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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING DIV

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

Case No. 02-1683-PALGRS 0

MEMORANDUM CONTRA DELTA ENERGY, LLC'S MOTION TO INTERVENE AND MOTION
FOR EVIDENTIARY HEARING

I. INTRODUCTION

Much like the other parties attempting to intervene and have the Commission set a hearing in IGS' certification docket ("Objecting Parties"), Delta Energy, LLC's ("Delta") premise for intervention is fundamentally flawed.¹ This proceeding is a certification docket where the only issue is whether IGS has the managerial, technical and financial ability to serve its customers. Despite Delta and the Objecting Parties' speculation as to what *could* result from IGS' use of the CRE service mark, these issues pose no relevance to IGS' fitness or ability to provide natural gas service to customers. For these reasons, and the reasons stated in IGS' prior Memoranda Contras to the Objecting Parties, Delta's motion to intervene and motion for evidentiary hearing should be denied.²

In addition to the arguments already presented by the Objecting Parties, Delta raises two new issues which warrant a response. Delta alleges that IGS' use of the CRE service mark is an undue preference granted by a utility in violation of R.C. 4905.35. Also, Delta alleges that a hearing is necessary to determine if IGS' licensed use of the CRE service mark creates an

¹ The other parties attempting to intervene in this proceeding are the Office of Ohio Consumers' Counsel ("OCC"), the Northeast Ohio Public Energy Counsel ("NOPEC"), Stand Energy ("Stand"), Border Energy ("Border") and the Retail Energy Supply Association ("RESA"). Collectively, these parties will be referred to hereinafter as "Objecting Parties."

² On August 9, 2010, IGS filed a Memorandum Contra OCC's, NOPEC's and Border's Motion to Intervene and Request for Evidentiary Hearing. On August 10, 2010 IGS filed a Memorandum Contra RESA's and Stand's Motion to Intervene. By reference, IGS incorporates herein those Memorandum Contras.

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affiliation with an Ohio public utility. As set forth more fully herein, Delta's allegations have no basis in law or fact.

II. ARGUMENT

A. Delta does not meet the Standards for Intervention.

Delta, along with the other Objecting Parties, does not meet the standards for intervention set forth in the Commission rules, and thus Delta's intervention should be denied. O.A.C. 4901-1-11(A) provides "any person shall be permitted to intervene in a proceeding upon a showing that . . . the person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest" (emphasis added). Delta argues that it has an interest in the effect IGS' use of the CRE service mark will have on the "energy consumer as well as Ohio's retail natural gas market as a whole."³ However, Delta's underlying assumption for intervention (that this proceeding will determine whether IGS should be able to use the CRE service mark) is false.

This proceeding was initiated in July 5, 2002 upon IGS filing an application for certification as a retail natural gas supplier. The Commission granted IGS' certification and each of its subsequent renewal certification requests after determining IGS has the managerial, technical and financial ability to provide natural gas service to customers. On August 6, 2010 IGS filed a Notice of Material Change in its certification docket in accordance with O.A.C. 4901:1-27(A) which requires *notification* when a certified supplier licenses a new trade name. O.A.C. 4901:1-27(A) does not require the certified supplier to file a motion for material change or an application for material change. By its very name, a notice filing of a certified suppliers' material change does not initiate a proceeding to determine whether the material change will be accepted or rejected by the Commission.

³ Delta Motion to Intervene at 3.

O.A.C. 4901:1-27(A)(2) contemplates holding a hearing *only if* the Material Change affects the certified supplier's "fitness or ability" to provide natural gas service to customers to such an extent that the Commission would consider "suspending, rescinding or conditionally rescinding" the certified supplier's certificate. O.A.C. 4901:1-27(A)(2) does not contemplate a hearing to determine whether the material change is to be accepted or rejected by the Commission. Delta, and the Objecting Parties, has not, and cannot make a showing that IGS' use of the CRE service mark has altered IGS' fitness or ability to provide natural gas service to customers.

