

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)	Case No. 12-2576-GA-CSS
Substitution of Service and For)	
Approval of Transition Plan)	
)	

MEMORANDUM OF OHIO INTRASTATE ENERGY, LLC IN OPPOSITION TO
MOTION TO DISMISS FILED BY KNG ENERGY, INC.

I. INTRODUCTION

Ohio Intrastate Energy, LLC (hereinafter, “OIE” or “Complainant”) submits this Memorandum in Opposition to the Motion to Dismiss filed by KNG Energy, Inc. (hereinafter, “KNG” or “Respondent”) on October 17. Although KNG professes that its Motion and Memorandum in Support (“KNG Memo”) demonstrate that no reasonable grounds for complaint have been alleged by OIE, KNG relies on its own interpretation of the legal significance of the unsworn factual statements made in the KNG Memo in asking the Commission to pre-judge the ultimate facts underlying the Complaint. OIE submits that the allegations in its Complaint clearly state reasonable grounds for the Complaint as Ohio Revised Code §4905.26 requires, and that the Commission has clear jurisdiction over this dispute to remedy the failure of KNG to provide the open access transportation service its tariff requires.

The Supreme Court has held that “R.C. 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the PUCO”. A complaint satisfies the “reasonable grounds” requirement when the complainant asks the provisions of a prior

Commission order be complied with.¹ Clearly, this Complaint satisfies that liberal standard.

The wandering “necessary history” commencing at page 6 of the KNG Memo is rife with misstatements of fact and erroneous legal conclusions KNG proffers to the Commission attributable to those misstatements of fact. At page 21 of the KNG Memo commences a supplemental answer to OIE’s Complaint. In both sections of the KNG Memo, what is presented is no more than a summary of the testimony KNG would apparently intend to present at evidentiary hearings.² This litany, while largely inaccurate, is simply not germane to the Commission’s consideration of KNG’s Motion to Dismiss. The fact is that KNG only presents its arguments in support of its Motion at pages 39 through 52 of the KNG Memo. OIE properly focuses this Memorandum in Opposition on those inadequate arguments. Before doing so, OIE briefly summarizes its position.

a. KNG mischaracterizes and distorts the Commission’s Finding and Order in the Suburban Abandonment Case. T

¹ *Allnet Communication Services, Inc. v. Public Utilities Commission et al.*, 32 Ohio St. 3d 115, 117-118, 512 N.E.2d 350 (1987). Indeed, in a complaint submitted pursuant to Ohio Rev. Code §4905.26, reasonable grounds may exist to raise issues which might strictly be viewed as “collateral attacks” on prior Orders of the Commission. See *Martin Marietta Magnesia Specialties, LLC v. Public Utilities Commission of Ohio*, 129 Ohio St. 3d 485, 2011 Ohio 4919, ¶41, 954 N.E.2D 104.

² Perhaps most gratuitous in its proffered unsworn “testimony” is its series of conclusions with respect to operating the system after deliveries are initiated from North Baltimore Station. The KNG Memo states at p. 32 that it would be required to “surrender control of the flows and pressure on the segment of the KNG Line between North Baltimore and Hoytville”. This is simply false. While KNG would have to coordinate pressures and flows with OIE, this is common practice and every utility has gas control responsibilities. On the same page appears a statement regarding perceived pressure constraints on the McComb Transmission System that would “degrade the pressure on the final leg of this path to a level insufficient to meet Hearthside’s requirements.” The fact is that the Village of McComb and the Hearthside plant were supplied for many years over the McComb Transmission System. KNG apparently presumes that service to the PNB development area at a rate of 300 Mcf/hour would instantaneously be in place, which clearly would not be true upon substitution of service by OIE, as KNG itself admits. Once OIE is operating the system it leases and owns it will make all necessary system upgrades and reinforcements justified by its economic analysis of loads to be added. Contrary to KNG’s assertions, the resumption of deliveries from North Baltimore Station westward to the Hoytville Lateral in coordination with flows eastward from Crossroads will not compromise the operation of the system or degrade operating pressures.

he linchpin of KNG's erroneous interpretation of the legal significance of facts relates to its distortion of the Commission's Finding and Order in the Suburban Natural Gas Company abandonment proceeding, Case No. 08-947-GA-ABN. That Finding and Order adopted a Revised Stipulation submitted by KNG, Ohio Gas Company, Suburban and the Village of Deshler authorizing the substitution of service by KNG and Ohio Gas Company in place of Suburban.³ The Revised Stipulation the Commission approved provided that Suburban would install blind plates on outlet valves located in the North Baltimore Station. KNG states at p. 4 of the KNG Memo (and repeats this assertion numerous times thereafter) that the Commission "contemplated that this line [Deshler Pipeline] would thereafter be fed from the west via a KNG delivery point on a Crossroads interstate pipeline". KNG acknowledges at p. 24 of the KNG Memo that it rejected OIE's proposal to transport gas through the North Baltimore Station west across the Deshler Pipeline to the Hoytville Lateral, because it determined that "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".

While the Commission clearly adopted the Revised Stipulation, including its provision that Suburban would install blind plates on the outlet valves in North Baltimore Station, KNG's position is untenable because the Commission never ordered or even implied that reinstitution of transportation service through North Baltimore Station was permanently foreclosed. Nor could it or should it be permanently foreclosed.

³ *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 (Finding and Order dated June 29, 2011).

KNG states that it relied on the Commission's Finding and Order in incurring "considerable expense" in finalizing the arrangements for deliveries from Crossroads eastward to the Deshler Line (KNG Memo, p.4).⁴ The implication is that this investment is rendered unusable should deliveries resume westward on the Deshler Line from North Baltimore Station. That is patently false, and KNG knows it. It is operationally feasible and in fact common practice in the industry for gas flows to be managed through pressure controls at each of two (or more) delivery points into a pipeline system so KNG's investment is not "stranded".

b. OIE's pressure regulation equipment is not connected to the Deshler Line at North Baltimore Station.

