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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. :

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The diagrams illustrate the stages of mitosis in a cell. The first diagram shows prophase, with a rectangular cell containing a nucleus and spindle fibers. The second diagram shows metaphase, with chromosomes aligned in the center. The third diagram shows anaphase, with sister chromatids separating and moving to opposite poles. The fourth diagram shows telophase, with two new nuclei forming and the cell beginning to divide.

On October 31, 2012, Ohio Intrastate Energy, LLC (“OIE”) filed a memorandum in opposition to the motion to dismiss the above-captioned complaint filed herein by the respondent, KNG Energy, Inc. (“KNG”), on October 17, 2012. KNG hereby files its reply pursuant to Rule 4901-1-12(B)(2), Ohio Administrative Code.

Although the OIE memorandum sheds more heat than light on the matter now before the Commission, the one thing OIE memorandum has accomplished is to narrow the issues involved. As noted in its motion to dismiss, it was not clear to KNG whether, or to what extent, OIE's complaint regarding KNG's refusal to permit OIE to deliver gas into the KNG Line from the east via a delivery point on the TCO interstate pipeline at North Baltimore, Ohio was premised on the notion that this refusal violated the capacity rights OIE alleges it derives from the 1959 Deed and Indenture (the "1959 D&I") as the assignee of the village of Hoytville and the successor in

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interest to the village of McComb. Thus, although KNG moved for dismissal on the ground that the complaint failed to state reasonable grounds for complaint as required by Section 4905.26, Revised Code, KNG also argued that the Commission lacked subject matter jurisdiction to interpret the 1959 D&I as insurance against the possibility that OIE was, in fact, relying on rights purportedly derived from that instrument as a basis for its complaint. KNG went on to point out that, in any event, it was not necessary for the Commission to reach this question, because, even if OIE had capacity rights on the KNG Line between North Baltimore and Hoytville by virtue of the 1959 D&I, OIE was barred from asserting such rights as a basis for its complaint in this proceeding based on the principles of promissory and collateral estoppel. However, as a review of OIE's memorandum will show, OIE has expressly disavowed that it is relying on the 1959 D&I as a basis for its complaint in this case.

Notwithstanding that OIE appended a copy of the 1959 D&I to its complaint, OIE specifically acknowledges in its memorandum contra KNG's motion to dismiss that it "is not seeking the Commission's adjudication of this complaint based on those rights."¹ Curiously, despite the assertions in OIE's complaint that it derives capacity rights on the KNG Line from this instrument, OIE now accuses KNG of seeking to introduce this issue into this case "as a red herring to deflect attention from its anti-competitive motives and conduct."² As must surely be obvious, the only reason KNG addressed the Commission's lack of authority to interpret 1959 D&I in its motion to dismiss was because OIE cited this instrument in its complaint that for the proposition that it has capacity rights on the KNG Line. KNG is thrilled that OIE has

¹ OIE Memorandum, 28; *see also* OIE Memorandum, 18, wherein OIE states that "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." (emphasis original)

² OIE Memorandum, 29.

acknowledged that this instrument is in no way relevant to its complaint and trusts that, in view of this representation, neither KNG nor the Commission will hear another word from OIE about purported rights under the 1959 D&I in the context of this case.³ Further, now that OIE has clarified its position, KNG agrees that its arguments that OIE is barred by principles of estoppel and laches from asserting rights purportedly derived from this instrument as a basis for its complaint are no longer relevant for the purposes at hand. Thus, although KNG vigorously disagrees with OIE's legal analysis of these grounds for dismissal, this is now a moot point.

A second issue laid to rest by OIE's memorandum contra is the question of whether OIE's new-found status at the operator of the North Baltimore delivery point imbues OIE with a right to deliver gas from this station into the KNG Line. For reasons explained in detail in the memorandum accompanying KNG's motion to dismiss, and consistent with the judge's ruling denying OIE's motion to join KNG as a necessary party in Suburban-OIE-TCO litigation,⁴ KNG contended that the ownership of facilities at the North Baltimore station does not confer any rights on the operator of the station with respect to KNG Line.⁵ Not only does OIE not dispute this proposition in its memorandum, but, as discussed below, OIE has reframed the issue

