File.

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Suburban Fuel Gas, Inc., Complainant,	)	
v.	)	Case No. 86-1747-GA-CSS
Columbia Gas of Ohio, Inc., Respondent.	)	

MOTION OF THE EAST OHIO GAS COMPANY FOR LEAVE TO FILE, INSTANTER, MATERIALS IN SUPPORT OF RESPONDENT'S APPLICATION FOR REHEARING

The East Ohio Gas Company ("East Ohio") respectfully moves the Commission for leave to file, instanter, the attached materials in support of the Application for Rehearing in this matter filed August 28, 1987 by respondent Columbia Gas of Ohio, Inc. ("Columbia"). These materials are offered in support of Columbia's argument that the Commission erred as a matter of law in this case, in holding that service under reasonable arrangements, entered into pursuant to Section 4905.31, Ohio Rev. Code, may not be provided until the arrangements have been filed with and approved by the Commission.

In support of its motion, East Ohio states the following:

1. East Ohio is a natural gas company as defined by Section 4905.03(A)(6), Ohio Rev. Code, and is subject to the jurisdiction of this Commission. East Ohio is actively engaged in serving customers pursuant to reasonable arrangements, which are subject to the regulation of this Commission under Section 4905.31.

2. East Ohio has a real and substantial interest in the issue identified above, and is likely to be directly and irreparably prejudiced by an affirmance of the Commission's previous decision in this case with respect to that issue. East Ohio is presently involved in a number of proceedings seeking approval of reasonable arrangements, in which intervenors have raised the same issue and requested rulings to the same effect as that from which Columbia now seeks rehearing. Thus, the resolution of Columbia's application on this point is almost certain to have a direct impact on East Ohio, not only as precedent in the decision of its presently pending cases but also in its continuing efforts to serve customers under reasonable arrangements. East Ohio's interests are not represented by any other party to this proceeding.

3. The materials attached to this motion, which East Ohio requests leave to file instanter in this proceeding, consist of East Ohio's previously filed responses to the motions and arguments of the intervenors raising this issue in East Ohio's own cases, as described above. Specifically, they include:

the Memorandum of The East Ohio Gas Company in Opposition to Motions to Terminate Service, filed July 17, 1987, in Case No. 87-304-GA-AEC; and

the excerpts of the Memorandum of The East Ohio Gas Company Opposing Motion of The Ohio Petroleum Producer's Association to Intervene and for Termination of Service or Other Relief, filed August 27, 1987, in Case Nos. 87-1049-GA-AEC et al., which relate to the issue described above.

East Ohio does not seek to add to the evidentiary record in this case or otherwise to delay the resolution of this matter. Rather, it offers the attached materials to aid the Commission in reconsidering the legal and policy issues involved in the construction of Section 4905.31, as those issues are presented by Columbia's application and East Ohio's own pending cases. No existing party to this proceeding will be unduly prejudiced by the filing of these materials.

WHEREFORE, The East Ohio Gas Company respectfully requests the Commission to grant it leave to file, instanter, the attached materials in support of Columbia's application for rehearing in this matter, and urges it to grant Columbia's application as to the issue discussed above for the reasons set forth in the attached materials.

Respectfully submitted,

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Attorneys for The East Ohio Gas Company

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The East Ohio Gas Company for Approval of Arrangements for Natural Gas Service, GCR Treatment and Pre-Granted Initiation and Termination Authority	)	Case No. 87-304-GA-AEC

MEMORANDUM OF THE EAST OHIO GAS COMPANY IN OPPOSITION TO MOTIONS TO TERMINATE SERVICE

On July 10, 1987, motions were filed by Northeast Ohio Natural Gas Corp. ("Northeast"), and by Clinton Gas Marketing, Inc. and The Clinton Oil Company (collectively "Clinton"), intervenors in this proceeding, requesting the Commission to order the termination of service by Applicant, The East Ohio Gas Company ("East Ohio" or "the Company") under certain Gas Service Agreements similar to the three arrangements filed by East Ohio for approval in this matter pursuant to Section 4905.31, Ohio Rev. Code. The Company opposes these motions, and urges the Commission to deny them.

