

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Review of Chapters)
 4901:5-17, 4901:5-19, 4901:5-21, 4901:50-23,)
 4901:5-25, 4901:5-29, 4901:5-33, 4901:5-35, and)
 4901:5-37 of the Ohio Administrative Code.)

Case No. 06-1201-AU-ORD

INITIAL COMMENTS OF THE OHIO GAS MARKETERS GROUP

Pursuant to the November 4, 2006 Entry in the above styled proceeding, the Ohio Gas Marketers Group ("OGMG") respectfully submits these initial comments to the proposed rules in Chapter 4901:5-25 of the Ohio Administrative Code related to natural gas energy emergencies. The OGMG consists of: Commerce Energy, Inc., d/b/a Commerce Energy of Ohio, Inc.; Direct Energy Services, LLC; Hess Corporation; Interstate Gas Supply, Inc.; MxEnergy, Inc.; and Vectren Retail, Inc. LLC d/b/a Vectren Source, each of which are actively engaged in sale of natural gas within Ohio. All the members of the OGMG are certificated, competitive retail natural gas providers or suppliers of standard service / PIPP programs or both. As detailed in the following comments, the OGMG respectfully suggests that the Commission modify the proposed rules in Chapter 4901:5-25 of the Ohio Administrative Code from the draft presented on October 11, 2006.

While the OGMG members are only commenting on the rules which address gas emergencies, the October 11, 2006 Entry in the above styled proceeding offered rule amendments for several other types of energy emergencies. In recognition of the breadth of the subject matter, which will likely produce voluminous filings, the OGMG has limited its comments to just the provisions addressing gas emergencies and then only to the proposed rule or rule amendments which the members of the OGMG feel require revision. Thus, the OGMG

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requests that its silence on a particular rule, whether addressing a gas or other type energy emergency, not be interpreted as an endorsement of any such rule amendment or provision.

I. BACKGROUND

The OGMG expresses its appreciation to the Commission for the opportunity to comment on these rules. The OGMG recognizes that emergency rules are of vital importance in dealing with natural gas emergencies. The experiences of the blizzard of 1977-78 underscore the need, in times of acute shortages, to marshal resources so as to preserve service to human needs customers. The OGMG does not oppose amending the current Energy Emergency Rules to include competitive retail natural gas suppliers and aggregators as entities subject to the Commission or natural gas utility's Commission approved emergency plans when an Energy Emergency has been declared, assuming like the utilities, competitive retail natural gas suppliers would be made whole with respect to such efforts.

The proposed rule amendments for gas energy emergencies (OAC 4901:5-25 et. seq.), however, do suffer from two generic problems: 1) they fail to provide for a clear chain of command in times of crises, and 2) they are ill suited for what the rules call "pre emergencies". Both programs stem from a drafting decision to expand the definition of "energy supplier" from just the gas or natural gas company which actually "supplies"¹ the gas to the customer to everyone in the supply chain including: marketers, suppliers, aggregators, brokers and oil and gas producers. By changing the definition of "energy supplier" to everyone in the chain of supply who contributes to physically delivering gas, it creates an unintended and confusing consequence of having both the utility and upstream suppliers issuing notices, making reports

¹ A natural gas company is one which physically brings or "supplies" the gas to the customer see Section 4905.03(A)(6)

and contacting end use customers. It also sweeps the non-regulated upstream suppliers under the Commission's pre emergency rule which is *ultra vires*.

If an energy emergency is declared by the Governor, or if the Commission determines that "pre emergency" conditions exist, the chain of command should be simple and straight forward. Any approach that injects the potential for confusion or duplication of efforts into the mix could result in dire consequences and consume valuable time and resources when they are needed most to protect Ohio's most vulnerable customers. The Commission should work through the utilities to marshal the supplies of gas available in the state, ensure high priority customers are served, and enforce emergency conservation plans. The utilities, in turn, should work with the competitive retail natural gas ("CRNGS"), suppliers, aggregators and producers via its tariff and contracts to keep gas supplies arriving on schedule. This includes, but is not limited to, operational flow orders, operational maintenance orders, and Choice Program and PIPP and Standard Service Supply orders. Such a straight forward chain of command has the best chance of providing the decision makers and the public with timely, accurate information needed to make good decision during the crises.

