

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application Seeking)	
Approval of Ohio Power Company's)	
Proposal to Enter into an Affiliate Power)	Case No. 14-1693-EL-RDR
Purchase Agreement for Inclusion in the)	
Power Purchase Agreement Rider)	
)	
In the Matter of the Application of Ohio)	
Power Company for Approval of Certain)	Case No. 14-1694-EL-AAM
Accounting Authority)	

**MOTION TO QUASH SUBPOENA AND MOTION FOR PROTECTIVE ORDER AND
MEMORANDUM IN SUPPORT OF INTERSTATE GAS SUPPLY, INC.**

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MOTION TO QUASH SUBPOENA AND MOTION FOR PROTECTIVE ORDER

Pursuant to Ohio Administrative Code ("OAC") 4901 -1-12, 4901-1-24, and 4901-1-25, Interstate Gas Supply, Inc. ("IGS") hereby moves the Public Utilities Commission of Ohio (Commission) to quash the subpoena issued in these proceedings on December 29, 2015. Specifically, IGS seeks to quash in its entirety the subpoena duces tecum issued to IGS, commanding it to produce an unnamed witness or witnesses to testify at a Commission hearing in the above-captioned proceeding. Furthermore, IGS requests that the Commission or Attorney Examiner issue a protective order insulating IGS from further discovery, including the notice of deposition served by the Office of the Ohio Consumers' Counsel ("OCC") on December 23, 2015.

As discussed further in the attached memorandum in support, the subpoena and notice of deposition are overly broad, unduly burdensome, request duplicative and unnecessary testimony, as well as protected communications not subject to discovery, and the requests are intended to harass IGS for its willingness to enter into a settlement

in the above-referenced proceeding. Moreover, the subpoena was not issued more than ten days in advance of the hearing as required by Commission rules. Therefore, IGS seeks a ruling from the Attorney Examiner quashing the subpoena. A memorandum in support of this motion is attached.

Very truly yours,

/s/Joseph Olikier

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MEMORANDUM IN SUPPORT

I. BACKGROUND

Following a hearing in the above-captioned proceeding in which IGS and others submitted testimony and participated in cross-examination regarding Ohio Power Company's ("Ohio Power") proposed purchase power agreement, IGS and several other parties submitted a Stipulation and Recommendation ("Stipulation") as part of a package deal to resolve the outstanding issues in the proceeding.

Ohio Power submitted the testimony of William Allen describing and supporting the Stipulation. No other witness has submitted testimony to support the Stipulation. Despite the fact that OCC has the opportunity to cross-examine Mr. Allen regarding the Stipulation, on December 23, 2015 at 5:15 pm, OCC served a notice of deposition to be

held on December 30, 2015 seeking testimony from unnamed IGS employees who have knowledge and expertise regarding three issues:

1. Ohio Power's proposal to enter into an affiliate power purchase agreement for inclusion in the power purchase agreement rider;
2. the Stipulation filed on December 14, 2015;
3. IGS's position regarding the Stipulation.¹

Subsequently, IGS's counsel notified OCC's counsel in a conversation on December 28, 2015 that each of the above issues has already been addressed at an earlier stage of this proceeding, in the testimony of Mr. Allen, or in discovery. Any additional information requested by in the notice of deposition is otherwise outside the scope of evidence such as protected settlement communications and communications protected by the attorney client privilege. IGS's counsel indicated that IGS would attempt to respond to OCC's 50+ discovery questions related to the Stipulation. But, IGS indicated that it objected to presenting a witness for deposition and would file a letter in the docket to that effect.

Because OCC's counsel indicated that it would not agree to resolve the discovery dispute for anything less than full satisfaction of its notice of deposition, it is apparent that the parties cannot resolve this dispute without Commission intervention.²

On December 29, 2015—near the eve of trial—OCC also served a subpoena on IGS pursuant to OAC 4901-1-25. The subpoena itself appears to request the right for limitless cross-examination, although the Motion for a Subpoena itself indicates that

¹ As part of the Stipulation, IGS, Sierra Club, and Direct Energy included certain footnotes clarifying their position regarding the Stipulation. IGS responded to over 50 discovery questions relating to the Stipulation.

² See Affidavit of Joseph Olikar.

OCC requests that IGS present employees on January 4, 2015 to present testimony with respect to the same categories identified in OCC's notice of deposition.

As discussed below, IGS requests that the Commission issue an order quashing the subpoena and issue a protective order.

