

Confidential Release

Case Number:

90-1825-GA-COI

90-785-GA-ATA

Date of Confidential Document:

MARCH 18, 1991

Today's Date:

July 28, 2009

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MAR 18 1991

DOCKETING DIVISION
PUBLIC UTILITIES COMMISSION OF OHIO

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

[FILED UNDER SEAL]

In the Matter of the Commission :
Investigation of the Suburban : Case No. 90-1825-GA-COI
Fuel Gas, Inc. Relating to the :
Establishment of Rates. :

In the Matter of the Application :
of the Suburban Fuel Gas, Inc. to :
Establish Initial Rates and :
Charges for Customers Served from : Case No. 90-785-GA-ATA
Municipally-Owned Transmission and :
Distribution Lines Operated Under :
Long-Term Leases by the Applicant. :

**REPLY TO MEMORANDUM
CONTRA MOTION TO USE
DEPOSITION AS EVIDENCE**

Consolidated Biscuit Company (hereafter "CBC") has opposed Suburban Fuel Gas, Inc.'s (hereinafter "Suburban") motion for an order permitting the use of the deposition of Norman J. Rood as evidence in the Motion to Disqualify portion of these proceedings.

Suburban does not dispute that it "made a mistake" regarding the availability of Mr. Rood when it proposed the March 19, 1991 hearing date. Mr. Rood's unavailability is a result of a family vacation cruise which cannot be cancelled or rescheduled without an approximate \$2,000.00 loss.

What Suburban does dispute, however, is that its request is

inappropriate or that any harm or prejudice would befall CBC should Suburban's request be granted.

In its memorandum contra, CBC first argues that "... the deposition of Mr. Rood will not be taken until March 12, 1991 and CBC does not have the benefit of knowing what Suburban hopes to demonstrate through Mrs. Rood's testimony". (CBC Memorandum p. 4). So what? CBC did not ask to depose Mr. Rood prior to his deposition and since he is a fact witness with no pre-filed testimony, CBC was in exactly the same position in this regard on March 12, 1991 as it would have been on March 19, 1991!

Next, CBC argues that "... Suburban has not responded to some of CBC's discovery requests and it is unlikely that CBC will have the information it seeks by March 12, 1991." Id., This discovery was not served upon Suburban until March 4, 1991 and is related solely to communications from David L. Pemberton¹. It is rather hard to understand how CBC is prejudiced here.

CBC also argues that it is somehow "... unfair to deny CBC the opportunity to question Mr. Rood following Mr. Rood's live testimony at the hearing based on the direct testimony of Mr. Rood and the evidence offered by Suburban's other witnesses." Id., pp. 5 and 6. CBC has no right to determine the order of Suburban's witnesses. Mr. Rood may very well have been the first witness called by Suburban, again putting CBC in the same position on March 19, 1991 as it was on March 12, 1991. Indeed, CBC had already deposed Mr. Pemberton (on February 8, 1991) and therefore is

¹

Suburban objected to this request on numerous grounds, and it was not provided.

familiar with what his testimony will be.

Suburban, again, would stress this is an administrative proceeding, there is no jury. Indeed, in most Commission proceedings, the vast majority of the testimony is pre-filed leaving only the cross-examination as "live". Suburban would note that the very similar practice of incorporation of cross-examination from one proceeding into the record of another proceeding is an accepted and often used practice at this Commission.

It is also important in this regard to understand why Mr. Rood is being called. Mr. Rood did not have any conversation or other direct contact with Mr. Randazzo. His deposition is being offered primarily for two reasons. First, to give the then present sense impression and the then existing state of mind of Mr. Pemberton during his contacts with Mr. Randazzo regarding representation, that it was Mr. Pemberton's impression that Mr. Randazzo accepted that representation and was given confidential information. Second, Mr. Rood's deposition is offered for his testimony that after he was informed that Mr. Randazzo would not represent Suburban that he instructed Mr. Pemberton to write a letter to Mr. Randazzo requesting confidentiality of all issues discussed. Again, this will simply confirm Mr. Pemberton's testimony. This is simply corroborative evidence related to the primary evidence offered by Mr. Pemberton, who actually had the conversations with Mr. Randazzo. Mr. Pemberton will, of course, be present.

Mr. McDonald and Mr. Randazzo were given notice of and

appeared at the deposition and, although they reserved their rights to object to the introduction of the deposition as evidence, cross-examined Mr. Rood. CBC would not be prejudiced in any way by the granting of Suburban's motion.

Rule 32 (A) (3) (g) O.R.C.P. requires only that "... such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." It does not require, as CBC would have the Commission believe, Mr. Rood to be "... dead, ill, infirm, imprisoned or unprocurable through a subpoena." These are requirements of other sections of Rule 32 (A) (3) which, if found, provides a right to so use the deposition without application and notice as required by Rule 32 (A) (3) (g). Here it is obviously desirable and certainly in the interest of justice to present this testimony by deposition. There is simply no requirement in Rule 32 (A) (3) (g) that "compelling reasons" be offered to justify Suburban's very reasonable request, as argued by CBC. Suburban believes that a fair review of the circumstances provides no adverse factors relating to "... the importance of presenting the testimony of witnesses orally in open court ..." which could overcome the positive factors.

Suburban also submits that an examination of the cases cited by CBC in support of its position actually support Suburban's position. In Jauch v. Corley 830 F. 2d 47 (5th Cir. 1987) there was no application nor notice pursuant to the Federal equivalent

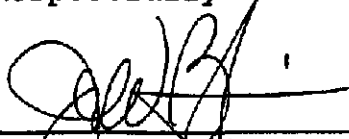
of Ohio Rule 32 (A) (3) (g), and more importantly, the record indicated the witness was, in fact, available. Additionally, the court considered it significant that the deposition sought to be admitted was the only testimony on a critical point of evidence. Similarly, in Allgeier v. U.S. 909 F. 2d 869 (6th Cir. 1990) the court found a violation of the civil rules in the admission of a deposition but only because there was no evidence of the witnesses unavailability - and the court declined to assume one. Even so, the court refused to reverse or find the depositions admission prejudicial, chiefly because cross-examination was had at the deposition. Here there is simply no doubt that Mr. Rood is unavailable to appear at the hearing (Rood depo. pp. 4 and 19). Notice was given and application made via motion, cross-examination was had and the evidence is only corroborative in nature. Suburban submits the case law cited by CBC actually supports its request.

Under the circumstances, Suburban believes that this phase of the proceeding must move on² and that there are sufficient circumstances to warrant the acceptance of Mr. Rood's deposition,

² In this regard, it should be noted that not all of the blame for delay can be laid at Suburban's door. Mr. Randazzo's deposition was delayed significantly as a result of scheduling conflicts of Mr. Randazzo and Mr. McDonald.

and that absolutely no prejudice befalls CBC as a result.
Suburban's motion should be granted.

Respectfully submitted,

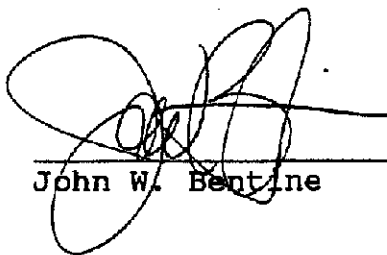


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply To Memorandum Contra Motion To Use Deposition As Evidence was served upon John C. McDonald, Emens, Hurd, Kegler & Ritter, Capitol Square, Suite 1800, 65 East State Street, Columbus, Ohio 43215, this 18th day of March, 1991, by hand delivery.



John W. Bentine