Finally, as both a matter of equity, and to ensure maximum deliveries of natural gas during emergencies, the rules must be clear that those customers called upon to sacrifice their gas supplies for higher priority customers or suppliers called upon to procure gas supplies in the midst of shortage are appropriately and timely reimbursed. It is imperative that timely reimbursement occurs so that there are no non-operational incentives toward confiscation of gas supplies.

II. COMMENTS

A. Proposed Rule 4901:1-17-02 Governor's Emergency Powers and Proposed Rule 4901:5-25-01 Definitions

The Commission Staff proposes enlarging the group of entities subject to a governmental order to acquire, produce or sell energy supplies during a declared energy emergency to include CRNGS suppliers, and aggregators. The statutory creation of CRNGS and aggregators in House Bill 9 came after the last five-year review of the Energy Emergency rules, and thus the current rules do not name CRNGS and aggregators specifically. Making CRNGS and aggregators subject to the Commission orders during a declared Energy Emergency will enhance the Commission's effectiveness during crises and is consistent with the apparent legislative intent of the General Assembly, because since the last Energy Emergency Rule review the General Assembly amended Section 4935.03, Revised Code to authorize Energy Emergency actions to apply to CRNGS and aggregators².

It is axiomatic that a legislative administrative agency, such as the Commission, only has that authority delegated to it by the General Assembly. The proposed amendments to OAC 4901:1-17-02 and OAC 4901:5-25-01 regarding CRNGS are on solid legal ground because the Section 4935.03, Revised Code provides for the Commission to order CRNGS, aggregators, and suppliers when the Governor issues an energy emergency declaration. The statute contains no similar authorization provision for ordering CRNGS, aggregators, or suppliers prior to the energy emergency declaration. Thus, the Commission has no authority under Section 4935.03, Revised Code to order the upstream suppliers to act with respect to energy emergency issues because of "pre energy emergency" conditions.

² Section 4935.02, Revised Code in declaring which entities are subject to energy emergency orders cites Section 4929.20, Revised Code which creates both CRNGS and aggregators.

B. Proposed Rule 4901:1-5-25-04 Pre-Emergency Actions” Should Not Be Applied to Competitive Retail Natural Gas Suppliers.

Rule 4901:5-25-04 of the Ohio Administrative Code covers “pre energy emergency” conditions and applies only to gas or natural gas utilities. While not directly subject to pre emergency orders, the upstream suppliers are affected by the supplier tariff provisions. Since the blizzard of 1978 and the chronic gas shortages in the 1970’s and early 1980’s, the Commission has honed the utility tariffs on the subject of gas shortages and shortfalls to include not only reactive curtailment plans, but proactive operational flow orders, maintenance flow orders and trading provisions designed to prevent supply disruptions³ in the first place. The upstream tariff system has worked particularly well; and, even during the price spike of 2004, curtailments were avoided by the major gas utilities.

In an attempt to be all inclusive in its rules proposal, though, the Staff seeks to expand OAC 4901:2-25-04 to cover “energy suppliers”. Thus, for the first time CRNGS, marketers, brokers, aggregators, producers and suppliers would be subject to the same regulations as the gas utilities. In addition, the Staff proposes adding two new subsections, subsection (E) which constitutes additional reporting and subsection (F) which permits authorized curtailment plans to be superseded.

Subsections (A) (B) (C) of OAC 4901:5-25-04 address distribution/system integrity issues in time of curtailment. Subsection (A) requires a gas utility to: 1) notify the news media of the shortage; 2) notify customers about the appropriate imminent shortage of gas; 3) suspend outdoor decorative lighting; 4) reduce gas water heating temperatures; and 5) reduce space heating usage. Subsection (B) requires the utility to inform its customers of its curtailment

³ Including both over deliveries as well as under deliveries

plans and to project the time and date of such cut backs when needed. Subsection (C) addresses reallocation of gas supplies among utility customers to protect high priority users.

