

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of )  
 )  
The Office of the Ohio Consumers' )  
Counsel, et al., )

Case No. 10-2395-GA-CSS

Complainants, )

v. )

Interstate Gas Supply, Inc. )

Respondent. )

PUCO

2011 OCT 17 PM 5:20

RECEIVED-DOCKETING DIV

---

**INTERSTATE GAS SUPPLY, INC.'S MOTION TO STRIKE NORTHEAST OHIO  
PUBLIC ENERGY COUNCIL'S MEMORANDUM IN SUPPORT**

---

**I. INTRODUCTION**

On September 22, 2011, Stand Energy Corporation ("Stand") filed a Motion for leave to file an amended complaint naming NiSource Corporate Services, Inc. ("NCS") and Columbia Gas of Ohio, Inc. ("Columbia") as parties to this case.<sup>1</sup> Stand's filing came nearly one year after the complaint was filed at the Public Utilities Commission of Ohio ("Commission"). On October 7, 2011, the Northeast Ohio Public Energy Council ("NOPEC") filed a Memorandum in Support of Stand's Motion for leave to file an amended complaint, to "support Stand[]" and, in addition, "request that the Commission add NiSource Retail Services Inc. ("NRS") as a necessary and indispensable party." (NOPEC Memorandum at 1.)

---

<sup>1</sup> On October 6, 2011, IGS filed its memorandum contra Stand's Motion. IGS requested that the Commission deny Stand's Motion based on procedural grounds. As such, IGS did not respond to every factual allegation in Stand's Motion. Any decision not to respond to Stand's factual allegations does not constitute IGS' acceptance of Stand's factual allegations. Rather, IGS intends to vigorously oppose all of the new factual allegations made in Stand's Motion if the Commission were to grant Stand's request to file an amended complaint.

It is simply not credible that over eleven months after filing the complaint, and thirteen months after initially raising the issue in Interstate Gas Supply, Inc.'s (IGS) certificate case,<sup>2</sup> that NOPEC has suddenly determined that NRS is a "necessary and indispensable party" to this case. (NOPEC Memorandum at 1) If NRS was a necessary and indispensable party, then NOPEC should have pursued a claim against NRS one year ago. Ohio Rule of Civil Procedure 19(B) makes it clear that an outsider to a case is "indispensable" if the case cannot in "equity or good conscience" proceed without them. (Civ. R. 19(B).) The facts of this case have not changed since the complaint was filed. This case involves a license to use a trade name and the resulting marketing efforts of IGS using the trade name. There are at least two parties to every license - a licensor and a licensee. NOPEC chose, by filing a complaint against IGS, to pursue its claim against the licensee, IGS. NOPEC chose to seek relief from IGS in the form of, *inter alia*, a cease and desist order – ordering IGS to stop using the trade name "Columbia Retail Energy." The licensor is not necessary or indispensable to the resolution of this case. The Commission can, if it so chooses, grant the relief requested by NOPEC without making anyone else a party to this case. This case can proceed without NRS, or any new party.

Moreover, nothing ever precluded NOPEC from filing a claim against the licensor one year ago. Since that time, NOPEC never sought discovery from NRS and NOPEC did not list any NRS employees as potential witnesses in this case. All that can be surmised from NOPEC's filing is that NOPEC clearly regrets its initial litigation strategy and now, at the eleventh hour, wants a second chance at formulating strategy that

---

<sup>2</sup> *In the Matter of Interstate Gas Supply, Inc. for Certification*, Case No. 02-1683-GA-CRS, NOPEC's Motion to Intervene, (August 31, 2010) (raising the same issues related to IGS' use of the trade name "Columbia Retail Energy" as NOPEC has raised in this case).

should have been decided well over a year ago. The hearing in this case is set to proceed on November 7, 2011, and IGS is prepared to defend the claims made against it. NOPEC should be ready, too. The proceeding should not be delayed any longer as a result of NOPEC's failure to form a clear litigation strategy in advance of filing a complaint.

It is also worth noting that the failure to add an indispensable party is cause for dismissal. (Civ. R. 19(B); Civ. R. 12(B)(7)). IGS avers that NRS is not necessary or indispensable to this case, however, if the Commission were to find that (1) NRS was necessary or indispensable to the adjudication of this case, but (2) the Commission chose not to add NRS as a party because of the extremely untimely and prejudicial nature of this filing, then NOPEC's failure to add NRS would be grounds for dismissal of the entire claim against IGS.

