

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of )  
Interstate Gas Supply, Inc. for )  
Certification as a Retail Natural Gas )  
Supplier )

Case No. 02-1683-GA-CRS

8  
RECEIVED-DOCKETING DIV  
2010 SEP -3 PM 4:44

PUCO

MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S,  
NORTHEAST PUBLIC ENERGY COUNCIL'S AND BORDER ENERGY, INC.'S MOTIONS TO  
INTERVENE AND MOTIONS FOR AN EVIDENTIARY HEARING

I. INTRODUCTION

Pursuant to Ohio Administrative Code (O.A.C.) 4901-1-12(B)(1), Interstate Gas Supply, Inc. ("IGS") respectfully requests that the Commission deny the Office of Consumers' Counsel's ("OCC"), Northeast Ohio Public Energy Council's ("NOPEC") and Border Energy, Inc's ("Border Energy") (collectively "Objecting Parties") Motions for Intervention in IGS' certification docket and Motions for an Evidentiary Hearing on IGS' recent notice of use of the trade name Columbia Retail Energy ("CRE").<sup>1</sup> A certification docket is intended to provide an applicant with an opportunity to demonstrate that it meets the minimum managerial, technical and financial capabilities as required in Chapter 4929.20, Ohio Revised Code ("O.R.C."). Contrary to the Objecting Parties' contentions, nothing regarding the addition of a trade name under which IGS may conduct business calls into question IGS' fitness to be a certified retail natural gas supplier ("CRNGS") in Ohio. To the extent the Objecting Parties contend that IGS' use of the CRE trade name may constitute a misleading marketing practice in violation of O.A.C. 4901:1-29-05(C), the appropriate procedural mechanism would be a complaint proceeding under O.R.C. 4929.15 and O.R.C. 4905.26. While IGS is confident it would prevail in any complaint proceeding, it is clear that the Objecting Parties' attempt to raise marketing issues in a certification docket proceeding

<sup>1</sup> Although each Objecting Party filed separate motions, IGS believes that each party has made essentially the same arguments and, accordingly, IGS will respond to all of the Objecting Parties' motions in this Memorandum Contra.

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 RC Date Processed 7-7-2010

is improper and the Objecting Parties' motions to intervene and motions for an evidentiary hearing should be denied.

## II. ARGUMENT

### A. The Certification Docket is Not the Appropriate Proceeding for the Objecting Parties' Complaints.

The docket in which the Objecting Parties have filed their motions to intervene is a certification docket, wherein the only question is whether a natural gas supplier's certification should be issued, renewed, suspended, or in certain cases rescinded or suspended. In order for a certification to be issued or renewed, pursuant to Ohio law, the applicant need demonstrate to the Commission only the following:

managerial, technical, and financial capability to provide that service and providing reasonable financial assurances sufficient to protect customers and natural gas companies from default. (emphasis added).

O.R.C. 4929.20(A). IGS demonstrated it met those standards when it filed for certificate renewal on June 21, 2010, and its certificate was renewed by operation of law, pursuant to O.A.C. 4901:1-27-09(C) and 4901:1-27-06(A), on July 22, 2010. No applications for rehearing were filed and, accordingly, the renewal was final on August 22, 2010. Therefore, the only grounds on which a hearing could now be held would be if the Commission determined that IGS' notice of use of the CRE trade name so adversely affected IGS' fitness or ability to provide the services for which it is certified that it warranted an adjudication by the Commission as to whether IGS' recently issued renewal certification should be suspended, rescinded or conditionally rescinded. O.A.C. 4901:1-27-10(A)(2).

O.R.C.4929.20(A) establishes the three areas relevant to approval of a competitive retail natural gas supplier's application to serve retail customers in the state, as detailed above. The use of a trade name is not managerial, technical or financial in nature and does not fit into any of those categories. A trade name is intellectual property, and in no way implicates whether a company has the requisite employee skills and training, programs, infrastructure and financial

capabilities to operate as a competitive natural gas supplier. The Objecting Parties base their motions on the tenuous proposition that the filing of a trade name under which a company may operate could so "adversely affect the retail natural gas supplier's \* \* \* fitness or ability to provide the services for which it is certified[.]" as to warrant suspension or rescission of the supplier's certification. OCC Motion to Intervene p. 7. To the contrary, the certification and renewal provisions in O.A.C. 4901:1-27-04 (Application Process for Certification as a CRNGS) and 4901:1-27-07 (Certification Renewal) clearly delineate the criteria upon which the Commission review is to be based, which include the applicant's:

ownership, managerial experience and capabilities, and prior regulatory or judicial actions, balance sheet, credit rating and other relevant financial information, technical ability to nominate, schedule and provide natural gas to consumers, and proof of an Ohio office and an employee in Ohio, and whether or not the applicant has ever been terminated from a choice program, or been in default for failure to deliver.

