BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Interstate Gas Supply, Inc. For Certification as a Retail Natural Gas Supplier.	)))	Case No. 02-1683-GA-CRS

NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S MEMORANDUM CONTRA MOTION OF NISOURCE CORPORATE SERVICES COMPANY TO QUASH SUBPOENA

On October 12, 2010, NiSource Corporate Services Company ("NiSource") filed a Motion of NiSource Corporate Services Company to Quash Subpoena (the "Motion to Quash"). In the Motion to Quash, NiSource refuses to respond to the proper subpoena served on NiSource by the Northeast Ohio Public Energy Council ("NOPEC") on September 23, 2010, and disregards the rules of the Public Utilities Commission of Ohio in doing so. Pursuant to Ohio Administrative Code ("OAC") Rule 4901-1-12, NOPEC hereby files its Memorandum Contra the Motion to Quash.

I. Statement of Relevant Procedural History

The Motion to Quash provides a detailed overview of the filings made by the Northeast Ohio Public Energy Council ("NOPEC") in this proceeding. NiSource is correct that many of these pleadings remain pending before the Commission. The substance of these pleadings, however, has little, if any, relevance to the subpoena served on NiSource and that remains unanswered.

On September 23, 2010, and pursuant to this Commission's rules, NOPEC filed a Motion for Subpoena that was approved, and signed, by Attorney Examiner Stenman, who is assigned to

this case.[1] As the Motion for Subpoena explained, the subpoena sought documents "relating to a licensing arrangement entered into between NiSource and Interstate Gas Supply Inc. ("IGS") for the use of the 'Columbia Retail Energy' trade name." Specifically, NOPEC explained:

> It is NOPEC's strong belief that a complete understanding of the Agreement is impossible without documentary materials from NiSource. Because the Agreement has the potential to harm natural gas customers, retail suppliers, governmental natural gas aggregators as well as the competitive retail natural gas market in Ohio, it is critical that NOPEC and the other intervening parties in this case have access to materials from both sides of the transaction.

Despite proper service of the subpoena on it, NiSource ignored the October 13, 2010 due date for its responses, filed the Motion to Quash, and did not produce the requested documents. Based upon NiSource's improper refusal to abide by the terms of a Commission-issued subpoena, and IGS' refusal to respond to general discovery requests in this case, NOPEC and the other intervening parties remain without access to documents from the two contracting parties to an unprecedented transaction in which IGS seeks to market retail natural gas services to consumers in the Columbia Gas of Ohio ("Columbia Gas") service territory using the "Columbia" name, even though IGS is not affiliated with Columbia Gas.

II. LEGAL ARGUMENT

1. The Commission's Discovery Rules

OAC Rule 4901-1-16(A) and (B) govern discovery in Commission proceedings. Together, these provisions establish the Commission's policy of encouraging the use of pre-hearing discovery,[2] and allowing "any party to a commission proceeding" to "obtain discovery of

[1] NOPEC acknowledges that it inadvertently failed to indicate in the subpoena that all documents should be produced at the offices of Bricker & Eckler LLP, Attn: Matt Warnock, 100 South Third Street, Columbus, Ohio 43215.

[2] OAC Rule 4901-1-16(A) explains that the "purpose of rules 4901-1-16 to 4901-1-24 of the Administrative Code is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings."

any matter, not privileged, which is relevant to the subject matter of the proceeding." The concerted actions of IGS and NiSource blatantly flaunt the Commission's discovery rules and only serve to delay the proceeding and increase the resources necessary to reach a resolution in this case.

2. NiSource Does Not Raise Any of the Statutory Grounds Required to Quash a Commission-Issued Subpoena.

There are only two grounds for quashing a Commission-approved subpoena. They are that: 1) the subpoena is unreasonable; or 2) the subpoena is oppressive. OAC Rule 4901-1-25(C). NiSource failed to mention this Commission's legal standard or raise any allegation or defense that NOPEC's subpoena is unreasonable or oppressive. The reason is simple: responding to six straightforward requests for production of documents is neither unreasonable nor oppressive. Each of NOPEC's requests is targeted to obtain the information necessary to analyze the unprecedented actions of IGS in this proceeding. Ohio consumers eligible for participation in NOPEC's governmental aggregation program deserve the right to have a careful review of the issues of first impression raised in this proceeding—a task that can only be accomplished by obtaining access to documents in NiSource's possession.

