

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of the Office of the Ohio	)	
Consumers' Counsel, Stand Energy Corporation, Border	)	
Energy, Incorporated, Northeast Ohio Public Energy	)	
Council, and Ohio Farm Bureau Federation	)	
	)	
Complainants,	)	Case No. 10-2395-GA-CSS
	)	
v.	)	
	)	
Interstate Gas Supply, Inc.	)	
	)	
Respondent.	)	

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NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S  
INTERLOCUTORY APPEAL FROM THE  
NOVEMBER 2, 2011 ATTORNEY EXAMINER'S ENTRY

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The Northeast Ohio Public Energy Council ("NOPEC"), pursuant to Ohio Administrative Code ("OAC") Rule 4901-1-15(B), appeals to the Public Utilities Commission of Ohio ("Commission") for an interlocutory order reversing the attached Entry dated November 2, 2011 which granted Interstate Gas Supply Inc.'s ("IGS") motion to quash the subpoena filed by NOPEC on November 1, 2011. The reasons supporting this interlocutory appeal are set forth in the attached Memorandum in Support.

Respectfully submitted

  
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Attorneys for Northeast Ohio Public Energy Council

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

Due to IGS' continued insistence that no depositions would be taken prior to the evidentiary hearing in this case, NOPEC moved, pursuant to Ohio Administrative Code ("OAC") Rule 4901-1-25, for the Commission to issue a subpoena commanding Scott White and any IGS corporate designee to attend the previously noticed November 3, 2011 deposition<sup>1</sup>. On November 1, 2011, IGS filed a Motion to Quash Subpoena. An Entry dated November 2, 2011 granted IGS' motion to quash on two grounds: (1) "the subpoena seeking to compel Mr. White's attendance at a deposition at this late stage of the procedural schedule is unreasonable;" and (2) "the affidavit [of Vince Parisi] attached to the motion to quash indicates that Mr. White will be unavailable on November 3, 2011." Neither of these grounds are sufficient for granting IGS'

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<sup>1</sup> Previously, on October 26, 2011, NOPEC served a deposition notice on IGS pursuant to OAC Rule 4901-1-21(F). This notice respectfully required IGS to choose one or more of its officers, agents, employees, or other persons duly authorized to appear and testify on behalf of IGS. This deposition notice is entirely separate from the subpoena challenged in their Motion to Quash and ruled upon in the November 2<sup>nd</sup> Entry.

Motion to Quash. In fact, both grounds are insufficient as a matter of law and/or fact.

For the reasons set forth below, NOPEC urges the Commission to reverse the ruling in the Entry so that NOPEC may proceed with the deposition of IGS' President, Scott White, prior to the evidentiary hearing in this case scheduled to begin on November 7, 2011.

## **II. LEGAL ARGUMENT**

This interlocutory appeal meets the conditions set forth in OAC Rule 4901-1-15. As required by OAC Rule 4901-1-15(A), NOPEC has been adversely affected by the Attorney Examiner's ruling under OAC Rule 4901-1-15 granting IGS' Motion to Quash. Further, this issue presents a novel question of interpretation and policy, as it: (i) defines the term "unreasonable" as it relates to the timing of a deposition relative to an evidentiary hearing; and (ii) overturns a subpoena that complied with the Commission's discovery rules and procedural schedule in this case. NOPEC will be severely prejudiced should it be forced to participate in an evidentiary hearing without the benefit of conducting the discovery deposition it timely requested.

**A. Contrary to the statements of Mr. Parisi's Affidavit, Mr. White was available on November 3, 2011, and counsel for IGS affirmatively represented this fact by e-mail.**

The November 2, 2011 Entry quashing the subpoena is premised on two grounds: (1) a deposition on November 3, 2011 is unreasonable in light of the November 7<sup>th</sup> hearing date; and (2) Mr. White was unavailable on November 3, 2011. Indeed, the Affidavit of Vincent A. Parisi, IGS general counsel, attested that he and Mr. White have an important business meeting on November 3, 2011, and would not be available for deposition. Further, the Affidavit of John

Bentine attested that he would be out of town from November 2 through November 4, 2011 and unable to attend the noticed depositions.<sup>2</sup>

