BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
V.	:	Docket No. R-00049783
COLUMBIA GAS OF PENNSYLVANIA, INC.	:	

EXCEPTIONS OF

NATIONAL ENERGY MARKETERS ASSOCIATION

TO RECOMMENDED DECISION OF MAY 5, 2005

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I. INTRODUCTION

These Exceptions concern the right of the National Energy Marketers Association ("NEM") to participate in a proceeding concerning Columbia Gas of Pennsylvania's ("Columbia" or "Company") proposal to offer its residential and commercial customers natural gas supply services on a fixed-price basis. NEM filed both a Complaint and a Petition to Intervene in the alternative in this proceeding. Columbia filed a Motion to Dismiss both NEM's Complaint and its Petition to Intervene, asserting a lack of standing to which NEM filed a Response. Oral argument on the Motion to Dismiss was held at the Prehearing Conference on March 15, 2005, and the ALJ requested additional information, including NEM's membership list. On March 22, 2005, in response to the ALJ's requests, NEM provided an Answer and Memorandum of Law in support of its standing but declined to provide its membership list for reasons discussed below. On May 5, 2005, the Office of Administrative Law Judge issued the Recommended Decision of ALJ Kandace Melillo denying NEM standing in this proceeding.

NEM now files these Exceptions to the Recommended Decision of ALJ Melillo.

II. SUMMARY OF EXCEPTIONS

The ALJ erred in finding that NEM claimed standing solely in its own right as a non-profit corporation and not, in the first instance, in its representational capacity on behalf of its membership. As NEM stated in its Answer and Memorandum of Law to the ALJ:

> NEM members serve and intend to serve customers in the Pennsylvania natural gas market, including Columbia's service territory. Approval by the Commission of Columbia's proposal would cause immediate and material harm to competition in the state of Pennsylvania, a jurisdiction of the highest priority to the NEM membership collectively. . . .
>
> Columbia's proposal presents a significant barrier to competition and thus the harm suffered by NEM members because of this proposal is direct and substantial. Furthermore, the ability of NEM members to fairly compete and thus bring the benefits of additional price competition to Pennsylvania natural gas consumers will be specifically affected by the outcome of this proceeding.

NEM Answer and Memorandum of Law, p. 3.

As the representative of the energy marketers who NEM believes serve, conservatively, more than half of customers in the continental US who have switched to competitive gas suppliers,[1] NEM's interest in this proceeding is direct, substantial and immediate and its advocacy on behalf of energy marketers is not only germane to, but central to, its organizational purpose. In 2004 alone, NEM participated actively in more than 70 proceedings before federal and state regulators. Without NEM, many of its members could not afford to participate in proceedings such as this without the shared cost of advocacy.

[1] This estimate is based on estimates provided by Association members. NEM, however, does not maintain the information to verify these estimates.

The ALJ also erred in concluding that NEM should be required to identify its membership as this has not been required in other proceedings. As NEM pointed out in its Answer and Memorandum of Law, a list of those NEM members who wish to make their membership publicly known is available on its website at ***www.energymarketers.com***. *Answer and Memorandum of Law*, p. 5. However, there are good reasons why membership lists should not be required to be disclosed as the Commonwealth Court has previously determined and such disclosure should not be required in this case where it is clear that many NEM members have standing on their own to participate in this proceeding.

Finally, NEM's primary corporate mission is to perform cost-shared advocacy services on behalf of its members collectively. NEM's ability to advocate the very issues that its membership has placed in its hands is vital. The ALJ erred in concluding that NEM's corporate mission is not, in fact, substantially harmed by preventing its participation on behalf of its members in proceedings such as this one.

