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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint against :  
KNG Energy, Inc. by Ohio Intrastate :  
Energy, LLC and Request for :  
Approval for Immediate Substitution :  
of Service and for Approval of :  
Transition Plan. :

Case No. 12-2576-GA-CSS

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MOTION TO DISMISS  
OF  
KNG ENERGY, INC.

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KNG Energy, Inc. ("KNG"), the respondent herein, pursuant to Rules 4901-1-12 and 4901-9-01(C), Ohio Administrative Code, hereby moves for an order dismissing the complaint filed herein on September 20, 2012 by Ohio Intrastate Energy, LLC ("OIE") and denying the request of OIE for approval of an immediate substitution of service and approval of a transition plan for those reasons set forth in the accompanying supporting memorandum.

Respectfully submitted,



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MEMORANDUM IN SUPPORT  
OF  
MOTION TO DISMISS  
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KNG ENERGY, INC.

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I. INTRODUCTION

Although OIE's complaint contains numerous allegations, the essence of the complaint appears to be that KNG is in violation of the Commission's June 29, 2011 finding and order in the Suburban Natural Gas Company ("Suburban") abandonment case, Case No. 08-947-GA-ABN, whereby KNG was authorized to serve certain end-user customers in and around the village of Hoytville ("Hoytville") and along a pipeline between Hoytville and the village of McComb ("McComb") on a temporary basis until such time as OIE was ready to commence service to these customers.<sup>1</sup> Under the terms of the order, KNG and OIE were to submit a joint application for a substitution of service, including a mutually acceptable transition plan, for Commission approval once all necessary arrangements were in place. In its complaint, OIE charges that KNG has refused to cooperate in effectuating the substitution of service, and goes

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<sup>1</sup> *In the Matter of the Application of Suburban Natural Gas Company for Authority to Abandon Service Pursuant to Sections 4905.20 and 4905.21, Revised Code*, PUCO Case No. 08-947-GA-ABN (Opinion and Order dated June 29, 2011).

on to suggest that KNG's failure to do so is anticompetitive and the product of a desire to prevent OIE from initiating service. As a part of its complaint, OIE unilaterally seeks an order authorizing an immediate substitution of service and approving its own version of a transition plan.<sup>2</sup> However, as demonstrated herein, it is OIE, not KNG, that is in violation of the Commission's order in the Suburban abandonment case, and it is OIE, not KNG, that is responsible for the delay in the transfer of customers to OIE service.

As explained herein, the predicament in which OIE now finds itself is entirely of its own making and has resulted from a series of dubious, if not downright reckless, business decisions made without regard to the terms of the comprehensive resolution of the Suburban abandonment case embodied in the joint stipulation and recommendation ("Stipulation")<sup>3</sup> approved by the Commission in that proceeding.<sup>4</sup> By its complaint, OIE now asks the Commission to bail it out from the consequences of these rash decisions, notwithstanding that OIE, which was a party to Case No. 08-947-GA-ABN, did not contest the Stipulation, which was endorsed by every other party to that proceeding and the Commission staff.

In accordance with the Commission-approved Stipulation, KNG stepped up to facilitate the global resolution Suburban required to resolve the case, thereby assuring that no customer would go without service until OIE was in a position to commence operations. Now, well over a year after the Commission order approving the Stipulation, OIE blithely announces that it is ready to commence service, stating that it intends to deliver gas to its customers in and around Hoytville and between Hoytville and McComb over an 8" line now owned and operated by KNG

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<sup>2</sup> See OIE Complaint, 23-24.

<sup>3</sup> Case No. 08-947-GA-ABN (Revised Stipulation dated June 23, 2011).

<sup>4</sup> Case No. 08-947-GA-ABN (Finding and Order dated June 29, 2011, at 11).

(the “KNG Line”)<sup>5</sup> via an interconnection with the Columbia Gas Transmission, LLC (“CGT”) interstate pipeline (the “TCO” pipeline) at the KNG Line’s eastern terminus near North Baltimore, Ohio. The problem, of course, is that the Stipulation approved by the Commission in its order in Case No. 08-947-GA-ABN provided that the KNG Line would be blind-plated at the point of interconnection with the Suburban regulation station at the North Baltimore delivery point<sup>6</sup> and contemplated that this line would thereafter be fed from the west via a KNG delivery point on a Crossroads interstate pipeline (the “Crossroads” pipeline.)<sup>7</sup> KNG, in reliance on the Commission-approved arrangement and at considerable expense, took all steps necessary to establish this pathway and, since July 1, 2011, has continuously delivered gas over this pathway to the customers OIE undertook to serve in and around Hoytville and on the McComb-Hoytville Line, as well as to its own customers on the segment of the KNG Line between Hoytville and North Baltimore.

Knowing full well that the Commission order in Case No. 08-947-GA-ABN required that the KNG Line be blind-plated at its eastern terminus, OIE took the extraordinary step of securing the right to operate the North Baltimore Station,<sup>8</sup> and maintains in its complaint that KNG must now permit OIE to flow gas from this delivery point east over the KNG Line to the Hoytville Lateral so that it can serve its customers, notwithstanding that KNG is delivering gas from the west to its own customers located on the portion of the KNG Line between North Baltimore and

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<sup>5</sup> Prior to its KNG’s acquisition of this line from the village of Deshler, the line was generally known as the “Deshler Line.” Although OIE refers to this line by various designations throughout its complaint, this line will be uniformly be referred to herein as the “KNG Line,” except in contexts that predate its acquisition from Deshler. In those instances, the line will be referred to as the “Deshler Line.”

<sup>6</sup> OIE’s complaint refers to the station at this delivery point as the “Deshler Station,” which, upon information and belief, is consistent with the CGT’s nomenclature. However, because there is now a meter station at the interconnection of the KNG Line and the village of Deshler’s distribution system, to avoid confusion, KNG will refer to the station at the KNG Line’s eastern terminus as the “North Baltimore Station.”

<sup>7</sup> Case No. 08-947-GA-ABN (Revised Stipulation date June 23, 2011, at 12).

<sup>8</sup> See OIE Complaint, 7-8.

Hoytville. Understandably, KNG has refused to transport gas for OIE over what is now a KNG distribution line. However, consistent with the Commission's order, KNG has, at all times, been willing to transport gas for OIE from the KNG delivery point on Crossroads and over its facilities, including the segment of the KNG Line between Deshler and Hoytville, subject to a mutually acceptable transportation agreement and the construction of a metered point of delivery where the Hoytville Lateral leased by OIE connects with the KNG Line.

Although KNG has complied, in all respects, with the Stipulation and the Commission order in Case No. 08-947-GA-ABN, OIE attempts to demonize KNG in a complaint chocked full of falsehoods, half-truths, and incomplete facts. However, despite OIE's efforts to portray it as such, KNG is not the villain here. More importantly, the complaint is based on a flawed legal theory that ignores, among other things, that OIE failed to object to the arrangement contemplated by the Stipulation and the Commission order in that case when it had the opportunity to do so. KNG respectfully submits that the OIE complaint fails to set forth reasonable grounds for complaint, is barred by the principles of promissory and collateral estoppel and laches, represents an untimely application for rehearing from the Commission's order in Case No. 08-947-GA-ABN, and seeks certain relief that the Commission has no authority to grant. Further, OIE's assertion that it has capacity rights on the KNG Line by virtue of a 1959 Deed and Indenture (the "1959 D&I")<sup>9</sup> – the thread upon which its entire complaint hangs – raises an issue this Commission has no jurisdiction to decide. Accordingly, the complaint should be dismissed. We begin with some necessary history.

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<sup>9</sup> A copy of the 1959 D&I is attached to OIE's complaint as Exhibit A.

## II. BACKGROUND

### A. The Suburban Abandonment Case

For half a century, Suburban provided natural gas service to the villages of Deshler, Hamler, Holgate, Hoytville, and Malinta, Ohio (collectively, the “Villages”) through a transmission and distribution system (the “System”) owned by the Villages and leased to Suburban pursuant to separate fifty-year lease agreements between Suburban’s predecessor, Suburban Fuel Gas, Inc., and each of the Villages. Under the 1959 D&I that created the System, each village owned and was responsible for the distribution facilities that served its own geographic area. In addition, the villages at west end of the System (Malinta, Holgate, and Hamler) owned and were responsible for the segment of the System transmission line between that village and the next village, back to Deshler. In addition to its own internal distribution system, Deshler owned and was responsible for the segment of the System transmission line between Deshler and the interconnection with the TCO interstate pipeline at North Baltimore (the “Deshler Line”) from which the entire System was fed. Hoytville, which is located just south of the Deshler Line between Deshler and North Baltimore, was served via a lateral connected to the Deshler Line (The Hoytville Lateral), but, like the other Villages, had no ownership interest in the Deshler Line. At one time, McComb, which was also a party to the 1959 D&I, owned and was responsible for a segment of the System that runs south from Hoytville’s facilities to the north edge McComb (the “McComb-Hoytville Line”), where it was connected to McComb’s internal distribution system.<sup>10</sup>

Originally, McComb was also served by Suburban pursuant to one of the fifty-year lease agreements. However, in the early 1990s, McComb terminated its arrangement with Suburban, established its own municipal utility, disconnected the McComb-Hoytville line at the north edge

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<sup>10</sup> A diagram showing the layout of the System described above is attached as Exhibit C to the OIE complaint.

of the village, and began utilizing a new delivery pathway from the south to feed its internal distribution system.

With the majority of the lease agreements set to expire in 2009,<sup>11</sup> Suburban approached the Villages in an attempt to extend the existing arrangements. However, certain of the Villages declined to enter into new lease agreements with Suburban. Suburban took the position that it could not profitably serve individual portions of the System, which had been designed as an integrated arrangement of distribution and transmission facilities to provide service to all the Villages. Thus, on August 1, 2008, Suburban filed an abandonment application with the Commission in Case No. 80-947-GA-ABN seeking an order relieving it of all public utility obligations with respect to customers served from the System. However, the case languished while the Villages attempted to locate a provider that was willing to step in and operate the System as a whole under a new lease arrangement similar to the previous arrangement with Suburban. After the leases expired, Suburban continued to serve the Villages under an interim arrangement designed to afford the Villages additional time to find another operator. By the spring of 2010, it had become apparent to the Villages that there were no takers for their proposal for a new, Suburban-type lease arrangement. Thus, the Villages collectively determined that each would go its own way in terms of arranging for natural gas service for their residents, and each enacted an ordinance terminating its interests in the 1959 D&I to clear the way for making these new arrangements. Copies of these ordinances are attached hereto as Exhibit A.

Malinta, Holgate, and Hamler ultimately decided to sell their respective distribution and transmission facilities to Ohio Gas Company ("Ohio Gas"), which would then become the natural gas distribution utility serving both their residents and the unincorporated area customers located along their respective transmission lines. Deshler decided to retain its internal

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<sup>11</sup> The Malinta lease was set to expire in 2012.

distribution facilities, to establish its own municipal gas utility, and to contract with KNG to operate and maintain these facilities. KNG owns an 8" high-pressure line that runs from an interconnection with the Crossroads interstate pipeline south to the village of Leipsic. This line crosses the segment of the former east-west System transmission line that Ohio Gas was purchasing from Hamler (the "Hamler Line") at a point just northwest of Deshler. Ohio Gas and KNG entered into discussions that ultimately resulted in an agreement to construct an interconnection at that point to enable Ohio Gas's marketing affiliate to transport gas from Crossroads over this KNG 8" high-pressure line to feed the western portions of the former System that Ohio Gas would acquire from Malinta, Holgate, and Hamler.<sup>12</sup> Part of the consideration for the KNG-Ohio Gas interconnection agreement was that Ohio Gas would convey the portion of the Hamler Line east of the KNG 8" high-pressure line to KNG so as to establish a delivery pathway whereby KNG could transport gas from its Crossroads delivery point to the Deshler municipal utility.<sup>13</sup> Thus, from Deshler's perspective, the Deshler Line was no longer necessary to deliver gas to serve its residents and, accordingly, Deshler put the line up for bid.

Although KNG had reservations regarding acquiring the Deshler Line due to its condition, KNG saw a benefit to having delivery points on two different interstate pipelines. However, early on in the discussions among the parties to the Suburban abandonment case, Suburban asserted that the regulation facilities at the North Baltimore Station were not part of the System, and, thus, were not Deshler's to sell. Not only were the Villages unwilling to devote the resources that would have been required to litigate this issue, but fighting this out in court would

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<sup>12</sup> See *In the Matter of the Joint Application of KNG Energy, Inc. and Ohio Gas Company for Approval of an Interconnection Agreement*, Case No. 11-1115-GA-ATR (Finding and Order dated April 5, 2011).

<sup>13</sup> Under its agreement with Ohio Gas, KNG would also assume responsibility for serving the unincorporated area customers along this segment of the former Hamler Line.



have caused a substantial delay in transitioning the customers from Suburban to the new providers. Moreover, there was no reason to undertake this effort in view of the fact that gas could be delivered to all the affected customers through KNG's delivery point on Crossroads.

Throughout the period its application was pending before the Commission, Suburban insisted that, whatever new arrangements were made by the Villages, Suburban had to be relieved of all its public utility obligations to the former System customers simultaneously. Because there were a number of unincorporated area customers served directly from the Deshler Line, the Commission staff recognized that, to satisfy Suburban's condition, someone would have to agree to serve these customers if the transition from Suburban service was to go forward. Thus, even after it had become clear that Suburban would not give up its interest in the North Baltimore delivery point, KNG, at the urging of the Commission staff, went forward with the acquisition of the Deshler Line in order to produce the global solution Suburban required.

