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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

2011 MAR 22 PM 5:13

IN THE MATTER OF THE COMPLAINT)
OF CUTTER EXPLORATION, INC.,)

PUCO

Complainant,)

Case No. 09-1982-GA-CSS

V.)

THE EAST OHIO GAS COMPANY d/b/a)
DOMINION EAST OHIO,)

Respondent.)

MEMORANDUM OF THE EAST OHIO GAS COMPANY d/b/a DOMINION EAST
OHIO CONTRA MOTION TO COMPEL OF CUTTER EXPLORATION, INC.

David A. Kutik (0006418)
Counsel of Record
Jennifer B. Flannery (0078651)
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Cleveland, Ohio 44114-1190
Telephone: 216-586-3939
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jbflannery@jonesday.com

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JONES DAY
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P.O. Box 165017
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325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215-2673
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E-mail: gwgarber@jonesday.com

ATTORNEYS FOR RESPONDENT THE EAST OHIO GAS COMPANY
d/b/a DOMINION EAST OHIO

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Technician And Date Processed 3/23/11

I. INTRODUCTION

In its haste to bring yet another discovery dispute to the Attorney Examiners, Cutter Exploration, Inc. (“Complainant”) has jumped the gun. *Before* Complainant filed its latest Motion to Compel, counsel for The East Ohio Gas Company d/b/a Dominion East Ohio (“DEO”) sent a detailed email to counsel for Complainant addressing each and every one of the items Complainant raises here. But rather than respond to that email—or at least focus its attention on resolving rather than litigating the pending discovery issues—Complainant simply filed its Motion anyway. This is inappropriate. It wastes the Attorney Examiners’ time, it needlessly distracts the parties, and it is inconsistent with the Commission’s rules regarding discovery motions. Complainant’s Motion to Compel, including its request for a continuance of the hearing, should be denied

II. ARGUMENT

“No motion to compel discovery shall be filed under this rule until the party seeking discovery has exhausted all other reasonable means of resolving any differences with the party or person from whom discovery is sought.” Rule 4901-1-23(C), Ohio Administrative Code.

Here, not only did Complainant fail to comply with this Rule—it affirmatively *ignored* DEO’s attempt to address the issues Complainant purports to bring here. As indicated by the time stamp on the version of Complainant’s Motion to Compel appearing on the Commission’s website, that Motion was filed at 5:14 p.m. on March 18, 2011.

Yet over an hour earlier—at 3:54 p.m.—counsel for DEO sent to all counsel for Complainant a detailed email addressing each of the items Complainant raises. (*See* E-mail dated Mar. 18, 2010 (Ex. GWG-1).) For example, in its Motion, Complainant represents to the Examiners that DEO has failed to respond to its requests to schedule a series of inspections of its rotary meters, during which the oil in the meter gear boxes will be changed. (Mem., p. 3.) But

in counsel's email—sent to Complainant's counsel *before* that Motion was filed—DEO proposes that these inspections begin tomorrow, on March 23, and DEO requests a list of metering sites to be inspected. DEO also proposes, in response to Complainant's request, a date and time for inspections of Dominion Field Services wells, and offers additional inspections of a meter, regulator tags and other fluid samples at "anytime." (Ex. GWG-1.) Complainant ignores these proposals in its Motion.

Similarly, Complainant represents to the Examiners that DEO has not cooperated in providing MiniMax data regarding the rotary meters serving its wells. (Mem., p. 3.) Again, that is not true. In order to obtain the MiniMax data Complainant requests, it is necessary for DEO to divert personnel from their other duties and send them to each metering station at issue to download the data, a process that takes days to complete (and additional time to schedule). Accordingly, in DEO's email, counsel advised Complainant's counsel that the MiniMax data and information it requested will be provided by March 25, 2011. (Ex. GWG-1.) In fact, all of the purportedly outstanding items listed in Exhibit A to Complainant's Motion are addressed in DEO's email.

