusion that IECPA is indeed little more than a loosely-affiliated, *ad hoc* group of customers looking to share litigation expenses – as the Presiding Officer properly concluded.

In addition to filings with the Corporations Bureau, IECPA should be able to produce evidence that it has acted in accordance with its bylaws – *e.g.*, Board of Directors Resolutions (including Resolutions to add or eliminate IECPA members and to participate in this proceeding) and Board of Directors Meeting Minutes. In this regard, Peoples notes that IECPA's discovery responses from August 14, 2013 are verified by the "Executive Director" for IECPA. As noted above, the bylaws provided with its Answer to the Motion to Compel do not even mention an

discovery. As a preliminary matter, immunity from discovery would prevent the Commission and other parties from discovering whether the corporate veil should even be pierced.

⁹ Decennial Filings are required in order for a corporation to demonstrate that it still exists. While the failure to make a Decennial Filing does not revoke the nonprofit entity's status as a corporation, the entity no longer has exclusive use of its name and the name becomes available for any corporation or other association registering to do business in Pennsylvania which may request it. See 54 Pa. C.S. §§ 503, 504.

¹⁰ Certainly, IECPA has had changes of officers since its incorporation in 1982 which would have triggered the requirement to file an Annual Statement.

“Executive Director” – drawing into question under what authority the Executive Director is acting and making it impossible to assign weight and credibility to the responses.

While IECPA may have explanations for these apparent legal shortcomings, it has not presented them. The inferences to be drawn from the failure to present what should be readily available evidence, together with the information that was actually available to the Presiding Officer, support the Presiding Officer’s conclusion that IECPA is acting as an *ad hoc* litigation group. IECPA’s use of the corporate veil as a shield to thwart the disclosure through discovery of relevant information should be pierced. Its members, who are individual utility customers with alleged immediate, direct and substantial interests in the outcome of this proceeding, should not be immune from discovery.

C. Evidentiary hearings would be required for certification.

As noted above, the standard for certification is whether the ruling involves an important question of law or policy that should be resolved immediately by the Commission. The instant dispute presents neither a question of law or policy – it is a factual issue. If IECPA, nevertheless, is now given a further opportunity to prove that it, in fact, operates as a *bona fide* corporation (which it should not be), such a factual issue should not be certified to the full Commission for interlocutory review. Rather, the Presiding Officer should conduct inquiries into the following topics, among others: IECPA’s compliance with its articles of incorporation and bylaws; IECPA’s satisfaction of corporate filing requirements; frequency of IECPA board of director meetings; the creation and authority of the position of IECPA Executive Director; changes in IECPA membership since the initiation of this proceeding; relative financial contributions of IECPA members toward the costs of this proceeding; and, joint cooperation

agreements between participating IECPA members. Such factual inquiries are relevant to whether IECPA's corporate veil should foreclose otherwise proper discovery. The Commission's Rules of Practice and Procedure state that any certification of discovery matter for interlocutory review will include "extracts from the record that will assist the Commission in reaching a decision." 52 Pa. Code § 5.304(e)(2).

D. IECPA's members will not suffer irreparable harm.

The scope of permissible discovery in Commission proceedings is very broad. *See* 52 Pa. Code § 5.321(c). Accordingly, where there is a doubt as to whether discovery should be permitted, the Commission should err on the side of broader rather than more-limited discovery. A party is not irreparably harmed by having to produce discovery. A party is irreparably harmed by being denied relevant discovery that is material to the party's case.

IECPA argues in its Petition that its members would suffer "substantial prejudice" if they are required to produce relevant discovery, suggesting that the individual members would have to expend additional resources as part of the discovery portion of the proceeding and that continued participation may become cost-prohibitive. Petition, p. 2. IECPA's argument is without merit.

The routine costs of litigation do not constitute irreparable harm.¹¹ In this regard, it should be noted that many of IECPA's members are large, sophisticated corporations with in-house legal and technical staff. Many of the members likely have annual revenues far in excess

¹¹ The Commission generally does not consider financial harm to be "irreparable." *See generally Re Incremental Gas Pricing Tariffs*, Docket No. I-79110324, 56 Pa. PUC 728 (Order entered Jan. 7, 1983) (decided in the context of a request for emergency relief); *see also The Peoples Natural Gas Co. v. Pa. Pub. Util. Comm'n*, 555 A.2d 288, 291 (Pa. Cmwlth. 1989) ("At best, adverse economic effects [e.g., loss of jobs and economic hardship at the manufacturing plant] are speculative. Therefore, the Commission's Order was not supported by substantial evidence.").

of the rate-regulated public utilities participating in this proceeding and the public advocates who operate on limited budgets.¹²

IECPA's members should not be immune from producing relevant information on the basis that such production may create an inconvenience. The only potential for irreparable harm resulting from this discovery dispute is the denial of relevant information to other parties if IECPA succeeds in its arguments.