For its part, Hoytville decided to lease its distribution facilities to OIE and to enact a municipal rate ordinance governing the rates OIE could charge for service in the village. In addition, OIE was pursuing the purchase of the McComb-Hoytville Line from McComb. However, while KNG, Ohio Gas, Deshler, Malinta, Holgate, and Hamler were firming up their various arrangements in the spring of 2011, OIE, which was a start-up company with no employees, no assets, no revenues, and no transportation arrangement in place, had not yet secured Commission approval to operate as a natural gas distribution utility.<sup>14</sup>

In an attempt to resolve the Suburban abandonment case, on June 13, 2011, KNG, Ohio Gas, and Deshler filed a motion seeking an order approving a substitution of service based on the

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<sup>14</sup> In 2005, OIE secured authority from the Commission to operate as an intrastate pipeline company. *See In the Matter of the Application of Ohio Intrastate Energy, LLC for Approval of Tariffs and to Become a Pipeline Company /Public Utility*, Case No. 05-468-PL-ATA. However, as a review of its annual reports to the Commission will show, OIE never actually provided any service pursuant to this authority.

arrangements described above. To address the Hoytville and McComb-Hoytville Line situation, the motion proposed that KNG would serve these customers on a temporary basis until OIE was in a position to commence operations. This proposal essentially mimicked the interim arrangements established by the Villages under which Suburban had been providing service since the expiration of the leases, except that KNG would provide the service at its own rates, which were lower than Suburban's rates.

After extensive negotiations with Suburban over the specifics of the transition plan, the arrangements described in the motion, including the blind-plating of the KNG Line at its eastern terminus at the North Baltimore delivery point, became the basis for the Stipulation that was ultimately jointly submitted to the Commission for approval on June 17, 2011 (as revised on June 23, 2011) by Suburban, the Commission staff, KNG, Ohio Gas, and Deshler. As noted above, the Stipulation contemplated that, when OIE was ready to begin serving customers, OIE and KNG would file a joint motion for a substitution of service and a proposed transition plan, and that, upon, Commission approval, KNG would turn the customers over to OIE. OIE, which had intervened in the case, did not contest the Stipulation<sup>15</sup> and stated on the record that it had no objection to the Stipulation when specifically given the opportunity to do so.<sup>16</sup> The Commission approved the Stipulation by its order of June 29, 2011, finding that, because there would be a substitution of service that would result in continuous service to all the former Suburban customers, there would be no abandonment. OIE did not challenge the Commission's order by filing an application for rehearing.

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<sup>15</sup> OIE did file what it styled as a "Reply Memorandum" to the Stipulation, but the matters raised therein related to the terms of the transition plan that would ultimately be submitted as a part of the joint KNG-OIE application for a substitution of service and had nothing to do with the provision of the Stipulation requiring that the connection between KNG Line and the Suburban regulation station at the TCO delivery point at North Baltimore would be blind-plated. *See* Case No. 08-947-GA-ABN (Reply Memorandum of Ohio Intrastate Energy, LLC dated June 21, 2012.)

<sup>16</sup> *See* Case No. 08-947-GA-ABN (June 23, 2011 Hearing Transcript, 7).

In accordance with the Commission's order approving the Stipulation, and with all the necessary construction and legal arrangements completed, on July 1, 2011, Suburban blind-plated the connection at the North Baltimore Station and KNG opened the new interconnection northwest of Deshler. All the former Suburban customers have been fed solely through the KNG delivery point on Crossroads since that date.

B. OIE-KNG Negotiations

Based on discussions among the parties in the Suburban abandonment case, OIE knew as early as March of 2011 that, once KNG acquired the Deshler Line, it intended to feed the line from the west. Thus, it came as a surprise when OIE's president, Scott Rothery, advised KNG's president, Sandra Roller, in an April 24, 2011 email that OIE had no intention of using the proposed interconnection northwest of Deshler as a pathway for delivering gas to serve its customers. From discussions among the parties to the Suburban abandonment case, KNG was aware of OIE's contention that, as Hoytville's assignee, OIE had a perpetual right under the 1959 D&I to transport gas on the pipeline facilities that comprised the former System, including the former Deshler Line. However, this proposition ignored (1) that Hoytville had terminated its interest in the 1959 D&I, (2) that this line would be owned and operated by KNG, (3) that, operationally, the line would be fed from the west rather than from the east as had previously been the case, (4) that KNG would have end-user customers on the segment of the line between Hoytville and North Baltimore, and (5) with the closing of the connection at the North Baltimore Station, KNG would operate the line solely as a distribution line to serve these customers. Thus, although KNG adamantly disagreed with OIE's contention that it had capacity rights on the KNG Line, KNG was confident that, even if, at some point down the road, it were determined that OIE somehow had capacity rights on this line under the 1959 D&I notwithstanding that the

integrated System no longer existed, KNG was confident that any such rights could not trump KNG's exclusive authority, as the owner of the KNG Line, to manage and operate the line in a manner consistent with the arrangements then being discussed. KNG had always assumed that OIE would utilize KNG's facilities, including the segment of the former Deshler Line between Deshler and Hoytville, to deliver gas to deliver Hoytville Lateral from the west. Thus, although KNG disagreed with OIE's argument that OIE had a right to capacity on the Deshler Line under the 1959 D&I, from KNG's perspective, the argument, as a practical matter, was moot because there would no longer be a delivery point at North Baltimore and because KNG was more than willing to permit OIE could transport gas on the segment of the former Deshler Line between Deshler and the Hoytville Lateral.

On April 25, 2011, Mr. Rothey sent a second email to Ms. Roller stating that that he was "still working on a gate," which "may be a new one" or "we may attempt to work out with Suburban temporary use of the one they think they own." At the time, KNG had no idea what Mr. Rothey meant by a "new" gate, because even if OIE were to obtain access to a delivery point on an interstate pipeline, OIE would still have had to install, at minimum, over eight miles of pipe to bring the gas to Hoytville – a measure that could not possibly be cost-justified based on the fact that there were only some 140 customers in and around Hoytville and on the McComb-Hoytville Line. KNG was also confused by the reference to the use of the Suburban gate, because, under the substitution of service arrangement then under discussion, the connection to the Suburban regulation station at North Baltimore would be closed. According to an OIE filing in the Suburban abandonment case, OIE did submit a gate access request to Suburban to transport via the North Baltimore Station at the delivery point on TCO, but, as OIE should have

anticipated, Suburban summarily denied this application as being contrary to the arrangement under which the connection to the regulator station would be blind-plated.<sup>17</sup>

On May 27, 2011, after OIE finally recognized that no other pipeline in the area would provide it with an interconnection and that North Baltimore delivery point was not an option under the proposed arrangement that was ultimately embodied in the Stipulation, OIE requested a proposal from KNG to provide transportation service using the new interconnection northwest of Deshler as a delivery pathway.<sup>18</sup> In response, on June 9, 2011, KNG forwarded its standard application for transportation service, which specified the information KNG required.<sup>19</sup> Citing the concern that KNG would have minimal incentive to proceed with the joint KNG-OIE substitution of service application, the OIE filing in the Suburban abandonment case criticized KNG for the “delay” in forwarding an application and requested that a fixed timeline be established for entering into the transportation agreement providing for service over this route.<sup>20</sup> Thus, there can be no question that OIE fully understood and accepted that the Stipulation approved by the Commission contemplated that KNG Line would be fed from the west when it indicated that it did not object to the Stipulation and when it chose not to file for rehearing from the Commission’s order.

OIE submitted its application for transportation service to KNG on June 12, 2011. The application was for firm transportation service for 200 Dth per day, with the delivery point to be

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<sup>17</sup> See Case No. 08-947-GA-ABN (Reply Memorandum of Ohio Intrastate Energy, LLC dated June 15, 2011, at 2).

<sup>18</sup> *Id.* Although the request referred to this interconnection as the “Ohio Gas-KNG Energy interconnect,” there is actually a separate connection on the KNG 8” high-pressure line adjacent to the Ohio Gas interconnection that connects this line to the segment of the former Hamler line conveyed to KNG by Ohio Gas as a part of their interconnection agreement.

<sup>19</sup> *Id.*

<sup>20</sup> See Case No. 08-947-GA-ABN (Reply Memorandum of Ohio Intrastate Energy dated June 15, 2011, at 3-4).

the “Hoytville Delivery Meter.” Notwithstanding that OIE had yet to receive authority from the Commission to operate as a natural gas public utility,<sup>21</sup> on July 27, 2011, KNG tendered a proposed transportation agreement to OIE based on the requirements stated in OIE’s application. Because there was no metered delivery point where the Hoytville Lateral met the KNG Line (*i.e.*, no “Hoytville Delivery Meter”), KNG also tendered a standard interconnection agreement providing that KNG would construct the metered delivery point at OIE’s cost. Negotiations commenced with OIE’s August 17, 2011 response to the proposed agreements. Based on emails subsequently exchanged between counsel for the respective parties, it was KNG’s understanding that, basically, the only significant issues in dispute related to the pricing for transportation service and, with respect to the interconnection agreement, which company would install and own the meter station.<sup>22</sup>

On October 12, 2011, long after negotiations over the terms of these agreements had commenced, OIE’s attorney sent undersigned counsel for KNG a letter stating that OIE had concluded that the “economics of the construction and ownership of this delivery point render it infeasible for OIE.” The letter indicated that, instead, OIE had decided to invest in an interconnection with NiSource and to lay the pipe necessary to bring gas from such interconnection to serve its customers. On its face, this made no sense. If OIE could not justify the cost of an interconnection with the KNG Line, how could it conceivably conclude that it

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<sup>21</sup> OIE did not obtain such authority until October of 2011. See *In the Matter of the Application of Ohio Intrastate Energy, LLC for Authority to Operate As a Natural Gas Company And for Approval of its Tariff for Retail Sales in Unincorporated Areas Not Served Pursuant to Ordinance Rates*, Case No. 11-3171-GA-UNC (Finding and Order dated October 3, 2011). Although the caption curiously referred to the approval of a tariff for “Retail Sales,” the application actually sought authority to operate as a local natural gas distribution company, with service to be provided at the bundled rate OIE was authorized to charge within the village of Hoytville pursuant to a Hoytville rate ordinance.

<sup>22</sup> There was no question that OIE would pay for the meter station, regardless of which company would own it.

would be economically feasible to establish an interconnection on a NiSource pipeline<sup>23</sup> and to install the eight-plus miles of pipe necessary to get the gas from such an interconnection to Hoytville? It turns out that, once again, OIE was going off half-cocked.

As KNG subsequently learned during a meeting with OIE representatives and Commission staff in early November 2011, Mr. Rothey had apparently had a conversation with NiSource regarding the plans for addressing the transportation requirements of customers, like KNG, that were currently served via the Crossroads interconnection as a condition of a then-proposed Crossroads abandonment.<sup>24</sup> One of the options under consideration was for NiSource to install a new 8" line in the right-of-way of the KNG Line so that, when Crossroads was no longer available as a delivery point, gas could be delivered from the east from the TCO Pipeline.<sup>25</sup> KNG does not know what NiSource may have told Mr. Rothey, but he was under the mistaken impression that under this option, NiSource, rather than KNG, would own and operate this line. Thus, the "NiSource interconnection" to which the letter referred was an interconnection on the hypothetical new 8" line at Hoytville, which, had it been installed, would have been owned and operated by KNG in any event.

At this same meeting, OIE went on to argue that, because the KNG Line and the Hoytville Lateral were already physically connected, KNG should not require the installation of a meter station and should simply permit OIE to pay for transportation service based on the total consumption registered on the individual meters of its end-user customers. Obviously, this

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<sup>23</sup> CGT, which is now the owner of the TCO Pipeline that formerly was interconnected with the Deshler Line at the North Baltimore Station, is a subsidiary of NiSource. Crossroads is also a NiSource subsidiary.

<sup>24</sup> At the time, NiSource was involved in negotiating a deal under which Crossroads would be used to transmit liquid petroleum products rather than natural gas.

<sup>25</sup> A new line would have been required because the existing KNG Line could not be operated at the pressure necessary to serve the requirements of a KNG customer currently served from the KNG high-pressure line off Crossroads.

approach, which would have required some sort of meter registration auditing process on KNG's part, was not acceptable to KNG due to nominations and balancing concerns, not to mention the prospect that there could be considerable unaccounted for gas as a result of condition of OIE's lines. The Commission staff agreed that this would not be appropriate and that a meter station that would isolate the facilities of the two parties would be required in accordance with standard industry practice. However, in an effort to keep the discussions moving, the Commission staff urged KNG to sharpen its pencil and provide a new proposal for transportation service, notwithstanding that KNG's initial proposal contained pricing below its tariffed transportation rates.

KNG tendered a new transportation proposal to OIE in mid-November, but heard nothing further from OIE until January 23, 2012, when KNG received an email from OIE's attorney advising that NiSource was reactivating the North Baltimore delivery point and had entered into an agreement with OIE under which OIE would operate the station. Again, KNG did not know what to make of this because even if OIE had rights to transport over the KNG Line under the 1959 D&I – a proposition KNG rejects – this would not change the fact that Commission's order in the Suburban abandonment case required that the connection with the KNG Line at the North Baltimore Station be closed, an outcome that had nothing whatever to do with the identity of the operator of the North Baltimore Station. Thus, it appeared to KNG that, whatever was going on with the North Baltimore Station, it might well be another product of the leap-before-you look mentality of OIE, the same company that had undertaken the obligation to serve customers a year earlier with no plan in place for delivering gas to them, and the same company that had established a bundled rate for its service with no idea what it would cost to provide the service. Subsequent developments showed that this was, indeed, the case.



C. The Suburban-OIE-CGT Litigation

In Paragraph 15 of its complaint, OIE acknowledges that Suburban filed suit in the Wood County Court of Common Pleas over OIE's claim of ownership of the regulator station at the North Baltimore delivery point, but states that the litigation was resolved by a settlement agreement entered into by Suburban, OIE, and CGT, which was also a named defendant. OIE asserts that, due to the confidential nature of the settlement, it cannot disclose any details of the terms that led to an agreed dismissal of all claims with prejudice, but goes on to state that Suburban no longer claims any interest in the station. However, the public record in the case provides some pertinent information that again illustrates OIE's penchant for impetuous decision making.