By expanding Subsections (A) and (B) from the gas utilities to all “energy suppliers” the proposed rule would create an obligation for a score of CRNGS, a dozen aggregators, and an untold number of producers to talk to the media, and contact customers about gas shortages. The relative supply position of each CRNGS, aggregator or producer is likely to be different from that of the utility as well as from each other—and given the competitive nature of their business may constitute proprietary business information that when shared with the media, on an individual level (as opposed to shared in the aggregate for all entities concerned by the utility company), could damage a supplier’s business position not only in Ohio but in other states as well. Further, the CRNGS will have no knowledge about whether the curtailment plan at the utility calls for the immediate cessation of decorative lighting or lowering thermostats. In a time of crises there should be one voice talking to the media and the public. Traditionally, the utility has been the entity that informs the end use customer of gas emergencies. Further, the utility knows its curtailment plan, has the customer information necessary to implement that plan, and has call center facilities and staff trained to respond to energy-emergency questions. Finally, the utility can provide the Commission with a consolidated picture of its total supply \ demand position, where as the upstream supplier can only report on its portion of the supply going into the utility for certain utility customers. The Commission needs consolidated information to assess whether extraordinary actions are warranted. The Commission’s view is not improved by getting numerous upstream reports, all of which would have to be consolidated, reviewed and analyzed in order to gain the same insight that could be provided from a single utility report.

Subsection (C) is the reallocation provision. As noted above, many of today's utility tariffs have proactive operational and maintenance flow orders and trading devices designed to adjust the flow of gas from the suppliers, CRNGS, and aggregators to match the demand. If read literally, subsection C would require each supplier, CRNGS, and producer to have a curtailment plan and allocate prior to delivering gas into the utility. For CRNGS and suppliers operating in two or three utility service areas, such a reallocation based on high priority use could significantly skew the gas supplies going to the several gas cooperatives and utilities within the state. Such pre utility reallocations will disrupt the carefully laid plans that exist now with the major gas utilities for times of shortage. Administratively, it makes more sense to make any adjustments designed to ensure that high priority customers have needed supplies at the last link in the supply chain, and by definition, that is the natural gas company which physically "supplies" the gas to the customer.

The new subsections (E) and (F) also seem to be designed for utilities only. Subsection (E) requires reporting to the Commission on the gas suppliers' upstream entitlements and storage. In the midst of gas crises a cacophony of supply reports from CRNGS, suppliers, aggregators, and producers will be of little value to the Commission and will distract the attention of key personnel at the CRNGS and suppliers from gas procurement duties. It is more important for the utility to report to the Commission on what supplies it thinks are coming. The Commission staff can of course contact the CRNGS for confirmation or additional information.

In sum, as a matter of policy, in a pre-emergency gas shortage, the planning, reporting and contact with the public should come from the gas utilities, which in turn should use their tariff provision addressing shortages to work with the CRNGS, suppliers, aggregators and

producers. Such an outcome can be accomplished by simply changing OAC 4909:5-25-04 to apply to “gas and natural gas companies” as opposed to “energy suppliers”.

In Section A of these Initial Comments it was noted that the Staff would have no difficulty stating the statutory authority on which its directives to CRNGS, aggregator or suppliers would be based following a declaration of an energy emergency by the Governor. The same is not true of “pre emergency” actions by the Commission. Unlike Section 4935.03, Revised Code which authorizes the Commission to take emergency actions after the declaration of an energy emergency by the Governor, there is no statutory authority for the Commission to take such action before the emergency declaration.

By design the “pre emergency” action called for by OAC 4901:5-25-04 would take place prior to a declared energy emergency. In fact, the real purpose of the pre emergency is to prevent the energy emergency if possible. By contrast with the upstream suppliers, the pre emergency activity, such as having and implementing curtailment plans, public notice and special reporting, is well within the Commission’s general supervisory authority over utilities. See Sections 4905.04 through 4905.06, Revised Code. It is important to note that these sections of the Revised Code apply only to public utilities, not competitive retail natural gas service providers, aggregators or suppliers.