III. EXCEPTIONS

Exception No. 1: The ALJ Erred In Concluding That NEM Did Not Seek Standing In This Proceeding In Its Representational Capacity. (R.D. at 5, 9)

Columbia's rate proposal in this proceeding represents a major departure from the reconciliation-based rate design under which Columbia and other natural gas distribution companies ("NGDCs") in Pennsylvania have offered such services to customers in the past.[2] If Columbia is able to offer natural gas supply services on a fixed-price basis, Columbia's regulated, tariffed rates will compete directly with the natural gas supply services offered by NGSs in the restructured marketplace provided by the Natural Gas Choice and Competition Act, 66 Pa.C.S. §§ 2201 *et seq.*

NEM is a national, non-profit trade association representing, among others, wholesale and retail marketers of natural gas and electricity[3]. As noted above, NEM's membership serves, conservatively, more than half of the natural gas customers in the continental US that have opted to switch to competitive suppliers.[4] NEM's primary purpose is as an advocacy organization. In 2004, for example, NEM participated actively in more than 70 proceedings before federal and state regulators. NEM's advocacy has been based over the years primarily upon a consensus position with respect to competitive gas marketplace issues that was adopted upon the organization's founding.

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[2] Although another NGDC in Pennsylvania, Equitable Gas Company, has been authorized by the Commission to offer a fixed price option for natural gas supply, it is NEM's understanding that no offer has yet been forthcoming to customers under such proposal.

[3] NEM's membership also includes companies that provide a wide range of energy-related products, services, information and advanced technologies.

[4] Because of its broad-based representation of NGSs, NEM's participation has been invited and welcomed in a number of jurisdictions as they have sought to determine the best path to bringing competition into the natural gas supply market.

Despite NEM's broad representation of NGSs, which the ALJ acknowledged,[5] the ALJ denied NEM standing in this proceeding, concluding that NEM does not have an interest which is "substantial, direct and immediate" as defined in George v. Pa. P.U.C., 735 A.2d 1282, 1286 (Pa. Commw. 1999). Nor, the ALJ concluded does NEM have standing to participate as an intervenor, finding that its interests are not directly affected or are adequately represented by existing participants, and is not in the public interest. R.D. at 11.

The ALJ's denial of NEM's standing apparently follow, in part, from her reading of NEM's pleadings and its Answer and Memorandum of Law. NEM believes that part of the reason for her denial of NEM's standing was her mistaken understanding of the bases upon which NEM sought intervention. Specifically, she has stated that "NEM's arguments concerning the protection of its members' interests are irrelevant" because it "has clarified in its Answer and Memorandum that it is only seeking party status in its own right as a separate legal entity," citing to page 5 of its Answer and Memorandum. R.D. at 9. Based upon this reading of page 5 of NEM's Answer and Memorandum, the ALJ apparently did not even consider NEM's arguments that it had standing as the representative of its members.

NEM is unsure of what specific statement on page 5 of its Answer and Memorandum caused the ALJ to reach this conclusion. However, the conclusion itself is mistaken. As reflected in that document, NEM sought standing both as the representative of its membership and on behalf of its own organizational interests. On page 2 of its Answer and Memorandum, NEM begins its discussion specifically of its standing on

[5] One of the ALJ's factual findings is that NEM represented a "broad-based regionally-diverse group of companies that market energy." R.D. at 4-5

behalf of its membership with a sub-heading of "NEM HAS STANDING ON BEHALF OF ITS MEMBERSHIP AND THE PUBLIC INTEREST" and its Answer and Memorandum cites numerous cases on representational standing. See Answer and Memorandum at 2, n. 2 and 3, citing Tripps Park v. Pa. P.U.C., 415 A.2d 967 (Pa. Cmwlth. 1980), 1000 Grandview Association, Inc. v. Mount Washington Associates, 434 A.2d 796 (Pa. Super. 1981). On page 3 of its Answer and Memorandum, NEM specifically states, "NEM corporately and on behalf of its members both individually and collectively will sustain a 'direct, immediate and materially adverse impact . . ." Then, on page 4 of its Answer and Memorandum, subheading III of NEM's Answer and Memorandum states "NEM'S DIVERSE MEMBERSHIP IS NOT ADEQUATELY REPRESENTED BY OTHER PARTIES."