³ Although KNG is gratified that OIE has agreed that the interpretation of the 1959 D&I is a matter for a court of competent jurisdiction, KNG notes that the scenario under which OIE envisions this issue would be teed up for judicial resolution (*see* OIE Memorandum, 29) is yet another example of OIE's fuzzy thinking. OIE posits that, if the Commission requires the substitution of service contemplated by the Commission's order in the Suburban abandonment case to go forward as a result of this complaint proceeding, but KNG refuses "to honor OIE's capacity rights as assignee of the Village of McComb, that refusal will be a matter for resolution in the Court of Common Pleas of Wood County" (*Id.*). Plainly, if the Commission were to find in favor of OIE in this proceeding, OIE's right to transport on the KNG Line would be based on the Commission's order, not on the 1959 D&I. Thus, leaving aside the fact that KNG would never subject itself to the consequences of violating a Commission order, any civil action to enforce the Commission's order would, by definition, not be based on any purported rights under the 1959 D&I.

⁴ *See Suburban Natural Gas Company v. Ohio Intrastate Energy, LLC and Columbia Gas Transmission, LLC*, Wood County Court of Common Pleas Case No. 2012CV0150 (Order on Defendant Ohio Intrastate Energy, LLC's Motion to Join KNG Energy, Inc. as a Necessary Party dated May 14, 2012), reproduced as Exhibit B to KNG Memorandum in Support of Motion to Dismiss.

⁵ *See* KNG Memorandum in Support of Motion to Dismiss, 18-20.

presented by its complaint in a manner that clearly indicates that it places no reliance on its status as the operator of the North Baltimore station as a basis for its complaint

In support of its argument that the OIE complaint should be dismissed for failure to state reasonable grounds, KNG noted that there was no allegation in the complaint that KNG had violated any statute or Commission rule and that the only violation of a Commission order alleged in the complaint was the accusation that KNG has not fulfilled the commitments contained in the affidavit of KNG's president, Sandra 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.⁶ In its memorandum contra, OIE claims that KNG's contention that the complaint contains no allegation that KNG has violated any statute is incorrect, and, despite the fact that there is no mention of this statute in the complaint, maintains that its complaint contains allegations that would support a charge that KNG has violated Section 4909.35, Revised Code.⁷ In an attempt to support this reading of its complaint, OIE goes to state that "the basis of OIE's complaint" is that "(a)s an open access transporter, KNG may not refuse transportation service to OIE under terms and conditions offered to similarly situated customers."⁸ This is good to know, because, as with the claim that KNG is in violation of the Commission's order in the Suburban abandonment case, there are no facts alleged in the complaint, which, if assumed to be true, would support a finding that KNG has violated this statute.

In its memorandum contra KNG's motion to dismiss, OIE has again displayed for same penchant for mischaracterizing KNG's position that was evidenced in its complaint. For

⁶ See KNG Memorandum in Support of Motion to Dismiss, 26-27, 40.

⁷ See OIE Memorandum, 16.

⁸ OIE Memorandum, 28.

example, OIE claims that KNG is asking the Commission to dismiss the complaint “based primarily on the contention that by adopting the Revised Stipulation . . . 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.*”⁹ (emphasis original). KNG made no such argument. Plainly, the Commission has no authority to order the deactivation of a delivery point on an interstate pipeline in any event, and the Commission certainly did not do so in its order in the Suburban abandonment case. What the Commission did in adopting the stipulation was to require the blind-plating of the connection of the former Deshler Line at this delivery point as a term of the substitution of service arrangement endorsed by the Commission staff and every other party to the proceeding except OIE, which did not contest the stipulation.

Notwithstanding OIE’s attempt to miscast KNG’s position, KNG’s position is now – and always has been – that, as the owner and operator of the KNG Line, under Ohio law, KNG cannot be compelled to connect what is now a KNG distribution line to a delivery point on an interstate pipeline without its consent. Further, KNG is under no legal obligation to consent to the reconnection of KNG Line to the North Baltimore delivery point to allow OIE to deliver gas into the KNG Line from the east for transportation, by KNG, to a redelivery point at the Hoytville Lateral. Indeed, KNG’s transportation tariff specifically provides that an applicant for transportation service provide “for the delivery of gas to a point on the Company’s existing system which is acceptable to Company” (emphasis supplied), and further provides that KNG “reserves the right to decline requests to provide service . . . whenever rendering such service

⁹ OIE Memorandum, 9.

would be detrimental to the operation of its system.”¹⁰ Under the Commission-approved arrangement, KNG feeds the KNG Line from the west. Thus, not only is the North Baltimore station is not an acceptable delivery point from KNG’s perspective, but relinquishing control of the ability to control the pressure and flows on this line to OIE would be detrimental to the operation of the KNG Line.