C. Proposed Rule 4901:5-25-05(A) (1) Should Be Modified to Keep The Natural Gas Company As The Entity Which Informs Consumers, Appeals to Consumers to Conserve, And Restricts Usage.

When an energy emergency is declared, it is important that the public receives information which is timely, accurate and helpful. As written now, the proposed OAC 4901:5-25-05(A) would have every CRNGS, aggregator, supplier, and producer as well as every utility contact each and every customer and inform them of the governor’s declaration, the severity of

the shortage, the actions to be taken by the energy supplier, and to urge customers to conserve. Subjecting end use customers to multiple calls with possibly different messages and placing additional demands on the telecommunications system at a time of an energy emergency is inefficient and runs the risk of conveying contradictory and confusing information. In times of crises, misinformation or contradictory information is worse than no information at all. The gas utility should be the point entity making contact with the end use customers. That way, the message to the public can be uniform, reviewed for accuracy and integrated with the other energy emergency activities. In a few isolated cases, there are customers who are not served by a utility and receive their gas directly from a supplier. In those relative few cases of direct supply, the supplier will need to convey the information on the energy emergency to the end use customer.

To prevent multiple and possibly contradictory messages, the proposed new OAC 4901:5-25-05(A)(1) should be amended to replace the term “Each Gas Supplier” – which would mean all CRNGS, suppliers, and producers as well as gas utilities – to “Gas and Natural Gas Companies and those who directly supply end use customers through pipes or distribution systems that they own”. Such a change will prevent both the natural gas utility and the upstream supplier from contacting the end user and possibly providing contradictory information.

D. OAC 4901:5-25-05(A) (2) (D) Should Not Be Expanded Beyond Reallocations Among the Gas Utilities And There Must Be a Mechanism for claims When Gas or Property is reallocated.

Under the current Rule OAC 4901:1-5-25-06 the Commission could order a natural gas company to

“(3) Transfer gas supplies to other gas suppliers to fulfill gas priority uses of the recipient gas suppliers.”

Since a gas supplier under the current definition is a natural gas utility, the above provision in essence provides that, in order to protect high priority customers in a particular utility service area, the Commission may reallocate gas from the low priority customers of one utility to the high priority customers in another utility. Since this provision for reallocation is limited to the time when an energy emergency declaration or the equivalent is in effect, and exists only among jurisdictional gas utilities, the current rule is well within the Commission's statutory authority and is reasonable. By virtue of changing the definition of "energy supplier" to include CRNGS, suppliers, brokers, aggregators and producers, the Staff proposal alters the above provision [now renumbered as OAC 4901:5-25-06(A) (2) (D) (3)] so as to potentially authorize reallocation of gas supplies from one marketer or supplier to another marketer or supplier both of which may be engaged in commercial activities within Ohio and in interstate commerce. Unlike the broad authority granted the Commission in Chapter 4905 Revised Code to supervise Ohio utilities, there is nothing in Chapter 4929 Revised Code which would authorize the Commission to force a sale by an upstream supplier to another supplier. Further, in the case of a supplier or CRNGS the gas being confiscated for the forced sale will most likely be upstream of the local distribution company in an interstate pipeline or storage field. That raises questions about federal jurisdiction since gas that must be transported across state lines, or is part of a sale for resale, and as such is subject to the jurisdiction of the Federal Energy Regulatory Commission. Finally, a forced sale dictated by the Commission in the midst of a gas shortage could place a burden on interstate commerce, as well as impair existing contracts⁴, both of which are severely limited by the federal Constitution.

⁴ Mobile – Sierra doctrine (United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1986) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956))

Once again it appears that redefining “energy supplier” to be more than a natural gas utility has had unintended consequences. The Commission can accomplish its task by waiting for the gas to reach the jurisdictional utility and then allocating it among or between utilities. That is the extent of the current rule and keeping with the other changes the Staff suggests for subsection 25-06 can be accomplished by changing OAC 4901:1-5-25-06(A)(2)(D) to read:

(D) May, by order, require any [strike Gas Supplier] gas or natural gas company to:

- (1) Reallocate and/or Curtail gas Supplies among its consumers.
- (2) Fulfill Gas Priority Use Requirements For Its Consumers.
- (3) Transfer Gas supplies to other [strike Gas Suppliers] gas or natural gas company to Fulfill Gas Priority use requirements consumers of the recipient gas or natural gas company.
- (4) Monitor consumer compliance with mandatory emergency actions.