All of these criteria relate to the capabilities of the supplier to physically perform; none address issues of trade names or even the broader aspect of customer communication. It is not only inappropriate but also procedurally improper for the Objecting Parties to ask the Commission to have a hearing on IGS' notice of use of a trade name in IGS' certification docket, since there is nothing that the Commission could find that is relevant to the elements to be considered by the Commission in determining whether a properly issued certification should be suspended, rescinded or conditionally rescinded.

The Objecting Parties make no allegation that the notice filed by IGS was of a nature that could impact its ability to physically or financially perform. Rather they base their motions on the unfounded and totally speculative assertion that the use of a trade name by IGS, an unaffiliated supplier, in all circumstances and without regard to the efficacy of IGS' disclosures and disclaimers, will adversely affect IGS' fitness to provide the services for which it was just

recently re-certified.<sup>2</sup> The registration of a trade name, although important for the Commission to know, has no bearing on IGS' financial, technical or managerial capabilities and thus its fitness to provide services for which it is certified. As a result, a motion to hold a hearing on whether or not IGS should be able to use a licensed trade name is outside the scope of the certification docket and should be denied. See, 4901:1-27-10.

Further, it is clear through a reading of O.R.C. 4929.20 and O.A.C. 4901:1-27 that the broader issue of customer communications is outside the scope of a certification docket. O.A.C. 4901:1-27-04 and 07 reveal no requirement that an applicant submit customer communication materials as part of a renewal certification, consistent with the Ohio Legislature's determination that the basis for certification is whether a supplier has the managerial, technical or financial ability to provide service to customers.

Other rules govern a supplier's interactions with customers and mechanisms are in place to address alleged violations of those rules. This includes the complaint process, which is an appropriate mechanism if an issue regarding a supplier's conduct arises. It is improper, however, to interject marketing issues into IGS' renewal certification docket, as the Objecting Parties attempt to do here, since (i) the certification is already final and (ii) such issues are irrelevant to the factors the Commission must weigh in considering whether a material change will adversely affect a supplier's fitness or ability to provide the services for which it is certified.<sup>3</sup>

---

<sup>2</sup> Proposed Intervenor NOPEC suggests as one of the grounds for its motion that IGS may have failed to disclose "an affiliation with a public utility" as required by O.A.C. 4901:1-27-10(B)(2). IGS made no such disclosure because no ownership or other corporate affiliation exists between IGS and a public utility. NOPEC's effort to characterize a contractual licensing agreement as creating the legal affiliation relationship contemplated by 4901:1-27-10 is meritless.

<sup>3</sup> It is also worth noting that in a complaint process, the Objecting Parties would shoulder the burden of proof regarding their allegations. In this docket, IGS was required to demonstrate its fitness to perform, albeit on managerial, financial and technical grounds (and not as the Objecting Parties have alleged based upon the use of a trade name). Denial of the Objecting Parties' motions would place the burden of proof where it squarely belongs if the Objecting Parties opt to pursue their allegations in a complaint proceeding, which is the proper procedure for their "issues" to be raised.

**B. IGS' Course of Conduct in Utilizing the CRE Trademark Is Consistent With Longstanding Practice.**

Although the Objecting Parties' motions should be denied because of their inherent procedural defects, it is essential to IGS to briefly respond to the Objecting Parties' unfounded allegations. First, it is important to point out that IGS is not the first to use a trademark, trade name or fictitious name that is similar to that of an incumbent utility in the Ohio market. In fact, IGS would be no less than the sixth, given the similarity of Dominion East Ohio Energy to Dominion East Ohio, First Energy Solutions to First Energy, Vectren Source to Vectren Energy Delivery, Duke Retail Energy to Duke Energy-Ohio and AEP Retail Energy to AEP-Ohio.<sup>4</sup> The Commission has sanctioned the use of such trade names in the past. Indeed, OCC's own comments in the proceeding to establish rules for the Ohio Choice Program specifically do not differentiate between affiliates and non-affiliates. OCC commented "that any use of the utility name or logo, regardless of whether a marketer is an affiliate, requires that a marketer disclose that it is not the utility" (emphasis added). Most notably in its comments, the OCC did not object to the use of the utility name or logo by a CRNGS Provider, nor did OCC make a distinction between a utility affiliate CRNGS Provider and a non-affiliate CRNGS Provider. PUCO Case No. 98-0593-GA-COI, OCC Comments (May 29, 1998) at 10.

Second, the Commission, by direction of the Legislature, when considering any rules it develops, is to ensure that "the standards shall allow flexibility for voluntary aggregation, to encourage market creativity in responding to consumer needs and demands" (emphasis added). O.R.C. 4929.20(B). IGS is doing nothing with the use of this trade name that has not already been part of the competitive market landscape in Ohio for years. Consumers buy from a variety of sources, and will continue to do so. IGS is simply rebranding its marketing offers,

---

<sup>4</sup> It should be noted that NOPEC's natural gas supplier to its retail customers is Dominion East Ohio Energy, a Competitive Retail Natural Gas Supplier that currently markets under the name and logo of Dominion East Ohio. Also, NOPEC receives fees from Dominion East Ohio Energy as part of their business relationship. See NOPEC 2009 Annual Report (4/19/2010) at 4, PUCO Case No. 10-0003-GE-RPT.

and if consumers find its products appealing, IGS may be able to provide even more competitive offers than it has in the past. If it fails, consumers have no risk.

