



Examiner's ruling presents a new or novel issue for the Commission or a departure from the Commission's past precedent. However, even assuming *arguendo* that there is new or novel issue for the Commission to address, the Attorney Examiner properly ruled that the subpoena was unreasonable and the Entry quashing the subpoena should be affirmed.

For the reasons set forth, IGS respectfully requests the legal director, deputy legal director, or attorney examiner to deny NOPEC's Application for Certification of Interlocutory Appeal.

## **II. LEGAL ARGUMENT**

### **A. NOPEC's Application for Certification does not present a new or novel issue for the Commission.**

Ohio Administrative Code ("O.A.C.") Section 4901-1-15(A) provides that "[a]ny party who is adversely affected thereby may take an immediate interlocutory appeal to the [C]ommission from any ruling issued under 4901-1-14 of the Administrative Code . . . ." O.A.C. 4901-1-14 authorizes attorney examiners to rule on procedural motions or other procedural matters.

An interlocutory appeal must be certified to the Commission by the legal director, deputy legal director, attorney examiner, or presiding hearing officer." O.A.C. § 4901-1-15(B) The appeal shall not be certified unless "the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question." *Id.*

NOPEC's has not established that the "appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent." O.A.C. § 4901-1-15(B). Ohio Administrative Code Section 4901-1-25(C) states that a Subpoena may be quashed if it is unreasonable or oppressive. Contrary to NOPEC's assertion, the Attorney Examiner has not defined the term "unreasonable" as it relates to the timing of a deposition relative to an evidentiary hearing. Rather, the Attorney Examiner has properly interpreted the term "unreasonable" and applied it to the specific set of facts in this case. Undoubtedly, it is in the province of the Attorney Examiner to make rulings with respect to discovery issues and deadlines. O.A.C. § 4901-1-14. The Attorney Examiner took into account NOPEC's extremely untimely notice of deposition and the fact that Mr. White was scheduled to be out of town on the date of the subpoenaed deposition, and accordingly, the Attorney Examiner found that the subpoena was unreasonable. This was not a broad stroke of policy change or a departure from the Commission's past precedent. The ruling only pertained to the facts in this case and correctly found NOPEC's subpoena to be unreasonable.

Because the application for certification does not demonstrate a new or novel issue for the Commission, the application should be denied. Attorney Examiners routinely deny applications for certification of interlocutory appeals for this reason. See, e.g., *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Attorney Examiner Entry, at ¶14 (Dec. 22, 2010); *In the Matter of the Application of P.H. Glatfelter Company for*

*Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-730-EL-REN, Attorney Examiner Entry, at ¶¶8, 12 (Oct. 15, 2009); *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Attorney Examiner Entry, at ¶¶9 (October 21, 2008).

NOPEC states that it is “not unusual” for depositions to occur “just prior to, or even during, an evidentiary hearing.” The three cases that NOPEC uses to support this proposition are actually Attorney Examiner Entries stating that the procedural schedule permits the parties to take depositions after the written discovery deadline. Not one of the cases stand for the proposition that a notice of deposition is unreasonable or reasonable, which is the issue in this application for certification. Obviously, the parties in this proceeding are not bound by the scheduling orders of past proceedings. Moreover, it is a very far stretch to make the argument that the Attorney Examiner’s Entry quashing NOPEC’s subpoena should be reversed because a separate case had a scheduling order permitting depositions after the written discovery deadline. NOPEC cannot show that the appeal presents a new or novel issue, and therefore, the application for certification should be denied.

Next, NOPEC has failed to show that it will be subject to undue prejudice as a result of the Attorney Examiner’s ruling. NOPEC only makes the conclusory statement that it will be prejudiced if it cannot take the depositions of Scott White and the IGS corporate designee prior to the hearing. NOPEC failed to elaborate with any specifics as to how NOPEC will be unduly prejudiced by the ruling. In fact, NOPEC’s competent

counsel had opportunity to cross-examine Mr. White and IGS' General Counsel Vincent Parisi during the evidentiary hearing. The Attorney Examiner specifically said on the record that she would give NOPEC additional latitude to examine the witnesses because they were not able to depose Mr. White. The Attorney Examiner only once limited NOPEC's scope of examination when counsel for NOPEC began a line of inquiry related IGS' lobbying efforts, which was deemed irrelevant to the proceedings. Accordingly, NOPEC has not been prejudiced by the Attorney Examiner's ruling.

