

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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MAR 01 2006

PUBLIC SERVICE
COMMISSION

In the Matter of :

CONSTELLATION NEW-ENERGY-GAS DIVISION, LLC)

COMPLAINANT)

CASE NO.
2005-00184

V.)

COLUMBIA GAS OF KENTUCKY, INC.)

DEFENDANT)

**RESPONSE OF CONSTELLATION NEW-ENERGY-GAS DIVISION, LLC TO
MOTION FOR DISMISS OF COLUMBIA GAS OF KENTUCKY, INC.**

This response is filed by CNEG New-Energy-Gas Division, LLC, (“CNEG”) in opposition to the Motion for Dismiss filed by Columbia Gas of Kentucky, Inc., (“Columbia Gas”) on July 5, 2005.

I. BACKGROUND

This case arises from a Complaint that CNEG filed with the Commission on June 10, 2005. In that pleading, CNEG described a situation that occurred on November 17, 2004 where Columbia Gas issued a Daily Interruption Notice (DIN), a/k/a Daily Delivery Notice, to certain of its customers. Under the DIN, Delivery Service customers (typically larger industrial/commercial customers) were restricted in the amount of natural gas which they (or their agents, such as CNEG) could place into the Columbia Gas distribution system. (See Attachment #1). The DIN was issued because Columbia Gas had an excess amount of gas on its system; and Columbia Gas wanted their customers and suppliers to reduce gas deliveries into Columbia Gas’ distribution system. The DIN was apparently issued pursuant to Sheet No. 91 of

Columbia Gas' General Terms, Conditions, Rules and Regulations (Applicable to Delivery Service Rate Schedules Only). (See Attachment #2). CNEG, as agent for several Columbia Gas customers (see Attachment #3), is responsible for providing natural gas for such customers through Columbia Gas' distribution system – and therefore was directly affected by the November DIN issued by Columbia Gas. Indeed, at the time, Columbia Gas, in recognition of CNEG's agency obligations, sent the DIN directly to CNEG.

Upon receipt of the DIN, CNEG took the steps necessary to comply with the terms of the Notice. Under the DIN:

1. Customers without daily gas measurement could deliver no more than 33% of the customers maximum daily quantity (MDQ) onto the system.
2. Customers with daily measurement could deliver no more than their actual daily demand.

Neither the tariff nor the DIN defined or described what constitutes “daily gas measurement” or the “daily measurement” of gas.

In response to the DIN, CNEG reviewed its Columbia Gas customers and identified those which had daily telemetering service, and those which did not. (A telemeter provides daily electronic reports of gas consumption, and is installed at the customer's expense.) For the telemetered customers, for the period that the DIN notice was in effect (November 18-21), CNEG properly provided gas to the Columbia Gas distribution system at no more than the actual daily demand; and these customers are not involved in this proceeding.

For CNEG's other customers (*i.e.*, those without daily telemetering service), CNEG reduced their gas delivery to 33% of the MDQ, as required by the DIN. Thus, CNEG believed it fully complied with Columbia Gas' DIN.

CNEG was thus surprised when some of its customers notified CNEG that Columbia Gas has assessed penalties against them for allegedly violating the DIN – penalties that were directly

caused by CNEGs actions in response to the DIN. Specifically, the penalties were imposed for those non-telemetered customers (1) whose consumption Columbia Gas determined to fall within the class of “daily metered”; and (2) whose daily consumption was less than 33% of MDQ¹. Columbia Gas has advised CNEG that the penalties were imposed at a rate of \$25 per Mcf under Tariff Interruptable Service (IS) Rate Schedule, Third Revised Sheet No. 15 (See Attachment #4). CNEG has reviewed this tariff sheet, and finds no authority within its terms that would authorize the imposition of a penalty on CNEG customers for supply violations of the November 17th DIN. CNEG’s customers receiving the penalties (totaling some \$25,192.50) were not pleased.