A second critical mischaracterization of fact underlying KNG's premise that the Complaint does not state reasonable grounds is KNG's repeated claim that OIE has made an unauthorized and illegal interconnection with KNG's Deshler Line at the North Baltimore Station. That is simply incorrect. In fact, OIE's regulator runs are connected to outlet headers owned and operated by Columbia Transmission within the North Baltimore Station. This is borne out by Columbia Transmission's business records maintained in the ordinary course of business and discovery responses in the SNG-OIE litigation in the Wood County Common Pleas Court. Based on its incorrect understanding of the facts, KNG contends that OIE was required to enter into a consensual agreement

⁴ This contention is directly controverted by the Revised Stipulation. At pages 8-9 therein, KNG acknowledged that an interconnection agreement with Ohio Gas had been submitted to the Commission in Case No. 11-1115-GA-ATR on March 2, 2011 and approved by Finding and Order on April 5, 2011. KNG represented that "this arrangement would permit Ohio Gas to transport gas from the Crossroads interstate transmission line over the KNG Pipeline to serve Hamler, Holgate, and Malinta". That approved interconnection agreement also provided for the conveyance of a segment of Ohio Gas pipeline that "will permit KNG to provide transportation service to Deshler from the north rather than constructing a direct connection from the KNG Pipeline to the Deshler distribution facilities, thereby permitting KNG to feed both the Deshler high pressure and low pressure systems" (Id., p. 9). The initial Stipulation in the Suburban Abandonment docket was filed on June 17, 2011. In making the investments in the Crossroads delivery path KNG clearly was not relying on the Commission's order entered approving the subsequently filed Stipulation.

with KNG under Ohio Revised Code §4905.48 to connect its facilities and submit a joint application for approval of such an interconnection. In point of fact, OIE has not connected to KNG's Deshler Line. OIE's natural gas pipeline facilities are the Hoytville Lateral and the McComb Transmission System, both of which are already connected to the Deshler Line and have been for over fifty years. Instead, OIE is contractually obligated to provide pressure regulation in Columbia Transmission's North Baltimore Station for interstate transportation by Columbia Transmission pursuant to its FERC-approved tariffs. This is why Columbia Transmission directed OIE to notify potential shippers west of the North Baltimore Station of its reactivation and availability as a delivery point for interstate supplies.

c. KNG's acknowledged contacts with McComb, Wood County Economic Development Commission, the Northwestern Water and Sewer District and PUCO demonstrate its anticompetitive motive for refusing transportation service for OIE from North Baltimore Station.

For all its protestations about the purity of its motives, KNG has acknowledged numerous contacts with governmental entities and potential customers of OIE all aimed at frustrating OIE's initiation of natural gas service and supporting KNG's initiative to obtain the business of such prospective customers and developments. These contacts were alleged in OIE's Complaint, and are the subject of discovery which OIE has addressed to KNG. Indeed, OIE will present evidence of additional contacts which KNG has not yet acknowledged. When evidentiary proceedings convene, OIE will support these allegations as fact. Specifically, KNG did initiate contact with the Wood County Economic Development Commission almost immediately after hearing testimony in a hearing in the Suburban-OIE Wood County litigation; it did subsequently initiate contacts with several representatives of, and meet with the executive director of the Northwestern

Water and Sewer District (one of the participants in the grant application with OIE relative to the PBD) to propose service by KNG in lieu of OIE. It did contact McComb's village administrator after OIE was the successful bidder to provide gas service to raise concerns regarding OIE's bid. And in a face to face meeting with OIE, KNG's President did state that KNG's position regarding the transportation rate it would offer OIE reflected its recognition of OIE as a potential competitor. All this was occurring while KNG was, to its way of thinking, negotiating in good faith to establish transportation rates and a transition plan leading to substitution of service.

It is for the Commission—not KNG in its Motion and Memorandum in Support—to determine the legal effect of these contacts, statements and this pattern of conduct. OIE believes it will be able to establish by competent evidence both motive for the pattern of contacts, and the execution of a plan to prevent or at least delay OIE's market entry except upon the exaction of unacceptable monopoly rents for service through the Crossroads meter station.

OIE must comment on the repeated attempts of the KNG Memo to paint OIE and its Managing Member, A. Scott Rothery, as guilty of rash business judgment demonstrating an inability to operate a natural gas company. OIE is prepared to present competent evidence of OIE's ongoing efforts to negotiate a mutually agreeable transportation arrangement with KNG based on sound business judgment. OIE was the party that initiated negotiations with KNG upon the receipt of approval by the Commission to initiate natural gas service as a distribution utility⁵ and was diligent in

⁵ *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). The Commission expressly found: "Upon our review of the application, we find that OIE has the technical, managerial, and financial capabilities to provide natural gas service." (Finding and Order, p. 3).

its ongoing efforts to negotiate with KNG. OIE responsibly investigated various alternatives when it became clear that KNG—despite its professed undertaking to negotiate a transportation arrangement in good faith leading to the filing of a joint application to substitute service—was instead intent on requiring OIE to source more expensive gas through the Crossroads Pipeline, and intent on exacting a transportation rate for such service from Crossroads and KNG that KNG knew would preclude OIE from serving its municipal ordinance customers in Hoytville. OIE explored the alternatives and adopted the one that provided more economical sources of supply through an interstate pipeline delivery point far closer to its Hoytville Lateral and McComb Transmission System than that insisted upon by KNG. KNG has itself acknowledged in various pleadings before the Commission the value of competitive sources of natural gas; it has acknowledged that it considered but rejected these potential opportunities through the North Baltimore Station route because of its fear of litigation with Suburban. It is patently clear that KNG would have considered the North Baltimore supply path ONLY if KNG were the operator of the station, again positioning itself as the only game in town for deliveries into the Deshler Line.

OIE also asks the Commission to reject the notion advanced by KNG that by choosing not to object to the Revised Stipulation in the Suburban Abandonment proceeding at Case No. 08-97-GA-ABN, OIE had somehow acted in non-compliance with the Commission's Finding and Order in that proceeding. First and foremost, that Finding and Order did not require OIE to do anything. The Order simply noted that because as of that date OIE was not yet authorized to provide service as a public utility and natural gas company, OIE had no standing to raise issues in Suburban's abandonment docket (Finding and Order, p. 10).

It should be abundantly clear that OIE's statement at the hearing in Case no. 08-947-GA-ABN on June 23, 2011 to the effect that it did not oppose the stipulation, was adopted in response to the affidavit submitted by KNG's President, Ms. Roller, stating that KNG would serve the Hoytville municipal customers and customers along the Hoytville Lateral and McComb Transmission System temporarily until OIE was approved as a natural gas company and utility by the Commission, including KNG's commitment to negotiate terms and pricing of transportation service to OIE "at an appropriate time and in good faith".⁶ Additionally her affidavit committed KNG to cooperate with OIE in attempting to develop a mutually acceptable transition plan to be included in a joint application for substitution of service (Finding and Order, p. 7). It is the height of audacity to claim as KNG does that OIE's continuing and diligent efforts to achieve agreements with KNG on these matters was in violation of that Finding and Order.

What is clear is that Ms. Roller's affidavit submitted in the Suburban Abandonment case omitted to state that her commitment for good faith negotiation with OIE was qualified as noted for the first time in the KNG Memo at p. 27: "[T]he 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."