**B. The Attorney Examiner correctly ruled that NOPEC's last-minute subpoena was unreasonable and oppressive.**

In the event the Attorney Examiner certifies NOPEC's application for interlocutory appeal to the Commission, the Attorney Examiner's Entry should be affirmed because NOPEC's Subpoena was unreasonable and oppressive.

On October 26, 2011, NOPEC filed with the Commission a Notice of Deposition, *Duces Tecum*, Upon Oral Examination of IGS President Scott White and IGS corporate designees set for November 3, 2011. The Commission's Rules state that "[a]ny party desiring to take the deposition of any person upon oral examination shall give **reasonable** notice in writing to the deponent, to all parties, and to the commission." (emphasis added) O.A.C. § 4901-1-24(B). The timing of NOPEC's Notice of Deposition was unreasonable in violation of O.A.C. 4901-1-24(B). This case was filed by Complainants, including NOPEC, on October 21, 2010. It was originally set for hearing on October 4, 2011, and by Entry dated September 27, 2011 was continued to November 7, 2011. NOPEC has had more than ample time to conduct discovery, including depositions, and did not do so.

Further, O.A.C. 4901-1-16, provides the purpose of the Commission's discovery rules is "... to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparations for participation in Commission proceedings." NOPEC's late discovery was quite the opposite of "prompt and expeditious" and indeed disrupted IGS' "thorough and adequate preparation for ..." the November 7, 2011 hearing. Similarly, O.A.C. 4901-1-17 requires that discovery "... should be completed as expeditiously as possible." Here NOPEC served interrogatories upon IGS on March 11, 2011, and IGS responded on April 8, 2011. NOPEC had conducted no other discovery until it served the Notice at issue herein – a period of nearly seven (7) months.

On October 28, 2011, counsel for IGS contacted NOPEC to inform NOPEC that its Notice was untimely and unduly burdensome, and that IGS would be filing a Motion for Protective Order barring NOPEC from taking the depositions Scott White and other IGS witnesses. In response to IGS' email, on October 31, 2011, counsel for NOPEC stated: "In the event that IGS does not agree to produce the noticed deponent(s) on November 3rd (or a mutually agreed upon alternative date), *NOPEC will have no choice but to file a motion to compel and request an extension of the November 7<sup>th</sup> hearing date.*" (attached hereto as Exhibit 1). IGS and NOPEC did not come to an agreement regarding NOPEC's notice.

On November 1, 2011, six days prior to the hearing, NOPEC filed a Motion for Subpoenas to enforce the Notice of Depositions of IGS President Scott White and one or more of IGS' officers, agents, employees or other persons duly authorized to testify

on its behalf.<sup>3</sup> NOPEC filed this Motion for Subpoenas at 11:39 a.m. as indicated on the Commission's time-stamp on the motion (attached hereto as Exhibit 2). IGS' counsel was not electronically served with the Motion for Subpoenas until 2:59 p.m. that day (attached hereto as Exhibit 3). By 2:59 p.m. on November 1, 2011, the Motion for Subpoenas had already been granted without NOPEC making any attempt to inform IGS that NOPEC sought an *ex parte* order from the Attorney Examiner to issue the subpoena.

The Subpoena of Mr. White was both unreasonable and oppressive because the Subpoena was filed within days of the evidentiary hearing and because Mr. White was not scheduled to be in Columbus, Ohio on November 3, 2011.<sup>4</sup> Mr. White and Vincent Parisi, IGS' General Counsel, had a prearranged business meeting out of state on November 3, 2011.<sup>5</sup> The meeting had been set for over three weeks, and could not be rescheduled as it was time sensitive and the parties with whom IGS was meeting had only the November 3, 2011 date available.<sup>6</sup>

IGS filed its motion to quash the subpoena on November 1, 2011. The Motion was granted on November 2, 2011.

