BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of its Rules for Competitive Retail Natural Gas Service Contained in Chapter 4901:1-27 Through 4901:1-34 of the Ohio Administrative Code.	)))))	Case No. 12-0925-GA-ORD

APPLICATION FOR REHEARING OF INTERSTATE GAS SUPPLY, INC.

On December 18, 2013, the Public Utilities Commission of Ohio ("Commission") set forth an Opinion and Order ("Opinion and Order") in the above captioned proceeding amending the rules that pertain to competitive retail natural gas ("CRNG") service in Ohio. Pursuant to Ohio Administrative Code ("OAC") 4901-1-35, Interstate Gas Supply, Inc. ("IGS") hereby submits this Application for Rehearing on the following issues:

1. The Opinion and Order is unlawful and unreasonable in that it violated the due process of interested parties by materially changing the scope of government aggregation programs without having afforded interested parties the opportunity to comment on the material change;

2. The Opinion and Order is unlawful and unreasonable in that it amends the definition of government aggregation programs in OAC 4901:1-28-01 to limit the terms of government aggregation programs beyond the scope of what is permitted by Ohio law;

3. The Opinion and Order is unreasonable or unlawful in that it fails to appropriately consider rapidly changing technology that can enhance the customer enrollment experience with a CRNG Supplier.

For the reasons more fully set forth in the attached Memorandum in Support, IGS requested rehearing on the above issues.

Also, in furtherance of the Commission's policy of requesting parties to consolidate their positions with those of like interests and thus limiting duplicative arguments and filings, IGS states its endorsement of certain positions taken in the

OGMG Application for Rehearing. As such IGS requests rehearing on the changes to following rules, for the reasons set forth in the OGMG Memorandum in Support:

- Rule 27-05(B)(1)(f);
- Rules Rule 27-08(A) and (D);
- Rules 28-01(C);
- Rule 29-01(N);
- Rule 29-03(C);
- Rule 29-05(E)(2);
- Rules 29-05(E)(3);
- Rule 29-05(E)(4);
- Rule 29-06(B)(6)(b)(ii);
- Rule 29-06(C)(6)(c);
- Rule 29-06(D)(1);
- Rule 29-06(D)(1)(c);
- Rule 29-08(D)(4);
- Rule 29-09(A);
- Rule 29-09(B);
- Rule 29-11.

Failure of IGS to request rehearing on the other amendments to the CRNG rules set forth in the Opinion and Order neither indicates IGS' support or opposition to such rule changes.

MEMERANDUM IN SUPPORT

A. The Opinion and Order Violates the Due Process of Interested Parties by Materially Changing the Scope of Government Aggregation Programs Without Having Afforded Interested Parties the Opportunity to Comment on the Material Change.

In the Opinion and Order the Commission added OAC 4901:1-28-01(E) to the CRNG rules to include a definition of "government aggregation program" to mean "a fixed aggregation term, which shall be a period of not less than one year and no more than two years."[1] This change was not in the rule amendments proposed by Staff in the Entry filed on November 11, 2012 in this proceeding. Further, this rule was not proposed by any other commentators in this proceeding, either in the initial comments or in the reply comments. As such, *no Party* has had the opportunity to comment on the merits, or potential detriments, of this rule change before it was approved in the Opinion and Order.

Although the Commission is not subject to the strict dictates of the Ohio Administrative Procedure Act Chapter 119, Revised Code, the Commission still must meet the basic of tenents of due process. One of those tenents is that the public must have notice and an opportunity to be heard on any governmental action that affects them. Section 119.03 (A)(2) and (3) requires that an agency amending or adding a rule must provide a copy of the proposed rule and a synopsis of the proposed rule. The Commission on December 18, 2013 adopted amendments to OAC 4901:1-28-01(E) without first providing public notice of the proposed amendment and providing an opportunity to be heard.