⁶ With that key commitment from KNG, OIE could agree not to oppose the Revised Stipulation. OIE recognized that the transition of service from Suburban to KNG, Ohio Gas and the Village of Deshler was a means of resolving the long standing application Suburban had filed in 2008. Even if it had determined to oppose the Revised Stipulation, the Commission determined in its Finding and Order that because OIE was not yet authorized to commence service as a public utility and natural gas company its concerns regarding service to customers along the Hoytville Lateral and McComb Transmission System were not ripe for determination.

But as developed in this Memorandum in Opposition, the Commission did not order that Columbia Transmission's delivery point at North Baltimore should be permanently closed. It is operationally feasible for such deliveries to be resumed. Public policy favors competitive supply sources; the availability of deliveries through the North Baltimore Station represents a clear opportunity for consumers to benefit from lower cost supplies sourced in the developing Appalachian shale plays. As an open access transporter, KNG cannot simply veto such transportation service.

OIE submits that the KNG Memo reflects its desperate desire to avoid having its anticompetitive conduct after July 1, 2011 subjected to scrutiny. When the time to present evidence comes, OIE will provide evidence that demonstrates the pattern of KNG actions taken to prevent OIE from initiating service to customers on the Hoytville Lateral and McComb Transmission System that it leases or owns, frustrating the intention of the Village of Hoytville to be served by OIE pursuant to its municipal ordinance, and seeking to preclude McComb from receiving the gas supplies it has elected to receive from OIE.

II. ARGUMENT

A. OIE's Complaint States Reasonable Grounds.

1. The Commission's Finding and Order in Case No. 08-947-GA-ABN did not foreclose the resumption of deliveries of interstate gas supplies through the North Baltimore Station.

KNG asks the Commission to dismiss this complaint based primarily on its contention that by adopting the Revised Stipulation proposing substitution of service in the Abandonment docket, the Commission was also implicitly ordering the permanent deactivation of Columbia Transmission's delivery point with the Deshler Line at the North Baltimore Station *unless KNG were to be the operator of that Station*. Quite

simply, the June 29, 2011 Finding and Order in Case No. 08-947-GA-ABN does not support any such interpretation.

In adopting the Stipulation, the Commission stated as follows:

Upon review of the stipulation, and the evidence presented at the hearing, we conclude that the terms and conditions therein represent a reasonable resolution of the issues in this case. We find that the stipulation is the product of serious bargaining among capable knowledgeable parties with diverse interests, as well as the staff. We believe that the stipulation benefits customers and the public interest, by assisting the affected villages in transferring management and control of the natural gas transmission and distribution systems serving the villages and avoids interruption of service to customers served through the system. Finally we find that the stipulation does not violate any regulatory principle or practice.

(Finding and Order, pp. 9-10).

Clearly, there is no independent finding in this Finding and Order that relates to the permanent termination of deliveries through deactivating the North Baltimore Station. If there is such a position on permanent termination, it must be found in the language of the Revised Stipulation that the Commission approved. At page 16 of the Revised Stipulation appears the following feature of the proposed transition plan:

In coordination with KNG, Suburban shall close the valves to the Deshler Pipeline and install flange blind plates on such valves at the North Baltimore interconnection on the Transfer Date immediately after KNG has verified that an adequate level of pressure has been established through the KNG interconnection.

At page 24 the Revised Stipulation provides that, other than compliance with the terms of the Transition Plan, Suburban would no longer have any obligations as of the Transfer Date under its Leases with the Villages, under the October 2009 Village Ordinances for temporary service after expiration of the leases or to KNG, Ohio Gas or Deshler's municipal utility, or regarding the System of transmission and distribution lines interconnecting the Villages.

Those are the only mentions of installing blind plate flanges in the Revised Stipulation. This strongly suggests that the installation of the blind plates was for Suburban's protection from any subsequent liability to any of its former contractual counterparties or the other parties to the Stipulation. It clearly does not rise to the level of an express finding that operation of the KNG pipeline system with deliveries from the Crossroads meter required that the delivery point be permanently closed. This is explicitly acknowledged at p. 24 of the KNG Memo: ("OIE contends that the Commission's approval of the Stipulation did not mean that deliveries could never be reinstituted over this pathway at some point in the future. KNG agrees.") KNG follows this admission with a qualification. It contends that only after a joint application and approval by the Commission pursuant to Ohio Revised Code §4905.48 could a connection of OIE facilities located in the North Baltimore Station with the Deshler Line be accomplished. Yes, the Finding and Order approved the Transition Plan including the provision that Suburban would install blind plate flanges on outlet valves. However, as discussed in the next section, there is no new or existing connection of OIE facilities with those of KNG for the Commission to approve.

KNG apparently sought to "finesse" the Revised Stipulation to transform the authorization that Suburban would blind plate the valves in North Baltimore Station into much more: a defensive mechanism against participation in the market served through the Deshler Line from that Station. This is apparent from the discussion appearing at p. 28 of the KNG Memo. In discussing the considerations that went into its purchase of the Deshler Line from the Village of Deshler, KNG acknowledged that:

[A]ccess to TCO [Columbia Transmission] would have been a plus, [but] Suburban maintained that the station was no 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. (Emphasis added).

One could simply insert "OIE" in place of "Suburban" in this passage to understand KNG's defensive posture. Clearly, KNG had made the determination very early on that while the operation of the North Baltimore Station provided advantages for consumers served through its Deshler Line, it would forego those advantages unless it had absolute control of deliveries through that delivery point. It follows this rationale with its unsupported contention that KNG "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." ⁷ OIE intends to present evidence showing how wrong that purported justification is. With responsible coordination of flowing gas pressures, the benefits to consumers of the additional path for competitively priced gas supplies can be gained and KNG will have the ability to serve its customers along the Deshler Line between North Baltimore and the Hoytville Lateral, without risk to service to consumers east or west of the Village of Deshler.

2. Columbia Transmission pipeline facilities are interconnected with KNG's Deshler Line downstream of the North Baltimore Station and there is no proposed or actual interconnection of the OIE pressure regulation facilities in that Station with KNG facilities that requires KNG consent or Commission Approval.⁸

The KNG Memo at p. 3 correctly states that the Deshler Line (which it refers to as the KNG Line) is interconnected with the Columbia Transmission pipeline "at the KNG

⁷ Id. At 28.

⁸ On October 17, 2012 KNG filed a complaint with the Commission premised upon the alleged non-compliance by OIE with requirements of Ohio Revised Code §4905.48 and violation of Ohio Revised Code §§ 4905.54 and 4905.56 by OIE and officers of OIE, respectively. OIE will submit its answer in timely fashion to that complaint, and a motion to dismiss. However, there are common themes addressed here.

Line's eastern terminus near North Baltimore, Ohio".⁹ However, the KNG Memo goes on to state that the Revised Stipulation 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." This is internally contradictory and factually inaccurate.