The case – Wood County Court of Common Pleas Case No. 2012CV0150 – was initiated by a complaint filed by Suburban against OIE and CGT on February 24, 2012 charging the defendants with, among other things, intentional trespass and wrongful conversion. In the complaint, Suburban asserted that it was the owner of the regulator station at the North Baltimore delivery point, having purchased said station from CGT's predecessor, Columbia Gas Transmission Corporation, pursuant to a contract and bill of sale dated February 20, 2001, a copy of which was appended to the complaint. The complaint alleged that one or more of the defendants entered its regulator station on or about February 16, 2012 and, without notice or permission, removed Suburban's blind plates and the associated property that isolated the KNG Line, installed its own regulation runs, and connected the runs to valves owned by Suburban. The complaint further alleged that, after Suburban had removed the regulation runs and reinstalled the blind plates, one or more of the defendants reentered the station on or about February 20, 2012 and again removed the blind plates and reinstalled its own runs.

On March 19, 2012, the court issued a Judgment Entry and Order on Preliminary Injunction continuing the terms of the Temporary Restraining Orders previously issued by court to preserve the status quo at the station during the pendency of the action. The uncontroverted evidence adduced at the preliminary hearing established that OIE was, in fact, the party that had removed Suburban's property at the station, installed the regulation runs, and reinstalled the runs after they were removed by Suburban, again removing the blind plates that isolated the KNG Line from the regulation facilities.<sup>26</sup> In its entry, the court went on to find that Suburban had presented evidence establishing proper title to the regulator station and, thus, had a likelihood of success on the merits.

OIE fails to mention any of this in its complaint, preferring to create the impression that, in agreeing to a dismissal of the complaint with prejudice, Suburban simply threw in the towel. Although OIE may not be permitted to disclose the terms of the settlement, the Commission can be fairly confident that, Suburban, which was on the brink of a victory on the merits, did not walk away empty-handed as a result of OIE's precipitous conduct. Moreover, there are some other facets of the Wood County case that KNG would bring to the Commission's attention as symptomatic of OIE's shoot-from-the-hip philosophy.

On March 30, 2012, OIE filed a third-party complaint against KNG in the Suburban action seeking, among other things, a declaratory judgment interpreting the 1959 D&I and KNG's authority to impose a charge on OIE for transportation on the KNG Line. KNG filed a motion to dismiss on April 13, 2012. In its motion, KNG argued that OIE's complaint was not authorized by civil rule governing third-party complaints, noting that, although OIE's filing contained a host of ill-founded allegations against KNG, the question of whether OIE had an

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<sup>26</sup> Indeed, OIE admitted this in its answer to the complaint and in its answer to an amended complaint Suburban filed after it had been established the OIE was the culprit.

unfettered right to transport gas on the KNG Line was totally separate from the central issue raised by the Suburban complaint, which was who, as between Suburban and OIE, owned the regulator station in question. On April 26, 2012, OIE, after putting KNG to the expense of preparing the motion to dismiss and sending its attorneys to the pretrial conference, and after prevailing upon the court to accord it time to respond, filed a notice of voluntary dismissal of its third-party complaint.

Undeterred in its effort to drag KNG into the proceeding, OIE, on that same date, filed an equally meritless motion to join KNG as a necessary party. KNG filed a memorandum contra on May 3, 2012, in which it again made the point that the issue regarding any rights OIE might have downstream of the North Baltimore delivery point had nothing to do with the issue raised by the Suburban complaint, which was who now owns the regulator station. As KNG admonished OIE when it learned that OIE had removed the blind plates, connecting the piping at the regulator station to the KNG Line constituted a trespass on KNG's property regardless of who owned the regulator station. This led OIE to suggest in its joinder motion that, if the issue of its downstream rights were not adjudicated in the case, it could be faced with "inconsistent obligations." KNG readily agreed that it was, indeed, possible that OIE could prevail on its claim of ownership of the regulator station but ultimately wind up in a situation in which the station turned out to be to be a classic example of a bridge to nowhere. However, as KNG observed, this dilemma would be a product of OIE's decision to attempt to acquire this station as a conduit for delivering gas to customers it had previously undertaken to serve, even though it knew full well that the comprehensive, multi-party arrangement approved by the Commission in the Suburban abandonment case required the connection to the KNG Line at the outlet valves of the North Baltimore Station to be closed. The court agreed, finding in its order of May 14, 2012

that OIE's motion to join KNG as a necessary party was not well taken and should be denied. A copy of the court's order is attached hereto as Exhibit B.

Having taken the extraordinary gamble of acquiring the right to operate the station in the face of the Commission's order in Case No. 08-947-GA-ABN and without any prior discussions with KNG, OIE now continues to roll the dice by hauling KNG before the Commission, claiming that that KNG has unreasonably refused to permit it to transport gas from this station to the Hoytville Lateral over the KNG Line. Plainly, the mere fact that CGT has entered into an agreement with OIE authorizing OIE to operate the North Baltimore Station does not confer any rights upon OIE with respect to facilities downstream of the station. CGT could only confer those rights on OIE that CGT had to give. CGT has no right to dictate the terms of transportation arrangements downstream of an interconnection and no right to compel an Ohio public utility to connect to one of its delivery points. Thus, the fact that OIE may now be the operator of the North Baltimore Station as a result of the settlement of the Suburban-OIE-CGT litigation is irrelevant. Further, because OIE's interest in the station derives solely from the transaction with CGT, OIE holds this interest as a Section 4905.03(F), Revised Code, pipeline company, irrespective of its claim that it has transportation rights on the KNG Line under the 1959 D&I.

In any event, the removal of the blind plates and the reconnection of the KNG Line to the North Baltimore regulation station required Commission approval under Section 4905.48, Revised Code. However, consistent with its typical modus operandi, OIE did not even bother to contact KNG to discuss its plan to deliver gas from the North Baltimore delivery point over the KNG Line prior to connecting its facilities to those of KNG, let alone secure KNG's agreement to participate in the required joint application to the Commission to obtain authority to reconnect the KNG Line to the station.

Notwithstanding that KNG's rejection of the delivery arrangement proposed by OIE is entirely consistent with the Stipulation and the Commission's order in the Suburban abandonment case and is in no way inconsistent with OIE's newfound right to operate the North Baltimore Station, OIE characterizes KNG's rejection of this arrangement as anticompetitive and the product of a desire to prevent OIE from commencing service. As a part of its continuing effort to vilify KNG, OIE then goes on to cite several other supposed examples of anticompetitive conduct and lack of good faith on the part of KNG. These allegations are totally unfounded and, in fact, say more about OIE than KNG. Although, technically, KNG is not required to respond to these allegations at this time other than through its answer, KNG cannot let these charges pass without comment.

### III. RESPONSE TO THE OIE ALLEGATIONS

#### A. KNG Has Complied with the Commission's Order in the Suburban Abandonment Case and Is Not Responsible for OIE's Failure to Commence Service to the Customers It Has Undertaken to Serve.

In Paragraph 7 of its complaint, OIE sets out an excerpt from the Commission's order in the Suburban abandonment case that discusses the representations contained in the affidavit of Ms. Roller that was submitted as an exhibit at hearing in that proceeding.<sup>27</sup> In that affidavit, Ms. Roller affirmed that KNG understood that it had the obligation to serve customers in and around Hoytville and along the McComb-Hoytville Line until it was relieved of that obligation by a subsequent Commission order approving a joint application to be filed by KNG and OIE for a substitution of service once OIE was authorized and ready to commence service. Ms. Roller also warranted that KNG would enter into good faith discussions with OIE regarding the terms and pricing of transportation service and would cooperate in developing a mutually acceptable

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<sup>27</sup> See OIE Complaint, 4.

transition plan. In Paragraph 8 of its complaint, OIE charges that “in contradiction of this undertaking, KNG has instead engaged in a pattern of conduct designed to prevent OIE from initiating service,” and contends that KNG has insisted “on unreasonable terms and conditions in refusing to proceed with good faith negotiations” to effectuate the transfer of service.<sup>28</sup> These allegations are so outrageous that one barely knows where to begin.

First, KNG has always been willing to negotiate the terms of a transportation service over the pathway contemplated by Commission-approved Stipulation and, in fact, engaged in such negotiations with OIE in the fall of 2011. KNG offered to provide transportation service over this pathway at a price lower than its tariffed transportation rate. Further, KNG made this offer months before OIE had secured Commission approval to operate as a public utility in the hope that the substitution of service could be effectuated before the 2011 heating season. And, while KNG did insist that a meter station isolating the KNG Line from the OIE facilities be installed at the point of interconnection of the Hoytville Lateral and the KNG Line, this standard industry requirement can certainly not be construed as an unreasonable or anticompetitive condition. Moreover, although OIE alleges that KNG’s estimated cost of the meter station was excessive,<sup>29</sup> KNG’s proposal specifically provided that there would be a true-up so that OIE would ultimately pay only the actual cost of installation. As previously noted, it was OIE that pulled the plug on those negotiations in October of 2011, professing that the “economics of the construction and ownership of this delivery point render it infeasible for OIE.” With all due respect, KNG would suggest that the economics of the situation was something OIE should have considered before it

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<sup>28</sup> See OIE Complaint, 4-5.

<sup>29</sup> See OIE Complaint, 17.

undertook to serve the 140 customers<sup>30</sup> in and around Hoytville and on the McComb-Hoytville Line. That OIE ultimately concluded that the numbers would not work cannot be laid at KNG's doorstep.

Second, as previously discussed, KNG had to explain to OIE at the November 2011 meeting with the Commission staff that its new plan to construct an interconnection with a line that might be installed by NiSource in the right-of-way of the KNG Line as a possible condition of a Crossroads abandonment was based on the erroneous assumption that NiSource would own and operate this line. It was certainly not KNG's fault that OIE chose to put its eggs in a non-existent basket. Moreover, after that meeting, KNG, at the Commission staff's urging, reworked the transportation agreement it had previously proposed to provide an even lower price for transportation service in an attempt to rekindle the negotiations. OIE never responded to this proposal. How any of this could be construed as evidence of a pattern of conduct on KNG's part designed to prevent OIE from initiating service escapes us.

Third, early on in the negotiations, OIE offered a proposed transition plan for KNG's consideration. KNG, which had previously indicated that it anticipated a transition plan along the lines of the transition plan approved in the Suburban abandonment case, provided some comments on the OIE proposal, but indicated that it would address the transition plan in more detail once the transportation service issues were resolved. Again, this is certainly not evidence of a pattern of conduct designed to prevent OIE from initiating service. KNG was simply putting first things first and assumed that there would be ample time to make any necessary tweaks to the Suburban template once the transportation issues were ironed out and construction of the meter station commenced.

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<sup>30</sup> There are now only 124 such customers, and, of these, only 108 represent active accounts.

Finally, KNG had absolutely nothing to do with the fact that OIE was not in a position to initiate service between the time OIE broke off negotiations in October of 2011 and August of 2012. This delay was entirely of OIE's own making, having first elected to pursue an interconnection with a non-existent NiSource line, followed by becoming entangled in the litigation it touched off when it decided to pursue the right to the operate the North Baltimore Station and removed Suburban's property without Suburban's consent.

That said, it is true that KNG did reject OIE's August 2012 proposal to use the segment of the KNG Line between the North Baltimore station and Hoytville as a pathway to deliver gas to the end-user customers undertook to serve back in early 2011. However, not only does KNG's rejection of this proposal not constitute a "pattern of conduct" of any sort, but, as explained in the email to OIE counsel,<sup>31</sup> this proposal was totally inconsistent with the Commission's order in the Suburban abandonment case, which provided that the connection at the North Baltimore station would be blind-plated and that the KNG Line would be fed from the west. There is nothing unreasonable or anticompetitive about KNG rejecting a proposal that was not in keeping with the Commission's order – an order KNG had relied on order in finalizing the arrangements necessary to comply with the obligations it imposed. Further, as explained above, not only did OIE's new status as the operator of the North Baltimore Station not give OIE the right to deliver gas into the KNG Line, but the identity of station's operator had nothing to do with the requirement that the connection with the KNG Line be closed.

Although acknowledging that the Stipulation in Case No. 08-947-GA-ABN required that the connection of the KNG Line to the North Baltimore station be blind-plated, OIE contends that the Commission's approval of the Stipulation did not mean that deliveries could never be

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<sup>31</sup> See OIE Complaint, 9.



reinstated over this pathway at some point in the future.<sup>32</sup> KNG agrees. However, this does not mean, as OIE would have it, that one public utility can dictate to another how to operate its facilities, as evidenced by the requirement of Section 4905.48, Revised Code, that utilities that wish to connect their facilities file a joint application with the Commission for approval of an agreement to do so. Thus, although KNG could voluntarily consent to join with OIE in seeking Commission approval of the connection requested by OIE, that is a decision that is entirely within the discretion of KNG.

B. KNG's Rejection of OIE's Proposal Is Not the Product of a Desire to Prevent OIE from Commencing Service.

KNG, as a matter of business judgment, determined that it does not wish to allow OIE to deliver gas into the KNG Line from the east by connecting the KNG Line to the North Baltimore Station, a measure that would give OIE control over a segment of the line from which KNG serves its own customers. OIE claims that this connection would benefit KNG by providing it access to the TCO interstate pipeline, which would allow it to obtain gas that OIE alleges is currently priced lower than the gas delivered over Crossroads.<sup>33</sup> OIE also asserts that KNG would realize transportation revenues under its plan to use the KNG Line, the Hoytville Lateral, and the McComb-Hoytville Line to create a path to deliver gas to the McComb municipal utility, which is currently supplied by KNG from the south, and to Hearthside, a major KNG customer located at the west edge of McComb.<sup>34</sup> Emphasizing its willingness to provide access to the

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<sup>32</sup> See OIE Complaint, 12.

<sup>33</sup> See OIE Complaint, 5-6. The fact is that OIE's comparison of the cost of gas off TCO and Crossroads ignores other factors that contribute to the all-in cost of gas from these sources and, when these factors are considered, the Crossroads option is the more favorable of the two. Further, these gas costs fluctuate daily, and neither OIE nor KNG has any way of knowing which option will be the more favorable at any particular time in the future.

<sup>34</sup> See OIE Complaint, 14-15.