Had IGS been provided the notice and opportunity to be heard it would have

[1] Dec. 18 Order, at 18.

informed the Commission that the proposed OAC 4901:1-28-01(E) would have a material adverse effect on IGS and customers. The proposed amendment materially restricts the term under which government aggregations can contract with customers. Further, in addition to IGS, other parties have not been provided the notice and opportunity to present evidence of how the material change to the existing Rule will effect aggregations or their customers or to question whether this change is allowable under Ohio law.

IGS fears that there are government aggregations, and customers, that have existing contracts in place that will be affected by this material change. Further, by restricting the term of permitted governmental aggregation beyond that established by statute, the Opinion and Order unilaterally implemented a material change that potentially affects not just existing aggregation customers, but also future aggregation customers.

Implementing OAC 4901:1-28-01(E) would also materially affect the administration of government aggregation programs. OAC 4901:1-28-03 requires governmental aggregators to provide a detailed plan for their customers and file it at the Commission. Further, R.C. 4929.26 (C) requires government aggregations to go through a specific approval process for aggregation plans including holding public hearings on the plan before approval. Thus, implementing OAC 4901:1-28-01(E), would require affected government aggregators to change their aggregation plans and go through the procedural mechanisms set forth in Revised Code and Administrative Code to make such changes – all with little notice.

Moreover, the rationale provided in the Opinion and Order for making this material

rule change is vague and sometimes contradictory. First, the Opinion and Order claims that this rule amendment was implemented "in furtherance of maintaining quality options for customers;"[2] yet the actual rule, if implemented, would limit the options for customers by limiting the term and thus the variety of products aggregations can offer. Second, the Opinion and Order claims that the rule amendment parallels the Competitive Retail Electric Service (CRES) rule for aggregations[3]; however, a review of the CRES aggregation rules demonstrates that the term restrictions for CRES aggregation are different than the term restriction for CRNG aggregation[4].

A rule change as significant as the one proposed in OAC 4901:1-28-01(E) should not be casually implemented. Rather, a rule change that limits the rights of existing and perspective aggregation customers needs to be carefully vetted, and there ought to be a record on the issue before such a material change is made. At a minimum, a record needs to be established on any material change in the rules to ensure that such a change is not in violation of Ohio law.[5] Unfortunately, in this instance, there is no record, and affected and interested parties had no opportunity to weigh in on whether this was an appropriate and lawful rule change. In-fact it may be indicative that OAC 4901:1-28-01(E) is not appropriate or lawful given that no party actually proposed this rule change to the Commission. As such, the Commission should reject the definition added for government aggregation programs and keep the existing rules with respect to government aggregation terms as is.

[2] Dec. 18 Order, at 18.
[3] Id.
[4] OAC 4901:1-21-01(T)
[5] As IGS explains below, the definition added as OAC 4901:1-28-01(E) is a violation of Ohio law and should be rejected.

B. The Opinion and Order Unlawfully and Unreasonably Limits the Terms of Government Aggregation Programs Beyond the Scope of What is Permitted by Ohio law.

R.C. 4929.26(F) provides that "a governmental aggregator shall be subject to supervision and regulation by the public utilities commission *only to the extent of any competitive retail natural gas service it provides*" (emphasis added). Thus, Ohio law grants Commission jurisdiction over government aggregators only to the extent the Commission has jurisdiction over CRNG suppliers – nothing more. With the implementation of OAC 4901:1-28-01(E), the Commission has exceeded its statutory authority to regulate CRNG suppliers and government aggregation programs beyond the scope permitted by Ohio law.

Unlike natural gas utilities (which under Section 4905.04, .05, and .06 the General Assembly delegated full supervisory authority) the General Assembly has only authorized the Commission to regulate CRNG suppliers with respect to the enumerated activities listed in Section 4929.22, Revised Code. Section 4929.22, Revised Code provides for consumer protection rules and oversight to ensure that CRNG suppliers have the financial, managerial and technical ability to serve customers. The statute though does not provide authority to set, amend or limit the price or term of customer contracts.

