BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF THE OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S COMPLIANCE WITH R.C. 4928.17 AND THE OHIO ADM. CODE CHAPTER 4901:1-37	)))))	Case No. 17-0974-EL-UNC

REPLY IN SUPPORT OF MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT OF INTERSTATE GAS SUPPLY, INC.

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I. INTRODUCTION

The purpose of this proceeding is to ensure that Ohio Edison Company, Toledo Edison Company, and Cleveland Electric Illuminating Company (collectively "FirstEnergy") have complied with R.C. 4928.17 and Chapter 4901:1-37, ie, Ohio's corporate separation laws and rules. Simply put, corporate separation provides the foundation for effective competition and consumer protection. Therefore, this proceeding is imperative to safeguarding against the risk that FirstEnergy has utilized non-competitive monopoly-based assets or information to harm competition or its customers.

Because the resolution of the factual and legal matters in this proceeding will have a direct bearing on Interstate Gas Supply, Inc. ("IGS"), IGS moved to intervene in this proceeding to protect its interest. FirstEnergy opposes IGS's intervention for several reasons. Each lacks merit; therefore, the Commission should grant IGS's motion and provide IGS full party status in this proceeding.

II. BACKGROUND

On December 12, 2012, the Commission initiated an investigation into the development of the retail electric service market.[1] In that entry, the Commission stated, "[a]s Ohio electric utilities are making the transition from functional to structural separation, the Commission finds it appropriate to evaluate the vitality of the competitive retail electric service markets supported by these legislative mandates now that the mandates have been in place sufficient time to assess the results."[2] In furtherance of its evaluation, the Commission solicited comments regarding several subjects and questions, including matters related to utilities' corporate separation practices and their impact on the competitive market.[3]

On January 16, 2014, following the submission of comments, Commission Staff issued a Market Development Work Plan finding, among other things, that "Staff fully believes it is imperative that utility and its affiliate activities should be vigilantly monitored to ensure compliance with section 4928.17, O.R.C. and Chapter 4901:1-37, O.A.C. Furthermore, alignment of cost causation with cost recovery is important in order to further Ohio's policy goals pursuant to Section 4928.02, O.R.C." [4] To that end, "Staff recommends that each utility's policy and procedures pertaining to compliance with the Code of Conduct rules between affiliates be audited at a minimum, every four years by

[1] *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI, Entry (Dec. 12, 2012) (hereinafter referred to as the "*RMI Docket*").

[2] *Id.* at 1.

[3] *Id.* at 3-5.

[4] *RMI Docket*, Market Development Work Plan at 12 (Jan. 16, 2014) (hereinafter "Staff Report").

the Staff of the Commission or by a third party auditor chosen by the Commission and under the direction of Staff."[5]

On March 26, 2014, the Commission issued its order in the *RMI Docket*, holding that "in light of the importance of vigilant monitoring of utility and affiliate activities, the Commission adopts Staff's recommended audit schedule, unless the Commission subsequently orders otherwise, with the recovery of the cost of the audit as a normal operating expense."[6]

On April 12, 2017, the Commission opened this docket to initiate an audit of FirstEnergy's compliance with R.C. 4928.17 and OAC 4901:1-37. On July 5, 2017, the Commission selected Sage Management Consultants, LLC to provide audit services to assist the Commission in its review.[7]

On August 30, 2017, pursuant to RC 4903.221(B) and OAC 4901-1-11(B), IGS moved to intervene in this proceeding. Those sections provide that the Commission, in ruling upon applications to intervene in its proceedings, shall consider the following criteria:

> (1) The nature and extent of the prospective intervenor's interest; (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case; (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

[5] *RMI Docket*, Staff Report at 13.

[6] *RMI Docket*, Finding and Order at 16.

[7] Entry at 1 (Jul. 5, 2017).

Finally, the Supreme Court of Ohio has held that intervention should be liberally allowed for those with an interest in the proceeding.[8]

IGS's motion meets the standard for intervention. In its motion, IGS identified that it has a substantial interest in this proceeding because FirstEnergy's corporate separation compliance—or non-compliance—has a direct bearing on IGS's ability to provide both retail electric service and products and services other than retail electric service (non-commodity products) in the FirstEnergy service territory and throughout the state.[9] With respect to its legal position, IGS stated that it will advocate for corporate separation policies and practices consistent with the General Assembly's intent to restructure the retail market in favor of market-based solutions.[10] Additionally, IGS indicated that it will contribute to the just and expeditious resolution of the issues and concerns raised in these proceedings.[11] Finally, IGS committed to contribute to the development of the record and equitable resolution of the factual issues in the proceeding.[12] In light of the liberal interpretation of the intervention rules, IGS clearly meets the standard for intervention in this proceeding.

