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BEFORE THE STATE ENVIRONMENTAL COMMISSION

JUN 23 2011

STATE OF NEVADA

NEVADA STATE ENVIRONMENTAL COMMISSION

In Re:
Appeal of Air Operating Permit: Class I
Operating Permit No. AP4953-1148.01 by
Refuse, Inc.

NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S
REPLY IN SUPPORT OF ITS MOTION
FOR BRIEFING SCHEDULE

The Nevada Division of Environmental Protection, Bureau of Air Pollution Control ("NDEP-BAPC"), by and through counsel, Catherine Cortez Masto, Attorney General for the State of Nevada, William Frey, Senior Deputy Attorney General, and Jasmine K. Mehta, Deputy Attorney General, hereby replies in support of its motion for a briefing schedule under NAC 445B.8925 in the matter of Refuse, Inc.'s appeal of the Class I Operating Permit No. AP4953-1148.01.

On May 31, 2011, pursuant to NAC 445B.8925, NDEP-BAPC moved for an order setting a briefing schedule and hearing date regarding the appeal by Refuse, Inc. NDEP-BAPC deposited the motion for service upon Appellant by mail that same day. NDEP-BAPC proposed the following briefing schedule:

- 4 weeks from June 1, 2011 for Refuse, Inc. to file its opening brief, which would be due June 29, 2011;
4 weeks after filing of the opening brief for NDEP-BAPC to file its responsive brief, which would be due July 27, 2011;
Hearing to be scheduled two weeks after filing the responsive brief, which would be August 10, 2011.

Mr. Michael Tomko, counsel for Appellant, contacted NDEP-BAPC's counsel on June 10, 2011 to discuss the briefing schedule and discovery. He explained that wanted to push the briefing and hearing schedule to at least a month later because he was scheduled to be on vacation the weeks of August 8, 2011, and August 15, 2011. Counsel for NDEP-BAPC offered to request a hearing date for the first week of August to avoid Mr. Tomko's vacation plans, but did not want to move the hearing date out further. Parties to an appeal hearing have a right for hearing to be scheduled within 20 days of the appeal. NAC 445B.891(1) ("The

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1 Secretary of the Commission will schedule a hearing to be held within 20 days after receipt of
2 the request for a hearing or an order to appear before the Commission.”). While NDEP-BAPC
3 had sought a briefing schedule to be set out to give the Appellant sufficient time to brief its
4 appellate issues, NDEP-BAPC does not want the hearing to be scheduled too far beyond the
5 20-day deadline.

6 Mr. Tomko also informed counsel for NDEP-BAPC that he wanted to take depositions,
7 and would need extra time for expert disclosures and depositions. While it is not clear
8 whether Appellant is seeking to conduct such discovery in the case at present (Response at 2,
9 fn. 1), there is no right in the statutes and regulations for the parties to conduct depositions.
10 The regulations only allow the SEC to issue subpoenas for the hearing, not for depositions.
11 NAC 445B.892(1) (“Subpoenas to compel attendance of any person at a hearing or to require
12 the production of books, records or other documents may be issued by the Commission.”).
13 Thus, no extra time is necessary for deposition discovery. Appellant has indicated that it will
14 seek documents from NDEP-BAPC, but it has not yet sought a subpoena to do so.

15 Furthermore, a long briefing schedule and extended discovery is not necessary. The
16 issue presented by Appellant alleges that NDEP-BAPC’s issuance of Appellant’s permit with
17 conditions requiring the installation of continuous emissions monitoring systems was beyond
18 the agency’s authority and arbitrary and capricious. It is a narrow issue. NDEP-BAPC does
19 not anticipate that it will require an extended amount of briefing and discovery.

20 While Appellant claims that the basis for NDEP-BAPC’s objection to a later hearing is
21 unclear (Response at 3, l. 1), it is equally unclear to NDEP-BAPC why a hearing date the first
22 week of August is objectionable to Appellant. Appellant requested to file a reply brief, and
23 counsel for NDEP-BAPC does not object to a reply brief. NDEP-BAPC suggested using a
24 briefing schedule that would mirror the local federal rules, which would provide 14 days to file
25 an opposition brief and 7 days to file a reply brief. U.S. District Court for the District of Nevada
26 Local Rule 7-2. That would still allow sufficient time for briefing if a hearing were scheduled

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1 the first week of August. It would also avoid Appellant's counsel's scheduled vacation for
2 August.

3 During the conversation on June 10, 2011, Appellant's counsel indicated that he would
4 respond on Monday regarding the suggestion to move the hearing date to the first week of
5 August. Not having heard from Appellant's counsel on Monday, June 13, 2011, counsel for
6 NDEP-BAPC contacted him by email on Tuesday to inquire. It was not until Wednesday that
7 Appellant's counsel sought to set up a phone call. One hopes that such conduct is not an
8 effort to further delay these proceedings so that the deadline that NDEP-BAPC proposed for
9 Appellant's initial brief be pushed out even further, which would necessarily cause the
10 deadlines for subsequent briefing to be set back as well.

11 Given that Appellant has not proffered any reason to further delay the hearing other
12 than its need for deposition discovery, which is not allowed under the regulations, that
13 Appellant has not yet requested a subpoena for documents, that moving the hearing to the
14 first week of August would avoid Appellant's counsel's scheduled vacation, and that there are
15 other attorneys at Appellant's counsel's firm assisting with this matter,¹ NDEP-BAPC
16 respectfully requests that the hearing be scheduled for the first week of August, 2011. In
17 order to allow Appellant sufficient time to brief its issues, NDEP-BAPC further suggests that
18 the briefing schedule be modified from the first proposal as follows:

- 19 • Appellant's initial brief to be due July 5, 2011, and served by electronic mail the
20 same day;
- 21 • NDEP-BAPC's response brief to be due 14 days later, July 19, 2011, and served by
22 electronic mail the same day;
- 23 • Appellant's reply brief to be due 7 days after the response brief, on July 26, 2011,
24 and served by electronic mail the same day.

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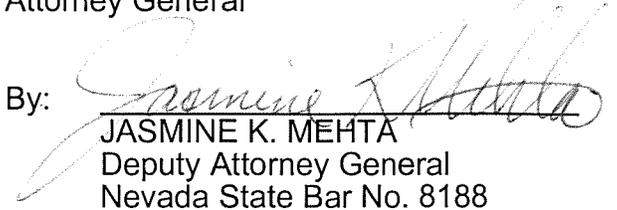
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27 _____
28 ¹ During the June 15, 2011, telephone call, not only was Mr. Tomko present, but Mr. Richard Angell of the same law firm was present on the Appellant's behalf as well.

DATED this 20th day of June 2011.

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CERTIFICATE OF SERVICE

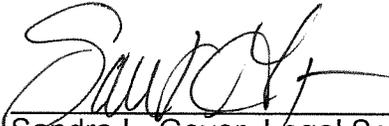
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I, Sandra L. Geyer, certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 20th day of June, 2011, I deposited for mailing a true and correct copy of the foregoing **NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S REPLY IN SUPPORT OF ITS MOTION FOR BRIEFING SCHEDULE**, via United States Postal Service in Carson City, Nevada, by first class mail, postage prepaid, and e-mailed an electronic copy, to the following:

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