Here is the fact: there is no interconnection between KNG's Deshler Line and OIE's pressure regulation facilities located within the Columbia Transmission North Baltimore Station. OIE's evidence will show that its regulator runs are connected exclusively with facilities owned by Columbia Transmission and operated by Columbia Transmission pursuant to FERC jurisdiction within the North Baltimore Station. KNG'S Deshler Line interconnects with *Columbia Transmission's* facilities downstream of the outlet valves that OIE owns in that Station. OIE will introduce documentary evidence in the form of business records of Columbia Transmission establishing that Columbia Transmission owns the land, the building housing the measurement, the measurement equipment itself, and all "Station Piping". Quite simply, KNG has no pipeline in the North Baltimore Station.

OIE's evidence will show that the blind plate flanges installed by Suburban were installed on those three outlet valves now owned by OIE. Those outlet valves are welded to an 8-inch outlet header owned by Columbia Transmission. Once the valves are opened (which will only occur after Commission approval of the Transition Plan effecting substitution of service in this proceeding) gas measured by Columbia Transmission will be reduced by OIE's pressure regulation to a level below the maximum allowable

⁹ Indeed, this was verifiably the intent of the parties to the 1959 Deed and Indenture (Exhibit A to the Complaint, p. 3) which stated "it is contemplated that the initial supply of gas to the System will be from the connection with the transmission line of the Ohio Fuel Gas Company [predecessor in interest of Columbia Transmission] at the eastern terminus of the above described 8-inch line of Deshler and the Transmission System is to be constructed in order to permit the supply of gas to each Municipality *from said point...*"

operating pressure of the Deshler Line, and will pass through Columbia Transmission's outlet header into the Deshler Line.

Ohio Revised Code §4905.48 applies to the operation of two utility systems in connection with one another. It establishes no requirement that the Commission approve interconnections between a jurisdictional natural gas company and an interstate pipeline regulated by the FERC. Moreover, because there is no physical connection between the equipment of OIE in the North Baltimore Station and the Deshler Line downstream of Columbia Transmission's pipeline in the North Baltimore Station, there was and is no basis for OIE and KNG to submit a joint application under §4905.48. OIE is requesting transportation service from KNG through an interstate pipeline delivery point on the Deshler Line. The fact that Columbia Transmission has designated OIE contractually to operate the Station does not change that. OIE does not seek authority to enter into a contract with KNG to operate its lines or plant in connection with the lines or plant of KNG governed by approval under Ohio Rev. Code §4905.48.

Under these circumstances, in combination with the fact, as KNG admits, that gas flow can be reinstituted through North Baltimore Station, there are reasonable grounds for OIE's complaint that its request for transportation service over the Deshler Line to the Hoytville Lateral is being rejected for impermissible anti-competitive reasons. Unfortunately for OIE and all potential shippers interested in the lower-cost gas sourced through the North Baltimore Station, KNG did not disclose in the Suburban Abandonment proceeding that its intention was to negotiate in good faith with OIE *only* if KNG's preferred transportation path eastward from Crossroads Pipeline were to be utilized for the requested transportation of what would most certainly be more expensive sources of supply. KNG now seeks the imprimatur of this Commission to implement its

defensive strategy and restrict transportation on its pipeline system in a way never contemplated by the Commission's order authorizing substitution of service in the Suburban Abandonment case or the Revised Stipulation adopted in that proceeding.

The KNG Memo acknowledges that the renewal of transportation service from North Baltimore Station west through the Deshler Line would provide KNG and the Deshler municipal utility with an additional supply option but states:

...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.

(KNG Memo, p.32)

Although OIE disputes that KNG would "surrender control of the flows and pressure" as KNG argues, KNG acknowledges that it is operationally feasible to renew deliveries through the North Baltimore Station. It must have a better rationale for refusing the open access transportation its tariff authorizes than to say this transportation path is "not a desirable supply option". OIE will present evidence demonstrating that the lower-priced sources of gas that would be available to shippers on the Deshler Line or to end use customers of shippers on the Deshler Line through resumption of transportation service from North Baltimore Station makes this a very desirable supply option indeed when the objectives of the consumer are taken into account. To the extent KNG refuses to avail itself and consumers on the Deshler Line or the Hoytville Lateral and McComb Transmission System of this opportunity, it must be held to a stricter standard than "we don't want to do it". It is a reasonable ground for OIE's Complaint that KNG rejects this attractive supply option based on an attempted misapplication of the approval

requirement of Ohio Revised Code §4905.48 based on a completely erroneous perception of the ownership of facilities in the North Baltimore Station.

KNG incorrectly contends that the Complaint “contains no allegation that KNG has violated any rule or statute” [sic], although conceding that KNG’s complaint alleges violation of a Commission Order (KNG Memo p. 40). The complaint clearly outlines OIE’s contention that by refusing transportation service from North Baltimore Station to the Hoytville Lateral, KNG is subjecting OIE and consumers on the Hoytville Lateral and McComb Transmission System to undue or unreasonable prejudice or disadvantage. Such discriminatory treatment, motivated by its desire to prevent another competitor from entering the market, is prohibited by Ohio Revised Code §4905.35. OIE’s Complaint alleges that existing and potential customers along those pipelines are being disadvantaged by KNG’s intransigent efforts to foreclose substitution of service by OIE.

Second, although KNG claims it did not deny transportation service, it limits this claim to transportation “over the path contemplated by the Commission-approved stipulation”. OIE disputes that KNG offered transportation service under non-discriminatory terms and conditions over the Crossroads to Hoytville transportation path and believes that this can be established by competent evidence after discovery is completed. However, it begs the ultimate question: can an open access transporter simply refuse to provide transportation service that is operationally feasible (by its own admission) because it deems the supply option “undesirable” due to another utility operating the delivery point where the jurisdictional pipeline interconnects with an interstate pipeline?

Finally, at p. 41 of the KNG Memo appears the contention that it was “abundantly clear” that after the deactivation of the North Baltimore Station in July 2011 KNG

intended to operate the Deshler line between Hoytville and North Baltimore Station as a “distribution line”. This is a distinction without a difference when KNG is providing transportation service to at least one customer on the Deshler Line. KNG has a transportation tariff. It has not segmented in any way its pipeline system to provide that transportation service is unavailable on any portion thereof. Without Commission approval for a modification to its transportation tariff, KNG’s attempt to refuse transportation on a segment of pipeline which it chooses to informally designate as a “distribution” pipeline is a violation of Ohio Revised Code §4905.35.