II. ARGUMENT

A. The Subpoena and Notice of Deposition are unreasonable, oppressive, seek duplicative information, and information outside the scope of discovery, including privileged communications, and they are intended to harass

OAC 4901-1-25(C) provides that a subpoena may be quashed "if it is unreasonable or oppressive" Similarly, OAC 4901-1-24 provides that the Commission may issue an order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Commission precedent holds that a subpoena may be unreasonable or oppressive if it overly broad, unduly burdensome, or requests information not likely to lead to admissible evidence or otherwise outside the scope of discovery. *In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio*, Case No. 12-160-EL-BGN, Entry at 10-11 (Oct. 22, 2012) (quashing overly broad, unreasonable, and unduly burdensome subpoena) (hereafter "*Champaign*"); *see also Champaign*, Opinion and Order at 9 (May 28, 2013) (affirming ruling because the "request is overly broad and not focused on obtaining information that could be admissible before the Board."). *In the Matter of the Complaint of Buckeye Energy Brokers, Inc.*, Case No. 10-693-EL-CSS, Entry at 3-4 (Mar. 30, 2011) (quashing subpoena seeking information outside the scope of discovery).

Moreover, Ohio Civil Rule 45 further provides that a subpoena shall be quashed if it “subjects a person to an undue burden” or “[r]equires disclosure of privileged or otherwise protected matter”³ Pursuant to this rule, courts in Ohio have quashed subpoenas that seek duplicative information. *In re Gerber Children*, 2008 Ohio 1044, ¶ 44, Ct of Appeals, 5th Appellate Dist (“we fail to find any error in the trial court’s quashing of the subpoena which would have been duplicative of the discovery provided by appellee.”)

The subpoena and notice of deposition are both flawed for the same reasons—they are overly broad, unduly burdensome and not likely to lead to the discovery of admissible evidence. IGS has already submitted testimony at an earlier stage of this proceeding regarding the purchase power agreement; the transcript and exhibits in this proceeding already reflect this fact. It would be overly burdensome to *require* IGS to appear at the hearing or a deposition to give additional testimony regarding the purchase power agreement.

Moreover, as noted above, IGS has not presented expert testimony in support of the Stipulation. Mr. Allen has already submitted prefiled testimony in that respect and agreed to be available for deposition and cross-examination at the hearing. Thus, there is no need to duplicate his testimony.⁴ Given that IGS has not submitted testimony regarding the Stipulation and is not bound to support the Stipulation itself, OCC’s request is clearly designed to harass and chill parties’ willingness to enter into reasonable settlements to resolve contested legal issues without litigation.

³ Commission rules further reinforce the notion that privileged communications and information are outside the scope of discovery. OAC 4901-1-16.

⁴ Commission rules require only one party to file testimony in support of a stipulation. OAC 4901-1-30.

The subpoena and notice of deposition also call for confidential settlement communications and information subject to attorney client privilege and work product doctrine. IGS's position regarding the Stipulation is self-evident from the document itself. Further explanation of IGS's position can only be construed as a request to delve into communications between attorney and client and settlement communications, which are protected by Commission rules and the Civil Rules.⁵ IGS cannot expound further regarding its reasons for agreeing to any particular portion of the Stipulation without revealing attorney client confidences and litigation strategy. Moreover, as the Stipulation specifically states, any parties' agreement does not reflect agreement to any particular provision outside the global settlement—thus IGS's reasoning with respect to any particular portion of the Stipulation is simply irrelevant:

More specifically, no specific element or item contained in or supporting this Stipulation shall be construed or applied to attribute the results set forth in this Stipulation as the results that any Signatory Party might support or seek, but for this Stipulation in these proceedings or in any other proceeding. This Stipulation contains a combination of outcomes that reflects an overall compromise involving a balance of competing positions, and it does not necessarily reflect the position that one or more of the Signatory Parties would have taken on any individual issue. Rather the Stipulation represents a package that, taken as a whole, is acceptable for the purposes of resolving all contested issues without resorting to litigation. The Signatory Parties believe that this Stipulation, taken as a whole, represents a reasonable compromise of varying interests.

OCC's attempt to further determine IGS's position regarding individual provisions of the Stipulation is thus inappropriate. Finally, IGS has already provided responses to OCC's discovery requests related to the Stipulation. IGS objects to further duplicative questioning that is clearly intended to harass and chill the willingness of IGS and others to entertain settlement to avoid litigation.

⁵ See OAC 4901:1-16; OAC 4901:1-26.

Accordingly, the Commission should issue orders quashing the subpoena and protecting IGS from OCC's request for deposition.

B. The subpoena was not appropriately executed

The subpoena should be quashed because it was not properly executed under either OAC 4901-1-25(A)(1) or (2). Those rules provide that a subpoena must be signed by the Attorney Examiner assigned to the case or the leave director or a designee.

(1) A party may file a motion for a subpoena with the docketing division. A completed subpoena form, ready for signature, shall accompany the motion. **The attorney examiner assigned to the case, or the legal director or deputy legal director or their designee, will review the filing and, if appropriate, sign the subpoena.** The attorney examiner, legal director, deputy legal director, or designee will return via United States mail the signed subpoena, with a cover letter, to the party that filed the motion. A copy of the cover letter will be docketed in the case file.