While NEM does speak of its organizational mission and does state that it was formed as an "organization separate from its members," its discussion of its existence as a separate entity and its unique organizational mission was never intended to be dismissive of its representational position. Indeed, NEM's tax exemption under Section 503(c)(6) of Internal Revenue Code is premised on its representational status as a trade or business association NEM believes that the ALJ's singular focus on NEM's establishment as a separate entity led to her denial of NEM's standing and, even though NEM submits that this itself was mistaken, the larger error NEM believes was to find that NEM was not also seeking representational standing and in not-finding that its broad-based representation of marketers who serve as much, or more than, 75% of the customers who have switched from natural gas supply services provided by NGDCs, was not an adequate basis for standing in this case.

The ALJ also concluded that "since NEM has failed to identify those members who would purportedly be affected by Columbia's tariffs, it is not permitted to claim its member's interests in support of its own standing," citing Pennsylvania Petroleum Association v. PP&L, 32 Pa. Commw. 19, 377 A.2d 1270 (1977), aff'd. 488 Pa. 308, 412 A.2d 522 (1980). As discussed below, this legal conclusion is also fundamentally in error and conflicts with recent decisions in both Commonwealth Court and before this Commission concerning the standing of NGSs in the context of competitive energy marketplaces. ARIPPA v. Pa. P.U.C., 792 A.2d 636 (Pa. Cmwlth. 2002); Joint Application for Approval of the Merger of GPU, Inc. with First Energy Corp., A-110300F0095, Order Granting Petition to Intervene of National Energy Marketers Association (R.D. of ALJ Gesoff, January 12, 2001); Mid-Atlantic Power Supply Ass'n v. PECO Energy Co., P-00981615 (R.D. of ALJ Turner, January 11, 1999).

Contrary to the ALJ's conclusion, and as discussed in its Answer and Memorandum of Law before the ALJ and further below, NEM submits that it has standing both as the representative of its membership, many of whom are participating in or considering participating in Columbia's Choice market, as well as in furtherance of its own mission as the advocate of its members' policy positions for which it stands. In doing so, NEM submits that it has a "direct, substantial and immediate interest" in ensuring that Columbia's tariff proposals do not harm the competitive marketplace. In accordance with long-established precedent on associational standing as set forth in Hunt v. Washington State Apple Avertisin Comm'n, 432 U.S. 333 (1977), this representation is germane to its organizational purpose and NEM's members would have standing on

their own to participate in this proceeding but the relief requested does not require their participation as individual advocates.

Exception No. 2: <u>Trade Associations, Such As NEM, Whose Membership Would Have Standing To Participate In Their Own Right And Whose Interest In The Proceeding Is Germane To Their Organizational Purpose, Have A Right To Participate In Proceedings Such As This, As Numerous Cases Have Determined.</u> (R.D. at 7-10, 13-14)

There can be little question in this case that NEM's members would have standing to sue in their own right and that its interest in this case is central to its organizational purpose. Most of NEM's members are energy marketers who regularly evaluate the economics of participation in energy markets all around the country and elect to participate in those markets where the rules of the marketplace enable them to compete. A central issue that often determines the competitiveness of a given market are the rules under which incumbent NGDCs price and participate in their own service territories.

If NGDCs are permitted to offer natural gas supply services and recover all or any portion of their costs to compete from the regulated portion of their operations, this would give them a competitive advantage in the marketplace and create a potential for market power abuse. If that is the case, then independent energy marketers will find it difficult to enter the marketplace. If, on the other hand, competitively-neutral controls are placed on NGDC offerings and they are prevented from subsidizing the offering of natural gas supply services with their revenue from distribution services, competition may flourish. NEM's participation in cases such as this is to ensure that its members' combined interests in this respect are protected. Indeed, this issue is perhaps the central

focus of NEM's participation in proceedings all around the country[6] – enhancing the competitiveness of energy marketplaces.

