



COMMONWEALTH OF PENNSYLVANIA

September 16, 2013

E-FILED

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

**Re: Joint Petition for Generic Investigation or Rulemaking Regarding "Gas-On-Gas"
Competition Between Jurisdictional Natural Gas Distribution Companies
Docket No. P-2011-2277868**

**Generic Investigation Regarding Gas-On-Gas Competition Between Jurisdictional
Natural Gas Distribution Companies
Docket No. I-2012-2320323**

Dear Secretary Chiavetta:

I am delivering for filing today the Responsive Brief to IECPA's Petition for Interlocutory Review, on behalf of the Office of Small Business Advocate, in the above-captioned proceedings.

Two copies have been served today on all known parties in this proceeding. A Certificate of Service to that effect is enclosed.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Elizabeth Rose Triscari".

Elizabeth Rose Triscari
Assistant Small Business Advocate
Attorney ID No. 306921

Enclosures

cc: Parties of Record
Robert D. Knecht

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Petition for Generic Investigation or Rulemaking:
Regarding "Gas-On-Gas Competition" : Docket No. P-2011-2277868
Between Jurisdictional Natural Gas :
Distribution Companies :**

**Generic Investigation Regarding Gas-on-Gas :
Competition Between Jurisdictional Natural Gas : Docket No. I-2012-2320323
Distribution Companies :**

CERTIFICATE OF SERVICE

I certify that I am serving two copies of the Responsive Brief to IECPA's Petition for Interlocutory Review, on behalf of the Office of Small Business Advocate, by e-mail and first-class mail (unless otherwise noted) upon the persons addressed below:

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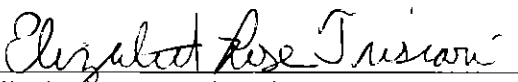
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Date: September 16, 2013


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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joint Petition for Generic Investigation or Rulemaking Regarding “Gas-On-Gas” Competition Between Jurisdictional Natural Gas Distribution Companies	:	
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	:	Docket No. P-2011-2277868
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	:	
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**RESPONSIVE BRIEF OF THE OFFICE OF SMALL BUSINESS
ADVOCATE TO IECPA PETITION FOR INTERLOCUTORY REVIEW**

Pursuant to 52 Pa. Code § 5.304(d), the Office of Small Business Advocate (“OSBA”) submits this Responsive Brief to the Petition for Interlocutory Review (“Petition”) filed by the Industrial Energy Consumers of Pennsylvania (“IECPA”) on September 9, 2013, with the Pennsylvania Public Utility Commission (“Commission”). The OSBA responds to the Petition as follows:

I. PROCEDURAL AND FACTUAL BACKGROUND

In the course of the protracted and at times contentious discovery process in the above-referenced proceeding, Peoples Natural Gas Company (“Peoples”) submitted its Set II interrogatories to IECPA on July 5, 2013.

On July 15, 2013, IECPA timely objected to certain of these interrogatories because they requested responses from each of IECPA’s individual members in addition to IECPA. IECPA argued that such interrogatories are unduly burdensome and irrelevant given that only IECPA, and not its individual members, is a party to this proceeding. IECPA averred that its individual members are only participating in this proceeding as members of an independent trade

association that asserts the collective viewpoint of large energy users in Pennsylvania without causing the individual members to expend significant time and resources.

In response, Peoples filed a Motion to Compel on July 25, 2013. Peoples argued that IECPA had presented no evidence that it is a trade association with a formal legal existence other than an unincorporated *ad hoc* group, and even if it were incorporated, it derives its standing from its individual members and such members should not be permitted to hide behind the veil of a collective group to avoid discovery requests. Moreover, Peoples argued that in this proceeding the facts surrounding IECPA individual members' rate discounts as a result of gas-on-gas competition is clearly relevant to this investigation, or, at the least, is likely to lead to the discovery of admissible evidence.

IECPA filed an Answer to Peoples' Motion to Compel on July 30, 2013, which, in addition to making the arguments mentioned above, attached IECPA's by-laws "indicating that it is an independent organization."¹

Administrative Law Judge ("ALJ") Elizabeth H. Barnes issued an order on September 5, 2013 ("Discovery Order"), ruling that Peoples' discovery request is relevant and not unduly burdensome and ordering IECPA to respond no later than September 20, 2013, to the interrogatories to which it had objected.

IECPA filed a Petition for Interlocutory Review on September 9, 2013, asking that the following specific question be submitted to the Commission for review:

[W]hether, as a matter of law, a party to a proceeding may ask interrogatories from individual business entities (including their representatives) that are not parties to the same proceeding, specifically when the individual business entities are only involved

¹ IECPA Answer to Motion to Compel at 3, fn. 4.

in the proceeding as members of a corporation that is a party to the proceeding.²

The OSBA submits this Responsive Brief in support of certification of the Discovery Order ruling to the Commission for interlocutory review and in support of upholding the Discovery Order.