INTRODUCTION

Even if Northeast and Clinton had standing to challenge service not at issue in this case (which they do not), and even if they had a sound legal argument to make (which they do not),

the semi-hysterical tone of their new attack on effective competition by East Ohio should be silenced by its mootness. East Ohio has filed every single executed Gas Service Agreement in existence. Northeast and Clinton are welcome to try to intervene in those various proceedings, and to demonstrate how they have any right at all to challenge or delay East Ohio's ability to serve eight loads formerly served by fuel oil, and four others representing either totally new demands for competitively priced energy, loads formerly served by coal, or loads served or threatened to be served by unregulated private suppliers of gas. Each of these arrangements is pending before the Commission for appropriate action. Based on these motions, however, it is hard to see what Northeast or Clinton might have to contribute to those determinations.

Take, for example, Northeast's annoyingly redundant, highly unimaginative, and extremely tiresome assertions that East Ohio has been providing "secret and unlawful" service. Aside from using up a lawyer's lifetime quota of the word "secret" and its derivatives, Northeast's linguistic red-herring is also an obvious oxymoron. How could anything so secret be so public?

How does Northeast know to complain about these "secret" arrangements, if they are secret? And when did it first know? In fact, East Ohio's original Application in this proceeding in February announced publicly that it intended to enter into other, similar arrangements in the future. It even sought

approval in advance of such arrangements. It was only when Northeast and other intervenors attempted to abuse the discovery process to gain highly confidential competitive information (not only about arrangements that were executed and before the Commission, but even about other offers, terms and negotiations that were only pending between East Ohio and prospective customers), that East Ohio was compelled to withdraw its request in order to protect its competitive position.

The record here shows that East Ohio filed this Application on February 20, 1987. The next Gas Service Agreement was not executed until March 11, 1987, when the original request for blanket approval still was pending. That request continued until, during the prehearing conference, East Ohio was forced to withdraw it in response to the over-reaching discovery requests of its competitors. Thereafter, given the extreme pressure of the hearing and settlement schedule, East Ohio promptly proceeded, in as timely a fashion as possible, to file for Commission approval every other executed Gas Service Agreement. Rather than accuse East Ohio of surreptitious and unlawful conduct, Northeast and Clinton should have tried to explain what their Motions have to do with this case, why they have a right to ask for the termination of East Ohio's service to satisfied customers, and why they did not follow the procedures outlined in Section 4905.26, Ohio Rev. Code, if they had a legitimate complaint to make.

Utility service and its regulation are too important to be turned into a game, where the players seek to manipulate the Commission's rules and jurisdiction to maximize their own

competitive leverage. The losers in such a "game" inevitably are consumers and the public interest which the Commission is bound to serve. As the Company has argued throughout this proceeding, the moving intervenors have failed to demonstrate their standing to participate in this case at all. That failure, however, takes on Orwellian proportions with the filing of these motions; having intervened in a case in which they had no standing, these parties now seek to interject new issues, and to enjoin transactions unrelated to the application and contracts before the Commission in this matter, without bearing -- much less meeting -- any burden of proof, all under the banner of orderly regulatory procedure. Under these circumstances, the claim that East Ohio would "reduce Ohio utility regulation to chaos" (Northeast Mem. at 8) sounds strange coming from a party whose sole objective has been to disrupt and delay that process for almost five months so far, for its own competitive advantage. These motions are yet another blatant gambit in this campaign to confuse and delay the process.

Compounding the procedural infirmities of the motions is the fact that Northeast's and Clinton's sole substantive argument rests on a clearly erroneous -- perhaps even frivolous -- reading of the controlling statute. Despite the inflammatory characterizations of East Ohio as a "renegade utility" seeking a "license for lawlessness", the record clearly demonstrates East Ohio's clear recognition of the Commission's jurisdiction over

these arrangements (which is in fact explicitly acknowledged by the agreements themselves), and its diligence in seeking the Commission's approval in the face of harassment and delay, the purpose of which has been to preserve and extend existing market advantages of competitors. Approval of the additional arrangements prior to their implementation is neither required by law nor practical in a competitive market where time is of the essence. Even if the motions had some substantive merit (which they do not), they have been made in the wrong case by the wrong parties, and thus must be denied.

A. NORTHEAST AND CLINTON ARE NOT ENTITLED TO SEEK, LET ALONE OBTAIN, THE REQUESTED RELIEF IN THIS CASE.

The instant motions seek an order by the Commission terminating service under East Ohio's Gas Service Agreements, other than those which are the subject of this proceeding. Clinton's seeks such relief for the pendency of this case, while Northeast, with perhaps greater self-confidence, has not so limited its request. How[illegible], whether they seek temporary or permanent relief, neither motion rests on a proper procedural foundation to warrant or permit the requested relief.