OIE also claims that KNG lied when its stated that it had incurred “considerable expense” in reliance on the Commission-approved arrangement for delivering gas from Crossroads, noting that the arrangements with Ohio Gas Company (“Ohio Gas”) relating to the new interconnection on the KNG high-pressure line off Crossroads predated the stipulation filed in the Suburban abandonment proceeding.¹¹ However, what KNG actually said was that it had incurred considerable expense in establishing the pathway to serve 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.¹² This was a reference to the consideration for the purchase of the former Deshler Line from Deshler, not to the earlier arrangements with Ohio Gas that ultimately allowed Ohio Gas to serve Malinta, Holgate, and Hamler, and KNG to deliver gas to Deshler. As previously explained, KNG incurred this expense to satisfy Suburban’s requirement that it be relieved of its obligations with respect to all customers served from the former System facilities simultaneously, and, in so doing, relied – not on the “Commission’s Finding and Order” as stated by OIE – but on the

¹⁰ See KNG Energy, Inc., P.U.C.O. No1, Section V, Original Sheet No. 12, Paragraph 40.

¹¹ See OIE Memorandum , 4, n. 4.

¹² See KNG Memorandum in Support of Motion to Dismiss, 4.

Commission staff's support for the temporary service arrangement then under discussion with the parties to the case that ultimately became the Commission-approved arrangement.

Not to belabor the point, but another example of OIE blatantly mischaracterizing a KNG position is the claim that KNG is now trying "to convince the Commission that the transition plan created for transitioning service from Suburban to KNG would apply wholly to OIE."¹³ Again, KNG said no such thing. KNG simply stated that it anticipated using the Suburban transition plan as a "template" for the KNG-OIE transition plan, and noted that this template would have to be tweaked to fit the KNG-OIE circumstances.¹⁴ In fact, the transition plan OIE initially proposed back in September of 2011 worked off the Suburban plan, and undersigned counsel provided comments on this proposed plan indicating instances in which tweaks would be necessary. OIE's suggestion that KNG advocates the use of the Suburban transition plan without any changes is just plain wrong.

KNG also finds it remarkable that OIE has the temerity to suggest that "KNG, for impermissible motives has sought to frustrate OIE's market entry to serve the customers on facilities OIE leases or owns."¹⁵ In the first place, the only customers on facilities leased or owned by OIE are the customers in and around Hoytville and along the McComb-Hoytville are the distribution customers OIE undertook the obligation to serve in early 2011 with no idea how it was going to deliver gas to them. To characterize these 108 customers as a "market" when no other local distribution company has the ability to serve them other than by duplicating OIE's facilities is quite a stretch. More to the point, the only entity that has impeded OIE's ability to serve these customers is OIE itself.

¹³ OIE Memorandum, 24.

¹⁴ OIE Memorandum, 23.

¹⁵ OIE Memorandum, 29.

OIE submitted an application to KNG for transportation service on June 12, 2011 that contemplated that KNG would transport gas for OIE from the KNG delivery point on Crossroads to the yet to be constructed meter station at the point where the Hoytville Lateral connects to the KNG Line. Both this delivery point and redelivery point were acceptable to KNG, and KNG has, at all times, been willing to provide transportation service to OIE over this pathway subject to a mutually acceptable transportation agreement. Indeed, notwithstanding that OIE had yet to obtain authority to operate as a natural gas public utility, KNG engaged in negotiations with OIE over the summer and fall of 2011 regarding the terms of such a transportation agreement, and offered to provide this service at a rate below its tariffed transportation rate – an offer KNG subsequently revised at the urging of the Commission staff to provide for an even lower price.

It was OIE that pulled the plug on these discussions in October of 2011, and it was OIE that pursued becoming the operator of the North Baltimore station, notwithstanding that achieving this objective would not confer upon OIE the right to transport on the KNG Line between North Baltimore and Hoytville. Then, after spending six months immersed in litigation OIE touched off when it removed Suburban's property from the North Baltimore station without Suburban's permission – a delay KNG had nothing whatever to do with – OIE showed up on KNG's doorstep with a proposal that it knew full well KNG would reject. KNG had explained to OIE in early 2012 when it first learned that OIE was after the North Baltimore station that it would not agree to the connection, but OIE charged ahead despite the provision of the Commission-approved stipulation in the Suburban abandonment case requiring that the connection be closed. Against the historical backdrop, for OIE to now accuse KNG of frustrating its so-called "market entry" because KNG has refused to roll over to OIE's demand

for transportation service via a delivery point that OIE has known all along was not acceptable to KNG is more than a little galling.