IGS is a well established energy company with an impeccable reputation for conducting itself with the highest level of integrity in the market. In developing its marketing program for use of the CRE trade name, IGS has relied heavily upon the Commission's rules governing the use of trade names and trademarks by affiliated companies to guide its disclosures to consumers regarding its relationship with the trade name owner. IGS has also consulted with the Commission's Staff regarding appropriate disclosures related to the use of the CRE trade name. Contrary to the Objecting Parties' allegations, the use of a regulated utility's trade name by an unaffiliated company, with clear and appropriate disclosures, provides a superior separation of the relationship with the regulated entity to that of an affiliated company. An unaffiliated relationship with the regulated entity actually eliminates many of the cross-subsidy, market information and remaining concerns that exist regarding the regulated and unregulated functions.<sup>5</sup>

At the end of the day, however, the fundamental point remains that, to the extent issues exist or may arise regarding a non-affiliate's use of a regulated utility's trade name or trademark, a supplier's certification docket is clearly not the proper procedural forum for resolution of those issues.

---

<sup>5</sup> See PUCO Case No. 98-0593-GA-COI, Opinion and Order (June 18, 1998) at 19-24.

### III. CONCLUSION

For all of the foregoing reasons, IGS respectfully requests that the Commission deny the Objecting Parties' Motions to Intervene and Requests for an Evidentiary Hearing.

Respectfully submitted,



John W. Bentine (0016388)

Email: [jbentine@cwsllaw.com](mailto:jbentine@cwsllaw.com)

Direct Dial: 614-334-6121

Stephen C. Fitch (0022322)

Email: [sfitch@cwsllaw.com](mailto:sfitch@cwsllaw.com)

Direct Dial: 614-334-6120

Matthew S. White (0082859)

Email: [mwhite@cwsllaw.com](mailto:mwhite@cwsllaw.com)

Direct Dial: 614-334-6172

CHESTER WILLCOX & SAXBE LLP

65 E. State Street, Suite 1000

Columbus, Ohio 43215

Telephone: 614-221-4000

Facsimile: 614-221-4012

Vincent A. Parisi

Email: [vparisi@igsenergy.com](mailto:vparisi@igsenergy.com)

IGS ENERGY

6100 Emerald Parkway

Dublin, Ohio, 43016

Telephone: 614-923-1000

*Attorneys for Interstate Gas Supply, Inc.*

### CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Memorandum Contra The Office of The Ohio Consumers' Counsel's Motion To Intervene And Motion For An Evidentiary Hearing* was served upon the following persons listed below by electronic mail and regular U.S. Mail, postage prepaid, this 3<sup>rd</sup> day of September, 2010.

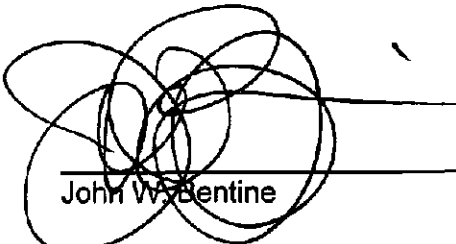
Joseph Serio  
Larry S. Sauer  
OFFICE OF CONSUMERS' COUNSEL  
10 W. Broad Street, Suite 1800  
Columbus, Ohio 43215  
Email: [serio@occ.state.oh.us](mailto:serio@occ.state.oh.us)  
[sauer@occ.state.oh.us](mailto:sauer@occ.state.oh.us)

Katie Stenman  
Attorney Examiner  
PUBLIC UTILITIES COMMISSION OF OHIO  
180 E. Broad Street  
Columbus, Ohio 43215  
Email: [Katie.Stenman@puc.state.oh.us](mailto:Katie.Stenman@puc.state.oh.us)

Glenn S. Krassen  
BRICKER & ECKLER LLP  
1011 Lakeside Avenue, Suite 1350  
Cleveland, Ohio 44114  
Email: [gkrassen@bricker.com](mailto:gkrassen@bricker.com)

Matthew W. Warnock  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, Ohio 43215  
Email: [mwarnock@bricker.com](mailto:mwarnock@bricker.com)

Carolyn S. Flahive  
Ann B. Zallocco  
THOMPSON HINE LLP  
41 South High Street, Suite 1700  
Columbus, Ohio 43215  
Email: [Carolyn.Flahive@ThompsonHine.com](mailto:Carolyn.Flahive@ThompsonHine.com)



John W. Bentine