Columbia's Rate PPS proposal clearly changes the economics which energy marketers face in competing in Columbia's marketplace. Columbia's ability to price without regard to its cost of service is a significant departure from traditional cost of service based ratemaking and just and reasonable rates to which a utility is normally subjected. Indeed, Columbia's offer from a pricing standpoint begins to look much more like the offers of unregulated competitive suppliers; at the same time, Columbia, as the incumbent, has greater market power, both as the regulated entity with which customers must deal and because of its control over various aspects of customer service – such as customer enrollments, billing, collections, and terminations.

As an organization which represents businesses who market natural gas supply services in competition with the regulated offerings of NGDCs, NEM has a direct, substantial and immediate interest in this proceeding and the rates and terms under which Columbia is able to offer natural gas supply services in a manner that competes more directly with marketer offerings. As the Commission well knows, the marketplace for residential natural gas supply and related service is an emerging new industry. Consequently, it is crucial that the Commission hear from those who are not yet participating in the marketplace because of perceived market barriers as well as those

[6] NEM has been active from year-to-year in approximately 50-80 proceedings in 15-20 states around the country. While NEM must, as a matter of cost, be selective about the proceedings in which it elects to intervene and the issues on which it elects to comment, it has nonetheless taken an active role throughout the country on competitive gas supply issues and its intervention in such proceedings has never previously been rejected. NEM's decision to focus more interest in the Pennsylvania marketplace has resulted from the Commission's Request for Comments on the competitiveness of the natural gas market in the Commonwealth, Investigation into Competition in the Natural Gas Supply Market, Docket No. I-00040103 (Order of May 28, 2004) and the possibility that an alternative Supplier of Last Resort may be selected under the terms of the Natural Gas Choice and Competition Act, 66 Pa.C.S. § 2207(h).

who are already participating in the marketplace and who have actual experience with marketplace barriers. NEM membership includes both those who are already participating and those who are not yet participating because of perceived market barriers and NEM submits that in the context of a natural gas marketplace that has been in place under the terms of the Natural Gas Choice and Competition Act for less than 6 years, it is crucial that the Commission hear from those who are actively evaluating the business economics of that marketplace and the market barriers presented by regulated entities participating in the same market.[7]

As discussed in Exception No. 1, the ALJ's decision reveals a misunderstanding with respect to NEM's associational standing. The ALJ asserts that NEM stated that "it is only seeking party status in its own right as a separate legal entity, and not as a representative of any of its members." R.D. at 9. Unfortunately, the ALJ misinterpreted NEM's statements with respect to its position as a separate legal entity: the point that NEM was making was simply that its position did not necessarily reflect the views of any individual member but was a consensus position adopted in accordance with the bylaws of the organization which NEM, as a separate entity, is advocating on behalf of that membership. NEM submits that this is the manner in which associations normally participate in proceedings, on behalf of the combined or consensus interests of all of their members as determined in accordance with their bylaws.[8] NEM's participation in this proceeding is no different. Along these lines, the requirements in Pennsylvania for

[7]It is worth noting that the migration of customers to competitive suppliers in jurisdictions such as Ohio, with 50% of customers taking service from a competitive supplier, indicates that there may well be continuing economic and regulatory barriers to competition in the Pennsylvania market that have been successfully removed in other markets. Indeed, in Ohio, at least one utility is requesting that it be relieved of the merchant function completely.