Despite all its mischaracterizations, as previously noted, OIE's memorandum in opposition to KNG's motion to dismiss provides a valuable clarification of the basis of OIE's complaint. First, we now know that the complaint is not based on a claim that KNG's refusal to agree to allow OIE to deliver gas into the KNG Line from the east constitutes a violation of capacity rights OIE alleges it derives by virtue of the 1959 D&I. Second, we also now know that the complaint is not based on the proposition that OIE has the right to deliver gas into the KNG Line from the east by virtue of its status as the operator of the North Baltimore station. With these grounds eliminated, the Commission is left with the allegation that KNG has violated the commitments contained in Ms. Roller's affidavit – a claim that will not stand up to even cursory scrutiny – and the new assertion that the “the basis of OIE's complaint” is that KNG has violated Section 4905.35, Revised Code, because “(a)s an open access transporter, KNG may not refuse transportation service to OIE under terms and conditions offered to similarly situated customers.”¹⁶ However, as demonstrated below, there are no factual allegations in the complaint, which, even is assumed to be true, would support a finding that either of these allegations constitutes reasonable grounds for complaint.

¹⁶ OIE Memorandum, 28.

II. ARGUMENT

A. The Facts Alleged In OIE's Complaint, If Assumed To Be True, Will Not Support A Finding That KNG Has Violated Section 4905.35, Revised Code.

1. KNG has not discriminated against OIE by imposing requirements that are different than the requirements imposed on similarly situated customers.

Under Section 4905.26, Revised Code, the Commission is required to set a complaint for hearing only "if it appears that reasonable grounds for complaint are stated." As previously discussed in KNG's motion to dismiss, 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.¹⁷ Thus, where the facts alleged in a complaint, if assumed to be true, fail to establish that the named respondent has violated any statute, rule, or Commission order, the complaint must be dismissed.

OIE now contends that KNG has violated Ohio's utility anti-discrimination statute, Section 4905.31, Revised Code. This statute provides, in pertinent part as follows:

(A) No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

(B)(1) A natural gas company that is a public utility shall offer its regulated services or goods to all similarly situated consumers, including persons with which it is affiliated or which it controls, under comparable terms and conditions.

¹⁷ 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).

Thus, to survive KNG's motion to dismiss, there must be a factual allegation in the OIE complaint, which if assumed to be true, would support a finding that KNG has violated these provisions. There is no such allegation in OIE's complaint.

As noted above, KNG's Commission-approved transportation tariff provides that an applicant for transportation service provide for the delivery of gas to a point on the KNG's existing system acceptable to KNG for redelivery to a point on KNG's system acceptable to KNG.¹⁸ Leaving aside the fact that the North Baltimore station is not a delivery point on KNG's existing system by virtue of the Commission's order in the Suburban abandonment case closing the connection of the KNG Line to the station, KNG has determined that the North Baltimore station is not an acceptable delivery point. This decision would be discriminatory only if KNG had determined in other instances involving applicants for transportation service similarly situated to OIE that the North Baltimore station represented an acceptable delivery point or had agreed to the use of another delivery point proposed by an applicant under a similar arrangement to that proposed by OIE.

As previously explained, the reason KNG has rejected OIE's proposal to reconnect the KNG Line to the North Baltimore Station for use as a delivery point is that KNG operates the KNG Line as a distribution line and feeds the line from the west to serve its own-end user customers between Hoytville and North Baltimore. OIE wishes to deliver gas into the KNG line from the east from a delivery point it controls and to use the KNG Line as a conduit for moving this gas from North Baltimore to Hoytville, a measure that would result in gas being delivered into the KNG Line simultaneously from two different directions and which would require KNG to relinquish its ability to control the pressure and flows on this line. In no instance has KNG

¹⁸ KNG Energy, Inc., P.U.C.O. No1, Section V, Original Sheet No. 12, Paragraph 40.

determined – nor would it ever determine – that a delivery point proposed by an applicant for transportation service was acceptable where this would be the result, and there is no allegation in the OIE complaint that it has done so.