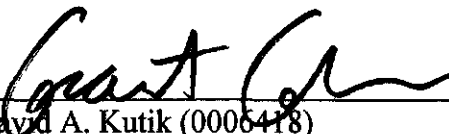
Complainant's Motion should be rejected out of hand. There simply is nothing for the Examiner to "compel"—as Complainant knew before it filed its Motion. Moreover, in light of the utter futility of further briefing on that Motion, counsel for DEO subsequently inquired whether Complainant's counsel intended to withdraw it. (See E-mail dated Mar. 21, 2010 (Ex. GWG-2).) Complainant's counsel ignored that inquiry. On the afternoon of March 21, however, Complainant's counsel addressed some of the issues raised in DEO's email, and DEO responded further this morning. (See Email dated Mar. 22, 2011 (Ex. GWG-3).) The parties are moving forward on addressing the open items Complainant purports to raise here. There is nothing for

the Examiners to "compel," and no basis on which to continue the hearing. Complainant's Motion should be denied.

III. CONCLUSION

For the foregoing reasons, DEO respectfully requests that the Commission or Attorney Examiner deny Complainant's Motion to Compel, including its request for continuance of the hearing.

Respectfully submitted,



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Columbus, OH 43215-2673
Telephone: (614) 469-3939
Facsimile: (614) 461-4198

Counsel for Respondent The East Ohio Gas
Company d/b/a Dominion East Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by first class U.S. mail, postage prepaid, and e-mail to the following persons this 22nd day of March, 2011:

John W. Bentine
Sarah Daggett Morrison
Stephen C. Fitch
Chester Willcox & Saxbe LLP
65 E. State Street, Suite 1000
Columbus, Ohio 43215
jbentine@cwsllaw.com
smorrison@cwsllaw.com
sfitch@cwsllaw.com

Mark J. Skakun
Clay K. Keller
Buckingham Doolittle & Burroughs, LLP
4518 Fulton Drive NW
P.O. Box 35548
Canton, Ohio 44735-5548
mskakun@bdblawn.com
ckeller@bdblawn.com



An Attorney for The East Ohio Gas Company
d/b/a Dominion East Ohio

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**IN THE MATTER OF THE
COMPLAINT OF CUTTER
EXPLORATION, INC.,**

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v.

**THE EAST OHIO GAS COMPANY d/b/a
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Respondent.

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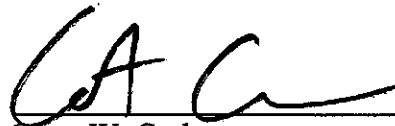
AFFIDAVIT OF COUNSEL

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

Grant W. Garber, being first duly sworn, states as follows:

1. I am over twenty-one (21) years old and am a resident of Franklin County, Ohio.
2. I am one of counsel for The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO") in the above-captioned case.
3. Exhibit GWG-1 is a true and accurate copy of an email I sent on March 18, 2011 to all counsel for Complainant Cutter Exploration, Inc. ("Complainant").
4. Exhibit GWG-2 is a true and accurate copy of an email I sent on March 21, 2011 to all counsel for Complainant.

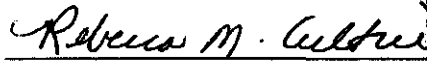
5. Exhibit GWG-3 is a true and accurate copy of an email chain from March 21 and March 22, 2011 in which counsel for the parties discuss certain of the pending discovery issues that purportedly are the subject of Complainant's Motion to Compel filed on March 18, 2011.



Grant W. Garber

Sworn to before me

this 22nd day of March, 2011.



Notary Public



REBECCA M. CULTICE
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES 11/7/2014

Exhibit GWG-1

Subject: Cutter v. DEO -- update on pending items

From: Grant W Garber
Extension: 6-3658
614-281-3658

03/18/2011 03:54 PM

To: ckeller

Cc: jbentine, smorrison@cwslaw.com, mskakun, sfitch, David A. Kutik, Jennifer B. Flannery

From: Grant W Garber/JonesDay Ext. 6-3658
614-281-3658

To: ckeller@bdbl.com

Cc: jbentine@cwslaw.com, smorrison@cwslaw.com <smorrison@cwslaw.com>, mskakun@bdbl.com, sfitch@cwslaw.com, David A. Kutik/JonesDay@JonesDay, Jennifer B. Flannery/JonesDay@JonesDay

Clay:

Here is the updated status regarding several pending discovery items:

1) DEO is prepared to begin the inspections of Cutter's rotary meters on Wednesday March 23. Please let me know by COB Monday if that date works for you. If so, we'll provide a specific time and location to meet. To avoid confusion about which sites we're inspecting, please provide me a list of the metering stations you want to include in this process by COB Monday, so we can schedule the order of the inspections. Our folks need 48 hours notice to arrange the schedule, so to the extent we can't finalize arrangements until next Tuesday, we'll begin the inspections on Thursday March 24. Also, DEO may have a lawyer present for the inspections. I'll confirm one way or the other next week.