[8] NEM's members participate in accordance with Roberts Rules of Order, with each member company having a single vote.

associations to participate in proceedings were well-stated in American Booksellers Ass'n, Inc. v. Rendell**,** 332 Pa. Super. 537, 481 A.2d 919 (1984). In that case, the Superior Court determined that four associations of booksellers had standing to challenge the constitutionality of a law prohibiting the display of certain materials in books. The Court there summarized the standard for review of standing of an association:

> As the representative of its members, an *association* may also have standing. An association must allege that its members, or any one of them, are suffering immediate or threatened injury, resulting from the challenged action, sufficient to satisfy the *Wm. Penn Parking Garage, Inc.* standard. If this can be demonstrated, and if the nature of the claim asserted and the relief sought does not render the individual participation of each injured party indispensable to proper resolution of the issue, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction. *See 1000 Grandview Ass'n v. Mt. Wash. Assoc., 290 Pa.Super. 365, 434 A.2d 796 (1981),* quoting *Warth v. Seldin, 422 U.S. 490, 511, 95* [*555] *S.Ct. 2197, 2211, 45 L.Ed.2d 343, 362 (1975)* (citations omitted.) n10

Id. at 554-55, 481 A.2d at 927 (emphasis in original).

In Hunt v. Washington State Apple Advertising Comm., 432 U.S. 333, 343 (1977), the U.S. Supreme Court, whose decisions on standing have generally been followed by Pennsylvania courts, even more clearly stated the requirements for associational standing:

> . . . an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

As set forth in detail in its Answer and Memorandum of Law, there can be little question that NEM has met these requirements. Clearly, many of NEM's members

would have standing to sue in their own right as they are either participating in Pennsylvania's Choice marketplace or are intending to participate in it, and thus will be harmed by changes in Columbia's tariff that make it harder to compete – ***and some of those members are also properly participating in this proceeding without challenge to their standing***. As NEM stated to the ALJ, its "members serve and intend to serve customers in the Pennsylvania natural gas market, including Columbia's service territory." *NEM Answer And Memorandum of Law*, p. 3.

This Commission and the Courts of Pennsylvania have found on a number of occasions that the financial interests of a competitor may constitute an interest necessary to confer standing. See, e.g., Pennsylvania Automotive Ass'n v. Commonwealth of Pa., 121 Pa. Commw. 352; 550 A.2d 1041 (1988). Columbia focused in its arguments before the ALJ, and the ALJ relied, upon the rejection of the Pennsylvania Petroleum Association's standing in Pennsylvania Petroleum Ass'n v. Pennsylvania Power & Light Co., 31 Pa. Commw. 19, 377 A.2d 1270 (1977) on an appeal from a PUC determination. As that case emphasized, however, parties complaining about competitive injury "have standing only where the alleged competition is prohibited by a regulatory scheme in which both parties participate." Id. at 26, 377 A.2d at 1273. In this case in contrast, the Natural Gas Choice and Competition Act is a regulatory scheme which is designed to protect the development of a competitive marketplace for natural gas supply service and to prohibit unfair competition by an incumbent public utility. In this context, a far more relevant determination to the instant case on the standing issue was made by Commonwealth Court in ARIPPA v. Pa. P.U.C., 792 A.2d 636 (2002) where that Court acknowledged the standing of the Mid-Atlantic Power Supply Association, among others,

to challenge an electric restructuring settlement and firmly rejected efforts to quash their appeals on the basis of standing, stating:

> Moreover, ***the Competition Act, which places an affirmative mandate on the Commission to foster competition . . . gives the . . . competitors such as Mid-Atlantic standing to challenge the non-unanimous Settlement Stipulation.***

792 A.2d at 654, n.30.

Commission ALJs have also addressed the issue of associational standing for NEM and others in the cases of Joint Application for Approval of the Merger of GPU, Inc. with First Energy Corp., A-110300F0095, Order Granting Petition to Intervene of National Energy Marketers Association (R.D. of ALJ Gesoff, January 12, 2001) ["GPU Merger"]and Mid-Atlantic Power Supply Association v. PECO Energy Company, Docket Nos. P-00981615, R.D. (January 11, 1999) ["MAPSA v. PECO"]. In GPU Merger, ALJ Gesoff specifically found NEM, as a "non-profit trade association representing the consensus position of a broad-based, regionally –diverse group of companies that market energy" has an interest which may be directly affected and which is not adequately represented by existing participants. GPU Merger at 2.[9] Similarly, in MAPSA v. PECO, ALJ Turner rejected PECO Energy Company's arguments that neither MAPSA nor the Clean Air Council had standing to challenge PECO's adherence to Code of Conduct requirements.