North Baltimore delivery point at no charge to KNG, OIE maintains that KNG's refusal to consent to the connection is unreasonable in view of these purported benefits, and that, therefore, KNG's refusal must be motivated by a desire to block OIE from "market entry."<sup>35</sup> Indeed, OIE even goes so far as to suggest that forcing OIE to utilize the KNG delivery point on Crossroads is the product of KNG's desire to obtain "essential information about OIE's loads, customers, and load factors."<sup>36</sup> Several points bear mention.

First, as discussed above, KNG is under no legal obligation to permit OIE to connect the KNG Line to the outlet valves at the North Baltimore Station. Not only does Section 4905.48, Revised Code, require utilities to mutually agree to a connection of their facilities, but the Commission's order in the Suburban abandonment case required the former connection of the KNG Line to the North Baltimore regulator station to be blind-plated. Thus, KNG's refusal to permit the connection is not subject to a reasonableness test.

Second, even if, contrary to fact, KNG's refusal were subject to some sort of reasonableness test, as framed in the complaint, what the Commission now has before it is essentially a request by OIE that the Commission determine that OIE's business judgment is superior to that of KNG in terms of what is good for KNG and its customers. This Commission has no authority to manage public utilities or to make business decisions on their behalf. Rather, the Commission's role is to assure that utilities operate in accordance with all applicable statutes, Commission rules, and Commission orders. Despite its groundless charge that KNG has engaged in a pattern of conduct designed to prevent OIE from instituting service to its customers,

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<sup>35</sup> See OIE Complaint, 14. OIE uses the term "market entry" without identifying the "market" to which it refers. To the extent OIE means the customers in and around Hoytville and along the McComb-Hoytville Line that OIE will serve in its capacity as a local distribution company ("LDC"), this is not a market that will ever be subject to competition because, to serve these customers, another LDC would have to replicate the lines leased or owned by OIE, a measure that could never be cost-justified in view of the miniscule load involved.

<sup>36</sup> *Id.*

there is no allegation in the complaint that KNG has violated any statute or Commission rule. Further, the only violation of a Commission order alleged in the complaint is the accusation that KNG has not fulfilled the commitments contained in the affidavit of Ms. Roller to discuss, in good faith, the terms and pricing under which KNG would provide transportation service to OIE and to cooperate with OIE in developing a mutually acceptable transition plan. KNG agrees that, at least by implication, these commitments were a term of the order approving the substitution of service in Case No. 08-947-GA-ABN. However, by definition, the commitment to discuss the terms and pricing for transportation service related to transportation service over KNG facilities off Crossroads, because that was the only delivery pathway that would be available once the connection of the KNG Line to the TCO delivery point was closed pursuant to the Commission-approved Stipulation. KNG certainly did not commit to negotiate terms governing the use of a delivery pathway that is unacceptable from its standpoint, and, thus, its rejection of OIE's proposal cannot conceivably be construed as a violation of the Commission's order in Case No. 08-947-GA-ABN, regardless of OIE's opinion that the arrangement it has proposed represents a good deal for KNG. KNG has discussed with OIE, in good faith, terms and pricing for transportation service over the routed contemplated by the Commission's order, which is all it was required to do, and KNG remains willing to continue those discussions.

Third, although KNG is under no obligation to defend its business judgment regarding the reasonableness and efficacy of OIE's proposal to deliver gas into the KNG Line from the east, KNG would offer the following observations in response to OIE's allegation that KNG's refusal to agree to this arrangement must necessarily be a product of a desire to prevent OIE from serving customers. As the following discussion demonstrates, there are sound reasons

KNG has refused to agree to the arrangement proposed by OIE. OIE simply does not understand the realities of the situation.

OIE makes much of the fact that, in the joint motion for a substitution of service that led to the Stipulation in Case No. 08-947-GA-ABN, KNG expressly acknowledged in a footnote that “access to two interstate pipelines (Crossroads and TCO) would be a significant benefit to KNG and ultimately all the affected customers, because it would increase supply options.”<sup>37</sup> Although no one would disagree with this statement as a general proposition, it is important that the Commission understand the context in which it was made. As a review of the paragraph in the body of the document will show, KNG was describing the considerations that went into its decision to acquire the Deshler Line.<sup>38</sup> The footnote explained that, although access to TCO through the North Baltimore Station would have been a plus, Suburban maintained that the station was not part of the System and that Suburban owned the station. This meant that Suburban, not KNG, would operate the delivery point, which was not acceptable to KNG. In other words, although access to TCO would have been desirable from KNG’s perspective, having Suburban in charge of the delivery point was not. Thus, there is no inconsistency between the language from the footnote cited by OIE and KNG’s position here. KNG has customers on the segment of the KNG Line between North Baltimore and Hoytville and needs to be able to control the flows on this segment so as to limit the flows to the scheduled volumes, and also needs to control the pressure on this segment. KNG cannot do that if OIE is operating the delivery point and is delivering gas into the line from the east.

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<sup>37</sup> See OIE Complaint, 13; Case No. 08-947-GA-ABN (Memorandum in Support of Joint Motion of KNG Energy, Inc., Ohio Gas Company, and the Village of Deshler, Ohio for an Order Approving a Substitution of Service dated June 13, 2011, at 7, n. 20). The page number in the citation in the OIE complaint is incorrect.

<sup>38</sup> See Case No. 08-947-GA-ABN (Memorandum in Support of Joint Motion dated June 13, 2011, at 7).

OIE also cites certain language from KNG's memorandum in support of its motion to intervene in Case No. 08-947-GA-ABN in an attempt to show that KNG's rejection of OIE's proposal is inconsistent with the position KNG has previously taken with respect to the benefits of multiple delivery points.<sup>39</sup> Again, OIE is wide of the mark.

As described in the KNG memorandum in question, with their Suburban leases nearing expiration, Deshler and Holgate approached KNG regarding the possibility of obtaining service from KNG via the KNG high-pressure line that runs from the KNG delivery point on Crossroads to the village of Leipsic. KNG indicated to both villages that it was willing to discuss a possible arrangement, but, as OIE correctly reports in its complaint, KNG "cautioned that an agreement would have to be reached with Suburban regarding the monthly balancing issues that would arise if both Suburban and KNG were introducing gas into the System."<sup>40</sup> KNG recognized that this issue could be avoided in the case of Deshler by installing a direct connection between the KNG high-pressure line and Deshler's internal distribution system, which was only stone's throw away. However, the Holgate situation was problematic because the Holgate distribution system was some eleven miles from the KNG high-pressure line, and, with the small number of customers involved, constructing a line to connect the two was not cost-justified. Thus, the only feasible way to serve Holgate would be to utilize the existing System transmission line by establishing an interconnection at the point where the KNG high-pressure line crossed the segment of the System transmission line between Hamler and Deshler. As indicated in its memorandum, KNG thought that Suburban might be receptive to such an arrangement because "KNG believed that, under these circumstances, it would be to Suburban's advantage to permit

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<sup>39</sup> See OIE Complaint, 10-11, citing Case No. 08-947-GA-ABN (KNG Energy, Inc. Memorandum in Support of Motion to Intervene dated August 21, 2008).

<sup>40</sup> *Id.* At the time, it was KNG's understanding that Hamler and Malinta had already entered into new lease arrangements with Suburban.

the interconnection so as to provide it with an additional delivery point and thereby increase the supply options available to the villages it would continue to serve.” This is the language OIE seizes upon in an attempt to show that KNG’s refusal to permit OIE to utilize the North Baltimore delivery point to deliver gas to its customers is unreasonable and is motivated solely by KNG’s desire to prevent OIE from initiating service. However, the two situations are not at all parallel.

Under the arrangement hypothesized by KNG in its discussions with Hoytville, Suburban would have continued to control all the flows on the System, thereby benefitting from access to two delivery points without compromising its ability to manage the System. Under this scenario, an agreement with Suburban would have been necessary to address the monthly balancing issues that would have resulted if KNG delivered gas to serve Hoytville through a metered interconnection on the KNG high-pressure line, but all gas would have flowed through the same delivery point. On the other hand, OIE wants to deliver gas from the east into a line owned by KNG that KNG feeds from the west to provide service to its own customers located on the line. Under OIE’s proposal, KNG would no longer be able to control the flows or pressure on its line. Thus, OIE’s reliance on the statement in KNG’s memorandum is misplaced.<sup>41</sup>

OIE goes on to claim in Paragraph 26 of the complaint that reactivating the delivery station at North Baltimore “provides KNG, OIE, Ohio Gas and the Deshler Municipal Gas Utility and their existing and prospective customers with precisely the increased supply options

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<sup>41</sup> OIE also cites this KNG memorandum for the proposition advanced in various places in its complaint that KNG has acknowledged that OIE has capacity rights on the KNG Line. However, it must be remembered that this memorandum was filed in 2008, which was before the Villages terminated their interests in the 1959 D&I and before the order in the Suburban abandonment case. Thus, any assertion that KNG now acknowledges that OIE has capacity rights on the KNG Line by virtue of the 1959 D&I is absolutely incorrect.

KNG acknowledged in its pleadings in the abandonment case.”<sup>42</sup> This statement is also inaccurate in several respects.

KNG cannot deliver gas into the KNG high-pressure line off Crossroads from the east because the MAOP on the KNG Line and the segment of the former Hamler Line between the KNG high-pressure line and Deshler that KNG now owns is well below the pressure at which the KNG high-pressure line is operated to meet the requirements of a large KNG customer at the southern terminus of the KNG high-pressure line. As previously noted, the Ohio Gas interconnection to the KNG high-pressure line northwest of Deshler is south of the interconnection to the KNG high-pressure line that KNG utilizes to feed the KNG Line. Although there is a bypass at this interconnection,<sup>43</sup> which if opened, would allow gas to be delivered into Ohio Gas’s facilities from the east via the North Baltimore delivery point on TCO, the KNG Line, and the segment of the former Hamler Line KNG acquired from Ohio Gas, a new meter station – that someone would have to pay for – would be required to make this arrangement work. Further, Ohio Gas and its affiliate have no existing capacity arrangements with CGT, but have existing capacity arrangements with Crossroads, which, upon information and belief, is one of the reasons Ohio Gas entered into the interconnection agreement with KNG (*i.e.*, to be able to access Crossroads via the KNG high-pressure line, thereby avoiding having to enter into an arrangement with CGT for deliveries via TCO that could not be cost-justified in view of the number of customers involved). Thus, contrary to OIE’s statement, connecting the KNG Line to the North Baltimore station would not provide either KNG’s large customer at

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<sup>42</sup> OIE Complaint, 13.

<sup>43</sup> This bypass was constructed to accommodate service from Suburban while the interconnection was being constructed.

Leipsic with an additional supply option, nor would it provide Ohio Gas with an option that Ohio Gas has any interest in pursuing.

Although reconnecting the KNG Line to the North Baltimore Station would provide KNG and the Deshler municipal utility supplied by KNG with an additional supply option, it would require KNG to surrender control of the flows and pressure on the segment of the KNG Line between North Baltimore and Hoytville, which KNG currently feeds from the west to serve its customers on that segment. Thus, this is not a desirable supply option from KNG's perspective. Further, the pathway that OIE seeks to create to transport gas to the McComb municipal utility would not create a supply option for Hearthside, the large customer at the west edge of McComb currently supplied by KNG from the south, because pressure constraints on the McComb-Hoytville line would degrade the pressure on the final leg of this path to a level insufficient to meet Hearthside's requirements.

C. OIE Is Not Subsidizing the Temporary Service KNG Is Providing to Customers in and around Hoytville and along the McComb-Hoytville Line.

OIE also complains that "KNG has had a 'free ride' on the OIE system for almost a year without any compensation to OIE,"<sup>44</sup> noting that OIE has paid almost \$10,000 to insure its pipeline and that another premium will be due in October 2012.<sup>45</sup> The notion that KNG had a profit motive in agreeing to provide the service it has provided on a temporary basis pursuant to the Commission's order in Case No. 08-947-GA-ABN and that OIE has somehow "heavily subsidized"<sup>46</sup> this service is absurd. Not only has KNG absorbed substantial costs that would

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<sup>44</sup> OIE Complaint, 14. KNG does not understand the "almost a year" reference, as KNG has been providing this service continuously since July 1, 2011.

<sup>45</sup> See OIE Complaint, 15.

<sup>46</sup> See OIE Complaint, 16.



have been incurred by OIE had OIE been providing the service to this tiny group of customers,<sup>47</sup> but KNG has shouldered the not inconsiderable administrative burden associated with effectuating the transfer of the customers from Suburban. KNG has also maintained, at its own expense, the insurance required for pipeline operators throughout the period it has provided this service. In short, KNG would like nothing better than for OIE to take over the service to these customers, and, indeed, had hoped that this would happen before the 2011 heating season.

KNG undertook to provide service to these customers solely to effectuate the global resolution of the Suburban abandonment case that Suburban required and with no expectation that it would realize a profit from this service. In fact, the irony of OIE' allegation is that Mr. Rothery acknowledged in the November meeting with KNG representatives and the Commission staff what everyone involved already knew: OIE's decision to undertake to serve customers in and around Hoytville and along the McComb-Hoytville line would not make economic sense were it not for the prospect that it could use the facilities it leased from Hoytville and purchased from McComb as a pathway to serve other potential customers (including customers now served by KNG). In other words, OIE was betting on the come when it undertook to serve customers in and around Hoytville and along the McComb-Hoytville line. For OIE to now suggest that it has been denied compensation when it has never provided service to these customers, is still not in a position to provide service to these customers, and never expected a sustainable profit from the service to these customers in the first place, is more than a little unseemly.

As an aside, KNG would also note that, although OIE professes concern for these customers, these customers are actually better off with the temporary service from KNG than they will be when OIE commences service because KNG's rates are lower than the Hoytville

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<sup>47</sup> These costs include railroad right-of-way occupancy license fees and certain public utility personal property taxes.

ordinance rates OIE is authorized to charge. Further, OIE says that it has received requests from prospective customers for natural gas service as an alternative to propane,<sup>48</sup> implying that these customers will go without service unless OIE is permitted to commence service. Plainly, this is not true. OIE should direct these potential customers to contact KNG, which, as the temporary service provider, has an obligation to serve them until such time as OIE is ready to do so.

