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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

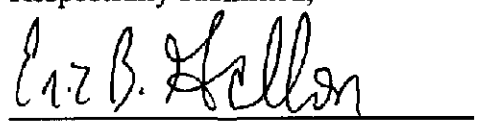
In the Matter of the Application of Interstate Gas Supply, Inc. for Certification as a Retail Natural Gas Supplier	)))	Case No. 02-1683-GA-CRS

MOTION OF NISOURCE CORPORATE SERVICES COMPANY TO QUASH SUBPOENA *DUCES TECUM*

Pursuant to Rule 4901-1-25(A), Ohio Admin. Code, NiSource Corporate Services Company ("NiSource Services") moves to quash the Office of the Ohio Consumers' Counsel's (OCC's) subpoena *duces tecum* on NiSource Services. It is inappropriate and unlawful for OCC to seek third-party discovery in this proceeding when the Commission has not ordered an evidentiary hearing and OCC is not a party. Even if OCC had the legal authority to serve subpoenas in this proceeding, OCC has requested documents that are not relevant to this proceeding and insisted that NiSource Services produce those documents, and a deposition witness, in only one week – an unreasonably short period of time.

A memorandum in support of this motion is attached.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. BACKGROUND

On June 21, 2010, Interstate Gas Supply, Inc. (IGS) filed an application for renewal of its certification as a competitive retail natural gas supplier (CRNGS). The application was deemed approved on July 22, 2010. *See* Ohio Rev. Code § 4929.20(A); *see also* Rule 4901:1-27-06(A), Ohio Admin. Code.

On August 6, 2010, IGS filed a Notice of Material Change in this case. The filing notified the Commission that IGS was registering a new trade name with the Ohio Secretary of State, "Columbia Retail Energy," and might offer service under that name. *See id.* at 1. Two weeks later, OCC moved to intervene in this proceeding. *See* OCC Mot. to Intervene and Mot. for an Evid. Hearing (Aug. 20, 2010) ("OCC Motion to Intervene"). OCC argued that IGS's use of "Columbia Retail Energy" as a trade name could confuse consumers and requested an evidentiary hearing, asserting that "[t]here are many unanswered questions [regarding the licensing agreement] which can only be fully explored in the context of an evidentiary hearing, complete with the discovery process and depositions." *Id.* at 6.

Despite OCC's implicit acknowledgement that it would be entitled to discovery only if the Commission ordered an evidentiary hearing, OCC immediately proceeded to serve discovery requests on IGS. *See* OCC's Ints. and Reqs. for Prod. of Docs. Propounded Upon IGS First Set (Aug. 20, 2010) (attached to IGS's Mot. for Prot. Order and Req. for Exped. Treatment (Sept. 3, 2010)). OCC's interrogatories sought information about the terms of the licensing agreement, the parties' motivations, and the negotiations between NiSource and IGS. *See id.*, OCC Ints. 1-36. OCC's document requests sought four categories of documents:

- "a copy of the licensing agreement between NiSource and IGS";
- "a copy of any memos, notes or analysis that that [*sic*] quantifies the dollar amount that IGS pays to NiSource in exchange for the right to use the Columbia name and logo"
- "a copy of any memos, notes or analysis that contemplates NiSource taking over or becoming affiliated with IGS";
- "a copy of any memos, notes or analysis that quantifies the value to IGS of the use of the Columbia name and logo."

Id., OCC RFPs 1-4. IGS filed a Motion for Protective Order on September 3, 2010. OCC opposed IGS's Motion on September 13, 2010, and, for some reason, also filed a motion to compel IGS to respond to OCC's discovery requests on September 17, 2010.