In its Application for certification, NOPEC claims that IGS and its counsel misrepresented Mr. White's lack of availability on November 3, 2011 because counsel for IGS contacted counsel for NOPEC to inform NOPEC that Scott White would be made available at 6:00 a.m. on November 3, 2011 if the Motion to Quash the Subpoena

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<sup>3</sup> Also on November 1, 2011, Stand Energy Corporation filed a Motion for Subpoena for Scott White to appear as a witness at the November 7, 2011 hearing in this case. The Motion for Subpoena was granted on November 1, 2011 and a subpoena was issued on November 1, 2011. IGS did not contest the subpoena, and Mr. White was in attendance at the hearing and cross-examined by counsel for Stand and NOPEC.

<sup>4</sup> White Aff. Ex. 4.

<sup>5</sup> *Id.*

was denied. In fact, as previously mentioned, Mr. White and Mr. Parisi were scheduled to be out of state on November 3, 2011.<sup>7</sup> Mr. White and Mr. Parisi had originally planned to leave in the early morning on November 3, 2011 and drive to their meeting.<sup>8</sup> After receiving the subpoena and conferring with counsel, Mr. White chartered a private airplane for he and Mr. Parisi to fly to their meeting.<sup>9</sup> Mr. White reserved the plane so that he could comply with the Subpoena if IGS' Motion to Quash was denied.<sup>10</sup> Mr. White went to great lengths and expense to honor the Commission's subpoena in the event it was not quashed. IGS did not misrepresent to the Commission any facts with respect to Mr. White's availability. Just the opposite, IGS spent considerable resources so that he could comply with Commission's orders and subpoenas.

**C. A Subpoena may not be used to obtain the attendance of a party at a deposition.**

O.R.C. Section 4903.082 states, "All parties and intervenors shall be granted ample rights of discovery. ... *Without limiting the commission's discretion the Rules of Civil Procedure should be used wherever practicable.*" (Emphasis added).

With respect to depositions, O.R.C. Section 4903.06 provides, "In an investigation, the public utilities commission or any party to the investigation may cause the depositions of witnesses residing within or without the state to be taken *in the manner prescribed for depositions in civil actions in the court of common pleas.*" (Emphasis added).

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*



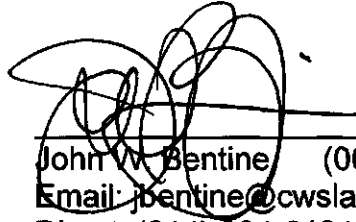
Within the context of these clear statutory rules of law, the Ohio Civil Rule of Procedure R. 45(A) states “[a] subpoena may not be used to obtain the attendance of a party or the production of documents by a party in discovery. Rather, a party’s attendance at a deposition may be obtained only by notice under Civ. R. 30, and documents or electronically stored information may be obtained from a party in discovery only pursuant to Civ. R. 34.” (Emphasis added).

The subpoena of Mr. White and other IGS’ officers, agents, employees or persons was in clear contravention of the Ohio Rules of Civil Procedure. Mr. White and IGS’ officers, agents, employees or persons are parties to this case and may not be subpoenaed for purposes of discovery in this case. While the Attorney Examiner’s Entry did not address this issue, the Entry should be affirmed because it comports with Civil Rule 45(A).

### **III. CONCLUSION**

For the foregoing reasons, IGS respectfully requests that the Commission deny NOPEC’s Application for Certification of Interlocutory Appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Bentine", is written over a horizontal line.

John W. Bentine (0016388)

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CHESTER WILLCOX & SAXBE LLP

65 East State Street, Suite 1000

Columbus, Ohio 43215

Telephone: (614) 221-4000

Facsimile: (614) 221-401

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Interstate Gas Supply, Inc.'s Memorandum Contra NOPEC's Application for Certification for Interlocutory Appeal from the Attorney Examiner's November 2, 2011 Entry* was served this 11<sup>th</sup> day of November, 2011 by U.S. First Class Mail and electronic mail upon the following:

Joseph Serio  
Larry S. Sauer  
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10 W. Broad Street, Suite 1800  
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Email: sauer@occ.state.oh.us