On September 14, 2017, FirstEnergy filed a memorandum contra IGS's motion to intervene. FirstEnergy alleges that IGS should not be granted party status or have the right to serve discovery for two reasons. First, FirstEnergy alleges that IGS has no real

[8] *Ohio Consumers' Counsel v. Pub. Util. Comm'n,* 111 OhioSt.3d 384, 388 (2006).

[9] Motion to Intervene and Memorandum in Support of Interstate Gas Supply, Inc. at 4-5.

[10] *Id.*

[11] *Id.* at 2, 5.

[12] *Id.* at 2.

or substantial interest in this proceeding that will be impaired. Second, FirstEnergy claims that IGS will unduly prolong this proceeding and therefore any intervention rights should be limited. As discussed below, each of these arguments lacks merit; therefore, the Commission should grant IGS's motion to intervene with full party status.

III. REPLY IN SUPPORT OF MOTION TO INTERVENE

A. IGS has a substantial interest in this proceeding

FirstEnergy claims that IGS's only alleged interest is that "it operates in the competitive market."[13] FirstEnergy further claims that the Commission has routinely denied intervention when an entity asserts a competitive interest in the resolution of the proceeding, relying on a decision issued by the Commission in a chilled water and steam rate case that predates the Supreme Court's decision in *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 OhioSt.3d 384 (2006). FirstEnergy's argument not only ignores a substantial body of precedent, but also misapplies the holding in the Akron Thermal case upon which it relies.

Initially, the Commission has previously permitted parties to intervene in audits of corporate separation plans,[14] and another party has already intervened without opposition in this proceeding.[15] Indeed, in the *AEP Corporate Separation Audit case*, the

[13] Memo Contra at 2.

[14] *See In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Their Corporate Separation Plan*, Case No. 09-464-EL-UNC (hereinafter "*AEP Corporate Separate Separation Audit*").

[15] *See* Motion to Intervene and Memorandum in Support of the Office of the Ohio Consumers' Counsel (Jun. 9, 2017).

Commission specifically established a deadline for parties filing motions to intervene.[16] Ultimately, the Commission granted all motions to intervene filed in the proceeding.[17]

The Commission's prior rulings permitting liberal intervention in corporate separation-related proceedings are not surprising. The very purpose of Ohio's corporate separation statutes is to ensure an electric distribution utility does not subsidize competitive activities with its distribution assets or otherwise does not negatively impact competitive businesses.[18] Many different parties may have a direct interest in the audit of a utility's compliance with corporate separation requirements. IGS operates in Ohio's

[16] *AEP Corporate Separation Audit*, Entry at 2 (Oct. 28, 2009). *See also In the Matter of the Application of Duke Energy Ohio for Approval of the Second Amended Corporate Separation Plan Under 4901:1-37, Ohio Administrative Code*, Case No. 09-495-EL-UNC, Entry at 2 (Aug. 26, 2009) (hereinafter "*Duke Corporate Separation Audit*").

[17] *AEP Corporate Separation Audit,* Entry at 1 (Apr. 7, 2010). *See also Duke Corporate Separation Audit,* Entry at 2 (Apr. 8, 2010).

[18] *See* R.C. 4928.17(A)(1)-(3), which states that a corporate separation plan must achieve each of the following (in addition to, among other things, the anti-subsidization policy contained in R.C. 4928.02(h)):

> (1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.
>
> (2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.
>
> (3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service, including, but not limited to, utility resources such as trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training, without compensation based upon fully loaded embedded costs charged to the affiliate; and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service. No such utility, affiliate, division, or part shall extend such undue preference. Notwithstanding any other division of this section, a utility's obligation under division (A)(3) of this section shall be effective January 1, 2000.

competitive markets, not just as a retail electric supplier, but also provides other competitive businesses related to energy. Therefore, FirstEnergy's compliance with corporate separation requirements is extremely relevant to IGS's businesses.