3. NOPEC is a Party to This Proceeding.

Contrary to NiSource's arguments in the Motion to Quash, and as NOPEC made clear in its Memorandum Contra Motion for Protective Order of Interstate Gas Supply Inc. filed on September 16, 2010 in this case, NOPEC falls within the scope of the Commission's definition of the term "party" in OAC Rule 4901-1-16(H) and is entitled to full use of the discovery process in this proceeding.[3] NiSource, however, contends that this definition of "party" in OAC 4901-1-

[3] OAC Rule 4901-1-16(H) expressly defines the term "party" to include **"any person who has filed a motion to intervene which is pending at the time a discovery request or motion is to be served or filed."** (Emphasis added).

16(H) does not apply to the subpoena rule. Instead, NiSource inaccurately contends that the term "party" is governed by OAC Rule 4901-1-10(A). See Motion to Quash at p. 3.

First and foremost, NiSource ignores the fact that its own argument necessarily undercuts its Motion to Quash. NiSource claims that, based on OAC Rule 4901-1-10, "for purposes of the Commission's subpoena rule – Rule 4901-1-25 – 'party' does not include entities that have simply moved to intervene" and "[b]ecause NOPEC has not been granted leave to intervene in this proceeding, NOPEC is not a party to this proceeding." (Motion to Quash at p. 3). OAC Rule 4901-1-25(A) specifically states that the "commission, any commissioner, the legal director, the deputy legal director, or an attorney examiner may issue subpoenas, upon their own motion or upon motion of any party." Likewise, OAC Rule 4901-1-25(C) states that the "commission, the legal director, the deputy legal director, or an attorney examiner may, upon their own motion or upon the motion of any party, quash a subpoena." Using NiSource's own logic, NiSource's Motion to Quash is improper and unlawful because it is not a party to this proceeding (and has not even filed a motion to intervene). It is illogical and nonsensical to argue that a "non-party" under OAC Rule 4901-1-25(C) is prohibited from requesting a subpoena in a Commission proceeding and, at the same time, argue that another "non-party" should be allowed to file a motion to quash a subpoena in the same proceeding.

The Commission has recognized the complete absurdity of NiSource's argument. In an Entry on Rehearing, the Commission denied a motion to quash filed by a non-party under OAC Rule 4901-1-25(C). *Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases*, Case No. 03-93-EL-ATA, at ¶ 9 (Jan. 2, 2007). In reaching its conclusion, the Commission noted that "[a]lthough OCC is technically correct that the relevant rule uses the term 'party' in its provision for motions to quash, the examiner does not believe that

such language is intended to prohibit the filing of a motion to quash by anyone other than a party." *Id.* Expanding on this statement, the Commission noted that "the wording in the rule is, in this circumstance, more appropriately interpreted as meaning that the examiner may quash a subpoena upon the motion of an affected person." *Id.* By interpreting the word "party" to mean "affected person" for purposes of the subpoena rule, this Commission adopted a broad definition that would include NOPEC—thereby reiterating the broad discretion the Commission retains over its own proceedings, even if that means applying a less strict reading of its own rules.

In addition, Subsection (D) of the Commission's subpoena rule itself recognizes that a Commission "subpoena is subject to the provisions of rule 4901-1-24 of the Administrative Code," which deals with discovery motions. By incorporating OAC Rule 4901-1-24, the subpoena rule necessarily incorporates the definition of party in OAC Rule 4901-1-16(H)—a definition that applies the "purposes of rules 4901-1-16 to 4901-1-24 of the Administrative Code."

4. An Evidentiary Hearing is not a Prerequisite to the Use of the Discovery Process.

NiSource claims that "even parties to a Commission proceeding have no right to conduct discovery in cases not requiring an evidentiary hearing." (Motion to Quash at p. 3). Although NiSource cites two cases in support of its claim, neither of them stands for this proposition.

First, the rulemaking proceeding cited by NiSource (Case No. 06-685-AU-ORD) involved proposed changes to the Commission's procedural rules. One of the issues raised by OCC involved the proposed addition of the word "proceeding" to OAC 4901-1-01—a definition that would have the effect of allowing full use of the discovery process in every case opened before the Commission. Rejecting this definition, the Commission simply explained that "[i]f OCC's proposal were adopted, any interested person would have the right to intervene, conduct

discovery, and present evidence in any Commission case. The Commission does not believe that such rights exist." See December 6, 2006 Finding and Order at ¶ 9. Moreover, the Commission noted that the OCC proposal "would eliminate the Commission's discretion to conduct its proceedings in a manner it deems appropriate." *Id.* These statements represent the Commission's view that the rights to intervene, conduct discovery, and present evidence are not present in every case opened by the Commission, and that the Commission has the ultimate authority to conduct its proceedings in whatever manner deems appropriate. In no way does it stand for the proposition that an evidentiary hearing is a prerequisite to the right to conduct discovery.