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[9] The ALJ attempted to distinguish the GPU Merger case on the basis that the objection was "provisional" rather than "general" in that GPU suggested that the ALJ could, instead, impose limits on NEM's participation. R.D. at 12. However, ALJ Gesoff rejected GPU's objection without regard to such conditions and it was, therefore, treated as if it were a general objection. NEM submits that the ALJ's attempted distinction is lacking in merit.

The ALJ also attempted to distinguish GPU Merger on the basis that the facts and circumstances were different and do not have applicability. R.D. at 12. However, the general purpose for which NEM was intervening were similar – to address the harm on competitive energy suppliers and the competitive marketplace. In essence, there really was very little difference.

NEM submits that decisions like those of ALJ Gesoff and Turner appropriately recognize the important role of associations such as NEM, MAPSA, CAC, and many others in providing insight and a better record upon which the Commission can make informed decisions, particularly on issues affecting the competitive marketplace.

NEM would also emphasize that associational standing has been widely recognized in Pennsylvania as well as nationally. In addition to the American Booksellers Association and the Pennsylvania Automotive Association cases mentioned above, the Courts have acknowledged the standing of many other associations. See, e.g., National Credit Union Administration v. First National Bank & Trust Co., 522 U.S. 479 (1998) (recognizing the American Bankers Association as having standing to challenge credit union laws on the basis of competition), The Hospital and Health System Ass'n of Pa. v. Commw. Of Pennsylvania, 828 A.2d 1196 (Pa. Cmwlth. 2003), National Solid Wastes Management Ass'n v. Casey, 135 Pa. 134 (Pa. Cmwlth. 1990).

NEM submits that it should be granted standing as a representative of its membership.

Exception No. 3: **NEM Should Not Be Required To Disclose Proprietary Business Information On The Record Of This Proceeding In Order To Obtain Party Status.** (R.D. at 9)

In her Recommended Decision, the ALJ asserts that because NEM did not specifically identify its membership that it is not permitted to claim its member's interests in support of its own standing, citing to PPA v. PP&L, supra. R.D. at 9. NEM submits that the Commission should recognize that there are important reasons why an organization such as NEM, which has bylaws that require that its membership list be

maintained as a proprietary and confidential business document, should not be required to provide its member list, for purposes of standing. Indeed, Commonwealth Court in the case of Interstate Gas Marketing v. Pa. P.U.C., 679 A.2d 1349 (1996) did not find that IGM's standing should be denied because it refused to provide a customer list since such customer list was "proprietary business information" and because it believed that making "a complete list of its customers part of the public record would irreparably harm IGM." Id. at 1355.

Likewise, in GPU Merger, ALJ Gesoff found that NEM's membership "is not relevant to NEM's status as an intervenor in this proceeding because it is a non-profit corporation with a legal identity which is separate from its members, because it is intervening in its own right and because it does not represent the position or competitive interest of any specific member." GPU Merger at 3.

NEM pointed the ALJ's attention to NEM's website which provides the identity of those NEM members who are not averse to having their identity known. However, NEM submits that, as in IGM, disclosure of the companies that have competitive interests with a particular utility might compromise the ability of its members to work effectively with such utility after the case is over.[10] Many members require such confidentiality so that they can work cooperatively with utilities while, as part of NEM, advocating for even more fundamental changes in the competitive marketplace.

Moreover, since NEM's position is a consensus position, it does not necessarily reflect the viewpoints of each member. This is typical of any trade or other association which, by its nature, will encounter differences of opinion regarding any particular issue

[10] It should also be emphasized that many members have legitimate fears of commercial retribution as a result of the positions that might be taken in a particular proceeding.

and which will have to develop a consensus before it can take any position as the representative of its membership. As a member of the National Association of Regulatory Utility Commissioners, this Commission is no doubt quite familiar with the process through which organizations such as NEM must develop and advocate on policy issues.