Initially, the Commission must again consider the matter of standing. As the Company has argued before, the interests of these parties in this case are those of competitors seeking to achieve or maintain a market advantage, and do not fall within the scope of interests historically viewed as cognizable by this

Commission. Having won the privilege of opposing East Ohio's application in this case, however, the parties by their motions attempt to bootstrap that limited standing into something much broader, claiming the right to both define the scope of the transactions at issue and to seek affirmative, injunctive relief. The Commission's allowance of the movants' intervention was not a license to disrupt the Company's business or meddle in its affairs at will. They must be required to establish their standing for the relief they request.

That relief, in fact, has nothing to do with this case. As both Northeast and Clinton point out, East Ohio's application originally sought approval of future contracts similar to those filed in this docket, but that request was withdrawn prior to the hearing. The movants nonetheless seek to use this case as the vehicle through which to obtain the equivalent of a preliminary injuction against contracts no longer at issue here. Why have they chosen to do so here, rather than pursuing other, more appropriate procedures?

Several reasons have been suggested above. One is the strategic objective of delaying and confusing this case by injecting new non-issues to be decided, not to mention the value of distracting Company counsel during the preparation of principal briefs. Another factor may be that, having been allowed to participate in this proceeding, movants chose to make hay while the sun shines rather than risk having to show a genuinely cognizable interest in the cases in which future

contracts would ultimately be filed (as they now have been). By achieving the premature termination of such contracts, movants may even have hoped to prevent such applications from being filed at all -- a realistic prospect in light of the critical importance of timely response in the highly competitive markets confronted by East Ohio and its customers. Suspension or delay of service under these contracts would force the customers to make other arrangements for their energy needs, and might impair the value of the agreements to such an extent that they would be unwilling to await final approval. Thus, having gotten their foot in the door, the intervenors seek to ensure that the door never opens again.

Most importantly, by filing the motions in this case, Northeast and Clinton clearly hope to avoid bearing the burden of proof associated with their affirmative request for relief. Since the agreements and service attacked by the motions are not even before the Commission in this case, the parties could more properly have initiated their challenge through a complaint proceeding under Section 4905.26, but had they done so they would have been required to establish both standing and reasonable grounds for complaint at the outset, and would ultimately have born the burden of proving the contracts unjust and unreasonable.

Of course, the parties now might also seek to intervene in the individual contract application cases which have been filed by East Ohio, if they could establish a cognizable interest in

those arrangements.* What they cannot do, however, in this or even in another more appropriate case, is demand relief from this Commission without establishing each of the elements of their entitlement to that relief. For the analagous judicial remedies of preliminary injunction or temporary restraining order, these elements generally include a showing that: (1) the moving party is likely to prevail on the merits of the claim, and thus has a "clear right" to relief; (2) the conduct to be enjoined threatens to irreparably injure the moving party, or to deprive the court of the ability to effectively implement its final judgment respecting the subject matter of the case; and (3) the hardship threatened in the absence of the requested order outweighs that which will be imposed upon the other affected parties and the public if the order issues. See, e.g., Ohio Rev. Code § 2727.02; Ohio Civ. Rule 65; 56 O. Jur. 3d, Injunctions, §§ 15-18, 25-26, 32-33, 37-38, and 50.

These showings cannot be made by the moving parties, and they have not even tried. They can show no legal right to be preserved in this case with respect to these contracts because, as each admits, these contracts are not at issue in this case. For the same reason, they cannot show how the Commission's ability to render an appropriate order in this case would be affected in any way by the provision of service under these other arrangements. Nor, for that matter, could they show any such impairment or irreparable harm arising even in the cases

* Given the fact that most of these arrangements involve incremental throughput secured by East Ohio for loads previously served by fuel oil, this is unlikely.

where the arrangements are at issue, since the contracts and service provided remain subject to the Commission's continuing jurisdiction by statute. Termination of service, however, would cause irreparable harm -- to East Ohio, the end-users under these arrangements, and East Ohio's ot . customers, who benefit from the throughput and resulting revenue made possible by the arrangements. As noted above and described at length in the hearings, the market faced by East Ohio is intensely competitive. The ability to meet service requirements in a timely fashion may often make the difference between securing and losing the load. Termination of service could therefore destroy any meaningful opportunity for the Commission to review and approve these arrangements, since East Ohio's inability to provide service could well render them moot. The "balance of hardships" test under element 3 above thus requires denial of the motions.