At each site, the inspection will consist of the following: (i) prover testing the rotary meter, followed by (ii) changing the rotary meter gear box oil, with North Coast present to take custody of the drained oil, subject to the conditions we agreed upon--namely, that (a) DEO will be notified in advance of any testing that North Coast intends to perform on the gear box fluid and will have the right to object, initiate motion practice with the Examiner, and receive a ruling from the Examiner before the proposed testing takes place; (b) DEO will receive the results of any testing performed by North Coast; and (c) the cost of any testing and related work performed by North Coast will be paid by Cutter. Be advised that if DEO discovers oil or other prohibited fluids or materials in the rotary meter or lines during these inspections, those sites will be shut-in, consistent with DEO's enforcement of its tariff and gas quality specifications.

2) DEO is in the process of rescheduling the annual inspections that were previously postponed, and I expect the first of those inspections will be rescheduled for next week. I'll provide you with advance notice of those dates as they are available.

3) On Monday March 14, DEO investigated reports of non-registering meters (i.e., meters that were not registering flow) at the Puljic / Eger (P697) and Greve (P513) sites. In connection with the investigation at the Puljic / Eger site, DEO changed the gear box oil at the rotary meter serving that location. Some of the confusion arose because there was no clear signage at that location indicating that Cutter owns/operates that well. The oil removed from the gear box at that site was discarded. DEO determined that the meter at Puljic / Eger was functioning properly. Going forward, we'll ensure that Cutter receives advance notice anytime DEO intends to change the gear box oil at a meter associated with a Cutter-owned/operated well, excepting emergencies. In any case, we agree that this site can be inspected as part of #1, above.

With respect to the Greve site (P513), DEO personnel did not change the gear box oil at that site. DEO determined that the meter serving that location was functioning properly.

4) The Allyn meter and regulator tags are available for inspection anytime. Please provide a date certain

and DEO will provide access for inspection on that day, so long as we have two days advance notice.

5) Please let us know how DEO should provide the Allyn and Perelman fluid samples to North Coast. It may make sense to simply provide those samples to North Coast at the first day of the inspections discussed in #1, above.

6) We're in the process of downloading current MiniMax data from the Cutter sites. I'll provide the new data, with the expanded files you requested, on March 25. On that day, I'll also provide the expanded files you requested that are associated with the October 2010 data and a response to Interrogatory No. 52.

7) DEO is available to provide access for Cutter's inspections (i.e., videos and photographs) of the Dominion Field Services wells specified in Cutter's Request for Entry No. 1 on March 28, 2011. Those sites are: Smith#2, Corbin#2, Miller #3 and #4, Miller #2, DEO Unit #1, DEO Unit #2, Kormish#4, Robli#3, Robli#4, Colloca#1, Dento, Kunkle#2, Smith#1, Sebe, Metro Parks, Haers#1 and Kormish#2. We propose to meet you at 8:30 a.m. on March 28 at the corner of Cleveland Massillon Road and Clinton Road in Clinton, Ohio, to begin these site visits.

8) With respect to the DEO documents you characterized as "missing," please see the attached chart. The first document, DEO 539, appears on the privilege log provided to Cutter's former counsel on May 21, 2010. The other documents already have been provided to Cutter's former counsel. As a courtesy, the smaller-sized documents (e.g. emails) are attached to this email, as indicated on the chart. However, several of the bates ranges you identified span hundreds of pages, all of which were provided to Cutter's former counsel. The attached chart indicates when those materials were provided. Please check again to see if you have those materials or can obtain them from your client's former counsel.

9) We are working to determine whether "full-sized" drawings of DEO 321-322 and 769-770 exist. If they do, we'll provide those by March 25.

10) We've agreed that the depositions of Brent Breon, Jim Reinmann and Matt Dye will take place on April 18 and 19. Please let me know the order in which those depositions will proceed. Also, we propose to begin the deposition of Mike Cutter on April 20th. This deposition will last at least two days. Please let me know if April 20 - 22 (to be safe) works for Mr. Cutter.