As noted above, members may not agree with NEM's position on every point or who may have a working relationships with public utilities that may require them to compromise such positions. As such, NEM should not be required to disclose its members' identities simply because they choose not to damage a business relationship with an incumbent utility. In this respect, NEM performs a critical role for its membership as it can take positions contrary to utilities without the same fear of commercial retribution. [11]

As indicated to the ALJ in NEM's Answer and Memorandum, those members of NEM who wish to disclose their identity, have done so on NEM's website by displaying their logos, a copy of which is attached as Exhibit "B" to these Exceptions.. *Answer and Memorandum of* Law, p. 5. Consequently, there can be no reasonable basis for concluding that NEM's wish to maintain its members' confidentiality should affect its standing in this case. However, NEM would urge the Commission to uphold Judge Gesoff's Opinion. As a matter of public policy, the advocacy of competitors and would be competitors should not be chilled because a utility is curious about the identity of companies wishing to open its markets for competition. NEM should have standing in

[11] While NEM opposes the disclosure of its proprietary list of membership identities, NEM would provide the list on a proprietary basis solely to the ALJ or the Public Utility Commission if doing so is necessary to establish that NEM's members have a direct, substantial and immediate interest in this proceeding. However, the fact that NEM is a non-profit corporation with a separate legal identify should make this unnecessary.

proceedings in which it is fulfilling its corporate mission as a representative of its members' consensus position. As ALJ Gesoff concluded, "such a list of members is irrelevant to the standing issue."

Exception No. 4: <u>The ALJ's Conclusions That NEM's Interest Is Neither Direct, Substantial, Or Immediate Is Without Any Sound Basis.</u> (R.D. at 7-10, 13-14)

In her Recommended Decision, the ALJ appeared to believe that NEM's interest and concern in this proceeding had to do with the success of its "consensus position." NEM submits that the ALJ simply misunderstood the harm to NEM, which is an IRC 501(c)(6) trade or business association organized specifically to perform these advocacy functions on a cost-shared basis for its members. It is NEM members that are at commercial risk of loss if NEM is unsuccessful. Both NEM and its members are directly harmed if, as in this case, NEM is unable or prohibited from performing its primary corporate function. This is a direct, substantial and immediate harm and was described at length in NEM's Answer and Memorandum of Law to the ALJ. That harm is to NEM's members' ability to compete in Columbia's service territory. NEM's goal in participating in this proceeding is to prevent the establishment of inappropriate barriers to entry in the Columbia marketplace for natural gas supply services.

Moreover, NEM's interest is unique in that NEM represents not only energy marketers who are currently participating on Columbia's system but energy marketers who would like to participate on Columbia's system but which find the barriers to entry too great. This is important because early participation in a Choice program may have enabled some to capture market share away from a utility, limiting their incentive to press change further. NEM stands alone in its broader representation of energy marketers.

Additionally, NEM's cost-shared advocacy model means that members that could not otherwise afford to participate in litigation in a particular state are afforded a voice by virtue of their membership. This means, for instance, that members that are contemplating doing business in the state but cannot currently afford to expend the resources on regulatory advocacy are represented. This is particularly important in the milieu of utility regulatory practice where utility legal and advocacy resources greatly surpass those available to competitive entities, many of whom are just beginning operations and must conserve resources just to remain viable. The voices of these competitive entities are undeniably important to implementing a competitively neutral market in Pennsylvania, and but for NEM's participation, these voices would not be represented.