The closest the OIE complaint comes to a factual allegation that is in any way related to its ill-founded discrimination claim is the observation that KNG currently provides transportation service to a customer located on the KNG Line between Hoytville and North Baltimore.¹⁹ However, this customer is, in no way, similarly situated to OIE. The gas transported by KNG to serve this customer enters the KNG system through the same KNG-operated delivery point that feeds the entire KNG system, and, thus, providing transportation service to this customer creates no concern regarding controlling the pressure or flow controls on the KNG Line. OIE, on the other hand, is proposing to deliver gas into a KNG distribution line from a delivery point OIE controls at the same time KNG is feeding this line from the opposite direction through a delivery point it controls. Thus, the fact that KNG has agreed to provide transportation service to a customer located on the KNG Line does not make its refusal to provide transportation service to OIE via the North Baltimore delivery point discriminatory.

OIE repeatedly asserts that the arrangement it has proposed is “operationally feasible,” and goes so far as to claim that it is “routine.”²⁰ Although there are undoubtedly arrangements where a particular pipeline is fed from more than one delivery point, KNG is unaware of any precedent for an arrangement in which transportation service is provided via a delivery point that is not controlled by the service provider entails moving gas across a distribution line that is simultaneously being fed from another direction through a different delivery point. Be that as it may, if, by “operationally feasible,” OIE means that its proposed arrangement is physically

¹⁹ See OIE Memorandum, 17.

²⁰ See OIE Complaint, Paragraph 26.

possible, this may be true. However, such an arrangement would be a nightmare from the standpoint of nominations and balancing. More importantly, the mere fact that this could physically be done, does not mean that KNG has an obligation to do it, nor does it make its refusal to agree to the use of the North Baltimore station as a delivery point discriminatory. Under the transportation provisions of its tariff that KNG “reserves the right to decline requests to provide service . . . whenever rendering such service would be detrimental to the operation of its system.”²¹ Not only would the arrangement proposed by OIE require KNG to give up control of the pressure and flows on the KNG Line, which, of itself, would be detrimental to the operation of its system, but it would impose a substantial administrative burden on KNG that KNG should not be forced to accept.

In evaluating whether OIE’s complaint contains any factual allegation that would support a finding that KNG has discriminated against OIE, it is important that the Commission bear in mind that OIE is not requesting service pursuant to KNG’s transportation tariff. Rather, OIE is, in fact, asking KNG to enter into a Section 4905.31, Revised Code, special contract, which, by definition, would provide for terms and conditions different from those KNG must make available to all applicants for tariffed transportation service. Although the Commission obviously has the authority to determine the reasonableness of a special contract submitted for its approval pursuant to this statute, the Commission has no authority to require KNG to enter into a special contract or to dictate the terms of such a contract, and neither does OIE. Other than 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, only the public providing the service may avail itself of Section 4905.31, Revised Code, to establish an

²¹ KNG Energy, Inc., P.U.C.O. No1, Section V, Original Sheet No. 12, Paragraph 40.

arrangement that differs from that it is required to provide pursuant to its tariff. Thus, KNG's refusal to agree to the special arrangement proposed by OIE cannot conceivably be construed to be a violation of the anti-discrimination provisions of Section 4905.35, Revised Code.

B. The Facts Alleged In OIE's Complaint, If Assumed To Be True, Will Not Support A Finding That KNG Has Violated The Commission's Order In The Suburban Abandonment Case.

As discussed in the memorandum accompanying in KNG's motion to dismiss, the only obligation the order in the Suburban abandonment case imposed on 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. KNG went on to point out that OIE's complaint did not dispute that KNG had offered to provide transportation service to OIE over the path contemplated by the Commission-approved stipulation in the Suburban abandonment case and by OIE's application for transportation service submitted to KNG in June of 2011. Further, the facts alleged in the complaint showed that KNG 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.²²

²² See Section 4905.32, Revised Code.

In its memorandum contra KNG's motion to dismiss, OIE argues that KNG's obligation to discuss the terms and pricing under which KNG would provide transportation service to OIE was not limited to transportation service over the route contemplated by the Commission's order in the Suburban abandonment case and OIE's June 2012 application, but extended to service over a pathway from the North Baltimore delivery point to Hoytville, despite the fact that the connection between the KNG Line and this delivery point was closed pursuant to the Commission-approved stipulation. However, KNG is under no legal obligation to agree to provide transportation service if it determines that the proposed delivery point is unacceptable and plainly has the right to reject an application for transportation service if the service would be detrimental to the operation of its system.

III. CONCLUSION

For those reasons set forth above, OIE's complaint fails to set forth reasonable grounds for complaint as required by Section 4905.26, Revised Code. Accordingly, KNG respectfully requests that the Commission issue an order dismissing the complaint.

Respectfully submitted,




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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following parties by electronic mail this 7th day of November 2012.


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