CNEG filed its Complaint with this Commission seeking three declarations. First, CNEG wants the Commission to direct Columbia Gas to better define the customers who fall within the “daily metered” classification referred to in the Tariff (See Attachment #2). There is no definition contained in the tariff; and the DIN is similarly devoid of description. Instead, Columbia Gas has informally advised CNEG that it treats all of its operational matching order customers (OMOs) as being “daily metered.” These customers include not only the telemetered customers, but also those customers who Columbia Gas believes are able to manually read their gas meters every day. This classification of all “OMO” customers as falling within the “daily metered” classification was not communicated by Columbia Gas to CNEG or its customers prior to this controversy. That is to say, for CNEG’s non-telemetered customers falling within Columbia Gas’ OMO class, neither the customer nor CNEG had been advised that in DIN conditions, they are required to manually read their gas meters daily, and to reduce their deliveries to “no more than their actual daily demand.” Through its Complaint, CNEG seeks to

¹ This meant that the customer was consuming daily an amount of gas less than 33% of its MDQ; and since CNEG was placing 33% of the MDQ onto the Columbia Gas Systems, Columbia Gas’ oversupply was increased.

have Columbia Gas clarify its definition of what constitutes “daily gas measurement” customers² (preferably by amending its First Revised Sheet 91 of its Tariff) so that the public is fully apprised of their obligations under the Tariff.

Second, CNEG asks this Commission to determine that Columbia Gas does not have the necessary authority under its tariffs (specifically Revised Sheet No. 15) to impose a \$25/Mcf penalty on customers who fail to comply with DIN’s related to delivery service as set forth in First Revised Sheet No. 91 of Columbia Gas’ tariffs. The penalty provision being relied upon by Columbia Gas appears to relate only to interruptible service (IS) customers who fail to reduce load after notice to cut back consumption of gas; it does not appear to involve penalties for oversupply of gas onto Columbia Gas’ distribution system.

Finally, CNEG wants the Commission to direct Columbia Gas to refund the penalties assessed by Columbia Gas to CNEG’s customers. These penalties were imposed solely because, in Columbia Gas’ opinion, CNEG misinterpreted and misapplied the November 17th DIN, and allegedly did not make the proper gas supply reduction for certain non-telemetered customers. CNEG believes that it acted properly under the circumstances, and that the imposition of the penalties was improper since (1) Neither the tariff nor the DIN specifies which customers fall within the daily metered class; (2) Columbia Gas had not communicated their “OMO” designation³ to CNEG prior to November 17; and (3) There does not appear to be any penalty provision applicable to this situation. Since penalties should be imposed only when the proscribed activity is clearly communicated to the affected person by an approved PSC tariff, CNEG, on behalf of its customers, has asked the Commission to direct Columbia Gas to return the penalties imposed upon, and paid by, CNEG’s customers.

² CNEG’s preference would be to restrict the definition to telemetered customers.

³ In Columbia Gas’ letter dated March 24, 2004 (see Complaint, Exhibit #3), they acknowledged the confusion caused by the OMO designation, and agreed to discontinue the use.

II. COLUMBIA GAS' MOTION TO DISMISS SHOULD BE DENIED.

Rather than addressing the merits of CNEG's Complaint, Columbia Gas filed a Motion to Dismiss the Complaint contending that CNEG lacks standing to bring the Complaint on behalf of their customers. For the reasons outlined below, Columbia Gas' Motion should be overruled.

A. Legal Standards for "Standing"

The legal concepts addressing the issue of "standing" are relatively easy to articulate; the difficulty often arises in their application. Columbia Gas sets forth several "standing" legal maxims, to which CNEG does not object. For example:

- To have standing, "a party must have a judicially recognizable interest in the subject matter of the suit." *Healthamerica Corp. v. Humana Health Plan*, 697 S.W.2d 946 (Ky. 1985). (Motion, p. 1.)
- The interest of the complainant must be present and substantial. *Winn v. First Bank of Irvington*, 581 S.W. 21 (Ky. App. 1979). (Motion, pp. 1-2.)
- Standing cannot rest solely upon the legal rights of third persons. *Warth v. Seldin*, 422 U.S. 490 (1975). (Motion, p. 2.)
- Actions shall be prosecuted by the real party in interest. *In the Matter of McGinnis v. GTE South, Inc.*, PSC Case No. 99-495, Order (Feb. 14, 2000). (Motion, p. 2.)