In any event, NOPEC's entire Memorandum should be stricken because the form of NOPEC's pleading – a “memorandum in support” – does not comply with the Commission's Rules. Chapter 4901 of the Ohio Administrative Code provides no authority for non-moving parties to file memoranda in support of motions. Rather, the Commission's Rules provide the opposite – that non-moving parties may file memoranda contra to motions. Because NOPEC's motion is procedurally flawed, it should be stricken from the proceedings.

The Memorandum in Support is also procedurally flawed because the memorandum is requesting relief beyond the scope of the relief requested in Stand's Motion. Unlike Stand's Motion, NOPEC has requested that the Commission add NRS as a party to the case. NOPEC cannot piggyback Stand's Motion under the guise of a

“memorandum in support” while simultaneously attempting to file a motion of its own adding a new party. NOPEC’s failure to file a proper motion under the Commission’s Rules is grounds to strike its request to join NRS as a necessary and indispensable party.

Furthermore, NOPEC’s improper request to join NRS, like Stand’s Motion, is highly prejudicial to Interstate Gas Supply, Inc. (“IGS”). Any joinder of parties at this late stage in the proceedings delays the proceedings and unduly prejudices IGS. IGS has been a defendant in this case for over a year and has spent considerable time and money defending the complaint. For the same reasons that IGS filed its memorandum contra to Stand’s motion for leave to amend the complaint, IGS submits that NOPEC’s memorandum in support is a baseless attempt to add parties for the sake of delaying an already prolonged proceeding.

For the reasons set forth herein, IGS respectfully requests this Commission to strike NOPEC’s Memorandum in Support.

## **II. LAW AND ANALYSIS.**

### *A. NOPEC’s Memorandum in Support Should Be Stricken Because it is Procedurally Improper.*

Ohio Administrative Code Section 4901-1-12(A) provides that any party may file a motion with an accompanying memorandum in support containing the grounds for the motion. Following the filing of a motion, any other party may file a memorandum contra, i.e. a pleading opposing the motion, within fifteen days of the service date of the motion. O.A.C. 4901-1-12(B)(1). Within seven days of the service of the memorandum contra, any party may file a reply memorandum. O.A.C. 4901-1-12(B)(2).

The Commission's Rules do not provide any authority for a party to file a memorandum in support to bolster the motion of another party. Despite the clear limits in the Rules, NOPEC has taken it upon itself to expand the Commission's Rules to file a responsive pleading in support of Stand's Motion. Previous attempts by parties to file responsive pleadings to support a Motion or Application have been stricken by the Commission. *In the matter of the Establishment of Carrier-to-Carrier Rules*, Case No. 06-1344-TP-ORD, Entry on Rehearing (Oct. 17, 2007) at Finding (6) (striking portions of memorandum contra that were actually memorandum in support); *In the Matter of Investigation of SBC's Entry into In-Region InterLATA*, Case No. 00-942-TP-COI, Entry on Rehearing (August 26, 2003) at Finding (19) (granting motion to strike because the responsive pleading was a memorandum in support); *In the Matter of the Regulation of the Electric Fuel Component Within the Rate Schedules of Ohio Power Company and Related Matters*; *In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of Columbus Southern Power Company and Related Matters*, Entry on Rehearing, Case Nos. 98-101-EL-EFC, 98-102-EL-EFC (July 15, 1999) (striking portions of memorandum contra that only served to bolster the antecedent motion).

NOPEC's filing serves no purpose but to bolster Stand's Motion. This type of filing is not permitted by the Rules. Accordingly, the Memorandum in Support should be stricken.