As it turns out, Mr. White was not unavailable. Mr. White's alleged unavailability was expressly contradicted by written and telephonic correspondence between counsel for IGS and counsel for NOPEC. At 3:47 p.m. on November 2, 2011, IGS counsel represented that if the Commission did not act on their Motion to Quash by the close of business "Mr. White will make himself available. However, Mr. White has a previous commitment out of Columbus tomorrow so you will need to start the deposition early in the morning." More specifically, Mr. White agreed to make himself available at 6 a.m. on November 3, 2011. Shortly thereafter, and only after rescheduling the court reporter, NOPEC confirmed by telephone that Mr. White would be available from 6-10 a.m. on November 3, 2011 Counsel for NOPEC memorialized his agreement with IGS' counsel in an e-mail at 4:24 p.m., confirming that should the motion to quash not be granted, Mr. White would be available to be deposed from 6 a.m. to 10 a.m. on November 3, 2011.<sup>3</sup> At 4:59 p.m., the Entry granting IGS' Motion to Quash, based principally on Mr. White's supposed unavailability, was docketed. This was incorrect as a matter of fact. IGS' affirmative representation demonstrates that Mr. White was not only available on November 3, 2011, but available for a period of 4 hours.

Perhaps most importantly, NOPEC has been willing to work to find a mutually agreeable date and time for the deposition since issuing and serving its Notice of Deposition on Wednesday, October 26, 2011. However, IGS simply refused to engage in such discussions. IGS did not provide any alternative dates or times for the deposition of Mr. White or any other

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<sup>2</sup> It bears noting that Mr. Bentine's absence has no bearing on his firm's ability to represent Mr. White at a deposition, particularly since at least two other attorneys from Mr. Bentine's firm are listed on all pleadings to this case.

<sup>3</sup> This e-mail chain is attached hereto as Exhibit 1.

corporate designee until the eleventh hour, and even then only after NOPEC issued a subpoena, and IGS filed a Motion to Quash, Motion for Protective Order, and Motion for Summary Judgment.

IGS' gamesmanship to avoid a noticed deposition shocks the conscience. It is made even worse by the fact that Mr. White was in fact available on November 3, but IGS simply chose to wait until literally the last minute to inform NOPEC and the Commission. The Commission's Entry rewards IGS' dilatory conduct and unfairly and unreasonably prejudices NOPEC's preparation for the evidentiary hearing.

**B. NOPEC's deposition notice is timely and comports with the Commission's discovery rules.**

The timing of the deposition notice in this case is not an issue. The Commission's discovery rules do not limit the time period during which a discovery deposition must occur. In fact, the Commission's discovery rules simply require that discovery be completed prior to the start of the evidentiary hearing. NOPEC's deposition comported with the requirements in OAC Rule 4901-1-21(B), established a proposed deposition date of November 3, 2011 (which was before the start of the evidentiary hearing), and specifically offered to work with counsel for IGS regarding alternative dates for the deposition(s). As such, the deposition was reasonable on its face.

Further, the deposition notice was filed and served on Wednesday, October 28th, or six (6) days before to the proposed deposition date. This is nearly identical to the time frame set forth in IGS' recently filed second amended notice of deposition to NOPEC. In fact, the second amended deposition notice to NOPEC was filed with the Commission on October 20, 2011 and required Mr. Herington to appear for a deposition just six (6) days later on October 26, 2011. NOPEC did not object to the deposition; and, as required by the Commission's rules, cooperated

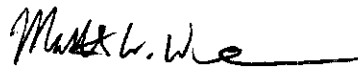
with IGS in the discovery process. NOPEC contacted IGS to arrange for an alternative deposition date (October 31, 2011), and Mr. Herington appeared, with responsive documents, to be deposed. NOPEC cooperated with IGS. IGS did not cooperate when the time came for its representatives to be deposed, even after deposing a NOPEC representative just seven (7) days before the evidentiary hearing. Given that settlement negotiations (which would have eliminated the need for the deposition) had broken down, NOPEC believed this timing was reasonable. NOPEC sought to depose, without documents, an IGS representative three (3) days before the hearing.

Not only is this reasonable, but depositions occurring just prior to, or even during, an evidentiary hearing are not unusual in Commission proceedings. There is precedent for NOPEC's position. See *In the Matter of the Application of Monongahela Power Company dba Allegheny Power for Approval of an Electric Transition Plan*, Case No. 00-02-EL-ETP, Attorney Examiner Entry, at Finding 4 (March 20, 2000) (holding that once the pre-hearing deadline for written discovery requests has passed, pursuant to OAC Rule 4901:1-20-11, parties may still take depositions in the 31 days prior to the start of the hearing, as long as reasonable notice is given); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP, 99-1730-EL-ETP, Attorney Examiner Entry, at Finding 10 (March 10, 2000) (same); *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Approval of Tariff Changes and New Tariffs, Authority to Modify Current Accounting Procedures, and Approval to Transfer its Generating Assets to an Exempt Wholesale Generator*, Case Nos. 99-1658-EL-ETP *et al.*, Attorney Examiner Entry, at Finding 2 (March 2, 2000) (same).