IGS's Motion for Protective Order and OCC's Motion to Compel Discovery are fully briefed and still pending. The Commission has not compelled IGS to produce the requested information. Now, OCC is trying a different tack. OCC has moved the Commission for a subpoena to require NiSource Services to produce the same documents OCC sought from IGS, plus "all other correspondence between IGS and NiSource[.]" *See* OCC Notice to Take Deposition and Motion for a Subpoena *Duces Tecum*, Subpoena *Duces Tecum* ("OCC Motion for Subpoena") at p. 2 (Oct. 25, 2010). The subpoena further demands that NiSource Services produce its Director of Strategic Financial Planning, Dean Bruno, for deposition "regarding the License Agreement between Nisource and IGS" and "the business case that supports IGSs [*sic*] Notice [of Material Change] filing[.]" *Id.* at p. 1. The subpoena gives NiSource Services less than one week to produce the requested documents and demands that NiSource Services produce Mr. Bruno for deposition just one day later. *See id.* NiSource Services moves to quash the subpoena on the grounds that it is unlawful, improper, overbroad, and unreasonable.

II. LAW AND ARGUMENT

OCC's subpoena is improper, unlawful, unreasonable, and unenforceable, for six reasons. First and foremost, parties to a Commission proceeding have no right to conduct discovery in cases not requiring an evidentiary hearing, as OCC itself twice acknowledged. When the Commission reviewed its procedural rules in 2006, OCC asked the Commission to add a new definition for "proceeding" in Rule 4901-1-01, Ohio Admin. Code, that would give parties full participation rights in all PUCO proceedings. OCC wrote:

> By broadly defining "proceedings" essentially as all matters over which the Commission has jurisdiction, OCC is ensuring that it and other parties will be permitted to fully participate in all matters before the Commission. Full participation includes, at a minimum, the right to intervene, **the right to conduct discovery**, the right to examine and challenge evidence that is made part of the record, and the right to submit evidence into the record. **The Commission's rules as currently written fail to extend these procedural due process rights to proceedings other than those where a hearing is held.** Procedural due process rights should extend to all matters placed before the Commission, **not just matters that are adjudicated by means of an evidentiary hearing.**

In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code, Case No. 06-685-AU-ORD, Comments of the Office of the Ohio Consumers' Counsel (June 26, 2006), at p. 3 (emphasis added) (footnote omitted). The Commission rejected OCC's proposal, concluding that the proposed definition was "overly broad and unnecessary" and holding:

> **If 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.** In addition, OCC's proposed definition would eliminate the Commission's discretion to conduct its proceedings in a manner it deems appropriate and would unduly delay the outcome of many cases. This request is denied.

In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code, Case No. 06-685-AU-ORD, Finding and Order (June 26, 2006), at ¶ 9 (emphasis added).

The Commission has said that "the full discovery process [is] normally reserved for cases where a hearing is required." *In the Matter of the Implementation of the Federal Communication Commission's Triennial Review Regarding Local Circuit Switching in the Mass Market*, Case No. 03-2040-TP-COI, Entry on Rehearing, ¶8 (Oct. 28, 2003). Indeed, OCC has implicitly acknowledged in this very matter that it is not entitled to discovery unless the Commission orders an evidentiary hearing. *See* OCC Motion to Intervene, Mem. Supp. at p. 6 (asserting that its questions "can only be fully explored in the context of an evidentiary hearing, complete with the discovery process and depositions."). Yet, OCC served discovery anyways. Because the Commission has already held that OCC is not entitled to discovery in proceedings in which no evidentiary hearing is held, the Commission should grant NiSource Services's motion to quash.

Second, OCC's motion for subpoena *duces tecum* is improper because OCC is not a party to this proceeding. The Commission's rules state that only the Commission itself, a commissioner, the legal director, the deputy legal director, an attorney examiner, or a "party" to a Commission proceeding may move the Commission to issue a subpoena. *See* Rule 4901-1-25(A), Ohio Admin. Code. "For purposes of rules 4901-1-16 to 4901-1-**24** of the Administrative Code, the term 'party' includes 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." Rule 4901-1-16(H), Ohio Admin. Code (emphasis added). But, for purposes of the Commission's subpoena rule – Rule 4901-1-**25** – "party" does not include entities that have simply moved to intervene. For Rule 4901-1-25, the term "party" includes "[a]ny person **granted leave** to intervene[.]" Rule 4901-1-10(A)(4), Ohio Admin. Code (emphasis added). Because OCC has not been granted leave to intervene in this proceeding, OCC is not a party to this proceeding. Consequently, OCC is not permitted to move for a subpoena.