B. SECTION 4905.31 DOES NOT REQUIRE THAT SERVICE BE DELAYED PENDING APPROVAL OF CONTRACTS.

The central argument of the moving parties rests upon their insistent and tortured reading of Section 4905.31 as they think it should have been written, and their stubborn refusal to read the plain words which the General Assembly in fact used. The statute initially states that: "Except as provided in section 4933.29 of the Revised Code, Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923 of the Revised Code do not prohibit a public utility from filing a schedule or entering

into any reasonable arrangement" [emphasis added] of certain defined types. The statute then provides that:

> No such arrangement, . . . is lawful unless it is filed with and approved by the public utilities commission. [Emphasis added.]

Movants' argument would require this sentence to be rewritten as follows:

> No such arrangement, . . . shall become effective until it is filed with and approved by the public utilities commission.

Had this been the legislature's intent, it clearly would have expressed it using the underscored alternative language, which in fact was used verbatim where the legislature did intend it, in Section 4909.17, dealing with applications for changes in tariff rates. Obviously, Northeast's preposterous assertions about the illegality of even offering these new contracts (see, e.g., Northeast Mem. at pp. 3, 4) fail in the face of the specific authorization in this section to enter into reasonable arrangements, subject to what must be a later filing with, and still later approval by, the Commission.

The differing contexts of the actual statutory language in Sections 4905.31 and 4909.17, together with other aids to construction, demonstrate that the legislature's choice of different words was deliberate, not simply inadvertent. Arrangements under Section 4905.31 are voluntary agreements reached at arm's length, which are "practicable or advantageous

to the parties interested." Tariff rates lack this element of voluntary agreement between the parties, and their implementation is therefore reasonably subject to the condition precedent of Commission approval. This construction is consistent with the treatment of schedules under Section 4905.31. Obviously, arrangements must be entered into before they can be filed, and once agreed upon, should be operative, subject to subsequent approval. While the first sentence of Section 4905.31 provides blanket authority merely to file schedules, it expressly authorizes entering into arrangements, and the subsequent condition of filing and securing approval (following subsection (E)) applies only to arrangements. The one inference that can be fairly drawn from this is that reference to schedules in this latter passage would be redundant, since they, and they alone, are subject to the more stringent requirement of prior approval under Section 4909.17. If the legislature meant that arrangements could not be implemented until filed and approved, it would have said so, as it did for rate changes. Instead, it provided that such arrangements are themselves not lawful "unless" filed and approved. That is not a constraint on the service, only on the arrangement itself.

Judicial precedent demonstrates clearly that the condition imposed by the statute for the "lawfulness" of an arrangement is not a condition precedent to its implementation. In Cookson Pottery, et al. v. Public Utilities Commission, 161 Ohio St. 498 (1954), the Court considered a tariff filing establishing rates

for a service previously provided by the utility under contracts which had not been filed. In rejecting arguments that the tariff therefore should not have been approved as a "first filing," the Court observed that "there is evidence in the record that the commission discouraged such filing. Under the statute, the only penalty imposed for failure to file such contracts with the commission is that the contracts shall not be lawful." Id. at 505 [emphasis added]. Further light is shed upon the meaning of the term "lawful" in this context by the opinion in Lake Erie Power & Light Co. v. Telling-Belle Vernon Co., 57 Ohio App. 467 (Cuy. Cty. App., 1937), cited without discussion by Clinton. The court there affirmed a finding for the defendant-customer in a suit by a utility for nonpayment under a contract, reasoning that "while it may have been unnecessary to file and have allowed the contract itself under the provisions of Section 614-17, General Code [the predecessor of present Section 4905.31], it was necessary to file and have allowed the details of the arrangement and rate embodied in the contract, in order to maintain suit for such minimum rate for the stipulated ten year duration of service, and as this was not done suit does not lie." [Emphasis added.] Id. at 478.