Contrary to FirstEnergy's claim, the Commission has routinely permitted parties to intervene in cases involving the resolution of issues that will impact the competitive market, including audit cases. Indeed, the Commission has flatly rejected FirstEnergy's reasoning on several occasions, finding that matters that may impact the competitive market do in fact constitute a substantial interest warranting intervention. For example, in the audit of Duke Energy Ohio's gas cost recovery mechanism, the Commission determined that IGS had a substantial interest in the resolution of competitive matters at issue in the proceeding:

> The examiner finds that issues related to the competitive market, competitive gas suppliers, and their customers may arise in this proceeding. Such issues have been a part of the utility's prior GCR cases before the Commission. Moreover, the competitive program was specifically addressed by CG&E's most recent management and performance audit report and the parties in that GCR proceeding agreed to discuss CG&E's choice program further. Therefore, the examiner finds that a real and substantial interest has been stated and the motion by IGS for intervention should be granted.[19]

Time and again the Commission has granted intervention on the basis that a matter may have an impact on the competitive market.[20] For example, Duke Energy Ohio, Inc.

[19] *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The Cincinnati Gas & Electric Company and Related Matters,* Case No. 05-218-GA-GCR, Entry at 2 (Nov. 15, 2005).

[20] Indeed, FirstEnergy's own affiliates have routinely intervened in corporate separation matters on the basis that they may impact the competitive market: "[a]s a CRES and wholesale provider, FES is impacted by the corporate separation of AEP Ohio and AEP Generation Resources, Inc. For example, FES and other CRES providers are affected when generation-related costs are passed on to all customers, including shopping customers, through an unjustified POLR, GRR, or capacity charge. CRES providers like FES are also impacted by the competitive information which may be shared between employees of AEP Ohio and

("Duke") and Duke Energy Commercial Asset Management ("DECAM") intervened in the audit of AEP-Ohio's fuel adjustment ("FAC") clause case for that reason.[21] Over AEP-Ohio's objection, the Commission permitted Duke and DECAM to participate in that proceeding without limitation.[22] Likewise, the Commission granted IGS's intervention in AEP's last fuel adjustment clause case—over AEP's objection—with full party status: "[t]he Commission finds the motions to intervene filed by IGS, RESA, and OMAEG, for full party status in the FAC Audit Cases, are reasonable and should be granted."[23]

Moreover, the Akron Thermal case FirstEnergy cites in its memo contra was decided by the Commission prior to the Supreme Court's decision in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384 (2006). In that case, the Supreme

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employees of AEP Generation Resources, Inc." *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Motion to Intervene of FirstEnergy Solutions Corp. at 5, (Apr. 10, 2012). *See also In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell its Generation Assets*, 13-2420-EL-UNC, Motion to Intervene of FirstEnergy Solutions Corp. (Jan. 9, 2014).

[21] *In the Matter of the Fuel Adjustment Clause of Columbus Southern Power Company and Ohio Power Company and Related Matters for 2011*, Case Nos. 11-281-EL-FAC, *et al.*, Tr. Vol. I at 10 ("Upon review of the pleadings that were filed, the motions will be granted as Duke Energy Ohio and Duke Energy Commercial Asset Management have met the intervention criteria which are liberally construed in favor of intervention.") (hereinafter "*2011 FAC Case*"); *2011 FAC Case*, Motion to Intervene by Duke Energy Commercial Asset Management at 4 (Oct. 10, 2013) ("DECAM is a participant in the wholesale electric market in Ohio. That wholesale market will be directly impacted by the rates being charged under the standard service offer of AEP Ohio."); *2011 FAC Case*, Reply of Duke Energy Commercial Asset Management in Support of Intervention at 2 (Oct. 22, 2013) ("DECAM has a real and substantial interest in protecting its ability to compete in the SSO. Contrary to AEP Ohio's contention that purely competitive interests do not justify intervention, the Commission has routinely recognized that such interests are indeed an adequate basis for intervention.").*See also In re Purchased Gas Adjustment Clause of The East Ohio Gas Company*, Case No. 05-219-GA-GCR at 6 (Dec. 2, 2005)(granting IGS's motion to intervene because gas cost recovery rate proceedings had a demonstrated impact on competitive markets and the interests of competitive suppliers).

[22] *In the Matter of the Fuel Adjustment Clause of Columbus Southern Power Company and Ohio Power Company and Related Matters for 2011*, Case Nos. 11-281-EL-FAC, *et al.*, Tr. Vol. I at 10.

[23] *In the Matter of the Application of the Fuel Adjustment Clauses of Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case Nos. 09-872-EL-FAC, *et al.*, Order on Global Settlement Stipulation at 17 (Feb. 23, 2017).

Court of Ohio held that "intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO." *Id.* at 388.