In a recent filing in this case, the Northeast Ohio Public Energy Council (NOPEC) noted that the Commission's subpoena rules do not technically permit a non-party to file a motion to quash. NOPEC's Memo Contra NiSource Services' Motion to Quash Subpoena (Oct. 19, 2010), at p. 4 (citing Rule 4901-1-25(C), Ohio Admin. Code). NOPEC admitted that this strict construction would lead to an absurd result, given that subpoenas are, by definition, served only upon non-parties. NOPEC further acknowledged that the Commission interprets its subpoena rule to avoid that absurd result. *Id.* at p. 5 (quoting *Consolidated Duke Energy Ohio, Inc. Rate Stabilization Plan Remand and Rider Adjustment Cases*, Case No. 03-93-EL-ATA, at ¶9 (Jan. 2, 2007)). NiSource Services agrees that logic dictates that subpoena recipients be permitted to move to quash those subpoenas. No logic, on the other hand, dictates that non-parties should be permitted to use the Commission's rules as a means to secure documents or deposition testimony from other non-parties. Much mischief would result if companies or the OCC could take advantage of the Commission's subpoena power simply by moving to intervene in a Commission proceeding. For this reason as well, OCC's subpoena *duces tecum* should be quashed.

Even if OCC were permitted to serve subpoenas in this case, the Commission would still be obligated to quash OCC's subpoena *duces tecum.* The third and fourth reasons to quash OCC's subpoena are that the subpoena impermissibly directs NiSource Services to produce its Director of Strategic Financial Planning, Dean Bruno, to be deposed on unspecified matters. If a party wishes to subpoena a corporation for deposition, it must "designate with reasonable particularity the matters on which examination is requested" and then allow "[t]he organization so named" to "choose one or more of its * * * agents * * * to testify on its behalf[.]" Rule 4901-1-21(F), Ohio Admin. Code. It is the corporation receiving the subpoena – not the party serving the subpoena – that gets to choose the deposition witness. *Cf. State ex rel. The V Cos. v.*

Marshall (1998), 81 Ohio St.3d 467, 470, 692 N.E.2d 198 (holding, with regard to the Ohio Rule of Civil Procedure that parallels Rule 4901-1-21(F), that a party serving a Rule 30(B)(5) deposition notice on a corporation "ha[s] no right to designate * * * the deponent to testify on [the corporation's] behalf."). Yet OCC's subpoena impermissibly designates Mr. Bruno as OCC's chosen witness. OCC cannot do that.

Additionally, the subpoena fails to designate "with reasonable particularity" the topics on which Mr. Bruno would be deposed. OCC's filing indicates that Mr. Bruno would be deposed on "matters[ ] **including but not limited to** the terms and conditions of the License Agreement that permits IGS to market retail natural gas services under the trade name Columbia Retail Energy[.]" OCC Motion for Subpoena at p. 2 (emphasis added). But, OCC also mentions Mr. Bruno's "knowledge regarding the business case that supports IGS's Notice filing," whatever that means. *Id.* Another part of OCC's motion refers to Mr. Bruno's "first-hand knowledge of * * * the negotiations that led to the Licensing Agreement" (*id.* at p. 3), but those negotiations are not listed as a deposition topic in OCC's subpoena (*see* Subpoena *Duces Tecum* at p. 1). It is unclear exactly what topics OCC intends to cover in Mr. Bruno's deposition. To the extent that OCC intends to depose Mr. Bruno on topics beyond the terms and conditions of the License Agreement between NiSource and IGS, OCC has not designated those topics with reasonable particularity.

Fifth, the subpoena *duces tecum* is overbroad and seeks documents that are irrelevant to this proceeding. Among other categories of documents, OCC has requested "any memos, notes and analysis that contemplate Nisource acquiring or becoming affiliated with IGS; a copy of any memos, notes and analysis that quantify the value to Nisource of permitting IGS to use the Columbia trade name and Columbia logo; and all other correspondence between IGS and

Nisource leading up to or after entering the License Agreement." (Subpoena *Duces Tecum* at p. 2.) Each of these requests is improper.