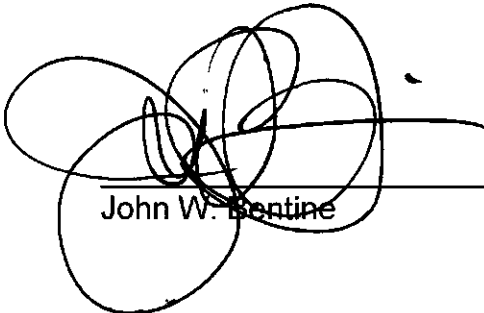
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John W. Bentine

**Warnock, Matthew**

**From:** Warnock, Matthew  
**Sent:** Monday, October 31, 2011 10:02 AM  
**To:** 'Zachary D. Kravitz'; 'Sarah D. Morrison'; Bentine, John  
**Cc:** 'vparisi@igsenergy.com'; Krassen, Glenn; O'Brien, Thomas  
**Subject:** RE: OCC, et al. v. IGS; PUCO Case No. 10-2395-GA-CSS  
**Importance:** High  
 John, Zach and Sarah,

Thank you for your message on Friday afternoon. As required by the Ohio Rules of Civil Procedure, and the PUCO's discovery rules, this email serves as NOPEC's attempt to resolve all issues pertaining to the notice of deposition of Scott White and any corporate designee of IGS.

First, the timing of the deposition notice should not be an issue in this case. The PUCO's discovery rules do not limit the time during which a discovery deposition may occur; and, in fact, the PUCO's discovery rules simply require that discovery be completed prior to the start of the evidentiary hearing. Here, NOPEC's deposition comports with the requirements in OAC Rule 4901-1-21(B), establishes a proposed deposition date of November 3rd (which is before the start of the evidentiary hearing), and specifically offers to work with counsel for IGS regarding alternative dates for the deposition(s). Further, the deposition notice was filed and served on October 28th, or approximately six (6) days prior to the proposed deposition date. This is similar to the time frame set forth in IGS' recently filed amended notice of deposition to NOPEC (and a time frame in which NOPEC worked with counsel for IGS to arrange for an alternative time, date and location amenable to all parties).

Second, the fact that neither IGS nor NOPEC identified Mr. White as a witness in this case has no bearing on the deposition notice. The only requirement for discovery, including the holding of a deposition, is that it pertain to "any matter, not privileged, which is relevant to the subject matter of the proceeding." OAC Rule 4901-1-16(B). It is beyond dispute that questioning the President of IGS (Scott White) and any corporate representative designed by IGS is relevant to a case in which IGS is the sole respondent, and that focuses on IGS' use of the Columbia trade name and starburst logo. In addition to being relevant, the deposition of Mr. White is necessary because Stand Energy, one of the complainants in this case, identified Mr. White on its witness list. This alone is enough to justify the deposition of Mr. White.

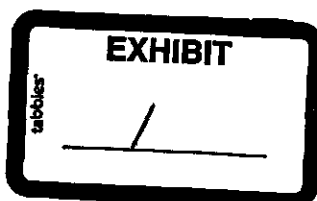
With this information in mind, NOPEC is willing to amicably resolve this dispute by: (1) continuing with the properly noticed depositions of Mr. White and any other corporate designee of IGS without the documents requested in the deposition notice; (2) holding the properly noticed depositions of Mr. White and any other corporate designee of IGS at a mutually agreeable time, date and location as long as it occurs prior to Friday, November 4th; and (3) resolving the duces tecum/document production portion of the deposition notice through pleadings (e.g. a motion for protective order and/or motion to compel). In essence, NOPEC will not require the deponents to bring documents to the deposition, but IGS agrees to produce Mr. White and any other corporate designee for a deposition on November 3rd or an alternative date prior to the evidentiary hearing.

In the event IGS does not agree to produce the noticed deponent(s) on November 3rd (or a mutually agreed upon alternative date), NOPEC will have no choice but to file a motion to compel and request an extension of the November 7th hearing date. Because a court reporter has already been scheduled for November 3rd, we look forward to hearing from you at your earliest convenience, and by no later than the close of business today (Monday, October 31, 2011).