These opinions confirm what is evident from the words of Title 49. "Unless" in Section 4905.31 does not mean what "until" means in Section 4909.17, and the lawfulness of a contract for enforcement purposes is not a prerequisite to the voluntary commencement of its performance by the parties who

have agreed to it. East Ohio has never argued, and will not argue, that filing and approval of these arrangements or others within the scope of the statute is never required, or that the Commission lacks jurisdiction to compel their filing in an appropriate proceeding. Nor does the Company contend that the approval process serves no valid regulatory purpose. However, pending such approval, the implementation of service under terms voluntarily agreed to by the parties and consistent with the Commission's applicable guidelines and precedents neither defeats those regulatory purposes, nor violates the letter of the statute. The Commission's jurisdiction to regulate East Ohio's service remains unimpaired.

In fact, the purposes for which the Commission has so effectively used the statute in the past would be defeated if it were now to adopt the rigid and unwarranted construction urged by the intervenors. In developing the self-help program, and again in authorizing flexible pricing in Case No. 85-800-GA-COI, the Commission has recognized that the energy requirements of particular customers may at times best be met through voluntary, negotiated arrangements of the type permitted under Section 4905.31, with resulting benefits for all system customers. The Commission has therefore sought and encouraged utilities to use the statute as a means of providing flexible responses to specific and changing market requirements and conditions. Foremost among those conditions today are the pressures of competition and the related demand for prompt responses.

Customers are not interested in getting a contract, which they may eventually be able to use; they demand service, and will deal with suppliers who are willing and able to provide it. If, as the movants argue, the statute is to be applied to prevent East Ohio from responding to these market realities, then the Commission's authorization and encouragement of flex rates and other competitive tools will ultimately have been in vain.

The premise of the motions is therefore incorrect as a matter of law, and unsound as a matter of policy. The goals of the requirement that contracts be filed and approved clearly do not include the creation of a regulatory obstacle course that cripples competitive initiatives because of delays rather than substantive deficiencies. That, however, is apparently the goal of Northeast and Clinton. The Commission should reject their effort to manipulate its processes for this purpose, and should deny their motion accordingly.

CONCLUSION

Movants apparently recognize that their remaining allegations of discrimination and anticompetitive conduct are (to the extent they are relevant at all) ultimate issues to be decided in this case, and do not base their motions on those grounds. As East Ohio will more fully argue in its pending post-hearing brief, the evidence of record conclusively demonstrates the reasonableness of the arrangements before the

Commission in this case, and their consistency with the revised transportation guidelines adopted in Case No. 85-800-GA-COI. While those guidelines did not supersede or dispense with the statutory condition of filing and approval, they do provide East Ohio with concrete guidance on the permissible scope and parameters of its competitive activities, and with a positive mandate to compete for the benefit of its system customers.

East Ohio has sought to fulfill that mandate in a manner consistent with the guidelines provided, and with the Commission's approval of comparable transactions entered into by Constitution Gas Transport Co., Inc. (Case No. 85-1920-GA-AEC et al., Opinion and Order (June 24, 1986)), Columbia Gas of Ohio, Inc. (Case Nos. 87-159-GA-AEC and 87-184-GA-AEC (March 17, 1987)), and Ohio Gas Company (Case No. 86-93-GA-AEC (February 11, 1986)). It has not sought to avoid regulatory scrutiny of the arrangements at issue in this case, or of those which are the subject of the instant motion. Rather, having initially sought approval of all of them through this filing, it has now sought to expedite matters by confining this docket to three contracts and filing the rest as individual applications.

The history of this case is perhaps the best demonstration of the critical importance of denying these motions. Despite the clear mandate and precedent supporting the reasonableness of these arrangements, this case will have been pending for almost six months by the time reply briefs are finally filed. That delay is primarily the product of efforts by competitors and

other suppliers to use these proceedings for market leverage, rather than any material concerns about consumer impact. If the Commission does not want East Ohio to be competitive, it can grant these motions. Customers will take notice that their arrangements with the Company can be held up indefinitely, and will look instead to energy sources like fuel oil, coal, and unregulated gas producers who can meet their requirements without delay. Such a course, however, would be unwarranted by law or policy, and would ultimately be to the detriment of consumers throughout Ohio.

