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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, et al.	)	
Complainants,	)	Case No. 10-2395-GA-CSS
v.	)	
INTERSTATE GAS SUPPLY, INC.	)	
Respondent.	)	

REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S MEMORANDUM IN SUPPORT

Pursuant to Ohio Adm. Code 4901-1-12(B)(2), NiSource Corporate Services Company ("NCS") and NiSource Retail Services, Inc. ("NRS") file this Reply Memorandum in Support of their joint Motion to Strike the Memorandum in Support filed by Northeast Ohio Public Energy Council ("NOPEC") in Support of Stand Energy Company's ("Stand") Motion for Leave to File an Amended Complaint.

I. INTRODUCTION

By their own admission, NOPEC and Stand elected to ride the coattails of Office of Ohio Consumers' Counsel ("OCC") during the past year that this litigation has been pending. At the eleventh-hour before hearing, they apparently have decided that they don't like the way OCC prosecuted the Complaint. NOPEC and Stand now suffer a shared delusion that adding NCS and NRS as parties will somehow resurrect their case. But it won't. NOPEC's memorandum in support is procedurally improper and should be stricken; and it is substantively improper because it seeks to add parties that are not subject to Commission jurisdiction. "Unique circumstances"

do not allow the Commission to exercise jurisdiction over NCS or NRS, as NOPEC would have the Commission believe. The Commission should strike NOPEC's memorandum in support and overrule Stand's motion to file an amended complaint.

II. ARGUMENT

A. Silence In The Procedural Rules Does Not Imply Consent.

NOPEC argues that because the Commission's rules do not specifically prohibit the filing of memoranda in support of another party's motion, its "me too" memorandum in support of Stand's motion should be permitted. NOPEC claims that the contrary authority cited by NCS and NRS is inapposite because these cases involved memoranda related to applications for rehearing. (*See* NOPEC Memo. at 2.)

NOPEC misses the point. In the cases cited by NCS and NRS, the Commission struck memoranda bolstering another party's application for rehearing because such memoranda are procedurally improper. *See, e.g., 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); *In the Matter of Investigation in SBC's Entry into In-Region InterLATA*, Case No. 00-942-TP-COI, Entry on Rehearing (Aug. 26, 2003) at Finding (19).[1] NOPEC cites no authority for its premise that memoranda deemed improper for one purpose (e.g., bolstering a party's rehearing request) are

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[1] In arguing that the citation to Case No. 00-942-TP-COI is "misleading," NOPEC ignores the plain language of Finding (19) of the Entry:

> The Commission finds that CLECs' response of August 7, 2003, is not a memorandum contra OCC's application for rehearing as contemplated by Rule 4901-1-35, O.A.C. Rather, at best, CLEC's filing is *simply a memorandum in support* of OCC's application for rehearing. *Therefore, SBC Ohio's motion to strike is granted.*

Unlike CLEC's filing, NOPEC's memorandum styles itself a "memorandum in support." A pleading by this or any other name is inappropriate when offered to support another party's motion.

proper when offered for a different purpose (e.g., supporting another party's motion to amend a complaint). A memorandum in support of another party's motion is improper for *any* purpose.

The case of *Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases*, Case Nos. 03-93-EL-ATA, et al., does not help NOPEC's argument. In that case, Industrial Energy Users-Ohio filed a memoranda in support of Duke Energy Retail Services, LLC ("DERS")'s motion to quash subpoenas served by OCC. *See* Entry (January 2, 2007) at Findings (4) – (5). OCC filed a motion to strike IEU-Ohio's memorandum in support. Although the Attorney Examiner denied OCC's motion to strike, at no point in the Entry did she address IEU-Ohio's supporting arguments. *Id.* at Findings (6) – (7). Nor does the Entry suggest that IEU-Ohio sought additional relief in its memorandum that DERS did not request in its motion.

Here, by contrast, NOPEC admittedly seeks relief that Stand did not request. "NOPEC included *its request* to add NRS as a party *to correct* what it believed to be Stand's mistaken understanding of the counterparty to the IGS licensing agreement." (NOPEC Memo. at 3-4) (emphasis added). Requesting additional relief is prejudicial, not only to the current parties of this proceeding responding to Stand's motion, but also to the potential parties NOPEC is trying to join. The Commission should recognize that NOPEC's attempts to "correct" Stand's Motion as prejudicial, inappropriate and wholly outside the procedural rules.

B. NOPEC Admits That Granting Stand's Motion Will Delay These Proceedings.

NOPEC claims, "Neither Stand's motion to amend, nor NOPEC's memorandum in support, are intended to unduly delay this proceeding." (NOPEC Memo. at 3.) But in the very next paragraph, it admits that the motions to amend the complaint would delay this proceeding: "NOPEC acknowledges that the procedural schedule would need to be extended to allow for the

filing of the amended complaint as well as answers by the additional parties." (*Id.*) Claiming that this delay will not prejudice anyone doesn't make it so. NOPEC and Stand are essentially asking for a do-over. Forget about the past year of litigation. According to these complainants, new parties must be named in a new complaint, new answers filed, new dispositive motions briefed and discovery resumed anew. This would be prejudicial to existing parties under any circumstances. To allow a do-over where the parties sought to be joined are not even subject to Commission jurisdiction would be a monumental waste of resources.

C. Neither NRS Nor NCS Are Subject to Commission Jurisdiction.

NOPEC provides no basis for the Commission to exercise jurisdiction over NCS or NRS. The best that it can do is argue that the failure to exercise jurisdiction would create a "regulatory gap." (NOPEC Memo. at 5.) That isn't good enough. The Commission has no authority to expand its jurisdiction beyond that which has been granted by the General Assembly. *See Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 307 (*citing Penn Central Transportation Co. v. Pub. Util. Comm.* (1973), 35 Ohio St.2d 97).