*B. NOPEC's Memorandum in Support Should Be Stricken Because it is Actually a Motion Asserting New Grounds.*

The Commission's Rules provide that all motions shall be accompanied by an accompanying memorandum in support and shall contain a brief statement of the

grounds for the motion. O.A.C. 4901-1-12(A). NOPEC has filed a responsive pleading, styled as a Memorandum in Support of Stand's Motion. In it, NOPEC has requested the extraordinary relief of joining NRS as a defendant nearly one year after NOPEC filed the original Complaint against IGS. However, Stand did not seek to add NRS as a party to the case. As such, NOPEC, by requesting that the Commission join NRS, is seeking more than Stand's Motion by attempting to add new parties to the case through a procedurally improper method. By slipping a request to add NRS to the case in a procedurally improper Memorandum in Support, NOPEC is ignoring the Commission's Rules, which will result in a proceeding that contravenes fundamental due process rights. IGS will have no opportunity to file a response within the limits of the Commission's Rules, because NOPEC never actually filed a Motion. The Memorandum in Support, which is nothing more than an extremely late Motion to Join New Parties, should not be permitted because IGS cannot defend it under the Rules. Thus, IGS' only course of redress is a Motion to Strike the entire Memorandum in Support, which is the proper response to the procedurally improper pleading.

*C. NOPEC's Memorandum is Untimely and Will Unduly Prejudice IGS.*

As stated above, NOPEC has attempted, pursuant to O.A.C. 4901-1-10, to join NRS as a necessary and indispensable party to this case by filing a Memorandum in Support of Stand's Motion for leave to file an amended complaint. While NOPEC's Memorandum does not state it explicitly, IGS presumes that NOPEC will attempt to amend the complaint to furnish new claims against NRS, along with NCS and Columbia, if the Commission were to grant Stand's and NOPEC's Motion to for leave to file an amended complaint and Memorandum in Support, respectively.

As more fully addressed in IGS's Memorandum Contra Stand's Motion, IGS will be unduly prejudiced by the addition of parties at this juncture in the proceeding. NOPEC has provided no explanation for its extremely late filing – only two weeks shy of the one year anniversary of the filing of the complaint. Courts have routinely denied motions to amend where the motion was made with little time remaining before trial. See e.g., *National/RS, Inc. v. Huff*, 10th Dist. No. 10AP-306, 2010-Ohio-6530, at ¶¶35, 36 (denying motion to amend to add new party as untimely when a plaintiff sought to add a defendant that was identified in exhibits to the complaint, but the plaintiff did not seek to amend the complaint for eighteen months after the complaint was filed, and only three months prior to the trial date); *Doe v. Flair Corp.* (8th Dist. 1998), 129 Ohio App. 3d 739, 719 N.E.2d 34 (denying motion to amend complaint to add new defendant and new claims one month before trial); *Geo-Pro Serv., Inc. v. Solar Testing Laboratories, Inc.* (10th Dist. 2001), 145 Ohio App.3d 514, 528, 763 N.E.2d 664, 676 (denying a motion to amend when it was made over a year after the original complaint and with only five (5) months left till the trial date); *Csejpes v. Cleveland Catholic Diocese* (8th Dist. 1996) 109 Ohio App.3d 533, 542, 672 N.E.2d 724, 730 (denying a motion to amend that was made twenty (20) months after the original complaint). Stand's motion to amend is no different from the abundant Ohio case law that prohibits extremely untimely motions to amend.

Furthermore, a delay in asserting a claim is unduly prejudicial to the non-moving party when a party knows that it has grounds to assert a claim and fails to do so early in a case. See e.g., *Nationwide Mut. Ins. Co. v. Am. Elec. Power*, 10th Dist. No. 08AP-339, 2008-Ohio-5618, at ¶¶21 (the moving party knew it had grounds to assert a claim

and failed to do so until a year after the original complaint was filed). IGS can only presume that, like Stand, NOPEC was not interested in pursuing its claims against IGS, not paying attention to the case, or relying on others to pursue their claims. All of these reasons are inexcusable. IGS should not bear the burden of re-defending its case simply because it suddenly dawned on NOPEC, as it did for Stand, that they were not satisfied with their own complaint and requests for relief therein. NOPEC's lack of pursuit of the claims in this case, and inexplicably late epiphany to significantly expand the scope of the case, will cause undue prejudice to IGS and should be rejected by the Commission.

Prejudice suffered by the non-moving party because of the undue delay is especially substantial when the delay would require the reopening of discovery and the marshalling of additional evidence to refute the new claim. *Jones v. R/P International Technologies, Inc.* (Sept. 27, 1995), 1st Dist. No. C-940567, 1995 WL 566622, \*5. Clearly, if granted, NOPEC's Memorandum in Support will require additional rounds of discovery as anywhere from one to three new parties could be added to the case, which is prejudicial to IGS, who has actively pursued the defense of the Complaint for the past year.