For the foregoing reasons, East Ohio respectfully requests that the motions of Northeast and Clinton be denied, and that the Application herein be promptly approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum Opposing Motions to Terminate Service of The East Ohio Gas Company was served by regular U. S. mail, postage prepaid, upon Sheldon A. Taft, Esq., Vorys, Sater, Seymour & Pease, 52 East Gay Street, P. O. Box 1008, Columbus, Ohio 43216-1008; Kevin O'Brien, Esq., Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43215; Thomas E. Lodge, Esq., Thompson, Hine & Flory, 100 East Broad Street, Columbus, Ohio 43215; Michael E. Jackson, Esq., Arter & Hadden, 1100 Huntington Building, Cleveland, Ohio 44115; Jerry K. Kasai, Esq., Associate Consumers' Counsel, Office of the Consumers' Counsel, 137 East State Street, Columbus, Ohio 43266-0550; Timothy J. Battaglia, Esq., Emens, Hurd, Kegler & Ritter, Capitol Square, 65 East State Street, Columbus, Ohio 43215; M. Howard Petricoff, Esq., Vorys, Sater, Seymour & Pease, 52 East Gay Street, P. O. Box 1008, Columbus, Ohio 43216-1008; Glenn S. Krassen, Esq., Squire, Sanders & Dempsey, 1800 Huntington Building, Cleveland, Ohio 44115; Landgon D. Bell, Esq., Bell & Bentine Co., L.P.A., 33 South Grant Avenue, Columbus, Ohio 43215, this 17th day of July, 1987.

Charles M. Kennedy
An attorney for The East Ohio Gas Company

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Applications of The East Ohio Gas Company for Approval of Arrangements With Specified End-Users for Natural Gas Service, GCR Treatment and Pre-Granted Termination Authority	Case Nos.	87-1049-GA-AEC 87-1050-GA-AEC 87-1051-GA-AEC 87-1052-GA-AEC 87-1053-GA-AEC 87-1054-GA-AEC 87-1055-GA-AEC 87-1056-GA-AEC 87-1057-GA-AEC 87-1068-GA-AEC 87-1069-GA-AEC 87-1070-GA-AEC 87-1071-GA-AEC 87-1136-GA-AEC
In the Matter of the Application of The East Ohio Gas Company for Approval of Arrangements for Transporting Gas to The Kroger Company, and Other End-Users, Pursuant to Ohio Revised Code Section 4905.31, and for Cancellation of an Earlier Arrangement	Case No.	87-99-GA-AEC
In the Matter of the Application of The East Ohio Gas Company for Approval of Various Arrangements for Transporting Gas to Worthington Industries, Inc., Bethandale Div. Pursuant to Ohio Revised Code Section 4905.31	Case No.	87-137-GA-AEC
In the Matter of the Application of The East Ohio Gas Company for Approval of Arrangements for Transporting Gas to FM Resources, Inc., and Other End-Users, Pursuant to Ohio Revised Code Section 4905.31	Case No.	87-679-GA-AEC
In the Matter of the Application of The East Ohio Gas Company for Approval of an Arrangement for Transporting Gas to Akron Brick & Block Co. Ltd., Pursuant to Ohio Revised Code Section 4905.31	Case No.	87-1067-GA-AEC

MEMORANDUM OF THE EAST OHIO GAS COMPANY OPPOSING MOTION OF THE OHIO PETROLEUM PRODUCERS' ASSOCIATION TO INTERVENE AND FOR TERMINATION OF SERVICE OR OTHER RELIEF

II. OPPA'S REQUEST FOR TERMINATION OF SERVICE SHOULD BE DENIED.

The second branch of OPPA's motion seeks termination of service under the arrangements proposed by each of the eighteen applications, until they are approved by the Commission.1/ From the foregoing, it should be evident that OPPA's lack of a cognizable interest in these proceedings deprives it of standing not only to intervene but also to seek the requested terminations. Even if intervention is granted, however, OPPA has alleged no injury or prejudice of any kind resulting from the continuation of service during the pendency of these matters. On this basis alone, its motion should be denied.

OPPA rests its entire argument on the Commission's recent decision in Suburban Fuel Gas, Inc. v. Columbia Gas of Ohio, Inc., Case No. 86-1747-GA-CSS, Opinion and Order dated August 4, 1987. East Ohio respectfully submits, as it has in Case No.

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1 By its own terms, OPPA's request clearly would not apply to those self-help arrangements which have already been approved by the Commission; OPPA's failure to specifically exclude them can only be attributed to its unfamiliarity with either the substance or status of those applications, despite its professed "interest" in each of these individual cases. The "alternative" request for a stay of these cases pending the decision in Case No. 87-304-GA-AEC is a bit more baffling; perhaps OPPA is content for service to continue, as long as the Commission's review of the applications does not proceed.