Because the deposition of Mr. Herington is taking place this afternoon, please follow up with Mr. O'Brien (phone: 614-227-2335; email: [lobrien@bricker.com](mailto:lobrien@bricker.com)) if you have any questions this afternoon.

Matt Warnock  
 Bricker & Eckler LLP

11/1/2011



Direct Dial - 614-227-2388

---

**From:** Zachary D. Kravitz [mailto:zkravitz@cwsllaw.com]  
**Sent:** Friday, October 28, 2011 4:33 PM  
**To:** Krassen, Glenn; Warnock, Matthew; O'Brien, Thomas  
**Cc:** JOE SERIO; thompson@CarpenterLipps.com; whit@carpenterlipps.com; bleslie@nsource.com; sseiple@nsource.com; tmrodgers@nsource.com; LARRY SAUER; lgearhardt@offbf.org; doonway@porterwright.com; Gallon, Eric; John M. Dosker; Bentine, John; Sarah D. Morrison; "Vince Parisi"  
**Subject:** OCC, et al. v. IGS; PUCO Case No. 10-2395-GA-CSS

Glenn, Matt and Tom,

We received NOPEC's notice of deposition, duces tecum, of Scott White and IGS. We believe your Notice is late and will cause IGS, Mr. White and counsel undue burden and expense. The Ohio Rules of Civil Procedure provide 28 days for a party to respond to a deposition duces tecum while the Commission's rules provide twenty days to respond to document requests. Your request provides only eight days to respond. This is simply not enough time to comply with your untimely request and we will not do so.

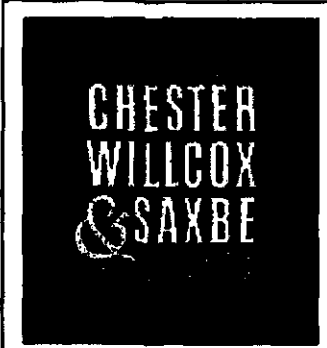
Moreover, you have had a year to decide to take these depositions. IGS did not list Mr. White as a potential witness in this case and NOPEC never filed a witness list. We do not understand why, at this late hour, you now want to engage in discovery through depositions of a witness neither party intends to call at the hearing.

We object to the Notice of Deposition, do not plan on making Mr. White or any IGS representative available on November 3, and we will be filing a timely motion for protective order for the deposition, duces tecum, of IGS and Mr. White.

Regards,

Zach Kravitz

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	<p><b>Zachary D. Kravitz</b></p> <p>DIRECT: 614.334.6117 zkravitz@cwsllaw.com Chester Willcox &amp; Saxbe, LLP 65 East State Street, Suite 1000 Columbus, OH 43215 MAIN: 614.221.4000 FAX: 614.221.4012 <a href="#">V-Card</a> <a href="#">Bio Page</a></p> <p>Check out the new <a href="http://www.cwsllaw.com">www.cwsllaw.com</a></p>
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11/1/2011

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FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING DIV  
2011 NOV -1 AM 11:39  
PUCO

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,

v.

Interstate Gas Supply, Inc.

Respondent.

Case No. 10-2395-GA-CSS

**MOTION FOR SUBPOENA**

Pursuant to Ohio Administrative Code ("OAC") Rule 4901-1-25, the Northeast Ohio Public Energy Council ("NOPEC") hereby moves the Public Utilities Commission of Ohio ("Commission") for the issuance of a subpoena to command Scott White, President of Interstate Gas Supply, Inc. ("IGS"), and one or more of IGS' officers, agents, employees, or other persons duly authorized to testify on its behalf, to appear at a previously noticed deposition scheduled for 10:00 A.M. on November 3, 2011, at the offices of Bricker & Eckler LLP, 100 South Third Street, Columbus, Ohio 43215. The deposition notice was filed in this docket on October 26, 2011

On October 26, 2011, and pursuant to OAC Rule 4901-1-21, NOPEC filed and served a notice for the depositions of Mr. White and one or more of IGS' officers, agents, employees, or other persons duly authorized to testify on its behalf relating to: (1) IGS' use of the trade name Columbia Retail Energy; (2) IGS' discussions with staff at the Public Utilities Commission of Ohio about using the trade name Columbia Retail Energy; (3) the licensing agreement between IGS and NiSource regarding the use of the Columbia name and starburst logo; (4) Columbia