NiSource relies on the October 28, 2003 Entry on Rehearing in Case No. 03-2040-TP-COI addressing telecommunications issues to support its incorrect argument. As part of that case, the Commission approved "managed discovery," but explained that it had "not foreclosed the possibility of party-initiated discovery in a subsequent phase of this proceeding." (October 28, 2003 Entry on Rehearing at ¶ 8). Continuing on, the Commission stated:

> The Commission's procedural rules and its governing statutes convey significant discretion and flexibility on the governance of its own proceedings. This is particularly so for proceedings where no hearing is required by law. There is no right to an evidentiary hearing in this proceeding or to the full discovery process normally reserved for cases where a hearing is required. Rather, the Commission's decision of whether to conduct a hearing for particular stages of this proceeding or whether to create a streamlined [discovery] process more suited to this *highly unique and complex* proceeding is discretionary.

Id. This statement simply reflects the fact that the Commission retains broad discretion over discovery, especially in "highly unique" proceedings and those without an evidentiary hearing. This proceeding is "highly unique," and limited discovery is necessary to obtain the information necessary to analyze the unprecedented actions of IGS in this proceeding. It is extremely rare

for a notice of material change to be filed by a competitive retail gas supplier. In addition, NOPEC is unaware of any proceeding in which this Commission has interpreted or addressed the hearing requirement in OAC Rule 4901:1-27-10(A)(2). Finally, IGS' request to market retail natural gas services to consumers in the Columbia service territory using the "Columbia" name even though IGS is not affiliated with Columbia Gas is unprecedented. Based upon the unique nature of this case, and the potential adverse impact of IGS' marketing practices on Ohio consumers, it is entirely proper to require NiSource to respond to six (6) straightforward requests for production of documents in NOPEC's subpoena.

5. The Subpoena is Not Moot.

Contrary to NiSource's arguments on page 4 of the Motion to Quash, neither IGS' filing of a revised first page of its competitive retail natural gas supplier ("CRNGS") renewal application seeking to use the "Columbia Retail Energy" trade name, or the alleged automatic approval of this revised page by the Commission, are relevant to NOPEC's subpoena. As NOPEC previously stated on pages 1-2 of the Reply of Northeast Ohio Public Energy Council to Interstate Gas Supply, Inc.'s Memorandum Contra Motions to Intervene and For an Evidentiary Hearing filed on September 10, 2010, "NOPEC is <u>not</u> challenging IGS' certification as a CRNGS or whether its CRNGS renewal application satisfied the requirements in Ohio Revised Code Section ("R.C.") 4929.20(A) or OAC Rules 4901:1-27-06 and 4901:1-27-09." Instead, the subpoena and NOPEC's pleadings related to the August 6, 2010 filing of a Notice of Material Change by IGS that would allow IGS to offer competitive retail natural gas service under the new trade name, "Columbia Retail Energy." Based upon the nature of the filing (a two-page document), the lack of any substantive information in the filing, the policy ramifications of allowing IGS to use the trade name "Columbia Retail Energy," and IGS' refusal to abide by this

Commission's discovery rules, NOPEC served the subpoena on NiSource to obtain necessary discovery in this case. For these reasons, the subpoena remains necessary for NOPEC to obtain relevant information in this proceeding.

IV. CONCLUSION

NOPEC's September 23, 2010 subpoena served on NiSource was proper under this Commission's rules, specifically OAC Rule 4901-1-25. It was neither unreasonable nor oppressive, and NiSource has not claimed that it was. NiSource's legal arguments in its Motion to Quash are incorrect and would lead to an absurd result. Therefore, NOPEC requests that the Commission issue an order denying NiSource's Motion to Quash and compelling NiSource to respond to NOPEC's properly issued Subpoena.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by hand-delivery upon John Bentine, Esq. and Matthew W. White, Esq., Chester Wilcox & Saxbe, LLP, 65 East State Street, Suite 1000, Columbus, OH 43215 on this 19th day of October 2010.

The undersigned hereby certifies that a copy of the foregoing was served upon the following parties of record by electronic mail and regular U.S. mail this 19th day of October 2010:

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