87-304-CA-AEC, that Suburban was wrongly decided on this point, and that the analysis and result should be reconsidered by the Commission. Staff's initial and reply briefs in Case No. 87-304-GA-AEC concur with the Company's position in this respect.

The case for termination must ultimately stand or fall upon the requirements of Section 4905.31, which authorizes both the making and regulation of reasonable arrangements.2/ The statute initially states that: "Except as provided in section 4933.29 of the Revised Code, Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923 of the Revised Code do not prohibit a public utility from filing a schedule or entering into any reasonable arrangement" [emphasis added] of certain defined types. The statute then provides that:

> No such arrangement, . . . is lawful unless it is filed with and approved by the public utilities commission. [Emphasis added.]

OPPA's argument (and the Commission's conclusion in Suburban) would require this sentence to be rewritten as follows:

> No such arrangement, . . . shall become effective until it is filed with and approved by the public utilities commission.

Had this been the legislature's intent, it clearly would have expressed it using the underscored alternative language, which in fact was used verbatim where the legislature intended it, in Section 4909.17, dealing with applications for changes in tariff rates.

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2 Significantly, OPPA's entire argument is "[b]ased on this Order [i.e., Suburban]", rather than on the statute. OPPA Mem. at 4-5.

The differing contexts of the actual statutory language in Sections 4905.31 and 4909.17, together with other aids to construction, demonstrate that the legislature's choice of different words was deliberate, not simply inadvertent. Arrangements under Section 4905.31 are voluntary agreements reached at arm's length, which are "practicable or advantageous to the parties interested." Tariff rates lack this element of voluntary agreement between the parties, and their implementation is therefore reasonably subject to the condition precedent of Commission approval.

This construction is consistent with the treatment of schedules under Section 4905.31. Obviously, arrangements must be entered into before they can be filed, and once agreed upon, should be operative, subject to subsequent approval. While the first sentence of Section 4905.31 provides blanket authority merely to file schedules, it expressly authorizes entering into arrangements, and the subsequent condition of filing and securing approval (following subsection (E)) applies only to arrangements. The one inference that can be fairly drawn from this is that reference to schedules in this latter passage would be redundant, since they, and they alone, are subject to the more stringent requirement of prior approval under Section 4909.17. If the legislature meant that arrangements could not be implemented until filed and approved, it would have said so, as it did for rate changes. Instead, it provided that such arrangements are themselves not lawful "unless" filed and

approved. That is not a constraint on the service, only on the arrangement itself.

Judicial precedent demonstrates clearly that the condition imposed by the statute for the "lawfulness" of an arrangement is not a condition precedent to its implementation. In Cookson Pottery, et al. v. Public Utilities Commission, 161 Ohio St. 498 (1954), the Court considered a tariff filing establishing rates for a service previously provided by the utility under contracts which had not been filed. In rejecting arguments that the tariff therefore should not have been approved as a "first filing," the Court observed that "there is evidence in the record that the commission discouraged such filing. Under the statute, the only penalty imposed for failure to file such contracts with the commission is that the contracts shall not be lawful." Id. at 505 [emphasis added]. Further light is shed upon the meaning of the term "lawful" in this context by the opinion in Lake Erie Power & Light Co. v. Telling-Belle Vernon Co., 57 Ohio App. 467 (Cuy. Cty. App., 1937). The court there affirmed a finding for the defendant-customer in a suit by a utility for nonpayment under a contract, reasoning that "while it may have been unnecessary to file and have allowed the contract itself under the provisions of Section 614-17, General Code [the predecessor of present Section 4905.31], it was necessary to file and have allowed the details of the arrangement and rate embodied in the contract, in order to maintain suit for such minimum rate for the stipulated ten year

duration of service, and as this was not done suit does not lie." [Emphasis added.] Id. at 478.

These opinions confirm what is evident from the words of Title 49. "Unless" in Section 4905.31 does not mean what "until" means in Section 4909.17, and the lawfulness of a contract for enforcement purposes is not a prerequisite to the voluntary commencement of its performance by the parties who have agreed to it. In the face of the statutory language and its judicial construction, the Suburban analysis is clearly deficient.