D. The Terms and Conditions under which KNG Has Offered to Provide Transportation Service to OIE Are Reasonable and Do Not Represent an Attempt by KNG to Eliminate Competition.

OIE also levels the ridiculous charge that, notwithstanding that KNG has offered to provide transportation service to OIE at a price lower than its tariffed transportation rate, KNG's proposal is an attempt to:

. . . eliminate competition from OIE, and ensure that KNG need not make any investment to commence a significant revenue stream from OIE, and stifle economic development in Ohio by forcing OIE's commercial and industrial customers to pay exorbitant rates.<sup>49</sup>

First, KNG's tariffed transportation rate, which was established in 1999,<sup>50</sup> obviously does not reflect the significant costs KNG incurred in connection with installing and acquiring the facilities necessary to create the pathway from Crossroads that enables KNG to deliver gas to the Hoytville Lateral from the west in accordance with the arrangement contemplated by the Commission's order in Case No. 08-947-GA-ABN. Thus, although it is true that KNG will not need to make any additional investment to initiate transportation service to OIE over this

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<sup>48</sup> OIE Complaint, 19-20.

<sup>49</sup> OIE Complaint, 19.

<sup>50</sup> See KNG Energy, Inc., P.U.C.O. No. 1, Original Sheet No. 14.

pathway, it is not true that the price KNG has proposed, which is below its tariffed transportation rate, is “exorbitant,” as OIE alleges.<sup>51</sup>

Second, if OIE were to commence service today to the 108 customers currently served from OIE’s facilities, almost all of which are residential customers,<sup>52</sup> KNG would not realize a “significant revenue stream from OIE.” OIE’s reference to a “significant revenue stream” apparently relates to future, but as yet unknown, tenants of the PBD, which OIE has banked on in leasing the Hoytville facilities and undertaking to serve the customers previously served by Suburban and now served on a temporary basis by KNG. Not only is there no assurance that the PBD will attract any such tenants, but, based on OIE’s description of the PBD,<sup>53</sup> it seems likely that any such tenant(s) would be operating warehouse facilities, not manufacturing facilities that use gas in their processes. Thus, OIE’s prognostication as to the hourly volumes it will be required to deliver appears to be, at best, wildly optimistic, not to mention that 300,000 cu.ft./hr. that OIE claims it must be prepared to deliver to the PBD<sup>54</sup> would exceed the capacity of the connection of the 6” Hoytville Lateral to the KNG Line. Be that as it may, the notion that KNG, which has participated in several JRS projects in its own right, wishes to thwart development in Ohio is simply ludicrous.

Third, OIE’s assertion that it should not be required to disclose throughput information to KNG because KNG could use this information to gain a competitive advantage will not stand up

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<sup>51</sup> OIE Complaint, 19.

<sup>52</sup> KNG does not understand OIE’s reference to “forcing OIE’s commercial and industrial customers to pay exorbitant rates.” There are no industrial customers in Hoytville or along the McComb-Hoytville Line, and the only existing commercial customer that comes to mind is a bar in Hoytville.

<sup>53</sup> See OIE Complaint, 6-7.

<sup>54</sup> *Id.*

to even cursory scrutiny.<sup>55</sup> KNG cannot provide transportation service to OIE without this information. Further, if KNG were to elect to compete for load that might develop around the PBD, it would certainly be able to obtain the necessary usage information directly from the prospective customer in any event. To suggest that KNG is intent on forcing OIE to deliver gas through its delivery point on Crossroads so that it can obtain this information is nonsensical.

E. The Concerns KNG Expressed Regarding the Reconnection of the McComb-Hoytville Line to the Facilities of the McComb Municipal Utility Were Created by OIE's Conduct and Not by a Desire to Prevent OIE from Supplying Gas to McComb.

The final examples OIE cites as evidence of a supposed pattern of anticompetitive conduct on KNG's part are contacts with OIE's contractor and the Commission's Pipeline Safety staff KNG made when it learned in the spring of 2012 that OIE was about to connect the McComb-Hoytville line to the McComb distribution system. These contacts were in no way the product of a desire by KNG to prevent OIE from supplying gas to the McComb municipal utility. In fact, although KNG has supplied gas to McComb for a number of years, KNG has always reminded McComb that it has the option of securing gas supply from another provider when negotiating its various agreements with the McComb. Rather, these contacts were the product of two very legitimate concerns.

As the operator of the McComb system pursuant to the McComb-KNG Master Service Agreement ("MSA"), KNG has the obligation to assure that any welds performed on the system are performed in compliance with DOT Pipeline Safety rules, which, among other things, require that the contractor provide certain documentation and credentials before undertaking such work. Thus, KNG advised OIE's contractor that he would be proceeding at his peril if this connection

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<sup>55</sup> See OIE Complaint, 9-10.

were performed without providing KNG with this necessary information.<sup>56</sup> KNG then contacted the Commission Pipeline Safety staff to ascertain how it should proceed in view of the fact that it would be unable to provide the required documentation during a pipeline safety audit if OIE's contractor performed the interconnection. KNG was also concerned that, if the connection were not blind-plated, KNG gas could be flowing into the McComb system, which would create liability for McComb for the unauthorized use of KNG's gas. Further, if and when OIE was ready to commence deliveries, the opening of the OIE connection would have to be coordinated with the closing of the two existing delivery points through which KNG currently supplies gas to the McComb distribution system, but OIE was proceeding with the interconnection without any discussions with KNG regarding this subject. In any event, neither of these contacts can conceivably be construed as anticompetitive conduct designed to prevent OIE from initiating service to the McComb municipal utility. Rather, these contacts were made to protect KNG and McComb from potential liability.

In this connection, KNG would also note that the request for bids McComb was soliciting for gas supply service mentioned by OIE in its complaint<sup>57</sup> were for a term commencing May 1, 2012 when McComb's existing supply contract with KNG expired. OIE submitted its bid notwithstanding that it knew, or should have known, that it would have no means to deliver gas to McComb on that date. The Suburban litigation in Wood County Common Pleas Court was ongoing and no trial date had been scheduled. Further, even if that litigation were to ultimately be resolved in OIE's favor, OIE had no transportation agreement with KNG and no meter station had been installed at the connection of the Hoytville Lateral to the KNG Line. Further, OIE was

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<sup>56</sup> Contrary to the statement in the complaint (*see* OIE Complaint, 22), KNG did not tell OIE's contractor that he was not permitted to work on the meter station OIE was installing. KNG told OIE's contractor that he should not connect the station to the McComb system until potential pipeline safety compliance issues were addressed.

<sup>57</sup> *See* OIE Complaint, 21-22.

well aware that KNG disputed OIE's claim that it had any right to deliver gas into the KNG Line from the east via the North Baltimore Station, which meant that OIE should have anticipated that there could well be additional litigation involving its plan to deliver gas to Hoytville over this path. Finally, under the terms of the Commission's order in Case No. 08-947-GA-ABN, a joint application with KNG had to be prepared, filed, and approved by the Commission before OIE could commence service. Yet, despite all this, OIE made what can only be described as an irresponsible decision to submit a bid to supply gas to McComb commencing May 1, 2012.

The fact that there was obviously no possibility that OIE would be in a position to deliver gas to McComb on May 1, 2012 was of particular concern to KNG, because, under the MSA, KNG is the provider of last resort in the event a supplier chosen by McComb fails to deliver. Thus, on April 12, 2012, undersigned counsel for KNG sent a letter to the McComb village administrator explaining the ramifications of OIE's failure to deliver gas on May 1, 2012, as well as the issues raised by OIE's decision to connect to the McComb system without consulting with KNG. Upon information and belief, OIE subsequently halted construction on the interconnection, and KNG has, since May 1, 2012, provided supply service to McComb through a series of three-month agreements. Again, none of this can conceivably be construed as anticompetitive conduct designed by KNG to prevent OIE from initiating service. Rather, this is yet another example of the cowboy approach that has been OIE's hallmark throughout.

The prudent and businesslike course would have been for OIE to first seek a judicial determination that, notwithstanding its failure to object to the Stipulation or contest the Commission's order in the Suburban abandonment case, OIE has enforceable capacity rights on the segment of the KNG Line between North Baltimore and Hoytville under the 1959 D&I before attempting to acquire the right to operate the North Baltimore delivery point. Instead, OIE

charged ahead with no assurance it could connect the station to the KNG Line based solely on an untested legal theory, despite knowing full well that none of the utilities that orchestrated the substitution of service that resolved the Suburban abandonment case agreed with its view with respect to this subject. Now, repeating this same pattern, OIE brings a complaint to the Commission – which has no jurisdiction to interpret the 1959 D&I upon which OIE hangs its hat – alleging that KNG has violated the Commission’s order in Case No. 08-947-GA-ABN despite the fact that KNG has complied in all respects with that order. Moreover, OIE asks the Commission to order the transfer of service to be completed by November 15, 2012,<sup>58</sup> notwithstanding that, if its complaint survives KNG’s motion to dismiss, there is no prospect that this proceeding will be anywhere near conclusion by that date, not to mention all the arrangements that would be required to effectuate the transfer of service. Once again, OIE appears to be oblivious to the realities of the situation.

#### IV. ARGUMENT

##### A. The OIE Complaint Fails to State Reasonable Grounds for Complaint and Must, Therefore, Be Dismissed.

Section 4905.26, Revised Code, provides that the Commission will set complaints for hearing “if it appears that reasonable grounds for complaint are stated.” In ruling on motions to dismiss complaints for failure to state reasonable grounds, the Commission applies a test similar to the standard governing motions to dismiss for failure to state a claim for which relief can be granted under the civil rules.<sup>59</sup> Thus, where the facts alleged in a complaint, if assumed to be

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<sup>58</sup> See OIE Complaint, 23.

<sup>59</sup> See, e.g., *In the Matter of the Complaint of Toledo Premium Yogurt v. Toledo Edison Co.*, Case No. 91-1528-EL-CSS (Entry dated September 17, 1992, at 2) and *In the Matter of the Complaint of The K&D Group, Inc. and Reserve Apartments, LTD v. Cleveland Thermal Steam Distribution, LLC*, Case No. 11-898-HT-CSS (Entry dated May 30, 2012, at 6); see also *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521 (1996).

true, fail to establish that the named respondent has violated any statute, rule, or Commission order, the complaint must be dismissed. In applying this test, it is important that the Commission bear in mind that there is a distinction between a factual allegation and the complainant's interpretation of the legal significance of the alleged facts. The Commission is not required to accept the latter in determining whether to grant a motion to dismiss. Indeed, if this were not so, no complaint could ever be dismissed, no matter how outlandish the complainant's theory of the case.

As previously noted, OIE's complaint contains no allegation that KNG has violated any rule or statute. And, although the complaint alleges that KNG has violated that Commission's order in the Suburban abandonment case, the facts alleged by OIE, even if assumed to be true, will not support such a finding.

As discussed above, the only obligation the order in Case No. 08-497-GA-ABN imposed upon KNG – apart from the obligation to serve customers in and around McComb and along the McComb-Hoytville Line on a temporary basis and the obligations relating to the orderly transfer of customers from Suburban – was the obligation to fulfill the commitments stated in affidavit of Ms. Roller submitted as an exhibit in that proceeding. These commitments were (1) to discuss, in good faith, the terms and pricing under which KNG will provide transportation service to OIE and (2) to cooperate with OIE in attempting to develop a mutually acceptable transition plan to be incorporated in a joint application by KNG and OIE for approval of a substitution of service to be filed once OIE is authorized and ready to commence service to the affected customers.

The facts alleged in the complaint show that OIE does not dispute that KNG has offered to provide transportation service to OIE over the path contemplated by the Commission-approved Stipulation in Case No. 08-947-GA-ABN and by OIE's application for transportation



service submitted to KNG in June of 2011. Nor does OIE dispute that KNG has offered to provide this service at a rate below its tariffed transportation rate, which, in the absence of a special contract, it would otherwise not only be entitled to charge, but, by law, would be required to charge.<sup>60</sup> Further, KNG engaged in negotiations with OIE regarding the terms and pricing of transportation service during the fall of 2011, and tendered a revised proposal to OIE even after OIE broke off negotiations in October of 2011. The fact that no agreement was reached as a result of these negotiations because OIE could not make the numbers work does not mean that KNG has violated the Commission's order by failing to discuss, in good faith, the terms and pricing for transportation service. All this shows is that OIE does not like KNG's proposal and wants a lower rate.

The heart of OIE's charge that KNG has not acted in good faith is KNG's refusal to permit OIE to deliver gas into the KNG Line from the east through a connection at the North Baltimore Station that was blind-plated pursuant to the Commission's order in Case No. 08-947-GA-ABN. However, the Commission's order imposed no obligation upon KNG to discuss the terms and pricing for transportation service over this route. Indeed, under the arrangements contemplated by the Stipulation, it was abundantly clear that, with the closing of this connection, KNG would operate the segment of the KNG Line between Hoytville and its eastern terminus at North Baltimore as a distribution line to serve its own customers on this segment and would feed this line from the west. Thus, even if the Commission accepts the factual allegations in the complaint as true – as it must in ruling on a motion to dismiss – there is no basis for a finding

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<sup>60</sup> See Section 4905.32, Revised Code. OIE appears to argue that no special contract is required because KNG has authority under its transportation tariff to flex the maximum tariffed volumetric rate downward. See OIE Complaint, 19. As OIE must surely understand, this authority is intended to facilitate retention of a revenue stream in instances where an end-user customer has dual fuel capability or an alternative source of gas supply and reflects the concept that, as long as the flexed rate covers variable costs and results in some contribution to fixed costs, the host utility and its customers are better off with some revenues as opposed to none. Downward flexing was never intended to apply in the situation where the transporter is a public utility delivering gas through KNG's facilities to serve its own end-user customers.

that KNG has violated its obligation to discuss, in good faith, the terms and pricing under which it would provide transportation service to OIE when the delivery pathway OIE now seeks to utilize no longer exists.