II. RESPONSE TO PETITION FOR INTERLOCUTORY REVIEW

A. Certification Is Appropriate

Although the OSBA takes issue with the legal conclusion implicit in IECPA's question, the Discovery Order ruling is one that is appropriate for interlocutory review, *i.e.*, it "involves an important question of law or policy that should be resolved immediately by the Commission."³ IECPA's question improperly presumes that individual members of an organization such as IECPA are not parties to a proceeding in which the organization has intervened. Such a conclusion has not been made by the presiding officer in this proceeding and IECPA has cited to no authority in support of that conclusion. The OSBA asserts that it is a question of law still to be determined by the Commission.

Whether individual members of a trade association are also parties to the proceeding in which their organization has intervened is a question central to the discovery issue of whether such members can be compelled to answer interrogatories in that proceeding. If they are parties, then they must respond to discovery requests such as those propounded by Peoples. If they are not parties, the question becomes whether "piercing the corporate veil" is appropriate. The Commission would need to determine whether organizations like IECPA should be permitted to

² Petition at 2. The Petition also attached as an appendix IECPA's Certificate of Good Standing issued by the Commonwealth of Pennsylvania Department of State on September 6, 2013, and certifying that IECPA is duly incorporated as a Pennsylvania Corporation.

³ Pa. Code §5.304(b).

use discovery as both a sword and a shield for its members, protecting them from individual discovery requests.

The answers to these questions have immediate consequences in the instant proceeding, but also could affect many other proceedings before the Commission now and in the future.

IECPA is correct that many similar organizations participate in Commission proceedings on behalf of their individual members. Therefore, it is important for the Commission to decide this issue on an interlocutory basis. Accordingly, the ruling in the Discovery Order should be certified to the Commission.

B. Discovery Order Should Be Affirmed

The OSBA finds itself in full agreement with the arguments made in Peoples' Motion to Compel, with the exception of the argument regarding evidence of IECPA's incorporation. The OSBA acknowledges that the issue of whether IECPA is a corporation has since been adequately answered in the affirmative. However, IECPA is not a typical corporation, but rather is a trade organization composed of large energy users that are each independent and sophisticated business entities with vast resources. It is distinguishable from other corporations, whether privately held by a few individuals or publicly owned by shareholders.

IECPA is also distinguishable from statutory advocates who represent the collective interests of consumers, such as the OSBA or the Office of Consumer Advocate ("OCA"). The OSBA and OCA derive their standing by state statute. IECPA has standing solely by virtue of its individual members' interests. In fact, in its Petition to Intervene, IECPA's grounds for intervention were that significant amounts of natural gas are used by its members, and therefore any change to Commission policy related to natural gas rates or regulation would directly affect

those members.⁴ IECPA did not allege a collective amorphous interest in this proceeding, but rather that the outcome would have a direct impact on individual members.

Moreover, the OSBA is not persuaded by IECPA's argument that Peoples' interrogatories are overly burdensome. They are limited in number and complexity, asking simply which members disagree with IECPA's policy position on a particular issue and for specific facts related to each member's rate discounts (or lack thereof) as a result of gas-on-gas competition. Such information falls under the broad criteria for discovery that it may lead to admissible evidence and it is crucial to the parties' investigation and evaluation of gas-on-gas competition. Furthermore, IECPA has signaled that it intends to argue that elimination of gas-on-gas competition discounts would cause at least some of its members to exit Pennsylvania, and as such may present testimony to that effect. Therefore, discovery from individual members is extremely relevant to this investigation and to prohibit such discovery would be prejudicial to the other parties.

The OSBA is not unsympathetic to IECPA's concerns with respect to overly burdensome discovery. Whereas statutory advocates are funded by ratepayers, large energy users and other interested parties are not. As a result, groups like IECPA, PIOGA, and RESA form to represent the mutual interests of their individual members and share the high costs of both monitoring the regulatory process and intervening in cases where necessary. The OSBA supports participation by such organizations in regulatory proceedings and would object to any party using discovery in an effort to overwhelm a participant in order to discourage participation. However, the OSBA concludes that individual members of organizations like IECPA should not be protected from all discovery requests in all circumstances merely because there is a possibility it could be unduly burdensome. Rather, the question of whether discovery propounded on individual members of

⁴ IECPA Petition to Intervene at 3.

such organizations is irrelevant or unduly burdensome should be decided on a case-by-case basis by the presiding officer, as ALJ Barnes has done in the Discovery Order.

IV. CONCLUSION

In view of the foregoing, the OSBA respectfully requests that the ruling in the Discovery Order be certified to the Commission for interlocutory review and that the Commission affirm the Discovery Order.

Respectfully submitted,



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