To understand the distinction between consumer protection and price and term regulation it is useful to look at examples of the different types of regulation. For instance, the Commission *does* have the authority to implement notice and consent requirements to customers if a CRNG supplier or government aggregation contract has

cancellation fees.[6] This is clearly within the purview of consumer protection because notice and consent requirements do not limit the type of contract a customer can enter into, but rather ensures that the customer has proper knowledge of the contract. On the other hand, OAC 4901:1-28-01(E), if adopted, would limit *the type* of contract that a customer can enter into by prohibiting government aggregation programs, and correspondingly customers, from entering contracts for less than one year or more than two years[7].

IGS also submits that the proposed OAC 4901:1-28-01(E) runs afoul of home rule authority granted to municipalities in the Ohio Constitution. Section 3 of Article XVIII of the Ohio Constitution states:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

(emphasis added). While the general laws do give the Commission the authority to enforce consumer protection standards for government aggregations and their customers, Ohio law does not give the Commission authority to regulate the price and the term of government aggregation contracts.

The Commission is a creature of statute and has no authority to act beyond that

[7] The General Assembly has provided specifically that governmental aggregation customers must be permitted to exit governmental aggregation programs once every two years. The statute though does not set a minimum or a maximum term so long as the retail customer and terminate at least once every two years. See Section 4929.26(D) Revised Code.

[7] The General Assembly has provided specifically that governmental aggregation customers must be permitted to exit governmental aggregation programs once every two years. The statute though does not set a minimum or a maximum term so long as the retail customer and terminate at least once every two years. See Section 4929.26(D) Revised Code.

specifically conferred by the General Assembly[8]. Nowhere in any statute is there a limitation on the allowable length of the aggregation program itself nor any authority conferred upon the Commission to limit contract terms of government aggregation.

By implementing OAC 4901:1-28-01(E), the Commission has exceeded its statutory authority by limiting the ability of government aggregation customers to enter into agreements for terms of less than one year. For this reason, the Commission should modify proposed OAC 4901:1-28-01(E) to eliminate the prohibition of entering into government aggregation contracts for less than one year or more than two years. For practical purposes IGS suggests that the Commission simply reject the insertion of a definition of government aggregation programs in the Ohio Administrative Code, given the lack of appropriate vetting of this definition (as explained above). However, if the Commission wishes to include a definition of government aggregation program in the CRNG rules, at a minimum the prohibition of aggregation contracts less than one year or more than two years should be eliminated and thus the revised definition should be as follows:

> "Government aggregation program" means the aggregation program established by the government aggregator with a fixed aggregation term which shall provide for the ability of aggregation participants to opt-out of the aggregation at least once every two years.

C. The Opinion and Order Fails to Appropriately Consider the Rapidly Changing Technology that can Enhance the Customer Enrollment Experience with a CRNG Supplier.

In the Opinion and Order, the Commission approved a number of rule changes that increase the customer consent requirements for customers enrolling with a CRNG

[8] See Reading v. Pub. Util. Comm., 109 Ohio St. 3d 193, 2006-Ohio-2181, 846 N.E.2d 840, at 13.

supplier.[9] IGS is appreciative of the Commission's desire to provide the utmost protection to customers enrolling with a CRNG; however one practical effect of these additional requirements is that the enrollment process for a customer seeking to enroll with a CRNG supplier will be more cumbersome and frustrating for customers than it needs to be. Given this regulatory back drop, in their comments OGMG and other CRNG suppliers proposed means by which new technology can be utilized to enhance the enrollment experience for customers, without sacrificing consumer protection. Unfortunately the Commission almost universally rejected these proposals. As such the Opinion and Order unreasonably or unlawfully failed to update the CRNG rules to reflect changes in technology.

One of the opportunities new technology brings is the ability to make customer enrollment entirely paperless. Paperless enrollment reduces the burden and clutter for customers and CRNG agents and it is also good for the environment. In fact, many customers would likely prefer not receiving paper contracts upon enrollment because electronic copies can be easier to track, store and organize.