In any event, the Akron Thermal case contains a different set of circumstances not present here. In that case, FirstEnergy Facilities Service Group, LLC ("FSG") sought to intervene in Akron Thermal's rate case.[24] FSG had filed a complaint in a separate case alleging that Akron Thermal's existing rates and proposed rates failed to cover their cost of service to the detriment of competition.[25] In denying FSG's motion to intervene in the rate case, the attorney examiner noted that Akron Thermal specifically stated in its application that its current rates are too low but that its "proposed rates and charges are just and reasonable."[26] The Commission noted that "[t]he only potential contribution FSG can bring to the instant rate increase proceeding is to argue that Akron Thermal's regulated rates should cover its cost of providing service, an interest that can be adequately represented by Akron Thermal."[27] In conclusion, the Commission determined that "FSG's interest as a provider of heating and cooling equipment systems is not related to the purposes of the rate increase proceeding and the resolution of issues raised under Chapter 4909, Revised Code."[28] The Commission further noted that "FSG does not

[24] *In the Matter of the Application of Akron Thermal, Limited Partnership for an Increase in its Rates for Steam and Hot Water Service*, Case Nos. 05-5-HT-AIR, *et al.*, Entry a 1 (Jun. 14, 2005) (hereinafter "*Akron Thermal*").

[25] *Id.*

[26] *Id.* at 2-3.

[27] *Id.* at 2.

[28] *Id.* at 3.

demonstrate a real and substantial interest in the rate increase case proceeding of the type that assists the Commission's primary interest of securing the best possible service for the public under a just and reasonable rate structure."[29] But, the Commission went on further to state "the Commission has granted intervention to competitive interests in more recent years with the advent of more competitive utility services, intervention by competitors usually involves utility services by regulated or unregulated providers of those services and where there has been a direct relationship to the proceeding."[30] As discussed below, the latter reasoning is more applicable to this case.

Unlike the Akron Thermal case, which involved a general rate increase, this case involves an audit of a utility's compliance with Ohio's corporate separation requirements. These requirements exist for the very purpose of safeguarding competition and entities such as IGS from regulated utilities utilizing their monopoly functions to uniquely and unfairly benefit unregulated business activities entities operating under a common corporate umbrella.[31] For example, the audit in this case will examine whether FirstEnergy's corporate separation plan is functioning properly and ensuring that unregulated and regulated functions are not cross-subsidizing each other with either resources or information that is not publicly available. Either of these scenarios would negatively impact IGS. Thus, IGS has a clear and direct interest in the resolution of this proceeding.

[29] *Id.* at 3.

[30] *Id.*

[31] *See* R.C. 4928.17(A)(1)-(3) and R.C. 4928.02(H).

FirstEnergy further claims that "it is not IGS's role to ensure that the Companies are complying with the law – it is the Commission's role – the Commission (and its Staff) is quite capable of making these determinations without IGS's assistance."[32] IGS agrees that it is the Commission that will determine whether FirstEnergy is or is not complying with the law. But that does not change the fact that IGS has a substantial interest in ensuring that the Commission makes its determination based upon an appropriately developed record and the correct legal standard. Nor does it change the fact that IGS has a substantial interest in ensuring that FirstEnergy does not provide a competitive advantage to unregulated operations under its common corporate umbrella to IGS's detriment. Indeed, under FirstEnergy's reasoning, no party could intervene *in any proceeding* if the Staff participates and the Commission issues the final decision. Given the Commission's liberal standard for intervention, FirstEnergy's argument should be rejected out of hand.

IGS agrees that the Staff and Commission are capable, but a diversity of intervening parties will enhance the dynamic in the proceeding by providing differing legal and factual perspectives. Through this diversity we may construct a better record and sharpen issues for Commission consideration. Additionally, while IGS appreciates the Staff's capability and hard work, IGS's and Staff's interests and advocacy have not always been aligned with respect to the application or interpretation of Ohio's corporate separation laws and rules.[33] Thus, there is no certainty that the Staff will assert the same

[32] Memo Contra at 3.

[33] *See generally In re Application of Duke Energy Ohio, Inc., for Approval of its Fourth Amended Corporate Separation Plan*, 148 Ohio St.3d 510 (Nov. 1, *2016); In the Matter of the Application of Duke Energy Ohio for Approval of the Fourth Amended Corporate Separation Plan under Section 4928.17, Revised Code, and Chapter 4901:1-37, Ohio Administrative Code*, Case Nos. 14-689-EL-UNC, *et al.*, Initial Comments

or even similar positions as IGS. Consequently, IGS should be permitted to intervene to protect its substantial interest in this proceeding—an interest that is not represented by any other party that will be prejudiced in the absence of granting IGS's motion.