As set forth in the passage quoted by OPPA, the Commission there acknowledged but then ignored the argument that approval was required only to enforce the contracts. Its rationale was simply that "the Commission has long had the policy that any arrangements under Section 4905.31, Revised Code, must be reviewed and approved by the Commission before they become effective so as to ensure that they are just and reasonable and to ensure that they will not adversely affect the balance of the company's customers." The only authority cited for this "policy" was a passage from Cleveland Electric Illuminating Co., Case Nos. 83-1342-EL-ATA, et al., Opinion and Order (May 8, 1984) at 7. In the context of the CEI case, the passage and policy relied upon were simply dicta, since the proposal rejected there was a flexible or competitive tariff provision, pursuant to which the utility would have been able to avoid filing specific arrangements and rates altogether -- either

before or after service began. No such "end-run" around statutory requirements is contemplated by East Ohio; had OPPA bothered to read the arrangements, it would have discovered that each is, by its express terms, entered into subject to the Commission's approval.

Moreover, Suburban's apparent advocacy and the Commission's application of the "policy" thus derived from the CEI case is shaded with irony, to say the least. Pursuant to the 85-800 guidelines, Suburban itself has filed, and the Commission has approved a "flexible" transportation tariff conceptually similar to the tariff rejected in CEI, which simply provides for a transportation charge "not to exceed sixty-eight cents (68¢) per MCF." Suburban Fuel Gas, Inc., Case No. 86-2009-GA-ATA, Finding and Order dated December 23, 1986. One wonders if Suburban is providing any service under this tariff, or has filed any agreements specifying particular rates within the range thus established. The point is not that Suburban's tariff should have been disapproved, but rather that if such a tariff is permissible after CEI, then the Commission's reliance on the dicta of CEI in the Suburban complaint decision was obviously misplaced. That much, however, is apparent from the language of 4905.31 itself.

East Ohio has never argued, and will not argue, that filing and approval of these arrangements or others within the scope of the statute is never required, or that the approval process serves no valid regulatory purpose. However, pending

such approval, the implementation of service under terms voluntarily agreed to by the parties and consistent with the Commission's applicable guidelines and precedents neither defeats those regulatory purposes, nor violates the letter of the statute. The Commission's jurisdiction to regulate East Ohio's service remains unimpaired. In fact, the purposes for which the Commission has so effectively used Section 4905.31 in the past would be defeated if it now adheres to the rigid and unwarranted "policy" articulated in Suburban.

In developing the self-help program, and again in authorizing flexible pricing in Case No. 85-800-GA-COI, the Commission has recognized that the energy requirements of particular customers may at times best be met through voluntary, negotiated arrangements of the type permitted under Section 4905.31, with resulting benefits for all system customers. The Commission has therefore sought and encouraged utilities to use the statute as a means of providing flexible responses to specific and changing market requirements and conditions. Foremost among those conditions today are the pressures of competition and the related demand for prompt responses. Customers are not interested in getting a contract, which they may eventually be able to use; they demand service, and will deal with suppliers who are willing and able to provide it. For all of these reasons, and those articulated by the Commission's Staff in Case No. 87-304-GA-AEC, the Company respectfully urges the Commission to reconsider its decision in the Suburban case.

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum of The East Ohio Gas Company was served upon Michael E. Jackson, Arter & Hadden, 1100 Huntington Building, Cleveland, Ohio 44115, by mailing this 27th day of August, 1987.

Charles M. Kennedy
An Attorney for The East Ohio Gas Company

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Motion of The East Ohio Gas Company have been served upon David L. Pemberton, Esq., Muldoon, Pemberton & Ferris, 2733 W. Dublin-Granville Road, Worthington, Ohio 43085-2710; Evelyn R. Robinson, Esq., Associate Consumers' Counsel, Office of the Consumers' Counsel, 137 East State Street, Columbus, Ohio 43266-0550; and Kenneth W. Christman, Esq., Attorney, Columbia Gas of Ohio, Inc., 200 Civic Center Drive, P.O. Box 117, Columbus, Ohio 43216-0117, by mailing this 10th day of September, 1987.

Charles M. Kvasnik

An Attorney for The East Ohio Gas Company

Summary: Motion Motion of The East Ohio Gas Company for leave to file, Instanter, materials in support of respondent's application for rehearing filed by C. Kennedy. electronically filed by Docketing Staff on behalf of Docketing