This leaves the question of whether KNG has violated its commitment to cooperate with OIE in attempting to develop a mutually acceptable transition plan to be incorporated in a joint application by KNG and OIE for approval of a substitution of service to be filed once OIE is authorized and ready to commence service to the affected customers. OIE contends that it is now ready to commence service to the affected customers based on the fact that it is now the operator of the North Baltimore Station. However, as previously discussed, the fact that OIE is the operator of station does not imbue it with the right to connect the station to the KNG Line or to dictate to KNG how to operate and manage its own facilities. Moreover, pursuant to Section 4905.48, Revised Code, public utilities must file a joint application with the Commission for approval to connect their facilities and obtain such approval before such connection can occur.<sup>61</sup> Notwithstanding that OIE has already unlawfully performed the connection, KNG has not consented to the connection of the KNG Line to the North Baltimore Station. Accordingly,

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<sup>61</sup> Section 4905.48, Revised Code, provides as follows:

With the consent and approval of the public utilities commission:

(A) Any two or more public utilities furnishing a like service or product and doing business in the same municipal corporation or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state, may enter into contracts with each other that will enable them to operate their lines or plants in connection with each other.

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. . . To obtain the consent and approval of the commission for such authority, a petition, joint or otherwise, signed and verified by the president and the secretary of the respective companies, clearly setting forth the object and purposes desired, and stating whether or not it is for the purchase, sale, lease, or making of contracts, or for any other purpose provided in this section, and also the terms and conditions of the same, shall be filed with the commission.

even assuming the factual allegations in the complaint are true, there is no basis for a Commission finding that OIE is ready to commence service to the affected customers, and, thus, no basis for finding that KNG has violated the commitment memorialized in the order in Case No. 08-947-GA-ABN that it will cooperate with OIE in attempting to develop a mutually acceptable transition plan to be incorporated in a joint application by KNG and OIE for approval of a substitution of service to be filed once OIE is authorized and ready to commence service to the affected customers. KNG is more than willing to work with OIE to come up with a mutually acceptable transition plan, but the first order of business is to resolve the transportation issues so that OIE will be in a position to provide service..

Although KNG believes that this should end the matter, KNG would reiterate that the mere fact that OIE may now be the operator of the North Baltimore Station does not confer upon OIE the authority connect the KNG Line to this station. Whether to permit OIE to connect the KNG Line to the North Baltimore Station is a matter within KNG's sole discretion, and its decision in this regard is not subject to a reasonableness test. For all those reasons previously stated, KNG's decision to prohibit this connection is entirely reasonable, but the point, for purposes at hand, is that KNG has no obligation to defend this decision to OIE, and the fact that OIE disagrees with KNG's position on this issue is irrelevant. Under Ohio law, the Commission plainly has the authority to assure that public utilities comply with the applicable statutes and its rules and orders, but it does not have the authority to make business decisions for a public utility as to how to conduct its operations. There being no factual allegation in the OIE complaint that, if assumed to be true, would support a finding that KNG has violated any statute, Commission rule, or Commission order, the complaint should be dismissed.

B. Any Claim by OIE that It Has Capacity Rights on the KNG Line by Virtue of the 1959 D&I Is Barred by the Principles of Promissory Estoppel, Collateral Estoppel, and Laches.

OIE sprinkles the notion throughout its complaint that successors in interest to villages that were signatories to the 1959 D&I have capacity rights on the former System lines by virtue of that instrument. However, at least as KNG reads it, OIE's complaint does not specifically charge that KNG's refusal to permit OIE to deliver gas over the segment of the KNG Line between the North Baltimore Station and the Hoytville Lateral constitutes a violation of rights derived by OIE from the 1959 D&I – presumably because OIE recognizes that, as discussed *infra*, this Commission does not have jurisdiction to adjudicate claims arising under this instrument. Even so, we have heard this claim from OIE so many times in the past that we feel compelled to address it to take into account the possibility that OIE actually is relying on this claim as a basis for its complaint.

Under the doctrine of promissory estoppel, a party making a promise not to assert a right, even though no consideration was involved, may be estopped from subsequently asserting such right if the party intended the promise to be relied upon, and the promise was, in fact, relied upon.<sup>62</sup> Thus, one who has a right, but induces another to act on the belief that the right will not be asserted, will not be allowed thereafter to exercise the right against a party that relied on the representation that the right would not be exercised.<sup>63</sup>

As shown in Exhibit A attached hereto, each of the villages affected by the Suburban abandonment application, including Hoytville, enacted ordinances terminating its interest in the 1959 D&I to clear the way for each village to make its own arrangements for gas service for their

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<sup>62</sup> See 42 O.Jur. 3d *Estoppel and Waiver* § 42 (1983).

<sup>63</sup> See *Krol v. Close*, 82 Ohio St. 190, 194 (1910).

residents once Suburban was out of the picture. This was a decision that was necessarily made by these villages in concert, because the ability to make their own arrangements for gas service would have been severely hampered if prospective purchasers of their facilities were saddled with obligations to third parties with respect to those facilities as well as obligations to third parties that related to facilities beyond those they were acquiring. Accordingly, in making their respective new arrangements for gas service to their residents, each of these villages relied on the provisions of the ordinances enacted by the other villages terminating their interests in the 1959 D&I. Thus, the principle of promissory estoppel would bar any claim by Hoytville that it has any remaining rights to System capacity under the 1959 D&I, which, in turn, pulls the rug from under OIE's suggestion that, as the successor in interest to Hoytville by virtue of being the lessee of Hoytville's facilities, it has capacity rights on lines that were once part of the former System.<sup>64</sup> Not only had Hoytville terminated its interest in the 1959 D&I prior to leasing its facilities to OIE, but OIE could only succeed to rights Hoytville could assert at the time it leased its facilities. Because Hoytville would be estopped from asserting capacity rights on the KNG Line in its own right, OIE's lease of the Hoytville facilities does not serve to resurrect these rights.

OIE also suggests that it derives capacity rights on the former System by virtue of its purchase of the McComb-Hoytville Line from McComb,<sup>65</sup> which was also signatory to the 1959 D&I. Although McComb did not enact an ordinance terminating its interest in the 1959 D&I, upon information and belief, in a November 25, 2009 addendum to an earlier agreement with Suburban governing the McComb's purchase of any and all interests Suburban had in the McComb distribution system, McComb specifically relinquished its right to take gas from the North Baltimore Station. For this reason, as well as others that we will not belabor at this time,

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<sup>64</sup> See OIE Complaint, 20.

<sup>65</sup> *Id.*

KNG believes that it can be successfully argued that OIE does not derive any capacity rights on the KNG Line between North Baltimore and Hoytville Lateral as a result of its purchase of the McComb-Hoytville Line from McComb. However, the Commission need not reach this issue – which it lacks jurisdiction to decide in any event – to dispose of an OIE claim that KNG must allow it to transport gas on the segment of the KNG Line between North Baltimore and Hoytville by virtue of the 1959 D&I. Even if one assumes that OIE did inherit capacity rights on this segment from McComb as a result of its acquisition of the McComb-Hoytville Line, OIE is barred from asserting those rights in this proceeding by principles of collateral estoppel and laches.

It is well-settled under Ohio law that the principle of collateral estoppel precludes the relitigation of a particular issue in a subsequent action based on a different claim, but involving the same parties that that participated in the original action in which the issue was litigated and decided.<sup>66</sup> The Stipulation in the Suburban abandonment case clearly provided that the KNG Line would be blind-plated at the connection to the North Baltimore Station and that the gas to supply the former Suburban customers would be delivered through the KNG delivery point on Crossroads. This was an essential element of the Stipulation, but when the Stipulation came on for hearing, OIE, which was a party to the proceeding, did not object to this provision when it was given the opportunity to do so,<sup>67</sup> nor did it subsequently file for rehearing from the Commission's order approving same. If OIE believed it had a right to access the delivery point at North Baltimore and to capacity on the segment of the KNG Line between the North Baltimore Station and the Hoytville Lateral, it was incumbent upon OIE to assert that right in

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<sup>66</sup> See 63 O.Jur. 3d *Judgments* § 380 (1983).

<sup>67</sup> See Case No. 08-947-GA-ABN (June 23, 2011 Hearing Transcript, 7).

Case No. 08-947-GA-ABN. Having failed to do so, OIE cannot now be heard to complain that the arrangement approved by the Commission in that case is unreasonable. Indeed, this is the very tactic that the principle of collateral estoppel is intended to prevent. Thus, even if one were to assume that OIE derives capacity rights on the KNG Line under the 1959 D&I as the successor in interest to McComb (or, for that matter, as Hoytville's assignee) OIE is estopped from asserting those rights as a ground for complaint in this case.

KNG recognizes that it is de rigeur for a respondent to assert laches as an affirmative defense to a complaint, but there is no question that this principle can appropriately be invoked under the circumstances presented here. Laches is defined as an unreasonable delay in seeking to enforce a right at the proper time where the delay causes prejudice to an adverse party.<sup>68</sup> In this instance, OIE stood idly by and allowed KNG to go forward with all the arrangements necessary to feed the KNG Line from the west in accordance with the Commission-approved Stipulation, only to appear at the Commission well over a year later charging that KNG is unreasonably preventing OIE from instituting service to its customers because it will not agree to permit OIE to deliver gas into the KNG Line from the east. Thus, in addition to being barred by the principles of estoppel discussed above, any claim that KNG is violating rights OIE derives from the 1959 D&I is also barred by the principle of laches.

C. OIE's Claim that It Is Entitled to Deliver Gas into the KNG Line via the North Baltimore Station Represents an Untimely Application for Rehearing from the Commission's Order in the Suburban Abandonment Case and, Therefore, Must Be Dismissed.

Section 4903.10, Revised Code, provides, in pertinent part, as follows:

After any order has been made by the public utilities commission, any party who has entered an appearance in

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<sup>68</sup> See 66 O.Jur. 3d *Limitations and Laches* § 219 (1983).

person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.

The Commission's order in Case No. 08-947-GA-ABN approving the Stipulation was entered upon the journal on June 29, 2011. The Stipulation provided that the KNG Line would be blind-plated at the North Baltimore Station and that KNG would serve its customers on the segment of the KNG Line between the North Baltimore Station and the Hoytville Lateral by feeding the KNG Line from the west. OIE, a party to Case No. 08-947-GA-ABN, did not apply for rehearing from the Commission's order within thirty days of the date the order was journalized. By its complaint, OIE now seeks a Commission determination that it is entitled to deliver gas into the KNG Line from the North Baltimore Station, a measure that is contrary to the Commission's determination that the terms of the Stipulation should be approved. Accordingly, OIE's complaint represents an untimely application for rehearing from the Commission's order with respect to this issue, and, thus, this claim should be dismissed on this ground as well.

In so stating, KNG is mindful that OIE states in its complaint that the Commission's finding in this regard does not mean that gas could never be delivered into the KNG Line in the future.<sup>69</sup> However, for those reasons previously discussed, OIE cannot connect its facilities to those of KNG without KNG's consent. Thus, in seeking to compel KNG to permit this connection, OIE is, in fact, asking the Commission to reverse the determination that the KNG Line should be blind-plated, which is tantamount to a belated application for rehearing from the Commission's June 29, 2011 order in Case No. 08-947-GA-ABN.

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<sup>69</sup> See OIE Complaint, 11-12.



D. The Commission Lacks Subject Matter Jurisdiction to Adjudicate Issues Relating to Rights and Obligations Purportedly Derived from the 1959 D&I.

It is axiomatic that the Commission, as a creature of statute, has only those powers specifically conferred upon it by the legislature.<sup>70</sup> The Commission obviously has jurisdiction over public utilities pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code, and subject matter jurisdiction over transactions between public utilities pursuant to, among other statutes, Section 4905.48, Revised Code. However, there is no provision in Title 49, Revised Code, that vests the Commission with authority to adjudicate issues relating to rights and obligations that may or may not be derived from a deed and indenture executed by a group of Ohio villages. That is a matter for a court of competent jurisdiction. Thus, to the extent that OIE's complaint charges that KNG's refusal to permit OIE to deliver gas on the KNG line to the Hoytville Lateral from the east constitutes a violation of capacity rights OIE holds as successor in interest to certain villages that were signatories to the 1959 D&I, this charge must be dismissed by the Commission for want of subject matter jurisdiction.

E. The Commission Lacks Authority to Grant Certain Elements of the Relief Requested in OIE's Complaint.

As demonstrated above, under Section 4905.48, Revised Code, KNG's consent is required for OIE to connect the regulation and piping at the North Baltimore Station to the KNG Line, and, as owner of the KNG Line, KNG has the exclusive authority to operate and manage this line. Because OIE has no lawful means to deliver gas into the KNG Line from the North Baltimore Station, and no right to dictate to KNG how to operate this line, OIE is not ready to commence service as alleged in the complaint. Thus, the Commission cannot grant the request

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<sup>70</sup> See, e.g., *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 234 (1996); *Canton Transfer and Storage Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 5 (1995); *Dayton Communications Corp. v. Pub. Util. Comm.*, 64 Ohio St.2d 302, 307 (1980); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St. 2d, 153, 166 (1981).

contained in paragraph (a) of the request for relief that KNG be ordered to transfer the customers it serves on a temporary basis pursuant to the Commission's order in Case No. 08-947-GA-ABN to OIE<sup>71</sup> because that would leave these customers without gas service. Further, the notion in paragraph (b) of the request for relief that the Commission should order that the transfer of customers be completed on or before November 15, 2012<sup>72</sup> is totally unrealistic in view of the procedural posture of this case. Although KNG would like nothing better than to transfer the affected customers to OIE in advance of the winter heating season, if this complaint goes forward, there is no way that the litigation will be completed and an order issued in time for that to happen, even if OIE were to prevail. Again, this is not KNG's fault. It is OIE that has continued to cast about for well over a year for an alternative to the delivery pathway contemplated by the Stipulation. Had OIE completed the negotiations with KNG that commenced in the summer of 2011 regarding the terms and conditions of a transportation arrangement with KNG over the pathway contemplated by the Stipulation, the transfer of customers could have been effectuated prior to the 2011 heating season.

