BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company.	)))))	Case Nos. 11-5201-EL-RDR

INITIAL BRIEF OF
INTERSTATE GAS SUPPLY, INC. d/b/a IGS Energy

I. INTRODUCTION

In its September 20, 2011 Entry on rehearing in Case No. 11-2479-EL-ACP, the Commission initiated Case. No. 11-5201-EL-RDR for the purpose of reviewing the Rider AER of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "FirstEnergy"). In addition, the Commission stated that its review would include FirstEnergy's procurement of renewable energy credits for purposes of compliance with Section 4928.64, Revised Code. This case proceeded to hearing on February 19, 2013 and continued through February 25, 2013. Pursuant to the Attorney Examiner's Entry of April 1, 2013, Interstate Gas Supply, Inc. dba IGS Energy submits this initial brief.

II. ARGUMENT

The General Assembly did not intend that renewable energy compliance payments be used as a means of achieving compliance in lieu of actually acquiring or realizing energy derived from renewable energy resources.

One of the issues in this case is whether Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company should have made renewable energy compliance payments imposed by the Commission instead of actually acquiring Renewable Energy Credits. While other states may permit this option to achieve compliance (Tr. I, 254-

255), the General Assembly has expressly removed that option in Ohio.

Section 4928.64(C)(5), Revised Code provides as follows:

> (5) The commission shall establish a process to provide for at least an annual review of the alternative energy resource market in this state and in the service territories of the regional transmission organizations that manage transmissions systems located in this state. The commission shall use the results of this study to identify any needed changes to the amount of the renewable energy compliance payment specified under divisions (C)(2)(a) and (b) of this section. **Specifically, the commission may increase the amount to ensure that payment of compliance payments is not used to achieve compliance with this section in lieu of actually acquiring or realizing energy derived from renewable energy resources.** However, if the commission finds that the amount of the compliance payment should be otherwise changed, the commission shall present this finding to the general assembly for legislative enactment.

(Emphasis added.)

The General Assembly has clearly indicated that electric distribution utilities and competitive retail electric service providers are to actually acquire or realize energy derived from renewal energy resources. It does not want electric distribution utilities or competitive retail electric service providers to achieve compliance merely by making the renewable energy compliance payment instead of actually acquiring or realizing energy derived from renewable energy resources. This Commission is a creature of statute and has only those powers given it by statute.[1] Given the choice of merely making renewable energy compliance payments "to achieve compliance", or requiring the actual acquisition or realization of energy derived from renewable energy resources, the only legislatively sanctioned option is the latter. The Commission must so find.

[1] Discount Cellular, Inc. v. Pub. Util. Comm., Ohio St.3d 360, 2007-Ohio-53, 859 N.E. 2d 957 (2007); Tongren v. Pub. Util. Comm., 85 Ohio St.3d 87, 1999-Ohio-206, 706 N.E. 2d 1255 (1999); Columbus S. Power Co. v. Pub. Util Comm., 67 Ohio St.3d 535, 620 N.E. 2d 835 (1993).

There is additional legal support for this position in Ohio law. Under Section 4928.64(C)(2), Revised Code, the Commission can only impose a renewable energy compliance payment if certain conditions are met. Subject to the three percent cost cap provisions, if the Commission determines after notice and an opportunity for hearing, and based upon its findings in that review regarding avoidable undercompliance or noncompliance, (but subject to the force majeure provisions of this statute that the utility or company has failed to comply with any benchmark), it shall impose a renewable energy compliance payment on the electric distribution utility or the competitive retail electric service provider. The nature or character of the imposition of a renewable energy compliance payment should also be determined.

Whether a sanction or liability is penal in nature depends on whether the "wrong" results in injury to the public or to an individual. If the injury is to the public, the liability is a penalty. Penalties are strictly defined and issued for the good of the public.[2] The imposition by this Commission of a renewable energy compliance payment on an electric distribution utility or a competitive retail electric service provider can be fairly characterized as a penalty because the injury is to the public -- the failure to actually purchase or realize energy from renewable energy resources. The purpose of the potential imposition of a renewable energy compliance payment is to encourage and provide an incentive for electric distribution utilities and competitive retail energy service providers to meet the benchmarks by requiring them to actually purchase energy derived from renewable energy resources as opposed to energy purchases of non-renewable energy resources.

[2] Mehl v. ICA Americas, Inc., 593 F.Supp. 157 at 160 (S.D. Ohio, 1984).

Forfeitures and penalties are not favored either in law or equity and should be imposed only when clearly justified.[3]

The renewable energy compliance payment is not an end in and of itself, nor is it a means to achieve compliance. Instead, it is a penalty that is designed to encourage compliance with the law and to deter non-compliance. The Commission should be implementing the General Assembly's clear intent by encouraging the purchase of energy from renewable energy resources.

III. CONCLUSION

The Commission should find that the potential imposition of a renewable energy compliance payment does not constitute a method of achieving compliance, but rather is a penalty intended to encourage and provide an incentive for electric distribution utilities and competitive retail electric service providers to actually acquire or realize energy derived from renewable energy resources.

Respectfully Submitted,

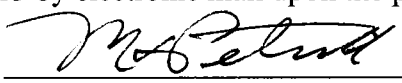
M. Howard Petricoff (0008287)
Stephen M. Howard (0022421)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, Ohio 43215
Tel. (614) 464-5414
mhpetricoff@vorys.com
smhoward@vorys.com

Attorneys for Interstate Gas Supply, Inc.

[3] State, ex rel., Lukens v. Industrial Commission, 143 Ohio St. 609, 56 N.E. 2d 216, 28 O.O. 506 (1944); and State, ex rel., Cline v. Industrial Commission, 136 Ohio St. 33, 23 N.E. 2d 636, 15 O.O. 534 (1939).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 15th day of April, 2013 by electronic mail upon the persons listed below.



M. Howard Petricoff

Thomas.lindgren@puc.state.oh.us
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
jkyler@BKLlawfirm.com
lmcalister@bricker.com
mwarnock@bricker.com
serio@occ.state.oh.us
vespolil@firstenergycorp.com
mkl@bbrslaw.com
cathy@theOEC.org
trent@theOEC.org
robinson@citizenpower.com
callwein@wamenergylaw.com
cmontgomery@bricker.com
todonnell@bricker.com
tsiwo@bricker.com
yost@occ.state.oh.us
berger@occ.state.oh.us
schuler@occ.state.oh.us
dakutik@jonesday.com
cdunn@firstenergycorp.com

Summary: Brief Initial Brief electronically filed by M HOWARD PETRICOFF on behalf of Interstate Gas Supply, Inc. d/b/a IGS Energy