To summarize, OIE has clearly stated reasonable grounds in its Complaint. The Commission could only rule in KNG’s favor on its Motion to Dismiss if it adopts the ultimate legal conclusions for which KNG contends in its Motion and supporting Memorandum. This the Commission cannot do when ruling on a Motion to Dismiss. The Commission would have to hold (contrary to KNG’s own admission) that the adoption of the Revised Stipulation in the Suburban Abandonment case Finding and Order dictated the permanent deactivation of the North Baltimore Station (unless KNG is the operator of the Station), such that the transportation path westward from that Station no longer exists. It would also have to find that KNG’s Deshler Line is connected to OIE’s pressure regulation equipment installed in Columbia Transmission’s North Baltimore Station rather than to Columbia Transmission’s station piping so that KNG could refuse to consent to deliveries through that Station in a joint application filed under Ohio Rev. Code §4905.48. And the Commission would have to determine that the contacts and conduct of KNG with current or prospective recipients of gas service located along the Hoytville Lateral, in the Village of Hoytville, and along the McComb Transmission System were not intended to preclude or at a minimum delay OIE’s entry as a potential

competitor in the marketplace in spite of its clearly undertaken obligation by sworn affidavit in the Suburban Abandonment proceeding to negotiate in good faith with OIE for transportation service and a mutually agreeable transition plan to support an application for substitution of service. It is submitted that KNG has justified none of these conclusions of ultimate fact in the KNG Memo.

B. OIE's claims are not barred by the doctrines of Promissory Estoppel, Collateral Estoppel, or Laches.

In its Motion to Dismiss, KNG asserts, simply for the purpose of making the argument, that any claim by OIE with respect to capacity rights on the Deshler Line by virtue of the 1959 Deed and Indenture would be barred by the doctrines of promissory estoppel, collateral estoppel, and laches. (KNG Memo, p. 44). KNG presents this argument despite admitting that: 1) OIE *does not* present the argument in its Complaint that KNG's refusal to permit OIE to deliver gas over the Deshler Line violates OIE's rights pursuant to the 1959 Deed and Indenture, and 2) that OIE makes no assertion that the Commission has jurisdiction to render such a decision regarding those rights. Yet, KNG engages in an unnecessary (and erroneous) analysis regarding why such rights are barred, if OIE is asserting such rights in this proceeding, which it clearly is not. OIE is not relying upon the capacity rights it clearly has in the Deshler Line. This effort by KNG to suggest that OIE is making such a contention is, quite frankly, a distraction from the real issues contained in OIE's Complaint-- that KNG has continually engaged in anti-competitive conduct and wrongly refuses provide the open access transportation service its tariff requires.

Notwithstanding the fact that any discussion regarding the capacity rights granted by virtue of the 1959 Deed and Indenture is inapposite to the issues at hand in this proceeding, OIE will address KNG's estoppel and laches arguments, below.

1. The doctrine of promissory estoppel does not bar OIE from asserting a claim.

KNG argues that OIE is barred by the doctrine of promissory estoppel from asserting any capacity rights pursuant to the 1959 Deed and Indenture, because the Village of Hoytville, to which OIE is a successor in interest, "terminated its interest in the 1959 Deed and Indenture prior to leasing its facilities to OIE".¹⁰ Hence, KNG concludes that estoppel would bar any claim by the Village of Hoytville and, thus, OIE, "that it has any remaining rights to System capacity under the 1959 D&I".¹¹ KNG's contention is erroneous. The doctrine of promissory estoppel is inapplicable under these circumstances and, even if it were, the facts of this proceeding would not be sufficient to warrant estoppel.

"Promissory estoppel is a quasi-contractual concept where a court in equity seeks to prevent injustice by effectively creating a contract where none existed."¹² "Promissory estoppel comes into play where the requisites of contract are not met, yet the promise should be enforced to avoid injustice."¹³ "Promissory estoppel can serve as a substitute for consideration in contract formation."¹⁴

¹⁰ (KNG Memo p. 45).

¹¹ *Id.*

¹² *Gus Hoffman Family L.P. v. David*, Clermont County Case No. CA2006-09-076, 2007-Ohio-3968, ¶6 (citations omitted).

¹³ *Olympic Holding Co. v. ACE Ltd.*, 122 Ohio St. 3d 89, 96, 2009-Ohio-2057, 909 N.E.2d 93.

¹⁴ *Dayton Area Sch. E.F.C.U. v. Nath*, 1998 Ohio App. LEXIS 4141, 16-17 (2nd Dist.)(citations omitted).

KNG's argument for promissory estoppel arises from an ordinance the Village of Hoytville passed in attempt to terminate its interest in the 1959 Deed and Indenture.¹⁵ Nothing about this argument relates to a contractual relationship or contract formation. The Village's renunciation, even though it was not legally effective,¹⁶ does not form any type of contractual relationship with any other entity and, thus, promissory estoppel clearly cannot be applicable here.

Even if the doctrine were applicable, which it clearly is not, the circumstances in this proceeding would not support such a claim. In order to prevail on a claim of promissory estoppel, one must show: 1) a clear and unambiguous promise, 2) reasonable and foreseeable reliance on the promise, and 3) injury resulting from that reliance.¹⁷ Further, the doctrine of promissory estoppel holds: "a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."¹⁸

The Village of Hoytville's attempt to renounce its rights does not constitute a "promise" let alone an unambiguous promise sufficient to substantiate a claim for promissory estoppel. The ordinance was a legal action and a unilateral statement, not a

¹⁵ (See KNG Memo p. 44 and Exhibit A thereto).

¹⁶ The 1959 Deed and Indenture requires consent of all the Municipalities, or their successors, in order to terminate any entity's interest and/or obligations in the Agreement. (Attached to Complaint as Exhibit A). Section 11 of the 1959 D&I provides:

Any person, firm, corporation or governmental body which shall assume the operation of the portion of the System owned by any of the Municipalities shall be entitled to its rights hereunder to the extent authorized by such Municipality, or to the extent provided by law, and shall be required to assume and shall be bound by the obligations of said Municipality hereunder in respect of the operation, maintenance, replacement and repair of its portion of the System; provided, however, that said Municipality shall not thereby be relieved of its obligations hereunder except with the consent of all the other Municipalities or to the extent required by law.

¹⁷ *Dayton Area Sch. E.F.C.U. v. Nath*, 1998 Ohio App. LEXIS 4141, 16-17 (2nd Dist.)(citations omitted).