Paragraph (b) of the prayer for relief also requests that the Commission direct OIE and KNG to employ the transition plan attached to the complaint as Exhibit D.<sup>73</sup> Contrary to the Commission order in Case No. 08-947-GA-ABN, which directed KNG to cooperate with OIE in an attempt to develop a mutually-acceptable transition plan to be submitted as a part of a joint application for a substitution of service, OIE unilaterally prepared the transition plan it now asks the Commission to approve. KNG certainly does not contend that the Commission does not have authority to approve the terms of a transition plan, but KNG does not agree with certain elements

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<sup>71</sup> See OIE Complaint, 22-23.

<sup>72</sup> See OIE Complaint, 23.

<sup>73</sup> *Id.*

of the transition plan proposed by OIE and is clearly entitled to be heard on this matter if this case goes forward. However, as previously indicated, KNG is more than willing to work with OIE to come up with a mutually-acceptable transition plan. Thus, KNG believes that the more expeditious approach would be for OIE to wait to see if an impasse develops in the transition plan discussions before attempting to tee this subject up for a Commission decision.

In Paragraph (c) of the prayer for relief, OIE requests that the Commission authorize OIE to design, construct, own, and operate an interconnection between the Hoytville Lateral and the KNG Line “pursuant to specifications approved by the Commission’s Service Monitoring and Enforcement Department.”<sup>74</sup> Although KNG is gratified that OIE has finally recognized that there must be a metered point of delivery to isolate the respective facilities of the parties at this interconnection, the Commission does not have authority to approve the design and physical specifications of an interconnection, and, even if it did, the Commission could not delegate this authority to its staff. KNG has substantial experience in managing the design, construction, and operation of metered points of delivery, and OIE has none. Further, as the billing party for transportation service to the delivery point, KNG has the right to own and operate the meter station, just as it owns and operates the meter station on the KNG high-pressure line under its interconnection agreement with Ohio Gas.<sup>75</sup> It is also worthy of mention that, regardless of which party ultimately owns the meter station, OIE will be responsible for the cost of its installation. If, as proposed by KNG in its discussions with OIE, KNG owns the meter station,

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<sup>74</sup> *Id.*

<sup>75</sup> *See In the Matter of the Joint Application of KNG Energy, Inc. and Ohio Gas Company for Approval of an Interconnection Agreement*, Case No. 11-1115-GA-ATR (Joint Application dated March 2, 2011).

KNG would be responsible for maintaining the station once title is transferred, thereby sparing OIE from incurring any additional costs.

Finally, Paragraph (d) of the prayer for relief requests that the Commission direct KNG and OIE to agree on a transportation rate to be charged to OIE for transportation service from the North Baltimore Station to the Hoytville Lateral. This paragraph further requests that, in the event that the parties cannot agree, a “default” rate of \$.20 per Dth be applied to this service “pending mediation by the Staff of the Commission subject to reconciliation to the rate ultimately determined to apply.”<sup>76</sup>

In the first place, for all those reasons previously stated, including the fact that KNG is feeding this segment of the KNG Line from the west to serve its own customers on this segment, OIE has no right to deliver gas into this segment from the east via the North Baltimore Station. However, even if OIE had such a right, the Commission has no authority to require KNG to agree to provide transportation service at any rate other than its Commission-approved tariffed transportation rate, nor does it have authority to require KNG to flex the tariffed rate downward. The only mechanism available for a utility to provide service at something other than its tariffed rates is a special contract approved by the Commission pursuant to the “reasonable arrangements” statute, Section 4905.31, Revised Code. However, this mechanism is available only upon the application of the public utility providing the service, except in the case of a mercantile customer of a electric distribution utility, which may apply for approval of a reasonable arrangement without the consent of the public utility involved.

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<sup>76</sup> See OIE Complaint, 23. Although the complaint does not explain where the proposed \$.20 per Dth “default” rate came from, OIE observes earlier in the complaint that KNG pays a rate of \$.38 per Dth to transport gas over North Coast to supply the McComb municipal utility and Hearthside. See OIE Complaint, 19-20. However, although the haul over this pathway is obviously longer than the haul over the KNG Line OIE wants to use, OIE fails to mention there are huge underlying differences between two, not the least of which is that KNG takes hundreds of thousands of Dth off North Coast annually, whereas, the customers that will be transferred to OIE use something on the order of 12,000 Dth annually. Thus, there is no merit to the notion the price KNG under its agreement with North Coast represents an appropriate benchmark for determining the rate KNG should charge OIE.

In so stating, KNG does not dispute that the Commission has the authority to require KNG to adhere to the commitment set out in the affidavit of Ms. Roller in Case No. 08-947-GA-ABN to discuss the pricing and terms of transportation service to OIE in good faith. However, as explained above, that commitment relates only to transportation service over the pathway contemplated by the Stipulation and not to transportation service over a pathway that is unacceptable to KNG. KNG has fulfilled this commitment and remains willing to continue those discussions.

Second, the Commission has no authority to require KNG to provide service at an arbitrarily determined “default” rate, regardless of whether payments under that rate would be subject to reconciliation once a transportation rate was finally established. The KNG tariffed transportation rate is, in fact, the “default” rate, because this is the only rate KNG can lawfully charge in the absence of a Commission-approved special contract.

Finally, assuming that the discussions with OIE will relate to transportation service via the KNG delivery point on Crossroads as contemplated by the Stipulation, KNG has no objection to the participation of the Commission staff in the negotiations as a mediator. However, contrary to the suggestion contained in paragraph (d) of OIE’s prayer for relief, the Commission staff has no authority to determine the rate that will ultimately apply. Thus, like the paragraphs discussed above, this paragraph of the prayer for relief seeks relief that the Commission has no authority to authorize.

## V. CONCLUSION

KNG apologizes to the Commission for the length of this memorandum, but believes that it is very important that the Commission be fully apprised of all the circumstances in considering KNG’s motion to dismiss. This is not a situation where the Commission should defer ruling on a

motion to dismiss and allow a complaint to go forward with the idea that the issues raised by the motion to dismiss can be sorted out and addressed after the hearing is held. Following this course in this instance will only delay the transfer of customers that both OIE and KNG would like to see effectuated. KNG urges the Commission to grant its motion to dismiss for the reasons set forth herein, which will permit the parties to go back to the bargaining table and resume discussions regarding the terms and pricing for transportation service over the pathway contemplated by the Stipulation and OIE's June 2011 application to KNG for transportation service.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Barth E. Royer", with a long horizontal stroke extending to the right.

Barth E. Royer  
BELL &, ROYER CO., LPA  
33 South Grant Avenue  
Columbus, Ohio 43215-3927  
(614) 228-0704 – Phone  
(614) 228-0201 – Fax  
BarthRoyer@aol.com – Email

Attorney for KNG Energy, Inc.

## EXHIBIT A

## RECORD OF ORDINANCES

455

Dayton Legal Blank Co.

ORDINANCE NO. 04-10

Form No. 30047

Ordinance No. \_\_\_\_\_ Passed \_\_\_\_\_ 19\_\_\_\_  
**AN ORDINANCE PROVIDING FOR THE SALE OF THE VILLAGE'S  
INTEREST IN AN INTEGRATED NATURAL GAS  
TRANSMISSION SYSTEM**

WHEREAS, Village, along with a number of other Northwestern Ohio Villages, which include the Villages of Hoytville, Deshler, Holgate and Hamler (collectively "Subject Villages"), hold interests in the Transmission System designed to provide natural gas services to Customers located within the Subject Villages;

WHEREAS, the Village operates its system under agreement with the other Subject Villages ("Contract");

WHEREAS, the contract allows for termination of the agreement to operate the integrated natural gas system upon consent of all the Subject Villages;

WHEREAS, for a period of almost fifty (50) years, Suburban Natural Gas Company and its predecessors ("Suburban") leased the natural gas distribution system from the Village of Malinta, Ohio ("Village"), as well as the Village's interest in an integrated natural gas transmission system ("Transmission System"), and under the same agreement, provided Village residents, businesses and other premises ("Customers") natural gas service ("Lease Agreement");

WHEREAS, Suburban leases each of the Subject Village's natural gas distribution systems as well as each's interest in the Transmission System, and provides natural gas services to the Subject Villages' customers in accordance to the terms and conditions of agreements similar to the Lease Agreement;

WHEREAS, the similar lease agreements between Suburban and the Subject Villages have expired and also will not be renewed by Suburban;

WHEREAS, the Lease Agreement expired on September 2012;

WHEREAS, Suburban has filed an application at the Public Utilities Commission of Ohio ("PUCO"), in PUCO Case No. 08-947-GA-ABN, seeking PUCO authority for Suburban to abandon any obligation to provide natural gas service to Customers after the Lease Agreement expires as well as those customers in the Subject Villages;

WHEREAS, the Village of Deshler desires to operate its system independently from the other Subject Villages;

WHEREAS, the Village is not technically or financially able to operate its own natural gas transmission system and has been unable to find a company willing to lease said system on acceptable terms that would be in the Village's best interest and therefore ownership of the natural gas system is not needed for any municipal purpose;

WHEREAS, since the natural gas system serves no purpose, the Village believes it to be in the best interests of its citizens to sell its interest in the integrated natural gas system in order to meet its citizen's best interests.

NOW, THEREFORE, BE IT ORDAINED BY THE VILLAGE COUNCIL OF THE VILLAGE OF MALINTA, OHIO, AFTER THE REQUIRED TWO-THIRDS AFFIRMATIVE VOTE:

Section 1: That the Village votes to terminate its interest in the Contract with the other Subject Villages to operate an integrated natural gas transmission system.

Section 2: That the Mayor is authorized to solicit and advertise for bids pursuant to the procedures set forth in Revised Code §721.03 from interested and qualified bidders to



456

## RECORD OF ORDINANCES

~~Dayton Legal Division~~ provide the necessary means to own and operate an integrated natural gas transmission system.

Ordinance No.

Passed

18

~~Section 3: Upon receipt of all bids, Village Council shall evaluate all competitive bids received and shall recommend to the acceptance of the highest and best bidder(s) capable of providing the necessary means to own and operate an integrated natural gas transmission system.~~

Section 4: That it is found and determined that all formal actions of this Village Council concerning and relating to the passage of this Ordinance were taken in conformance with applicable open meetings laws and that all deliberations of this Village Council and of any committees that resulted in those formal actions were in compliance with all legal requirements including any applicable open meetings requirements.

Section 5: That this Ordinance shall take effect from and after the earliest period allowed by law.

1<sup>st</sup> Reading: June 21, 20102<sup>nd</sup> Reading: July 5, 20103<sup>rd</sup> Reading: July 19, 2010Passed this 19<sup>th</sup> day of July, 2010.

Mayor

Attested:

Clerk

## RECORD OF ORDINANCES

821

BARNETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

Form 6220

Ordinance No. 277Passed 7-13192010ORDINANCE NO. 277

**AN ORDINANCE PROVIDING FOR THE SALE OF THE VILLAGE'S  
INTEREST IN AN INTEGRATED NATURAL GAS  
TRANSMISSION SYSTEM**

WHEREAS, Village, along with a number of other Northwestern Ohio Villages, which include the Villages of Hoytville, Deshler, Holgate and Malinta (collectively "Subject Villages"), hold interests in the Transmission System designed to provide natural gas services to Customers located within the Subject Villages;

WHEREAS, the Village operates its system under agreement with the other Subject Villages ("Contract");

WHEREAS, the contract allows for termination of the agreement to operate the integrated natural gas system upon consent of all the Subject Villages;

WHEREAS, for a period of almost fifty (50) years, Suburban Natural Gas Company and its predecessors ("Suburban") leased the natural gas distribution system from the Village of Holgate, Ohio ("Village"), as well as the Village's interest in an integrated natural gas transmission system ("Transmission System"), and under the same agreement, provided Village residents, businesses and other premises ("Customers") natural gas service ("Lease Agreement");

WHEREAS, Suburban leases each of the Subject Village's natural gas distribution systems as well as each's interest in the Transmission System, and provides natural gas services to the Subject Villages' customers in accordance to the terms and conditions of agreements similar to the Lease Agreement;

WHEREAS, the similar lease agreements between Suburban and the Subject Villages have expired and also will not be renewed by Suburban;

WHEREAS, the Lease Agreement expired on October 20<sup>th</sup>, 2009;

WHEREAS, Suburban has filed an application at the Public Utilities Commission of Ohio ("PUCO"), in PUCO Case No. 08-947-GA-ABN, seeking PUCO authority for Suburban to abandon any obligation to provide natural gas service to Customers after the Lease Agreement expires as well as those customers in the Subject Villages;

WHEREAS, the Village of Deshler desires to operate its system independently from the other Subject Villages;

WHEREAS, the Village is not technically or financially able to operate its own natural gas transmission system and has been unable to find a company willing to lease



## RECORD OF ORDINANCES

BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

Form 6220

Ordinance No. 777

Passed 7-13

2010

said system on acceptable terms that would be in the Village's best interest and therefore ownership of the natural gas system is not needed for any municipal purpose;

WHEREAS, since the natural gas system serves no purpose, the Village believes it to be in the best interests of its citizens to sell its interest in the integrated natural gas system in order to meet its citizen's best interests.

NOW, THEREFORE, BE IT ORDAINED BY THE VILLAGE COUNCIL OF THE VILLAGE OF HOLGATE, OHIO, AFTER THE REQUIRED TWO-THIRDS AFFIRMATIVE VOTE:

Section 1: That the Village votes to terminate its interest in the Contract with the other Subject Villages to operate an integrated natural gas transmission system.

Section 2: That the Mayor is authorized to solicit and advertise for bids pursuant to the procedures set forth in Revised Code §721.03 from interested and qualified bidders to provide the necessary means to own and operate an integrated natural gas transmission system.

Section 3: Upon receipt of all bids, Village Council shall evaluate all competitive bids received and shall recommend to the acceptance of the highest and best bidder(s) capable of providing the necessary means to own and operate an integrated natural gas transmission system.

Section 4: That it is found and determined that all formal actions of this Village Council concerning and relating to the passage of this Ordinance were taken in conformance with applicable open meetings laws and that all deliberations of this Village Council and of any committees that resulted in those formal actions were in compliance with all legal requirements including any applicable open meetings requirements.