EXHIBIT



2

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.  
Technician JD Date Processed 11-01-11

## John W. Bentine

**From:** Orahood, Teresa [TORAH@BE.BRICKER.COM]  
**Sent:** Tuesday, November 01, 2011 2:59 PM  
**To:** Zachary D. Kravitz; JOE SERIO; LARRY SAUER; lgearhardt@ofbf.org; John M. Dosker; brian@mcintoshlaw.com; whitt@carpenterlipps.com; thompson@CarpenterLipps.com; dconway@porterwright.com; Gallon, Eric; tmrodgers@nisource.com; sseiple@nisource.com; bleslie@nisource.com; vparisi@igsenergy.com; John W. Bentine; Sarah D. Morrison  
**Cc:** Krassen, Glenn; Warnock, Matthew; O'Brien, Thomas  
**Subject:** OCC, et al. v. IGS, PUCO Case No. 10-2395-GA-CSS  
**Attachments:** Motion for Subpoena.PDF; Proof of Service.PDF

Attached is a copy of Motion for Subpoena and proof of service which were both filed today, November 1, 2011 in the above referenced proceeding.

 <b>Bricker &amp; Eckler</b> ATTORNEYS AT LAW	<b>Teresa Orahood</b> Senior Paralegal  Direct Dial 614.227.4821 <a href="mailto:torahood@bricker.com">torahood@bricker.com</a>   <a href="#">Website</a>	<b>Bricker &amp; Eckler LLP</b> 100 South Third Street Columbus, OH 43215-4291  Main 614.227.2300 Fax 614.227.2390 <a href="http://www.bricker.com">www.bricker.com</a>
Think green! Please print only if necessary.		
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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

Complainants,

v.

Interstate Gas Supply d/b/a Columbia  
Retail Energy,

Respondent.

Case No. 10-2395-GA-CSS

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**AFFIDAVIT OF SCOTT L. WHITE**

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Scott L. White, being first duly sworn and cautioned according to law, does swear and depose that:

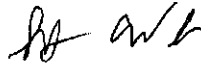
1. I, Scott L. White, am President of Interstate Gas Supply, Inc. ("IGS"). I am authorized by IGS to make this affidavit, and I make this affidavit based on my own personal knowledge regarding the matters herein;
2. IGS' General Counsel Vincent Parisi and I had a prearranged important business meeting out of state on November 3, 2011. We were not available for the deposition on November 3, 2011. The meeting had been set for over three weeks, and could not be rescheduled, because it was time sensitive and the parties with whom IGS was meeting had only this date available;
3. Mr. Parisi and I had originally planned to leave in the early morning on November 3, 2011 and drive to our meeting;
4. After receiving the subpoena in Case No. 10-2395-GA-CSS and conferring with my counsel, I chartered a private airplane for myself and Mr. Parisi to fly to our meeting



on November 3, 2011 if the subpoena was not quashed, and therefore, I could make myself available from 6:00 a.m. to 10:00 a.m. on November 3, 2011;

5. I chartered the airplane so that I could comply with the subpoena if IGS' Motion to Quash was denied;

Further affiant sayeth naught.



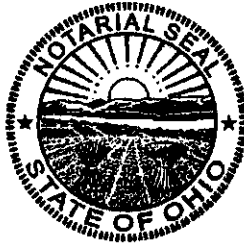
\_\_\_\_\_  
Scott L. White  
President  
Interstate Gas Supply, Inc.

STATE OF OHIO  
COUNTY OF FRANKLIN, SS:

On this 14th day of November 2011, Scott L. White appeared before me, a notary public for the State of Ohio, and subscribed and swore that the foregoing is true and accurate to the best of his knowledge and belief.

  
\_\_\_\_\_  
Notary Public

4843-3903-0030, v. 1



Helen A. Sweeney  
Notary Public, State of Ohio  
My Commission Expires 09-26-2015