¹⁸ *Id.* (citing *Talley v. Teamsters, Chauffeurs, Warehousemen, and Helpers, Local No. 377*, 48 Ohio St. 2d 142, 146, 357 N.E.2d 33 (1976)).

representation to another party. Additionally, KNG has not alleged that it has either relied upon or suffered any injury from such reliance upon the Hoytville ordinance. KNG only suggests that the other villages made arrangements for gas service to their residents, not that KNG relied upon the ordinance, or suffered any injury as a result of such reliance.¹⁹

KNG's vague assertion that OIE would be estopped from asserting capacity rights obtained by virtue of OIE's purchase from the Village of McComb of the McComb-Hoytville Line is similarly unsupported. Again, any attempt by the Villages to renounce rights or obligations pursuant to the 1959 Deed and Indenture, without unanimous consent from each Village, is ineffective. Even if it were, KNG would have no standing to assert promissory estoppel in that circumstance because it cannot maintain that the Village of McComb made any unambiguous promise not to take gas from the McComb-Hoytville Line or that KNG was damaged by any reasonable or foreseeable reliance on such a promise.

2. The doctrine of collateral estoppel does not bar OIE from asserting a claim related to capacity rights granted by virtue of the 1959 Deed and Indenture.

As noted in the Section I, reliance on the doctrine of collateral estoppel has no place in determining whether reasonable grounds have been stated for a complaint filed pursuant to Ohio Rev. Code § 4905.26. The Ohio Supreme Court has held that reasonable grounds may exist to raise issues which might strictly be viewed as "collateral attacks" on previous orders (See Footnote 1 for citations). For this reason alone, KNG's contention here is unavailing.

¹⁹ (See KNG Memo, p. 45).

KNG argues that collateral estoppel would preclude OIE from asserting rights to access the delivery point at North Baltimore and to capacity on the Deshler Line, because OIE did not object to the Stipulation. KNG erroneously suggests that the Stipulation language, which states that the “Deshler 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” was meant to be permanent and is binding on OIE and KNG with respect to their transition plan.²⁰ Not only does this assertion completely misrepresent the provisions contained in the Stipulation, KNG’s assertion that collateral estoppel is applicable here is inherently flawed.

In order to prevail on a claim of collateral estoppel, a party must demonstrate: 1) the party against whom estoppel is sought was either a party or in privity with a party to the prior action, 2) the court must have rendered a final judgment on the merits in the prior case after a full and fair opportunity to litigate the issues, 3) the issue must have been admitted or tried and decided and must have been necessary to the final judgment in the prior case, and 4) the issue must have been identical to the issue involved in the prior suit.²¹ “An absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action.”²²

As OIE has previously indicated in this response, the issue of how KNG will transition service to OIE was not a matter that was tried and decided in the Abandonment Proceedings.

²⁰ (KNG Memo p. 46).

²¹ *Montfort Supply Co. v. City of Chevoit*, 1995 Ohio App. LEXIS 4172, *15-16 (Hamilton County).

²² *Id.* at 201.

The provision contained within the Stipulation to which KNG relies upon for its contention, provides as follows:

...In coordination with KNG, Suburban shall close the valves to the Deshler Pipeline and install flange blind plates on such valves at the North Baltimore interconnection on the Transfer Date immediately after KNG has verified that an adequate level of pressure has been established through the KNG interconnection...²³

Nowhere in the Stipulation or Order is there any requirement that the valves will be blind plated *indefinitely* or that OIE would be required to transport gas through the Crossroads delivery point, as KNG contends. KNG is essentially taking the position that an action which was performed solely for the purpose of enabling Suburban to relinquish any obligation to provide service to customers in the Villages is somehow a binding declaration on OIE. The transition plan in the Stipulation was agreed upon solely for the purpose of enabling Suburban to abandon service and cease any obligation to serve the Villages or the unincorporated surrounding areas.²⁴ KNG seems to forget that the Stipulation also provided that KNG and OIE would come up with their own transition plan.²⁵ As such, the matters at issue in the Abandonment Proceeding come nowhere close to meeting the standard for mutuality of issue, as is required for collateral estoppel to apply.²⁶

²³ (Stip. p. 16).

²⁴ (See Stip. pp. 6, 12, 14).

²⁵ (Order, para.12, 17) (“[A]ny transfer of service from KNG to OIE would be subject to the terms and conditions of any agreement that those two entities enter into in the future and subject to the approval of the Commission”).

²⁶ The Supreme Court has analyzed four factors to determine whether litigated issues are identical: 1) the court considered the existence of substantial overlap between evidence and argument, 2) the court examined whether the new claim involved application of the same rules of law, 3) the court considered whether pretrial preparation and discovery reasonably could have been expected to cover the new matters in the prior action, and 4) the court looked to the closeness of the relationship between the claims involved in the two proceedings. *Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St. 3d 193, 443 N.E. 2d 978 (1983).

Further, during the Abandonment Proceedings, KNG agreed that it would cooperate with OIE to “develop a mutually acceptable transition plan to be incorporated into 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.”²⁷ OIE accepted KNG’s representations that it would engage in such cooperative discussions and negotiations to create the transition plan and apply to substitute service once OIE was approved by the Commission to provide natural gas service, which it was in October 2011. It defies logic that, considering those representations, KNG would now try to convince the Commission that the transition plan created for the purpose of transitioning service from Suburban to KNG would wholly apply to OIE. What KNG has actually done is road blocked negotiations at every turn and continually engaged in uncooperative conduct with the intention of railroading OIE into transporting gas through Crossroad, which it is not required to do, and preventing OIE from transporting gas through Deshler, which it has every right to do.

3. The doctrine of laches does not bar OIE from asserting a claim related to capacity rights by virtue of the 1959 Deed and Indenture.

KNG’s assertion that laches bars OIE from asserting any claims to rights pursuant to the 1959 Deed and Indenture is completely unsupportable. First, laches is an affirmative defense and, thus, is not the proper subject of a motion to dismiss; rather, it “must be pleaded and proven by the party asserting that defense.”²⁸ In any event, KNG has not demonstrated that OIE engaged in any dilatory conduct or that KNG has somehow been prejudiced by a delay.

²⁷ (Order, para. 12).

²⁸ *Post v. Caycedo*, 2008-Ohio-111, ¶7 (9th Dist.) (citing *State ex rel. Freeman v. Morris*, 62 Ohio St. 3d 107, 579 N.E.2d 702 (1991)).

In order to establish laches, one must demonstrate: 1) unreasonable delay or lapse of time in asserting a right, 2) absence of an excuse for such a delay, 3) knowledge, actual or constructive, of the injury or wrong, and 4) prejudice to the other party.²⁹ Delay in asserting a right does not in itself constitute laches.³⁰ In order to succeed on a claim of laches, one must demonstrate material prejudice by the unreasonable and unexplained delay.³¹

The Abandonment Proceeding was not a proper time or forum for OIE to assert rights with respect to the 1959 Deed and Indenture. The Finding and Order in the Suburban Abandonment case did not (and could not) establish any rights pursuant to the 1959 Deed and Indenture and in no sense did the Stipulation or Order purport to do so. The Commission even recognized in its Finding and Order that because OIE had not yet become authorized to commence service as a public utility and a natural gas company, its concerns regarding service to customers along the Hoytville Lateral and McComb Transmission System were not ripe for determination. As discussed above, the language indicating that the Deshler Line would be blind-plated and the Crossroads interconnection would be established, had no impact on OIE's right to common capacity pursuant to the 1959 Deed and Indenture, because nothing in the Stipulation or Order indicated either that the line would be blind-plated for any reason other than to allow Suburban to abandon service as quickly as possible or that it would remain in place permanently.