In addition to these tests, standing can be found when the complainant's interests are "within the zone of interests to be protected or regulated." *Humana of Kentucky, Inc. v. N.K.C. Hospitals, Inc.*, 751 S.W.2d 369, 373 (Ky. 1988).

B. Application of the standards for "Standing" establish that CNEG has a sufficient interest in the subject matter of the Complaint to provide for standing.

Columbia Gas argues in a perfunctory manner that CNEG lacks standing because the penalties were imposed by Columbia Gas on CNEG's customers, and were paid by CNEG's customers. Thus, Columbia Gas concludes that CNEG has no interest in the subject matter of the

Complaint (*i.e.*, the “penalties” issue, in Columbia Gas’ view), and therefore has no standing. A more thoughtful analysis of the entirety of the circumstances produces a contrary conclusion.

First, CNEG has standing to seek money relief for its customers, since CNEG has an Agency Agreement with each of its customers which designates CNEG as the customer’s “exclusive authorized representative” to act on behalf of the customer in matters involving “the management of Customer’s natural gas supply, transportation needs, and all related services.” (See Attachment #3.) Under this authority, CNEG both secures a natural gas supply for the customer, and delivers that natural gas into Columbia Gas’ distribution system. As agent for the customer, with such broad authority, CNEG has standing to bring this Complaint “on its [own] behalf and on behalf of its customers.” (Complaint, ¶ 4.)

This agency authority in CNEG should not be news to Columbia Gas. Indeed, in many cases the Agency Agreement had been provided to Columbia Gas, so that Columbia Gas knows the party supplying the gas onto their distribution system (*i.e.*, CNEG). Moreover, in this very case, Columbia Gas provided the November 17th DIN directly to CNEG, thereby recognizing CNEG’s expansive role, and keen interest, in the decisions of Columbia Gas that affect CNEG’s customers. Finally, Columbia Gas expressly recognized the status of CNEG by directly communicating with CNEG on the DIN and penalties issues prior to the filing of the Complaint. *See, e.g.*, Complaint, Exhibit #3. Columbia Gas should not now be allowed to claim that CNEG lacks standing to represent the interests of its customers, since Columbia Gas has both directly and indirectly acknowledged CNEG’s authority to act on their customers’ behalf.

CNEG separately and independently seeks relief from this Commission on its own behalf as well. From a business standpoint, Columbia Gas’ misapplication of its tariffs and the November 17th DIN has damaged CNEG’s business relationships with the affected customers.

Under the circumstances, CNEG should not have to await a damages claim from one of these customers before being able to seek relief from this Commission. Furthermore, the essence of CNEG's Complaint raises questions about whether Columbia Gas' actions under the DIN and the imposition of penalties is even authorized by a legitimate company tariff. Moreover, it is undeniable that CNEG is a member of the public affected by Columbia Gas' actions, since it was CNEG that was called upon, both by their customers and Columbia Gas, to interpret and apply the Columbia Gas tariffs and the DIN purportedly issued pursuant thereto.

Under this more thoughtful analysis of the facts, CNEG clearly has standing under the standards set forth above. CNEG has "a judicially recognizable interest in the subject matter" of the Complaint because (1) CNEG has an agency relationship with Columbia Gas' customers vesting authority in CNEG for dealing with the subject matter; and (2) CNEG is the entity called upon to comply with Columbia Gas' tariffs, and DIN. Thus, CNEG is an entity directly affected by Columbia Gas' misapplication of the tariffs, and Columbia Gas' erroneous DIN definition.

CNEG's interest in the subject matter of the Complaint is both "present and substantial." CNEG has the direct responsibility to supply gas to Columbia Gas' distribution system – and in so doing CNEG must comply with Columbia Gas' tariffs and DIN's. Indeed, it was CNEG which, according to Columbia Gas, failed to properly interpret Columbia Gas' tariff and DIN; and it was the good-faith actions of CNEG that led to the assessment of penalties.⁴ To perform its agency responsibilities, CNEG must have clearly applicable and unambiguously worded tariffs (and notices) issued by Columbia Gas. CNEG asserts in its Complaint that Columbia Gas has failed to provide such clarity in either of the tariff sheets or the DIN; and accordingly, CNEG has standing to bring the instant Complaint.