11) We're working on the outstanding verifications for DEO's responses to Cutter's interrogatories. We'll provide those by March 25.



Chart.pdf



Documents.pdf

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Mailing Address:
P.O. Box 165017
Columbus, OH 43216-5017

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by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

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Exhibit GWG-2

Subject: Cutter v. DEO -- motion to compel

From: Grant W Garber
Extension: 6-3658
614-281-3658

03/21/2011 12:40 PM

To: smorrison@cwslaw.com
Cc: jbentine, mskakun, ckeller, sfitc

From: Grant W Garber/JonesDay Ext. 6-3658
614-281-3658

To: smorrison@cwslaw.com <smorrison@cwslaw.com>

Cc: jbentine@cwslaw.com, mskakun@bdblawn.com, ckeller@bdblawn.com, sfitc@cwslaw.com

Sarah:

I write regarding the motion to compel filed by Cutter late last Friday afternoon. At 3:54 p.m. on Friday -- over an hour before that motion was filed -- I sent a long email to you and Cutter's other counsel addressing various open discovery items, including all of the items discussed in that motion. For example, in that email I conveyed DEO's proposal to begin changing the gear box oil at all metering stations associated with Cutter's wells beginning this Wednesday. To date, I have not received a response to that proposal.

Given my email addressing those discovery items -- which was sent before Cutter filed its motion -- please let me know if Cutter intends to withdraw that motion.

Grant W. Garber
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Fax: 614-461-4198
gwggarber@jonesday.com

Mailing Address:
P.O. Box 165017
Columbus, OH 43216-5017

=====

This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

=====

Exhibit GWG-3

Subject: Re: FW: Cutter v. DEO -- update on pending items 

From: Grant W Garber
Extension: 6-3658
614-281-3658

03/22/2011 09:24 AM

To: Clay Keller

Cc: "David A. Kutik", jbentine, "Jennifer B. Flannery", "Mark Skakun", sfitch, smorrison

From: Grant W Garber/JonesDay Ext. 6-3658
614-281-3658

To: "Clay Keller" <CKeller@BDBLAW.com>

Cc: "David A. Kutik" <dakutik@JonesDay.com>, jbentine@cwslaw.com, "Jennifer B. Flannery" <jbflannery@JonesDay.com>, "Mark Skakun" <MSkakun@BDBLAW.com>, sfitch@cwslaw.com, smorrison@cwslaw.com

Clay:

Responding to your points:

1. Please let us know when you're ready to proceed with the inspections. With sufficient advance notice (four or five days), we should be able to schedule them most anytime. As a reminder, when you propose dates, please also send a list of the sites you want to be inspected. A lawyer may be present because we understand that in the past Mr. Tirpak often has made comments or asked aggressive questions of our folks that are not appropriate. When we performed a series of visual inspections of Cutter-related metering stations last fall, we found that having lawyers present alleviated these issues. To the extent the inspections take multiple days, and if the first day goes smoothly, we may not have a lawyer present for the subsequent inspections. Also, we disagree that shutting-in wells that introduce harmful fluids and other materials into DEO's meter and lines, in violation of DEO's gas quality specifications, is discriminatory. DEO will shut-in wells where it finds fluids, oil or other impermissible materials in the meter or lines.

2. Although we will try to combine the visits where possible, DEO's annual inspection schedule reflects "hard" deadlines, some of which cannot be pushed out any further. We may have annual inspections at a handful of sites that must take place in the next two weeks. I've inquired about this and will advise of those dates when I receive them.

3. The gear box oil at the Puljic / Eger site can be removed and examined in connection with the inspections described in #1, above.

4, 5, 7. We'll wait for your response.

8. You misremember our conversation about this issue. We were willing to fill in discrete gaps in the document production, which we did. The fact that Cutter's former counsel evidently did not provide you with hundreds of pages from the production strikes us as an issue to raise with them. Nonetheless, we'll have a set of those documents copied and mailed to you before the end of this week.

10. Please let us know (i) when you want to depose Messrs. Reinmann, Dye and Breon; (ii) the order of those depositions; (iii) a sense of how many days each of those depositions will take; and (iv) Mr. Cutter's availability for a 2-3 day deposition.