Further, for KNG to represent that OIE has somehow been blindsided KNG with respect to its position that it has capacity rights by virtue of the 1959 Deed and Indenture

²⁹ *Martin Marietta Magnesia Specialties, LLC v. Pub. Util. Comm.*, 129 Ohio St. 3d 485, 2011-Ohio-4189, 954 N.E.2d 104, ¶45.

³⁰ *Post, supra* at ¶9 (citations omitted).

³¹ *Id.*

is a clear misrepresentation of the facts leading up to this point. Even though OIE does not seek a declaration of its rights under that document in this proceeding, OIE has asserted from the very beginning of negotiations with KNG regarding the establishment of a proper transition plan, that it does have capacity rights to the Deshler Line pursuant to the 1959 Deed and Indenture. OIE has continued to engage in negotiations with KNG to obtain open access transportation under non-discriminatory terms and conditions in order to come to an agreement with respect to a transition plan, which KNG stated it would negotiate in good faith. OIE has relied upon KNG's representations and had no reason to believe that KNG would act otherwise, but KNG has acted otherwise.

Finally, KNG has made no allegation that it has at all been prejudiced by any delay, even if such a delay occurred, which it did not. In fact, KNG has no basis to assert prejudice, let alone the type of *material* prejudice necessary to prevail on a claim for laches.³²

C. OIE's Complaint is not an untimely application for rehearing of the Suburban Abandonment Opinion and Order.

KNG asserts in its Motion to Dismiss that OIE is asking the Commission to "reverse the determination that the Deshler Line should be blind-plated, which is tantamount to a belated application for rehearing from the Commission's June 29, 2011 order..."³³. KNG's assertion has no merit.

OIE's Complaint has been properly instituted in accordance with R.C. 4905.26. R.C. 4905.26 provides, in pertinent part:

³² "'Material prejudice' consists of 'two types of material prejudice, either of which necessitate the application of laches: (1) the loss of evidence helpful to the defendant's case, and (2) a change in the defendant's position that would not have occurred had the plaintiff not delayed in asserting [its] rights.'" *Reid v. Wallaby's, Inc.*, 2012-Ohio-1437 (Green County.), ¶36 (citations omitted).

³³ (KNG Memo p. 48).

Upon complaint in writing against any public utility by any person... that any ...service rendered... is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that *reasonable grounds* for complaint are stated...³⁴

“R.C. 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the PUCO.”³⁵ “Reasonable grounds” for complaint exist where a public utility asks the PUCO to do what its order intended to do.³⁶ “Reasonable grounds may exist to raise issues which might strictly be viewed as “collateral attacks” on previous orders.”³⁷

Reasonable grounds clearly exist here for OIE to institute this Complaint against KNG. The basis of OIE’s Complaint is requesting the Commission to hold KNG to its promise to negotiate in good faith towards a transition plan and effectuate the same. OIE has not asked the Commission to rehear a matter that was previously determined at the Abandonment Proceeding. As is discussed at length, above, the provision in the Stipulation indicating that the Deshler Line would be blind-plated at North Baltimore was not an indefinite determination or a complete bar for OIE and KNG to do so with respect to their own transition plan. KNG agreed to negotiate the terms of pricing of transportation service to OIE; this current Complaint arises out of KNG’s failure to do so.

³⁴ (Emphasis added).

³⁵ *Allnet Comm. Svcs, Inc. v. Public Utilities Commission of Ohio*, 32 Ohio St. 3d 115, 117, 512 N.E.2d 350 (1987).

³⁶ *Id.*

³⁷ *Martin Marietta Magnesia Specialties, LLC v. Public Utilities Commission of Ohio*, 129 Ohio St. 3d 485, 2011-Ohio-4189, 954 N.E.2d 104, ¶41.

As such, OIE has presented reasonable grounds for Complaint and is not seeking a rehearing of any matter presented to the Commission in the Abandonment Proceedings.

D. The Commission has subject matter jurisdiction to adjudicate OIE's Complaint.

As an open access transporter, KNG may not refuse transportation service to OIE under terms and conditions offered to similarly situated customers. This is the basis of OIE's Complaint. But KNG repeatedly insinuates that OIE's complaint is premised on OIE's rights under the 1959 Deed and Indenture (Exhibit A to Complaint) and that such contractual rights are not a matter of the Commission's subject matter jurisdiction. In the KNG Memo, KNG announces to the Commission that it is solely a matter of KNG's "business judgment" whether to "allow" OIE to deliver gas into the Deshler line through the North Baltimore Station, and that this business judgment is not subject to review by the Commission (KNG Memo, p. 25). Once again, this is an issue of ultimate fact for the Commission to decide, not KNG. However, KNG's position on the determination of this ultimate fact is wholly dependent on its erroneous factual assertion that OIE has connected its pipeline facilities to KNG's Deshler Line; and its erroneous legal conclusion flowing from that assertion that OIE must have received KNG's consent and must make a joint application to the Commission under Ohio Revised Code §4905.48.

OIE acknowledges that it has capacity rights under the 1959 Deed and Indenture, but OIE is not seeking the Commission's adjudication of this Complaint based on those rights. Instead, after repeated fruitless efforts to obtain service from KNG through the Crossroads interconnection, OIE approached Columbia Transmission for service through the North Baltimore Station because KNG is an open access transporter connected with Columbia Transmission at that Station. KNG's tariff provides for transportation service.

The tariff does not state that the provision of such service is based on the unilateral “business judgment” of KNG, nor could it so state. It is KNG’s failure to provide transportation service on non-discriminatory terms and conditions that provides the Commission with subject matter jurisdiction over this complaint.

After the Commission approves substitution of service by OIE in place of KNG under its clear subject matter jurisdiction over the non-discriminatory offering of open access transportation service, if KNG refuse to honor OIE’s capacity rights as assignee of the Village of McComb that refusal will be a matter for resolution by the Common Pleas Court of Wood County. But OIE’s Complaint here clearly raises matters within the Commission’s subject matter jurisdiction. KNG’s effort to suggest otherwise is a red herring to deflect attention from its anti-competitive motives and conduct and its selective refusal to follow its tariff obligation to provide open access transportation in this instance.