OCC has acknowledged that IGS is not affiliated with NiSource. *See, e.g.*, OCC's Reply Supp. OCC's Motion to Intervene at p. 1 (Sept. 13, 2010) (stating that IGS's licensing agreement with NiSource Services "does not include an affiliate relationship between any company held by Nisource (the holding company of Columbia Gas of Ohio) and IGS."). Consequently, documents in which NiSource "contemplates" an affiliation with or acquisition of IGS, if there were any such documents, would be completely irrelevant to the situation as it actually, currently exists. Documents "quantify[ing] the value to NiSource" of the licensing agreement are also irrelevant. The issue before the Commission in this proceeding, according to OCC, is whether IGS's " name change and use of the Columbia logo results in adversely affecting the retail natural gas supplier's fitness or ability to provide the services for which it is certified." OCC Reply Supp Mot. to Intervene at p. 4 (Sept. 13, 2010). The value of the licensing agreement to **NiSource Services** has no conceivable relationship to IGS's fitness for CRNGS certification. Lastly, OCC's request for "all other correspondence between IGS and Nisource leading up to or after entering the License Agreement" is vastly overbroad and unduly burdensome. The request is not limited in time or by topic. It simply demands the entirety of all communications between IGS and NiSource Services, ever – and it demands that production in one week.

The insufficient time given NiSource Services to comply with OCC's subpoena *duces tecum* is the sixth and final reason to quash OCC's subpoena. Typically, the recipient of a request for production in a Commission proceeding has twenty days to serve a written response. *See* Rule 4901-1-20(C), Ohio Admin. Code. OCC's subpoena *duces tecum*, in comparison, gave NiSource fewer than seven days to gather, review, and produce the documents OCC requested.

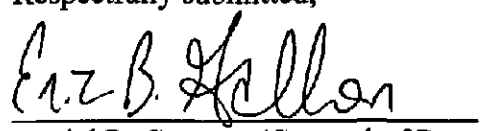
Additionally, OCC would require NiSource Services to produce a witness for examination on the very next day. OCC offers no explanation for the quick turn-around it demands, save for the empty claim that "time is of the essence for OCC to develop the record." OCC Motion for Subpoena, Mem. Supp. at p. 4.

As explained above, there is no "record" to develop. The Commission has not scheduled an evidentiary hearing in this case. And time is not "of the essence." According to OCC, "IGS began solicitation efforts using the trade name 'Columbia Retail Energy' and using the Columbia logo" **six weeks ago.** *In the Matter of the Complaint of OCC et al. v. IGS*, Case No. 10-2395-GA-CSS, Complaint, ¶ 21 (Oct. 21, 2010). And the Commission has not established any case schedules for this matter. Given that almost two months has passed since IGS reportedly began using the Columbia Retail Energy trade name and there are no imminent deadlines (or, for that matter, **any** deadlines) in this case, OCC has no reason to demand an expedited response to its discovery requests.

III. CONCLUSION

In sum, OCC's attempt to sidestep IGS's motion for protective order and seek the same information from NiSource Services, when OCC admits it has no entitlement to discovery and is not even a party to this proceeding, is prohibited by the Commission's rules. And even if the OCC were permitted to serve a subpoena *duces tecum* on NiSource Services, the particular subpoena that OCC served is defective in several ways: it impermissibly selects a witness to testify on behalf of NiSource Services at deposition; it fails to designate the topics of the deposition with reasonable particularity; it seeks irrelevant information; its document requests are overbroad; and it does not provide a reasonable period of time to comply. For all of these reasons, NiSource Services moves the PUCO to quash OCC's subpoena *duces tecum.*

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2010, a true and accurate copy of the foregoing Motion of NiSource Corporate Services Company to Quash Subpoena *Duces Tecum* was served by electronic mail and First-Class United States Mail upon the following:

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