⁴ CNEG has some 44 customers on the Columbia Gas system, with a combined number of accounts totaling 76. Of these accounts, 11 were assessed penalties by Columbia Gas totaling \$25,192.50.

In bringing this Complaint, CNEG is not standing “upon the legal rights of third persons.” To the contrary, CNEG is legitimately asserting the rights of those “third persons” pursuant to CNEG’s authority under the various Agency Agreements. Moreover, as noted above, CNEG’s own legal rights are being asserted. As a member of that segment of the public who is directly affected by Columbia Gas’ Tariffs, and the November 17th DIN, CNEG has standing in its own right to seek a ruling from this Commission clarifying the terms of the tariff, and CNEG’s responsibilities thereunder.

For the above reasons, CNEG must be held to be a “real party in interest,” one with standing to bring its complaint. Indeed, it is CNEG who must answer its customers’ questions about the penalties imposed by Columbia Gas; and it is CNEG who must attempt to interpret Columbia Gas’ tariffs and comply with DIN’s issued by the utility. Columbia Gas has recognized this “interest” by CNEG in at least three ways: (1) Accepting the Agency Agreements filed with them; (2) Sending the DIN directly to CNEG; and (3) Directly addressing CNEG’s concerns after the November 18-21 DIN period.

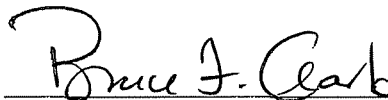
Finally, CNEG clearly falls “within the zone of interests to be protected or regulated.” Columbia Gas is regulated by this Commission pursuant to Chapter 278 of the Kentucky Revised Statutes. This regulation of gas utilities is vested with the Commission in order to protect the public interest; and included in such protection is the Commission’s requirement that utilities operate pursuant to clearly established and public tariffs; and that utilities treat their customers in a professional manner. CNEG maintains in its Complaint that Columbia Gas’ gas volume tariffs are inadequate to put the public on notice of the scope of its terms; and that Columbia Gas’ application of an inapplicable tariff to impose penalties upon CNEG’s customers simply is not

legitimate or proper, especially under the confusing circumstances presented. Accordingly, refund of those penalties paid by CNEG customers is in order.

III. CONCLUSION

For the reasons set forth above, CNEG respectfully requests that Columbia Gas' Motion to Dismiss be denied; and that the Commission either set the matter for hearing or require the parties to attend an informal conference with the Commission staff in order to assist in a resolution of the issues raised in the Complaint.

Respectfully submitted,



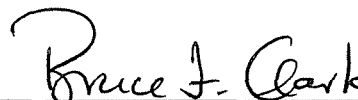
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COUNSEL FOR COMPLAINANT,
CONSTELLATION NEWENERGY-GAS
DIVISION, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by United States First Class Mail, postage prepaid, on this 1st day of March, 2006 upon:

Stephen B. Seiple, Esq.
Stanley J. Sagun, Esq.
200 Civic Center Drive
P.O. Box 117
Columbus, OH 43216-0117

Richard S. Taylor, Esq.
225 Capital Avenue
Frankfort, KY 40601



Bruce F. Clark

Exhibit 1

DAILY INTERRUPTION NOTICE**Columbia Gas of Kentucky, Inc. (CKY)**

Posted on 11/17/2004 10:06 AM

Effective Gas Day(s): November 18 - 22, 2004**Required Action:**DAILY DELIVERY INTERRUPTION

CKY's Volume Banking and Balancing Service is being restricted for the reasons cited below. As a result, Delivery Service customers without daily measurement are required to deliver confirmed scheduled supply that is **no more than 33%** of the Customer's Maximum Daily Quantity (MDQ). (Please take note that this percentage may change each gas day during the OFO period. Notice will be sent the gas day before the percentage change is to be effective).

Delivery Service customers with daily measurement are required to deliver confirmed scheduled supply that is **no more than** their actual daily demand.

Marketers serving SVGTS rate schedule (Choice) customers are required to deliver confirmed scheduled supply that is no more than the gas supply demand curve for each of the marketer's Aggregation Pools.

Reason(s) for Notice:

Warmer than normal temperatures, coupled with CKY's pipeline storage injection rights for November limit CKY's ability to accommodate positive imbalances between transportation customer supply and demand.