E. The Commission has authority to grant the relief requested in OIE’s complaint.

Stripped to its essentials, OIE asks the Commission to step in and facilitate the substitution of service that the Commission contemplated would take place in orderly fashion by mutual agreement and joint application of KNG and OIE in its Finding and Order in Case No. 08-047-GA-ABN on June 29, 2011, and its Finding and Order on October 3, 2011 authorizing OIE to operate as a public utility and natural gas company in Case No. 11-3171-GA-UNC. However, KNG for impermissible motives has sought to frustrate OIE’s market entry to serve the customers on facilities OIE either leases or owns.

KNG asserts at p. 49 of the KNG Memo that the Commission cannot grant the substitution of service requested by OIE in paragraph IV(a) of its Complaint because

OIE has not demonstrated it is ready to commence service, claiming it has “no lawful means” to deliver gas into the KNG Line and “no right to dictate” to KNG how to operate the KNG Line. As to the former, this is simply a rehash of KNG’s flawed argument that KNG must consent to, and then file a joint application with OIE for Commission approval, to connect their facilities under Ohio Rev. Code §4905.48. OIE has already dealt with those arguments in Section II(A) and will not repeat that discussion here. With respect to the second contention, OIE is not attempting to “dictate to KNG how to operate its pipeline” between North Baltimore Station and Hoytville Lateral. It is seeking open access transportation from KNG pursuant to KNG’s transportation tariff under non-discriminatory terms and conditions. KNG cannot unilaterally segment its pipeline system to declare transportation service unavailable on one portion because it deems the supply option “undesirable”.

With respect to Paragraph IV(b) of OIE’s Prayer for Relief, KNG states that OIE unilaterally prepared the Transition Plan attached as Exhibit D to its Complaint, and that KNG does not agree with certain elements of it. KNG concedes that the Commission has authority to adopt the transition plan submitted by OIE (KNG Memo, p. 50). The fact is that OIE submitted several drafts of a transition plan to KNG for consideration and approval. The only reason OIE “unilaterally” proposes the Transition Plan in Exhibit D is because KNG refused to even consider negotiating a non-discriminatory transportation rate for transportation service on the Deshler Line from the North Baltimore Station. Faced with that intransigence OIE proposed the Transition Plan in Exhibit D, which review will show is closely modeled on the transition plan approved by the Commission in Case No. 08-947-GA-ABN. Having said that, OIE fully intends that KNG should have

the unfettered opportunity to propose modifications to the Transition Plan in Exhibit D. It was always OIE's intent to negotiate this Transition Plan in good faith with KNG.

Regarding Paragraph IV(c) of OIE's Prayer for Relief, KNG disputes OIE's request to design, construct, own and operate a measurement station on the Hoytville Lateral at the existing valve between the Hoytville Lateral and the Deshler Line, arguing that the Commission lacks authority to approve the design and specifications for a meter station (KNG Memo, p. 51). OIE contends that pursuant to authority under 49 CFR Part 192, Subpart D, the Staff of the Commission can indeed review the design prepared by OIE and determine whether it meets the pipeline safety requirements for the facilities to be installed.

Regarding Paragraph IV(d) of OIE's Prayer for Relief, commencing at p. 52 the KNG Memo suggests that the Commission has no authority to require KNG to agree to provide transportation service at anything but its published tariff rate. KNG correctly notes that a special arrangement under Ohio Revised Code §4905.31 is the appropriate mechanism for a rate other than the stated maximum transportation rate in its approved tariff. However, KNG acknowledges at p. 53 that the commitment made by its President was to negotiate such a special arrangement with OIE in good faith. Now it adds the qualifier that that good faith obligation only related to transportation eastward from the Crossroads Pipeline interconnection—a qualifier conspicuously absent from its affidavit (KNG Memo p. 53). OIE has already addressed KNG's contention that it can “just say no” to transportation service requested through the North Baltimore Station unless KNG is the operator of that Station and will not repeat that discussion here.

All OIE desires is for KNG to live up to its commitment to negotiate a transportation rate on non-discriminatory terms for open access transportation from North

Baltimore Station to the Hoytville Lateral. Unfortunately, it appears that Commission compulsion is required to ensure that KNG lives up to the obligation it undertook to do so in its sworn affidavit submitted at the evidentiary hearing in the Suburban Abandonment docket on June 23, 2011.

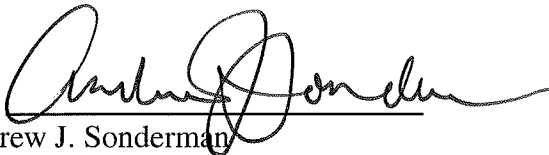
III. CONCLUSION

The bar for granting a Motion to Dismiss filed pursuant to Ohio Rev. Code §4905.26 is set high, as reflected in the cases cited in various sections of this Memorandum. Essentially, a Respondent must demonstrate that even if every factual allegation of the complaint is true, the Complainant cannot prevail. As has been demonstrated in the foregoing discussion, KNG has not come close to supporting dismissal. KNG acknowledges that it had a good faith obligation to negotiate based on its sworn undertaking in Case No. 08-947-GA-ABN. It acknowledges that from an operational standpoint, it is feasible to resume deliveries of interstate gas supplies through Columbia Transmission's North Baltimore Station. It acknowledges numerous contacts with existing and potential customers served from the Hoytville Lateral which OIE leases and the McComb Transmission System which OIE owns.

Once focus is properly placed on KNG's Argument commencing at p. 39 of the KNG Memo, it becomes clear that KNG's desperate attempt to prevent the Commission from finding that reasonable grounds exist for OIE's Complaint must fail. Only if the Commission were to accept at face value KNG's erroneous legal conclusions based on its inaccurate view of the operative facts that will be at issue in this case could the Commission find that the Complaint is insufficient to meet the statutory test. These are

serious allegations and must be heard and evaluated on the basis of competent evidence, not unsworn testimony masquerading as a Memorandum supporting a Motion to Dismiss.

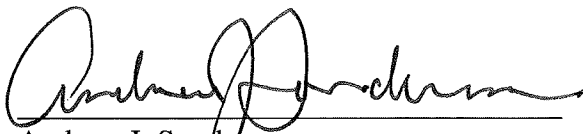
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CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing Memorandum in Opposition to Motion to Dismiss has been served electronically on this 31st day of October, 2012, upon the following Counsel for KNG Energy, Inc:

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Summary: Memorandum Memorandum of Ohio Intrastate Energy, LLC In Opposition to Motion to Dismiss Filed by KNG Energy, Inc. electronically filed by Mr. Andrew J Sonderman on behalf of Ohio Intrastate Energy, LLC