Section 5: That this Ordinance shall take effect from and after the earliest period allowed by law.

1<sup>st</sup> Reading: 6-8-2010

2<sup>nd</sup> Reading: 6-22-2010

3<sup>rd</sup> Reading: 7-13-2010

Passed this 13 day of July, 2010.

Wallace Snyder  
Mayor

Attested: Suey Brings  
Clerk

ORDINANCE NO. 2010-04

**AN ORDINANCE PROVIDING FOR THE SALE OF THE VILLAGE'S  
INTEREST IN AN INTEGRATED NATURAL GAS  
TRANSMISSION SYSTEM**

WHEREAS, Village, along with a number of other Northwestern Ohio Villages, which include the Villages of Hoytville, Deshler, Holgate and Malinta (collectively "Subject Villages"), hold interests in the Transmission System designed to provide natural gas services to Customers located within the Subject Villages;

WHEREAS, the Village operates its system under agreement with the other Subject Villages ("Contract");

WHEREAS, the contract allows for termination of the agreement to operate the integrated natural gas system upon consent of all the Subject Villages;

WHEREAS, for a period of almost fifty (50) years, Suburban Natural Gas Company and its predecessors ("Suburban") leased the natural gas distribution system from the Village of Hamler, Ohio ("Village"), as well as the Village's interest in an integrated natural gas transmission system ("Transmission System"), and under the same agreement, provided Village residents, businesses and other premises ("Customers") natural gas service ("Lease Agreement");

WHEREAS, Suburban leases each of the Subject Village's natural gas distribution systems as well as each's interest in the Transmission System, and provides natural gas services to the Subject Villages' customers in accordance to the terms and conditions of agreements similar to the Lease Agreement;

WHEREAS, the similar lease agreements between Suburban and the Subject Villages have expired and also will not be renewed by Suburban;

WHEREAS, the Lease Agreement expired on October 20<sup>th</sup>, 2009;

WHEREAS, Suburban has filed an application at the Public Utilities Commission of Ohio ("PUCO"), in PUCO Case No. 08-947-GA-ABN, seeking PUCO authority for Suburban to abandon any obligation to provide natural gas service to Customers after the Lease Agreement expires as well as those customers in the Subject Villages;

WHEREAS, the Village of Deshler desires to operate its system independently from the other Subject Villages;

WHEREAS, the Village is not technically or financially able to operate its own natural gas transmission system and has been unable to find a company willing to lease.

said system on acceptable terms that would be in the Village's best interest and therefore ownership of the natural gas system is not needed for any municipal purpose;

WHEREAS, since the natural gas system serves no purpose, the Village believes it to be in the best interests of its citizens to sell its interest in the integrated natural gas system in order to meet its citizen's best interests.

NOW, THEREFORE, BE IT ORDAINED BY THE VILLAGE COUNCIL OF THE VILLAGE OF HAMLER, OHIO, AFTER THE REQUIRED TWO-THIRDS AFFIRMATIVE VOTE:

Section 1: That the Village votes to terminate its interest in the Contract with the other Subject Villages to operate an integrated natural gas transmission system.

Section 2: That the Mayor is authorized to solicit and advertise for bids pursuant to the procedures set forth in Revised Code §721.03 from interested and qualified bidders to provide the necessary means to own and operate an integrated natural gas transmission system.

Section 3: Upon receipt of all bids, Village Council shall evaluate all competitive bids received and shall recommend to the acceptance of the highest and best bidder(s) capable of providing the necessary means to own and operate an integrated natural gas transmission system.

Section 4: That it is found and determined that all formal actions of this Village Council concerning and relating to the passage of this Ordinance were taken in conformance with applicable open meetings laws and that all deliberations of this Village Council and of any committees that resulted in those formal actions were in compliance with all legal requirements including any applicable open meetings requirements.

Section 5: That this Ordinance shall take effect from and after the earliest period allowed by law.

1<sup>st</sup> Reading: May 26, 2010

2<sup>nd</sup> Reading: June 9, 2010

3<sup>rd</sup> Reading: June 23, 2010

Passed this 23 day of June, 2010.

Larry D. ...  
Mayor

Attested: Shelly ...  
Clerk

**ORDINANCE NO.10-10****AN ORDINANCE PROVIDING FOR THE LEASE AND/OR SALE OF THE  
VILLAGE'S INTEREST IN AN INTEGRATED NATURAL GAS  
TRANSMISSION SYSTEM**

WHEREAS, Village, along with a number of other Northwestern Ohio Villages, which include the Villages of Hoytville, Deshler, Holgate and Malinta (collectively "Subject Villages"), hold interests in the Transmission System designed to provide natural gas services to Customers located within the Subject Villages;

WHEREAS, the Village operates its system under agreement with the other Subject Villages ("Contract");

WHEREAS, the contract allows for termination of the agreement to operate the integrated natural gas system upon consent of all the Subject Villages;

WHEREAS, for a period of almost fifty (50) years, Suburban Natural Gas Company and its predecessors ("Suburban") leased the natural gas distribution system from the Village of Deshler, Ohio ("Village"), as well as the Village's interest in an integrated natural gas transmission system ("Transmission System"), and under the same agreement, provided Village residents, businesses and other premises ("Customers") natural gas service ("Lease Agreement");

WHEREAS, Suburban leases each of the Subject Village's natural gas distribution systems as well as each's interest in the Transmission System, and provides natural gas services to the Subject Villages' customers in accordance to the terms and conditions of agreements similar to the Lease Agreement;

WHEREAS, the similar lease agreements between Suburban and the Subject Villages have expired and also will not be renewed by Suburban;

WHEREAS, the Lease Agreement expired on October 20<sup>th</sup>, 2009;

WHEREAS, Suburban has filed an application at the Public Utilities Commission of Ohio ("PUCO"), in PUCO Case No. 08-947-GA-ABN, seeking PUCO authority for Suburban to abandon any obligation to provide natural gas service to Customers after the Lease Agreement expires as well as those customers in the Subject Villages;

WHEREAS, the Village of Deshler desires to operate its system independently from the other Subject Villages;

WHEREAS, the Village is not technically or financially able to operate its own natural gas ~~transmission~~ distribution system and is thus seeking a company willing to lease said system on acceptable terms that would be in the Village's best interest;

WHEREAS, the Village has determined it will likely be better served by acquiring a new tap for its' gas supply, and has thus determined the approximately 13-mile "main line" from North Baltimore will serve no Village purpose;

WHEREAS, since the natural gas line serves no purpose, the Village believes it to be in the best interests of its citizens to sell or lease its interest in said line in order to meet its citizen's best interests.

NOW, THEREFORE, BE IT ORDAINED BY THE VILLAGE COUNCIL OF THE VILLAGE OF DESHLER, OHIO, AFTER THE REQUIRED TWO-THIRDS AFFIRMATIVE VOTE:

Section 1: That the Village votes to terminate its interest in the Contract with the other Subject Villages to operate an integrated natural gas transmission system.

Section 2: That the Mayor is authorized to solicit and advertise for bids pursuant to the procedures set forth in Revised Code §721.03 from interested and qualified bidders to provide the necessary means to lease and operate an integrated natural gas transmission distribution system; and to solicit bids as outlined above for the lease or sale of the gas line from North Baltimore to the Village of Deshler.

Section 3: Upon receipt of all bids, Village Council shall evaluate all competitive bids received and shall recommend to the acceptance of the highest and best bidder(s) capable of providing the necessary means to lease and operate an integrated natural gas transmission system.

Section 4: That it is found and determined that all formal actions of this Village Council concerning and relating to the passage of this Ordinance were taken in conformance with applicable open meetings laws and that all deliberations of this Village Council and of any committees that resulted in those formal actions were in compliance with all legal requirements including any applicable open meetings requirements.

Section 5: That this Ordinance shall take effect from and after the earliest period allowed by law.

1<sup>st</sup> Reading: June 14, 2010

2<sup>nd</sup> Reading: June 28, 2010

3<sup>rd</sup> Reading: July 12, 2010

Passed this 12<sup>th</sup>, day of July, 2010.

Attested: Karen M. Diem  
Clerk

Stephen D. Wilson  
Mayor

ORDINANCE NO. 2009-167

**AN ORDINANCE PROVIDING FOR THE LEASE OF THE VILLAGE'S  
INTEREST IN AN INTEGRATED NATURAL GAS TRANSMISSION SYSTEM**

WHEREAS, the Village, along with a number of other Northwestern Ohio Villages, holds an interest in the Transmission System designed to provide natural gas services to Customers located within the Subject Villages;

WHEREAS, the Village operates its system under agreement with the other Subject Villages ("Contract");

WHEREAS, the contract allows for termination of the agreement to operate the integrated natural gas system upon consent of all the Subject Villages;

WHEREAS, for a period of almost fifty (50) years, Suburban Natural Gas Company and its predecessors ("Suburban") leased the natural gas distribution system from the Village of Hoytville, Ohio ("Village"), as well as the Village's interest in an integrated natural gas transmission system ("Transmission System"), and under the same agreement, provided Village residents, businesses and other premises ("Customers") natural gas service ("Lease Agreement");

WHEREAS, Suburban leases the Subject Village's natural gas distribution systems as well as interest in the Transmission System, and provides natural gas services to the Subject Village's customers in accordance to the terms and conditions of agreements similar to the Lease Agreement;

WHEREAS, the similar lease agreements between Suburban and the Subject Villages have expired and also will not be renewed by Suburban;

WHEREAS, the Lease Agreement expired on October 20<sup>th</sup>, 2009;

WHEREAS, Suburban has filed an application at the Public Utilities Commission of Ohio ("PUCO"), in PUCO Case No. 08-947-GA-ABN, seeking PUCO authority for Suburban to abandon any obligation to provide natural gas service to Customers after the Lease Agreement expires as well as those customers in the Subject Villages;

WHEREAS, the Village of Hoytville desires to operate its system independently from the other Subject Villages;

WHEREAS, the Village is not technically or financially able to operate its own natural gas transmission system and needs to either sell or lease said system on acceptable terms that would be in the Village's best interest;



WHEREAS, the Village believes it to be in the best interests of its citizens to lease its interest in the integrated natural gas system in order to meet its citizens' best interests.

NOW, THEREFORE, BE IT ORDAINED BY THE VILLAGE COUNCIL OF THE VILLAGE OF HOYTVILLE, OHIO, AFTER THE REQUIRED TWO-THIRDS AFFIRMATIVE VOTE:

Section 1: That the Village votes to terminate its interest in the Contract with the other Subject Villages to operate an integrated natural gas transmission system.

Section 2: That the Mayor is authorized to solicit and advertise for bids pursuant to the procedures set forth in Revised Code §721.01 from interested and qualified bidders to provide the necessary means to lease and operate an integrated natural gas transmission system.

Section 3: Upon receipt of all bids, Village Council shall evaluate all competitive bids received and shall recommend to the acceptance of the highest and best bidder(s) capable of providing the necessary means to lease and operate an integrated natural gas transmission system.

Section 4: That it is found and determined that all formal actions of this Village Council concerning and relating to the passage of this Ordinance were taken in conformance with applicable open meetings laws and that all deliberations of this Village Council and of any committees that resulted in those formal actions were in compliance with all legal requirements including any applicable open meetings requirements.

Section 5: This ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety of the citizens of the Village of Hoytville, Wood County, Ohio.

Section 6: That this Ordinance shall take effect from and after the earliest period allowed by law.

Passed this 25<sup>th</sup> day of October, 2010.

Attested: [Signature]  
Clerk

[Signature]  
Mayor

S-yes    ☒-no

## **EXHIBIT B**

FILED  
WOOD COUNTY CLERK  
COMMON PLEAS COURT

12 MAY 14 PM 2:17

CINDY A. HOFNER

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

Suburban Natural Gas Company,

Case No. 2012CV0150

Plaintiff,

Hon. Robert C. Pollex

vs.

Ohio Intrastate Energy, LLC, et al.,

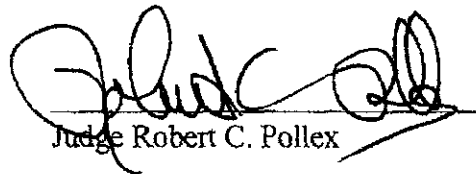
**ORDER ON DEFENDANT OHIO  
INTRASTATE ENERGY, LLC'S  
MOTION TO JOIN KNG ENERGY,  
INC. AS A NECESSARY PARTY**

Defendants.

This matter is before the Court on Defendant Ohio Intrastate Energy, LLC's ("OIE") motion to join KNG Energy, Inc. as a necessary party in this action pursuant to Civ.R. 19(A). Upon due consideration of the motion and the opposition filed by Plaintiff and by KNG Energy, Inc., the Court finds the motion not well taken and that it should be denied.

KNG does not claim an interest relating to the subject of this action involving a dispute between Plaintiff and Defendant OIE over the ownership of Regulator Station No. 702304. Defendant OIE has failed to establish that KNG is a necessary party in these proceedings.

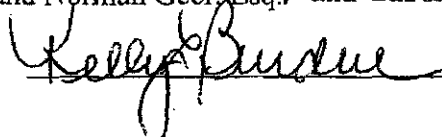
IT IS THEREFORE ORDERED that Defendant Ohio Intrastate Energy, LLC's motion to join KNG Energy, Inc. as a necessary party in this action be, and it is hereby, denied.



Judge Robert C. Pollex

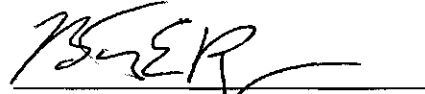
**CERTIFICATION**

This is to certify that on May 14, 2012 the undersigned delivered or sent by fax or by mail a copy of this Order to: Andrew Sonderman, Esq., Albert Potter, II, Christopher Frasor, Esq., William Michael, Esq., Jerome Cook, Esq., and Norman Geer, Esq., and Barth Royer, Esq.



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following parties by electronic mail this 17th day of October 2012.

  
Barth E. Royer

Andrew J. Sonderman  
Kegler, Brown, Hill & Ritter LPA  
Capitol Square, Suite 1800  
65 East State Street  
Columbus, Ohio 43215-4294