In the present context, the Commission's jurisdiction is limited to "public utilities," "competitive retail natural gas suppliers" and, to a lesser extent, "persons or companies owning, leasing or operating" public utilities. R.C. 4905.03, 4905.05, 4929.24. NOPEC does not dispute that neither NCS nor NRS are a public utility or competitive retail natural gas supplier. Nor does R.C. 4905.05 apply. As already explained in the Motion to Strike, NiSource Inc. is the ultimate parent corporation of NRS, NCS, and Columbia. (*See* NCS Memo. Contra, Exhibit A at ¶3; NCS & NRS Motion to Strike, Exhibit A at ¶3; Annual Report of Columbia Gas of Ohio, Inc., Case No. 11-0002-GA-RPT (Apr. 29, 2011) at 3.1.) NCS does *not* own or control NRS or Columbia. (NCS & NRS Motion to Strike, Exhibit A at ¶9; Annual Report of Columbia Gas of

Ohio, Inc., Case No. 11-0002-GA-RPT (Apr. 29, 2011) at 3.1, 6.) NRS does *not* own or control NCS or Columbia. (NCS & NRS Motion to Strike, Exhibit A at ¶¶10, 13.) Because they do not own or control a public utility in this state, are organized under the laws of a different state and are not public utilities in the State of Ohio, NRS and NCS are not subject to Commission jurisdiction. R.C. 4905.05.[2]

Rather than address the obvious -- that the Commission has no subject matter jurisdiction over the parties sought to be joined -- NOPEC would have the Commission look the other way because this case supposedly presents a "case of first impression" involving "unique circumstances." (NOPEC Memo. at 4, 6.)[3] But this is hardly the first case in which the Commission has dismissed claims against respondents not subject to its jurisdiction.[4] The only "unique circumstances" here are NOPEC's eleventh-hour attempt to join parties it knows are not proper respondents.

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[2] When deciding subject matter jurisdiction, the Commission is not limited to the allegations in the complaint. *See, e.g., State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349, 2004 Ohio 3208, ¶19.

[3]NOPEC takes issue with NCS and NRS's characterization of *Twinsburg Hotel v. NOPEC,* Case No. 03-2112-EL-CSS (NOPEC Memo. at 4-5), but its reasoning is nonsensical. NOPEC claims it is "misleading" to say that FirstEnergy was dismissed from this case because it was "not a public utility and provides no electric service to customers in Ohio," because "The Commission made no such statement." (*Id.* at 4.) Rather, "The language quoted by NCS is actually a restatement by the Attorney Examiner of an argument set forth by FirstEnergy Corp." (*Id.*) NOPEC is attempting to raise a difference without a distinction. The Attorney Examiner quoted FirstEnergy's argument and proceeded to grant its motion. If the Attorney Examiner granted the motion for reasons *other* than argued by FirstEnergy, that certainly is not apparent from the Entry, and NOPEC provides no alternative rationale.

[4] *See, e.g., S.G. Foods v. FirstEnergy Corp.*, Case No. 04-28-EL-CSS, Entry (March 7, 2006); *Tomlin v. Columbus Southern Power*, Case No. 02-46-EL-CSS, Entry (May 14, 2002); *Nader v. Colony Square Partners, Ltd.*, Case No. 99-475-EL-CSS, Entry (August 26, 1999); *Haning v. Rutland Furniture, Inc. d/b/a Rutland Bottled Gas Service*, Case No 97-32-GA-CSS, Entry (July 17, 1997), *aff'd, Haning v. Pub. Util. Comm.* (1999), 86 Ohio St.3d 121; *Toledo Premium Yogurt Inc. d/b/a Freshens Yogurt v. Toledo Edison Co.*, Case No. 91-1528-EL-CSS, 1992 Ohio PUC LEXIS 984, Entry on Rehearing (November 5, 1992); *Gillooly d/b/a Putt-Putt Golf Course of Newark, Ohio v. ALLTEL Ohio, Inc.*, Case No. 88-768-TP-CSS, 1988 Ohio PUC LEXIS 759, Entry (August 15, 1988).

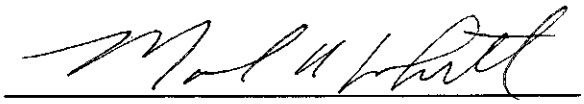
According to NOPEC, "As the entity which licensed or leased the 'Columbia' name and starburst logo to IGS, NRS would fall within the scope of the Commission's supervisory jurisdiction as it is leasing the Columbia utility's name and starburst logo." (NOPEC Memo. at 5-6.) NOPEC cites no legal authority for this argument, because there is none. NOPEC also gets it wrong on the facts. NRS does not own or control Columbia's property or intellectual property, contrary to NOPEC's baseless assertions. (NRS & NCS Motion to Strike, Exhibit A at ¶¶10-12.) The intellectual property owned by NRS is *separate and distinct* of the intellectual property owned by Columbia.

III. CONCLUSION

The Commission should strike NOPEC's memorandum in support and deny its attempt to join NRS and NCS as parties to this proceeding.

Dated: November 2, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Memorandum in Support of Motion to Strike NOPEC's Memorandum in Support was served by ordinary U.S. mail, postage prepaid, to the following persons on this 2nd day of November, 2011:

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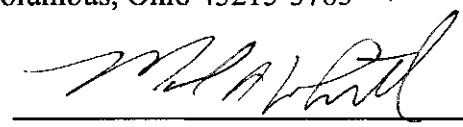

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