Reversals of these conditions could cause a change or withdrawal of this Notice and the required actions related to it.

Estimated Duration: 5 Days**EXHIBIT**

1

COLUMBIA GAS OF KENTUCKY, INC.

**GENERAL TERMS, CONDITIONS, RULES AND REGULATIONS
APPLICABLE TO DELIVERY SERVICE RATE SCHEDULES ONLY
(Continued)**

5. VOLUME BANK

Customers must subscribe to the Banking and Balancing Service set forth on Sheet Nos. 39, 40 and 41 to be eligible for the provisions of the Volume Bank section described herein. Customers without daily demand reading meter equipment must subscribe to the Banking and Balancing Service.

Customers who have installed daily demand reading meter equipment and who choose not to subscribe to the Banking and Balancing Service will be placed on a daily cash-out provision, defined as follows. On days when Customer's deliveries are less than their usage, the Company will sell gas to the Customer at the Customer's applicable sales rate schedule. On days when Customer's deliveries are greater than their usage, Company may, at its option, purchase the excess deliveries at Company's Weighted Average Commodity Cost of Gas (WACCOG).

Under the Banking and Balancing Service, Company has established a system to account for Customer's volumes received by Company but not delivered to Customer at its facilities during the same monthly billing cycle. Such undelivered volumes shall be called a volume bank and Customer shall be permitted to receive such banked volumes at a later date at Company's discretion.

The total volume bank of Customer shall not at any time exceed a 'bank tolerance' of five percent (5%) of Customer's Annual Transportation Volume. If, at any time, Customer's volume bank exceeds the bank tolerance, Company may require Customer to immediately reduce or stop deliveries until its volume bank of gas is equal to or less than the bank tolerance. In addition, if Customer's deliveries to Columbia on any day vary significantly from Customer's consumption on that day, Columbia may require Customer to immediately bring Customer's deliveries and consumption into balance.

In either case, Company may, on its own initiative, take such actions as are necessary to (1) immediately bring Customer's deliveries and consumption into balance or (2) reduce Customer's volume bank to a level which is equal or less than the bank tolerance permitted under this section. The Company further reserves the right to set limitations prior to, or during the course of a month, on how much gas can be scheduled by the Customer in an effort to control Customer's banking activity.

In the event Customer's volume bank exceeds the five percent (5%) bank tolerance, Customer is subject to the FSS and SST overrun charges of the Columbia Gas Transmission Corporation. In addition, if the Customer's exceeded bank tolerance causes the Company to incur a storage overrun penalty, Customer is subject to the penalty.

In the event service hereunder is terminated, Company will deliver to Customer volumes of Customer's gas which Company is holding pursuant to this Volume Bank section during the three monthly billing cycles following the date of termination. However, should Customer fail to take

(T) Change in Text

DATE OF ISSUE: September 28, 1993

DATE OF EFFECTIVE: November 1, 1993

Issued by: K. I. Shroyer

Vice President - Regulatory Services

EXHIBIT

2

**NATURAL GAS
AGENCY AGREEMENT**

Effective Date: _____
Contract No.: _____

This **Agency Agreement** ("Agreement") is to designate **Constellation NewEnergy – Gas Division, LLC** ("Agent") as the exclusive authorized representative on behalf of _____ ("Customer") for the management of Customer's natural gas supply, transportation needs, and all related services.

This Agreement authorizes Agent to act as our agent for the collection of our entire natural gas supply, transportation needs, account data, and contract information as it pertains to our facility's service from your company. Your company may deal directly with Agent's representatives on any and all matters pertaining to the collection of (by way of illustration and not limitation) all our natural gas supply, transportation information, account data (both historical and future), nomination of gas transportation volumes, and contract information inclusive of terms and provisions and should follow Agent's instructions with respect thereto.

This Agreement authorizes Agent and its representatives to receive all pricing and invoicing information as it pertains to Customer's natural gas procurement information, in order for Agent to manage and evaluate all of our natural gas supply and transportation arrangements as it pertains to our facility.

This Agreement authorization will remain in effect until modified or revoked in writing by either of the undersigned, which written notice from either party will cancel this Agreement. This authorization does not preclude the ability of Customer to act in their own behalf for same services.