Finally, FirstEnergy claims that the Commission may, in its discretion, provide IGS with an opportunity to file comments following the issuance of the audit report without granting IGS party status, yet, in the same memo, First Energy also makes the assertion that "[a]s IGS and other participants already made comments in the *RMI Docket*, such an opportunity has already been given and further comments are not necessary."[34]

Although IGS agrees that the Commission should permit parties to file comments, the Commission should also grant IGS's intervention and permit the filing of discovery prior to the issuance of the audit report to permit IGS to assist in the development of the record. Based upon IGS's expertise in competitive retail electric service, non-commodity products and services, and corporate separation requirements, IGS is uniquely situated to contribute toward the development of the record in this proceeding.

Regarding FirstEnergy's claim that IGS has already had an opportunity to comment in the *RMI Docket*, that argument completely misses the point. The RMI proceeding related to a statewide discussion of corporate separation issues. It did not relate to the actual compliance or non-compliance of each electric distribution utility based upon actual facts and circumstances. This proceeding will evaluate FirstEnergy's actual business activities to determine whether it has adhered to the law. To date, IGS has not

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Submitted on Behalf of the Staff of Public Utilities Commission of Ohio (May 15, 2014) (hereinafter "*Duke Corporate Separation Case*"); *see Duke Corporate Separation Case*, Objections of IGS Energy (May 15, 2014).

[34] Memo Contra at 3-4.

had an opportunity to weigh in one way or another on that issue; therefore, intervention in this proceeding is warranted.

B. IGS's participation will streamline this proceeding and refine the issues under consideration

FirstEnergy alleges that allowing IGS to intervene would unduly prolong this proceeding because it will allow IGS to serve discovery on FirstEnergy while the audit is ongoing. FirstEnergy alleges that this would be inappropriate "and will require the Commission to engage in lengthy motion practice and discovery disputes as the Companies will resist any premature discovery and requirement that the Companies produce information that is protected by R.C. 4901.16."[35] If the Commission permits IGS to intervene, FirstEnergy argues that it should not be permitted to submit discovery until after a final audit report is issued. Each of these arguments lacks merit.

While FirstEnergy claims that IGS's intervention will delay the proceeding, FirstEnergy's memo contra appears to concede that any delay will be the result of FirstEnergy's own litigiousness rather than any conduct from IGS. Indeed, FirstEnergy baldly states that it intends to oppose any discovery. Such a position defies common sense, reason, and the Commission rules.[36] An audit case, by definition, involves the evaluation of company-specific information. Such information does not fall from the sky—it is produced in response to discovery.

[35] Memo Contra at 4.

[36] Under the Commission's rules, discovery may commence immediately. OAC 4901-1-17.

Further, limiting IGS's ability to serve discovery until after the audit report is issued would frustrate administrative economy by denying the auditor the ability to examine and consider information that IGS may solicit in discovery. The proposed ruling would also defy Commission rules. Under OAC 4901-1-17(A), "discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible." First Energy's argument that requests for discovery should not be served until after the audit report is issued runs contrary to the express language of the Commission's discovery rules. Accordingly, IGS should be permitted to intervene with full party status.

FirstEnergy's reliance on R.C. 4901.16 is also misplaced. As the Commission has noted, "[t]hat statute provides that the Commission staff shall not publicly release public utility information acquired by staff other than through a staff report to the Commission or through staff testimony in a Commission or court proceeding."[37] In other words, the statute prohibits the *staff and the auditor* from disclosing information prematurely, for example, pursuant to a public records request. With respect to any discovery that IGS may independently serve on FirstEnergy as party in this proceeding, R.C. 4901.16 is completely inapplicable. Thus, FirstEnergy's reliance on the statute to prohibit IGS from seeking discovery during the course of the audit is a red herring.

IV. CONCLUSION

For the reasons stated herein, IGS respectfully requests that the Commission grant IGS's motion to intervene. IGS looks forward to participating in this proceeding to

[37] *In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to Its Compliance With the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPA, Entry on Rehearing at 4 (Jul. 28, 2004).

expeditiously and judiciously develop the record with the ultimate goal of enhancing and improving the market for retail electric and non-commodity products and services.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Reply in Support of Motion to Intervene and Memorandum in Support of Interstate Gas Supply, Inc.* was served this 21st day of September 2017 via electronic mail upon the following:

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Summary: Reply in Support of Motion to Intervene and Memorandum in Support electronically filed by Mr. Joseph E. Oliker on behalf of IGS Energy