E. A stay is warranted if certification is granted or evidentiary hearings held.

A stay of this proceeding is warranted if the Presiding Officer elects to certify this discovery matter to the Commission for interlocutory review. Upon certification, the Commission would have 30 days to act on the certified question. 52 Pa. Code § 5.304(h). Rebuttal testimony (and Peoples' supplement direct testimony) is currently due on October 17, 2013. IECPA's responses to the Disputed Interrogatories are necessary for Peoples and the other parties to prepare further testimony in a meaningful manner. Accordingly, if a question is certified to the Commission, it is unlikely that IECPA's responses would be available at a reasonable date before further testimony is due and a stay would be appropriate.

A stay is also appropriate if the Presiding Officer elects to hold evidentiary hearings on IECPA's corporate status. Such hearings would create a need to delay the due dates of further testimony.

If the Petition is denied (which it should be), the Presiding Officer should set a date certain for IECPA's responses to the Disputed Interrogatories. Peoples suggests October 3, 2013 as a fair and appropriate due date. Peoples and the other parties would then have two weeks to

¹² It should also be noted that IECPA has been, by far, the most prolific propounder of discovery in this proceeding – serving approximately 51 sets of discovery on other parties thus far. As such, the costs of IECPA's participation are being largely driven by IECPA itself.

review the responses and prepare their further testimony which is currently due on October 17, 2013.

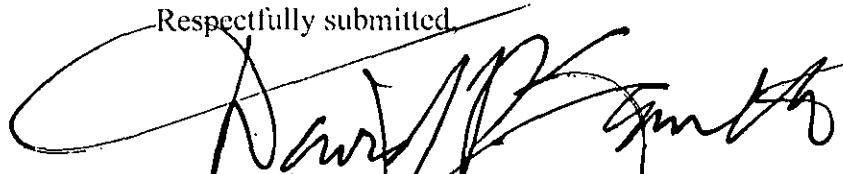
VII. CONCLUSION

IECPA has failed in its Petition to present an “important question of law or policy” for certification to the full Commission. The Presiding Officer correctly concluded that IECPA presented no evidence that it operates as a *bona fide* corporation, such that its individual members should be immune from discovery. Because the Commission’s Rules of Practice and Procedure favor a broad scope of discovery and IECPA’s members would suffer no irreparable harm by producing relevant information, IECPA’s Petition should be denied.

It is fundamentally unfair to the other parties in this proceeding to have to litigate against the ghost of a nonprofit corporation formed three decades ago. IECPA should not be permitted to manifest itself for purposes of litigation and then contend that its members are exempt from providing information relevant to the issues in this case.

WHEREFORE, Peoples Natural Gas Company LLC respectfully requests that the Presiding Officer deny the Petition of the Industrial Energy Consumers of Pennsylvania for certification of a discovery matter for interlocutory review and that she compel responses to the Disputed Interrogatories to be produced on or before October 3, 2013 (*i.e.*, two weeks before the current due date for further testimony).

Respectfully submitted,



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CERTIFICATE OF SERVICE
Docket Nos. P-2011-2277868 and I-2012-2320323

I hereby certify that I have this day served a true copy of the foregoing Responsive Brief of Peoples Natural Gas Company LLC to Industrial Energy Consumers of Pennsylvania's Petition for Interlocutory Review of a Discovery Matter, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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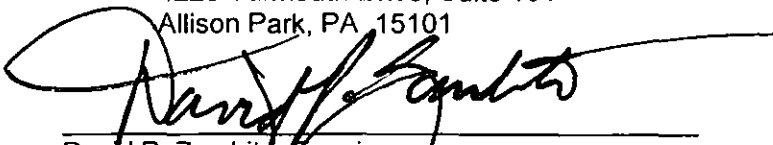
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