### .III. CONCLUSION

WHEREFORE, because the grounds for the November 2, 2011 Entry are not supported by law or fact, the ruling would have an immediate and unduly prejudicial effect on NOPEC, and is a departure from past Commission precedent allowing for properly noticed depositions prior to hearing, NOPEC requests that the Commission reverse the Entry and deny the motion to quash.

Respectfully submitted,



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Attorneys for Northeast Ohio Public Energy Council



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Ohio Consumers' Counsel, Stand )  
Energy Corporation, Incorporated, )  
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Complainants, ) Case No. 10-2395-GA-CSS  
v. )  
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Respondent. )

ENTRY

The attorney examiner finds:

- (1) On October 21, 2010, the Ohio Consumers' Counsel (OCC), Border Energy, Inc. (Border), Northeast Ohio Public Energy Council (NOPEC), Stand Energy Corporation (Stand), and the Ohio Farm Bureau Federation (OFBF) (collectively, joint complainants) filed a complaint, alleging that, among other things, Interstate Gas Supply, Inc. d/b/a Columbia Retail Energy (IGS) has engaged in marketing, solicitation, sales acts, or practices that are unfair, misleading, deceptive, or unconscionable. By entry issued February 28, 2011, MXenergy (MX) was granted leave to join the complaint. On March 16, 2011, and May 13, 2011, respectively, Border and MX withdrew from the case.
- (2) On November 12, 2010, IGS filed its answer denying the allegations contained in the complaint and asserting that it has complied with all statutory and regulatory requirements.
- (3) A hearing is currently scheduled to commence in this matter on November 7, 2011.
- (4) On November 1, 2011, Stand filed a motion for a subpoena to compel Scott White, President of IGS, and the person who, on behalf of IGS, signed the licensing agreement that precipitated the filing of this complaint to appear at the November 7, 2011, hearing.

- (5) On November 1, 2011, NOPEC filed a motion for a subpoena seeking to compel Scott White, and one or more of IGS' officers, agents, employees, or other persons authorized to testify on its behalf to appear at a deposition to be held on November 3, 2011. In support of its motion, NOPEC explains that it filed its notice of the deposition on October 26, 2011. NOPEC further explains that IGS responded to its notice of deposition via email on October 28, 2011, indicating that neither Mr. White nor any other IGS representative would be made available for the November 3, 2011, deposition. According to NOPEC, none of its attempts to reach an agreement regarding the deposition were successful despite the fact that NOPEC: provided advanced notice to Mr. White; scheduled the court reporter; agreed that Mr. White would not need to bring any documents to the deposition; and attempted to schedule the deposition at a mutually convenient date, time, and location.
- (6) On November 1, 2011, IGS filed a motion to quash the subpoena filed by NOPEC. IGS argues, in support of its motion, that NOPEC's attempt to subpoena Mr. White is procedurally improper because Rule 45(A) of the Ohio Rules of Civil procedure provides that "a subpoena may not be used to obtain the attendance of a party or the production of documents by a party in discovery. Rather, a party's attendance at a deposition may be obtained only by notice under Civ. R. 30. . . ." In addition, IGS argues that the subpoena should be quashed because it is unreasonable and oppressive under Rule 4901-1-25(C), Ohio Administrative Code (O.A.C.). IGS explains that NOPEC's notice of deposition, filed October 26, 2011, and its motion for subpoena filed November 1, 2011, is extremely late, especially when one considers the amount of time this complaint has been pending. In addition, IGS further explains that Mr. White will not be available on November 3, 2011, and will be in attendance at another meeting which has been scheduled for several weeks and cannot be rescheduled. IGS also asserts that NOPEC represented in prior discussions that, if the notice of deposition could not be worked out between the parties, it would be filing a motion to compel. Therefore, IGS requests that the subpoena to compel Mr. White's attendance at the deposition on November 3, 2011, be quashed. It does not appear that IGS is challenging the November 1, 2011, subpoena to compel Mr. White's attendance at the November 7, 2011, hearing in this matter.
- (7) Rule 4901-1-12(F), O.A.C., provides that an attorney examiner may, upon their own motion, issue an expedited ruling on any motion,

with or without the filing of memoranda, where the issuance of such a ruling will not adversely affect a substantial right of any party. Given the expedited timeframe for the consideration of IGS' motion to quash the subpoena filed by NOPEC, the attorney examiner elects to issue an expedited ruling.