Grant W. Garber
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Phone: 614-281-3658
Fax: 614-461-4198

gwggarber@jonesday.com

Mailing Address:
P.O. Box 165017
Columbus, OH 43216-5017

"Clay Keller"

Grant:

03/21/2011 04:45:57 PM

From: "Clay Keller" <CKeller@BDBLAW.com>
To: "Grant W Garber" <gwggarber@jonesday.com>
Cc: <jbentine@cwslaw.com>, <smorrison@cwslaw.com>, "Mark Skakun" <MSkakun@BDBLAW.com>, <sfitch@cwslaw.com>, "David A. Kutik" <dakutik@JonesDay.com>, "Jennifer B. Flannery" <jbflannery@JonesDay.com>
Date: 03/21/2011 04:45 PM
Subject: FW: Cutter v. DEO -- update on pending items

Grant:

We have not had an opportunity to discuss your e-mail with Cutter Exploration and all of the issues raised below. I will initially note that these scheduling issues have been outstanding for weeks and, in some cases months, during which time we could get no response or commitment from DEO. Accordingly, sending an e-mail late Friday afternoon and then demanding an answer by close of business today is inappropriate and does not work.

But, let me provide an initial response to some of the numbered items below:

1. This Wednesday does not work for inspection of the meter stations. You also have now indicated that DEO may have a lawyer present. Please explain if a lawyer will be present and why. Moreover, DEO's threat to shut-in additional Cutter wells based upon operating conditions commonly experienced by producers will not be tolerated. DEO's desire to inflict economic harm upon Cutter Exploration by shutting in its wells while allowing other wells to continue to operate is plainly discriminatory.
2. I do not understand why point 2 is different from point 1? We had agreed that everything would be done at the same time.
3. This is no less than the third specific instance in which DEO has destroyed evidence after we requested it to be preserved. This is unacceptable and Cutter Exploration reserves all rights it has concerning the spoliation issues.
- 4, 5 and 7 --I need to get back to you after conferring with my co-counsel and client.
8. We talked about this issue a long time ago. The whole purpose of providing the list of documents is that we do not have them and they were not received from prior counsel. You told me that your firm has the files electronically stored and they could be sent to us. Directing me to go back to Vorys is directly contrary to what we discussed. Please provide the documents we do not have as you indicated previously would be done.

10. We did not "agree" that the depositions of Brent Breon, Matt Dye and Jim Reinmann would be completed on April 18 and 19th as you e-mail suggests. We asked for deposition dates for these three individuals and all you provided was two days. Yet, at the same time you plan to take one our witnesses for two days? That's not agreeable and we will need sufficient time to complete our depositions which will likely run over two days.

We will respond more fully after we have had a chance to confer with our client.

Clay K. Keller, Esq.



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[View my Biography](#)
[Privacy Notice](#)

From: Grant W Garber [mailto:gwgarber@jonesday.com]

Sent: Friday, March 18, 2011 3:55 PM

To: Clay Keller

Cc: jbentine@cwslaw.com; smorrison@cwslaw.com; Mark Skakun; sfitch@cwslaw.com; David A. Kutik; Jennifer B. Flannery

Subject: Cutter v. DEO -- update on pending items

Clay:

Here is the updated status regarding several pending discovery items:

1) DEO is prepared to begin the inspections of Cutter's rotary meters on Wednesday March 23. Please let me know by COB Monday if that date works for you. If so, we'll provide a specific time and location to meet. To avoid confusion about which sites we're inspecting, please provide me a list of the metering stations you want to include in this process by COB Monday, so we can schedule the order of the inspections. Our folks need 48 hours notice to arrange the schedule, so to the extent we can't finalize arrangements until next Tuesday, we'll begin the inspections on Thursday March 24. Also, DEO may have a lawyer present for the inspections. I'll confirm one way or the other next week.

At each site, the inspection will consist of the following: (i) prover testing the rotary meter, followed by (ii)

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8) With respect to the DEO documents you characterized as "missing," please see the attached chart. The first document, DEO 539, appears on the privilege log provided to Cutter's former counsel on May 21, 2010. The other documents already have been provided to Cutter's former counsel. As a courtesy, the smaller-sized documents (e.g. emails) are attached to this email, as indicated on the chart. However, several of the bates ranges you identified span hundreds of pages, all of which were provided to Cutter's former counsel. The attached chart indicates when those materials were provided. Please check again to see if you have those materials or can obtain them from your client's former counsel.

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