AGENT:

Constellation NewEnergy – Gas Division, LLC
9960 Corporate Campus Dr, Ste 2000
Louisville, KY 40223-4055
Phone: (502) 426-4500
Fax: (502) 426-8800

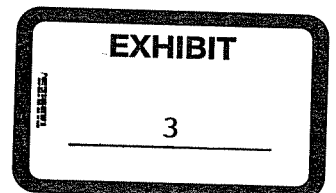
By: _____
Name: _____
Title: _____
Date: _____

CUSTOMER:

Phone: _____
Fax: _____

By: _____
Name: _____
Title: _____
Date: _____

CONFIDENTIAL



COLUMBIA GAS OF KENTUCKY, INC.

INTERRUPTIBLE SERVICE (IS)

RATE SCHEDULE

(Continued)

GAS COST ADJUSTMENT (Continued)

paragraph 1 (a) of Sheet No. 48 herein, and shall not be adjusted to reflect the supplier Refund Adjustment (RA), the Actual Cost Adjustment (ACA), or the Balancing Adjustment (BA) for a period of one year from the effective date of the Customer's agreement. At the end of that one-year period, any gas purchased by the Customer under that agreement shall be subject to the Commodity Cost of Gas, including all appropriate adjustments, as defined in Sheet Nos. 48 and 49.

Gas Sales purchased under this rate schedule that are within the Customer's specified Daily Firm Volume as contracted for under the Standby Service Rate Schedule are subject to the Commodity Cost of Gas, including all appropriate adjustments, as stated on currently effective Sheet Nos. 48 through 51 herein.

The charges set forth herein, exclusive of those pertaining to Customer charges, shall be subject to a Gas Cost Adjustment as shown on Sheet No. 6 of this tariff.

LOCAL FRANCHISE FEE OR TAX

The monthly bill to Customers served under this rate schedule is subject to the Local Franchise Fee or Tax as set forth on Sheet No. 52.

LATE PAYMENT PENALTY

Refer to the General Terms, Conditions, Rules and Regulations, Section 25.

PENALTY CHARGE FOR FAILURE TO INTERRUPT

On any day when Customer has been given timely notice by Company to interrupt, any quantity of gas taken in excess of the quantity specified to be made available on that day shall be subject to a charge of twenty-five dollars (\$25) per Mcf for all volumes taken in excess of one hundred three percent (103%) of the volumes specified to be made available on such day by Company. The penalty charge for failure to interrupt shall be in addition to the charges specified in this rate schedule. Customer shall be liable for any personal injury or damage to the property of Company or third parties which results from Customer's failure to interrupt, and Customer shall indemnify and hold Company harmless with respect to such injuries or damages.

When the notice to interrupt is issued for a seasonal purpose, Customer must deliver, on any given day, at least 60% of its metered consumption for that day and company will then utilize a three-day average of customer usage and customer deliveries to Company to determine volumes subject to the penalty charge above. The aggregate rolling three-day consumption shall not exceed the aggregate rolling three-day delivered volumes by Customer to Company. In the event of an interruption for peak day conditions, Company may increase the required deliveries up to 100% of gas taken and shall require a daily matching rather than three-day average of customer consumption to customer deliveries.

PAYMENT FOR UNAUTHORIZED TAKES

DATE OF ISSUE: October 25, 2001

DATE OF EFFECTIVE: November 24, 2001

Issued by: J.W. Kelly

Executive Vice President and Chief Operating Officer

EXHIBIT

4

Third Revised Sheet No. 15
Superseding
Second Revised Sheet No. 15
P.S.C. Ky. No. 5

COLUMBIA GAS OF KENTUCKY, INC.

Gas taken on any day in excess of one hundred three percent (103%) of the specified Maximum Daily Volume set forth in the Sales Agreement shall constitute unauthorized takes unless prior approval for additional volumes has been granted by Company. The sum of all such unauthorized takes in a billing month shall be billed at the rate of twenty-five dollars (\$25) per Mcf for gas so taken. Payment for such unauthorized takes shall be in addition to the charges specified in this rate schedule. Customer

DATE OF ISSUE: October 25, 2001

DATE OF EFFECTIVE: November 24, 2001

Issued by: J.W. Kelly

Executive Vice President and Chief Operating Officer