Exception No. 5: **Contrary to the ALJ's Determination, NEM's Interests May Be Directly Affected And Are Not Adequately Represented By Existing Participants.** (R.D. at 10-11, 13-14)

In her consideration of NEM's status as an intervenor rather than a complaining party, the ALJ concluded that NEM's interests are not directly affected by Columbia's filing and that NEM has not shown that other parties would not adequately represent its positions. In assessing NEM's interests in this respect, the ALJ indicated that she did not look on the interests of NEM's members but only concerned herself with the organization itself. As discussed above, NEM's interests, as the representative of its members' collective positions, are directly affected by Columbia's filing and other parties' interests are simply distinct from those of NEM. The ALJ's misinterpretation of NEM's position with respect to its representation of its members resulted in a relatively meaningless

assessment of NEM's interest as distinguished from its membership interest. NEM submits that it is nearly impossible to separate its interest from its membership interest. Nonetheless, denial of NEM's participation in this case could adversely impact its ability to perform its corporate purpose as a cost-effective, national advocacy organization that actively intervenes in state and federal regulatory proceedings.

NEM believes that this potential impact is obvious, as well as direct, substantial and immediate. NEM simply cannot continue to fulfill its organizational mission if it is prevented from advocating in proceedings such as this one where the terms under which energy marketers must compete are debated and established. Just as ALJ Gesoff determined in the GPU Merger case, the Commission should find that NEM's interests are directly affected and not adequately represented by other participants.

Exception No. 6: Contrary to the ALJ's Conclusion, NEM's Participation Is In The Public Interest. (R.D. at 11-14)

For many of the same reasons that NEM's interest in this proceeding is unique, its participation is also in the public interest. First, NEM's participation enables energy marketers who would not otherwise be able to afford to participate in proceedings such as this one to assert their viewpoints and enhance the possibility that they could participate economically in this marketplace when they are not participating currently.

Second, members serving consumers in a particular utility service territory and engaging in litigation with that utility must still ultimately be able to do business with that utility in the end. As such, their individual positions may be tempered because of sheer business necessity. NEM's bylaws established its membership list as proprietary and confidential in part to provide members a means to forward their legal, regulatory

and public policy positions without fear of retribution. Thus, because NEM itself does not rely on a utility to sign up a new customer on a timely basis or to bill or deliver its energy in a timely and reliable fashion, it can advocate important issues that may not otherwise be heard without harm to individual members if their identities are permitted to remain proprietary and confidential. Consequently, NEM's participation advances the public interest by helping to develop a record that is more complete on the benefits of market-based reform.

If NEM members are not required to be specifically identified, NEM members can have their viewpoints expressed without fear of retribution from utilities with whom they must do business. Thus, NEM may not be encumbered by these same considerations and can therefore advocate a stronger competitive position. As such NEM's participation advances the public interest by ensuring the completeness of the record.

Third, as NEM pointed out before the ALJ, NEM's diverse membership includes input from entities such as billing, back office, customer service and related information technology providers, price reporting services, inventors, and patent holders. (RD at 12). NEM submits that the expertise from such members on issues such as cross-subsidies of competitive services can be critical. The ALJ's rejection of the value of this input is an inaccurate assessment of the importance of the issues in this case. It is in the best interest of all of NEM's members when utility service territories are opened for choice on a competitively neutral basis. Notwithstanding what functions are currently provided in the marketplace on a competitive basis, these emerging energy-related services, information, and technologies represent the "value-added" promise that competitive markets were meant to deliver. As such, the anti-competitive impacts of Columbia's proposal have

more far-reaching consequences than just to competitive natural gas suppliers currently operating in the service territory.

NEM submits that its participation in this proceeding is in the public interest.

IV. CONCLUSION

NEM's interest in this proceeding on behalf of its membership, and in its own right, is direct, substantial, and immediate, is central to the purpose for which the organization exists, is not adequately represented by any other participant to this proceeding, and is in the public interest. The ALJ's decision denying standing to NEM should, therefore, be reversed and NEM permitted to participate as a full party in this proceeding.

Respectfully Submitted,

Edmund J. Berger

On Behalf of: National Energy Marketers Association

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