In that timeframe, IGS has not rested on the anticipated work of others in preparation of defense of the claims. IGS has expended significant resources, time and money engaging in discovery throughout the twelve months that have passed since the original complaint was filed in an attempt to ascertain what, if any, factual or legal basis the complainants have for the allegations in the complaint. IGS is prepared to try this case at the Commission on the hearing date set for November 7, 2011. NOPEC filed



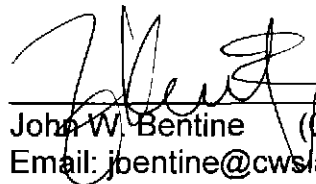
the complaint against IGS nearly one year ago and, now, with only a month before trial, NOPEC should be prepared to go forward with its claims, as well.

## II. **CONCLUSION.**

NOPEC's Memorandum in Support was filed untimely and will result in undue prejudice to IGS. NOPEC's filing is procedurally and substantively flawed, and accordingly, the Commission should strike, in its entirety, NOPEC's Memorandum in Support of Stand's Motion.

For the foregoing reasons, the Memorandum in Support of Stand's Motion should be stricken.

Respectfully submitted,



John W. Bentine (0016388)  
Email: jbentine@cwsllaw.com  
Direct: (614) 334-6121  
Stephen C. Fitch (0022322)  
Email: sfitch@cwsllaw.com  
Direct: (614) 334-6120  
Sarah Daggett Morrison (0068035)  
Email: smorrison@cwsllaw.com  
Direct: (614) 334-6155  
Mark S. Yurick (0039176)  
Email: myurick@cwsllaw.com  
Direct: (614) 334-7197  
Zachary D. Kravitz (0084238)  
Email: zkravitz@cwsllaw.com  
Direct: (614) 334-6117  
CHESTER WILLCOX & SAXBE LLP  
65 East State Street, Suite 1000  
Columbus, Ohio 43215  
Telephone: (614) 221-4000  
Facsimile: (614) 221-4012

**Attorneys for  
Interstate Gas Supply, Inc.**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Motion to Strike NOPEC's Memorandum in Support of Stand Energy Corporation's Motion for Leave to File an Amended Complaint Naming Columbia Gas of Ohio, Inc. and NiSource Corporation Services, Inc. As Parties* was served this 13<sup>th</sup> day of October, 2011 by electronic mail upon the following:

Joseph Serio  
Larry S. Sauer  
OFFICE OF CONSUMERS' COUNSEL  
10 W. Broad Street, Suite 1800  
Columbus, Ohio 43215  
Email: serio@occ.state.oh.us  
Email: sauer@occ.state.oh.us

Larry Gearhardt  
Chief Legal Counsel  
OHIO FARM BUREAU FEDERATION  
280 North High Street  
Columbus, Ohio 43218-8256  
Email: LGearhardt@ofbf.org

Glenn S. Krassen  
BRICKER & ECKLER LLP  
1011 Lakeside Avenue, Suite 1350  
Cleveland, Ohio 44114  
Email: gkrassen@bricker.com

Matthew W. Warnock  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, Ohio 43215  
Email: mwarnock@bricker.com

John M. Dosker  
STAND ENERGY CORPORATION  
1077 Celestial Street, Suite 110  
Cincinnati, Ohio 45202  
Email: jdosker@stand-energy.com

A. Brian McIntosh  
McIntosh & McIntosh  
1136 Saint Gregory Street, Suite 100  
Cincinnati, Ohio 45202  
Email: brian@mcintoshlaw.com

Mark A. Whitt  
Melissa L. Thompson  
Carpenter Lipps & Leland LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, Ohio 43215  
Email: whit@carpenterlipps.com  
Email: Thompson@carpenterlipps.com

Daniel R. Conway  
Eric B. Gallon  
Porter Wright Morris & Arthur, LLP  
41 South High Street  
Columbus, Ohio 43215  
Email: dconway@porterwright.com  
Email: egallon@porterwright.com

Todd M. Rodgers  
NiSource Corporate Services Company  
200 Civic Center Drive  
Columbus, Ohio 43215  
Email: tmrodgers@nisource.com

Stephen B. Seiple  
Brook Leslie  
200 Civic Center Drive  
Columbus, Ohio 43216  
Email: sseiple@nisource.com  
Email: bleslie@nisource.com

  
\_\_\_\_\_  
Zachary D. Kravitz