- (8) Rule 4901-1-25, O.A.C., provides that "an attorney examiner may, upon their own motion or upon motion of any party, quash a subpoena if it is unreasonable or oppressive."
- (9) In reviewing the motion to quash, in light of the fact that the joint complaint has been pending for over a year, as well as the November 7, 2011, hearing date, the attorney examiner agrees with the assertion of IGS that the subpoena seeking to compel Mr. White's attendance at a deposition at this late stage of the procedural schedule is unreasonable. Moreover, the affidavit attached to the motion to quash indicates that Mr. White will be unavailable on November 3, 2011. Accordingly, the attorney examiner finds that NOPEC's November 1, 2011, subpoena is unreasonable and should be quashed. However, in reaching this ruling, the attorney examiner is mindful that IGS is not contesting the subpoena compelling Mr. White's attendance at the November 7, 2011, hearing, thus, NOPEC will have the opportunity to question Mr. White at that time.

It is, therefore,

ORDERED, That IGS' motion to quash the subpoena filed by NOPEC on November 1, 2011, be granted. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Katie L. Stenman  
By: Katie L. Stenman  
Attorney Examiner

GRJ  
/dah

Entered in the Journal

NOV 02 2011

Betty McCauley  
Betty McCauley  
Secretary

**Warnock, Matthew**

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**From:** Warnock, Matthew  
**Sent:** Wednesday, November 02, 2011 4:24 PM  
**To:** 'Sarah D. Morrison'; Krassen, Glenn; O'Brien, Thomas; Bentine, John; 'Zachary D. Kravitz'; 'Vincent Parisi'  
**Subject:** RE: White deposition, Case No. 10-2395-GA-CSS  
**Importance:** High  
Sarah,

This is to confirm our telephone conversation that, assuming the motion to quash is not granted by the close of business today, Mr. White will be made available at your office at 6am tomorrow morning (November 3, 2011) for his deposition. Based on our conversation, Mr. White will be made available until 10am because of a previously scheduled flight, and if the deposition is not finished, counsel will reserve the right to continue the deposition until the soonest available date, preferably Friday, November 4th or Saturday, November 5th. Once you have been able to confirm Mr. White's availability on Friday or Saturday, please let us know. I will follow up with the names of those attending tomorrow's deposition, including the court reporter, yet this afternoon.

Matt

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**From:** Sarah D. Morrison [mailto:smorrison@cwslaw.com]  
**Sent:** Wednesday, November 02, 2011 3:47 PM  
**To:** Krassen, Glenn; Warnock, Matthew; O'Brien, Thomas; Bentine, John; Zachary D. Kravitz; Vincent Parisi  
**Subject:** RE: White deposition, Case No. 10-2395-GA-CSS

Counsel,

As you are aware, we have filed a motion for quash the subpoena to Scott White. If that Motion is not acted upon by the Commission by the close of business, Mr. White will make himself available. However, Mr. White has a previous commitment out of Columbus tomorrow so you will need to start the deposition early in the morning. Pursuant to Mr. Warnock's email stating that they were willing to work with us on scheduling, we will make Mr. White available at the offices of Chester, Willcox & Saxbe, LLP in Columbus at **6:00 a.m.** tomorrow, **November 3.**

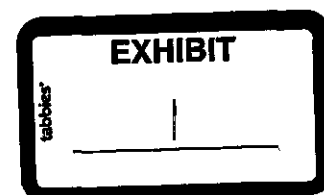
Sarah

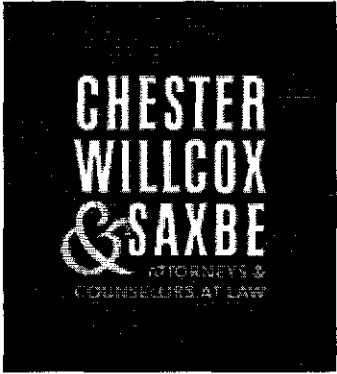
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11/4/2011



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served upon the following parties of record by electronic mail and regular U.S. mail this 4<sup>th</sup> day of November, 2011:

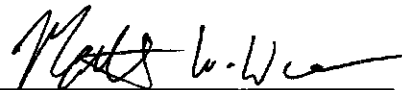
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