(2) **To receive expedited treatment, a motion for a subpoena and the subpoena itself should first be submitted in person to the attorney examiner assigned to the case, or to the legal director or a designee, for signature of the subpoena.**

The subpoena was signed by Attorney Examiner Mandy Chiles. Because Greta See and Sarah Parrot are the Attorney Examiners assigned to this proceeding, the subpoena was not properly executed.⁶

Moreover, it is too late for OCC to cure this deficiency by obtaining an expedited subpoena from the proper signee. Such a subpoena must be obtained at least five days prior to the hearing.⁷ Thus, the Commission should quash the subpoena.

⁶ See docket sheet <http://dis.puc.state.oh.us/CaseRecord.aspx?CaseNo=14-1693&x=0&y=0>

⁷ OAC 4901-1-25(E).

III. CONCLUSION

It is important to consider these motions within the context of the facts of this case. At this stage, several parties have submitted a settlement for Commission consideration and approval. The Stipulation is supported by the testimony of a witness, and the signatory parties' position regarding the Stipulation is self-evident from the document itself. It would be unduly burdensome and oppressive to require anything more. Moreover, it would set bad precedent, effectively establishing a rule that any party that enters into a stipulation—ten parties in this case, not including Ohio Power—could be compelled to participate in further litigation despite the fact that they have entered the settlement to, in part, avoid that very thing. Rather than lay down a rule that would have a chilling effect on parties' willingness to let go of their litigation positions in favor of settlements, the Commission should recognize the patent unreasonableness of OCC's requests and grant IGS's motions.

Very truly yours,

/s/Joseph Olikier

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Motion to Quash and Motion for Protective and Memorandum in Support* was served this 31th day of December 2015 via electronic mail upon the following:

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/s/ Joseph Olikier
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State of Ohio : S.S.

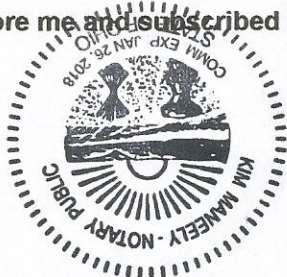
County of Franklin :

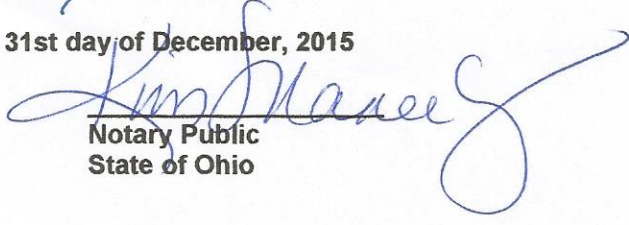
I, Joseph Olikar, counsel for Interstate Gas Supply, Inc. ("IGS" or "IGS Energy") in Case Nos. 14-1693-EL-RDR, *et al.*, being first duly sworn, depose and say:

1. On December 23, 2015, the Office of Consumers' Counsel ("OCC") served a notice of deposition on IGS related to a Stipulation and Recommendation filed in the above-captioned proceeding. The notice requested that IGS present an unnamed witness on December 30, 2015.
2. On December 28, 2015, I had a conversation with OCC's counsel in which I indicated that IGS objected to OCC's request for a deposition because it seeks duplicative testimony or testimony that was already provided at an earlier stage of the proceeding. I further indicated that the notice of deposition appears to seek information outside the scope of discovery, including communications or information protected by settlement privilege, attorney client privilege, or word product doctrine. I indicated that IGS would attempt to respond to discovery responses issued by OCC to resolve this matter, but that IGS objected to presenting a witness for deposition.
3. On December 28, 2015, I served responses and objections to over 50 discovery requests served by OCC on IGS related to the above-captioned proceeding.
4. On December 29, 2015, I filed correspondence in the above-captioned proceeding providing formal notice of IGS's objection to OCC's notice of deposition.
5. On December 29, 2015, OCC served a subpoena on IGS requesting that IGS present an unnamed witness at Public Utilities Commission of Ohio ("Commission") hearing in Case No. 14-1693-EL-RDR, *et al.* on January 4, 2015. The subpoena requested that IGS present a witness to testify with respect to the same categories of information identified in the notice of deposition.
6. On December 31, 2015, I contacted OCC's counsel to determine if the parties could resolve the outstanding discovery-related issues with respect to the subpoena and notice of deposition without Commission intervention. The parties, however, were not able to agree to a compromise solution.
7. After communicating with OCC's counsel and attempting to resolve this matter, it is apparent that this dispute cannot be resolved without the issuance of orders from the Commission.


Joseph Olikar

Sworn before me and subscribed in my presence this 31st day of December, 2015




Notary Public
State of Ohio

This foregoing document was electronically filed with the Public Utilities

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Case No(s). 14-1693-EL-RDR, 14-1694-EL-AAM

Summary: Motion to Quash Subpoena and Motion for Protective Order and Memorandum in Support electronically filed by Mr. Joseph E. Oliker on behalf of IGS Energy