To that end, OGMG proposed allowing customers to enroll via electronic signature and be emailed a copy of their enrollment contract during direct enrollment, instead of requiring customers to have a physical copy of the signed contract.[10] The Commission rejected this proposal on the grounds that "customers should be provided with the terms and conditions of the contract at the time of the sale so that they know what terms they

[9] These changes include but are not limited to: requiring that all door-to-door enrollments have an independent third party verification (TPV). OAC 4901:1-29-06(C)(6)(b);requiring door-to-door agents to leave the premises during the TPV and not return, limiting the ability of agents to assist with customer enrollment. OAC 4901:1-29-06(C)(6)(e); requiring additional statements in the door-to-door acknowledgement forms. OAC 4901:1-29-06(C)(6)(a). Requiring additional statements in the TPV making the TPV longer and potentially even more confusing for customer. OAC 4901:1-29-06(C)(6)(b).

[10] OGMG Initial Comment, at 28.

agreed to."[11] The Commission's conclusion, however, does not take into consideration that e-mail arrives in the customer's e-mail inbox virtually instantaneously, and customers have a 7 day rescission period from the date of the postmark of the utility enrollment letter to rescind any agreement. Further, *if the customer chooses* to receive an emailed copy of the contract, rather than a hard copy (whether for environmental reasons or otherwise) then the customer should have that choice. The decision to reject the OGMG proposal, however, prohibits customers from making a common sense choice that customers are already used to making for other products and services that they purchase.

Ohio Revised Code ("R.C.") 1306.06 also gives enrollment via electronic contract and electronic signature the full force and effect of enrollment via a hard contract with wet signature.[12] Thus, the Commission's decision is contrary to Ohio law, which already concludes that electronic enrollment should not be distinguishable from enrolling via a physical contract.

Border Energy also made a proposal to allow TPVs to be video recorded.[13] The Commission rejected this proposal on the grounds that it had the potential to violate customer privacy, without extrapolating any further on how it would violate a customer's privacy.[14] Again, *if the customer consents*, there is no legitimate reason why a TPV should not be video recorded, if the CRNG supplier has the means of doing so. In fact, like electronic processes, a video recorded TPV has the potential to make the

[11] Dec 18 Order, at 44.
[12] See R.C. 1306.06: (A) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form;(B) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation; (C) If a law requires a record to be in writing, an electronic record satisfies the law; (D) If a law requires a signature, an electronic signature satisfies the law.
[13] Border Energy Initial Comments, at 1.
[14] Dec 18 Order, at 43.

enrollment process a better experience for customers.

IGS submits that the Commission should reconsider rejecting the proposals made by CRNG suppliers that will enable the use of technology to ease the burdens of the ever increasing enrollment requirements. However, at a minimum, if there are technological advances that can potentially ease the enrollment process for customers, and at the same time meet the same consumer protection standards in the current rules, CRNG suppliers should have an opportunity to present the enrollment mechanism to Commission Staff and get a waiver of any rule that may not be appropriate in this day in age. Thus, if the Commission decides not to adopt the OGMG proposals for utilization of electronic signatures and e-mailed contracts and the provision for video recorded TPVs, the Commission should add the following provision to the OAC 4901:1-29(C)

> (7) Notwithstanding the provisions in 4901:1-29(C), a retail natural gas supplier shall have an opportunity to seek waivers of the requirements in 4901:1-29(C) from commission Staff, if the retail natural gas supplier is able to demonstrate with the utilization of new technology, it can achieve the same or greater consumer protection in its customer enrollment process.

D. Conclusion

IGS respectfully requests that the Commission grant rehearing on the issues presented in the Application for rehearing. Moreover, IGS respectfully requests that the Commission implement the recommendation made throughout this Application for Rehearing and Memorandum in Support.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Application for Rehearing was served via electronic mail this 17th day of January 2014 on the parties listed below.

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Summary: App for Rehearing electronically filed by Mr. Matthew White on behalf of IGS Energy