As the list clearly indicates, the intent of proposed rule was focused on just the jurisdictional utilities, which is within the Commission’s authority. The suggested amendment should be adopted to maintain the current scope of the rule.

While the Commission’s direct action will be with the gas utilities, the CRNGS and suppliers will be working directly with the utilities via the tariff provisions addressing the Choice and transportation of gas. In other words, upstream supply in a future shortage will be addressed as it is today via the operational and maintenance flow order, Choice program send in orders and balancing and banking provisions of the utility tariffs. In that regard, provisions already exist for cash ins and cash outs should gas be reallocated.

Since the tariff provisions are an essential part of the gas emergency plan, the Commission should order a review of all the gas utilities with transportation plans to ensure that their tariffs match the energy emergency program anticipated by Energy Emergency Rules. One issue in particular that must be addressed in the tariffs is how compensation for gas that has been reallocated will be handled. An example of one such tariff provision is in Addendum to Sheet No. 44 page 7 of 11 of the Duke Energy Ohio Tariff, PUCO Gas No. 18 which states:

Compensation for Gas Utilized by Company

In the event the Company, acting pursuant to regulations or guidelines then in effect of government agencies having jurisdiction over such matters, utilizes natural gas supplies of the Supplier in order to assure gas supply to human needs and public welfare Customers as defined in PUCO Case No. 85-800-GA-C01, the Company will reimburse Supplier for such usage upon the presentation of invoices by Supplier Documenting its delivered cost for such natural gas.

Reference to the 85-800 Guidelines needs to be updated, but Duke's basic concept of having a ready-made formula to pay those customers and suppliers who are having their supplies confiscated at market has two benefits. First, it will make the transaction easier during the shortage as the suppliers will know they will get paid their cost. Second, it will provide an incentive to all customers, be they of high or low priority, to provide for their own supply because relying on emergency supplies could be very expensive.

E. Similarly Situated GCR and Transportation Customers Should Be Treated the Same for Curtailment Purposes.

When the Commission does examine tariff provisions of the jurisdictional utilities to see if they comport with the energy emergency rules, some attention should be focused on the curtailment plans themselves. The OGMG respectfully submits that as a general matter of policy, similarly situated GCR and transportation customers should be treated the same for curtailment purposes. In other words, merely because a consumer transports gas, that consumer should be treated no better or worse than GCR customers in the queue for curtailment.

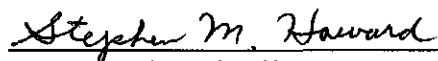
III. CONCLUSION

The Commission should amend its proposed emergency rules in Chapter 4901:1-5-25 of the Ohio Administrative Code. Competitive retail natural gas service providers should not be subject to pre-emergency rules, other than to cooperate with and follow reasonable curtailment plans. Under voluntary curtailment, communications to consumers should be done only by the Commission, Consumers' Counsel and public utilities, not upstream suppliers such as competitive natural gas service providers, aggregators, suppliers or producers.

As part of preparing for an energy emergency, each gas or natural utility should examine its tariff provisions to insure that that they will accommodate the energy emergency plans and that there is a compensation provision for gas that is reallocated. Finally, as a general policy matter, similarly situated GCR and transportation customers should be treated the same for curtailment purposes and the Commission should add a policy statement to that effect.

WHEREFORE, the Ohio Gas Marketers Group respectfully requests that the Commission modify its Rules consistent with these initial comments.

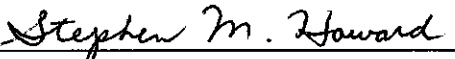
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Initial Comments of the Ohio Gas Marketers Group was served upon the following persons by first class U.S. mail, postage prepaid, or, where indicated, also by electronic mail, this 15th day of December, 2006.


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