IGS has capably and reliably provided natural gas service to customers for over 20 years. Moreover, the Commission has recently approved IGS' renewal application certifying that IGS does have the managerial, technical and financial ability to provide natural gas service to customers.⁴ It is absurd to conclude that marketing under a new service mark will affect IGS' fitness or ability to provide service to customers going forward. If Delta has concerns about IGS' use of the CRE service mark, there are other procedural mechanisms to address such concerns (as IGS has already explained in its previously filed memo contras), but IGS' certification docket is not one of them.

In a similar case the Commission denied OCC's "collateral attack" on Duke Energy Retail Services' retail electric supplier certification.⁵ In that docket the Commission determined that the certification docket was not the appropriate place to address OCC's concerns. The Commission wrote "in particular, the Commission notes that the relevant criteria focus on the applicant's managerial, financial, and technical capabilities of performing the service it intends to provide."⁶ In determining that a complaint proceeding is the appropriate mechanism to address OCC's concerns, The Commission wrote:

⁴ On July 22 2010, IGS' renewal application was approved by application of law in accordance with O.A.C. 4901:1-27-09 and O.A.C. 4901:1-27-06.

⁵ Case No. 04-1323-EL-CRS, Entry (December 3, 2008) at Finding 8.

⁶ Id.

Despite its many allegations and arguments about corporate separation, OCC has not used or mentioned the existing complaint process in Sections 4905.26 and 4928.18, Revised Code, to address corporate separation violations concerning an electric utility or its affiliate. In 1999, the General Assembly established that the Commission has jurisdiction under Section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the Commission, to determine whether an electric utility or its affiliate has violated any provision of Section 4928.17, Revised Code, or an order issued or rule adopted under that section. The Commission has a broad range of remedies under Section 4928.18 of the Revised Code, in addition to any remedies otherwise provided by law, to address violations of law, orders, and rules adopted under Section 4928.17, Revised Code. Under this process, the complainant would bear the burden of proof.⁷

Much like OCC's allegations in the Duke Energy Retail Services proceeding regarding OCC's corporate separation concerns, IGS' certification docket is not the appropriate place to address Delta's or Objecting Parties' concerns regarding IGS' use of the CRE service mark. For these reasons, Delta, along with the Objecting Parties, has not met the standards for intervention in this proceeding and Delta's Motion to Intervene should be denied.

B. Delta Filed Its Intervention out of Time.

Even assuming *arguendo* a certification docket could be used as contemplated by Delta and the Objecting Parties, the law with regard to this docket is very clear on the effect of filings, whether it be an initial certification, renewal certification or any update. Ohio Revised Code 4929.20(A) specifically states "certification or certification renewal shall be deemed approved thirty days after the filing of an application with the Commission unless the Commission suspends that approval for good cause shown." (Emphasis added). Delta filed its Motion to Intervene more than 30 days after IGS' notice of material change filing. Therefore, if an action were to occur with respect to IGS' certificate, it must have occurred within that 30 day time frame or by action of law it has been accepted by the Commission. As such, Delta's filing itself is out of time assuming for the sake of this argument that intervention was even appropriate, since after the 30 day period expired CRE became part of IGS' certification by operation of law, without further action of the Commission being necessary. The issuance of an updated

⁷ Id.

certification thereafter is simply perfunctory in nature, and unnecessary especially given the notice nature of the filing.

C. IGS' Use of the CRE Service Mark is not a Violation of R.C. 4905.35.

In its Motion to Intervene, Delta argues that IGS' use of the CRE service mark is an unfair advantage in violation of R.C. 4905.35.⁸ As a preliminary matter, for the reasons stated above, an allegation of violations of R.C. 4905.35 should not be adjudicated in IGS' certification docket, and would only be appropriate as a complaint filing. However, IGS will briefly address the substance of Delta's allegations.

First, R.C. 4905.35 prohibits a *public utility* under Ohio law ("Public Utility") from giving an undue or unreasonable preference or advantage. IGS is not a Public Utility and thus cannot be in violation of R.C. 4905.35. Second, the CRE service mark is licensed to IGS by NiSource which is also not a Public Utility. Finally, and most importantly, the licensed use of the CRE service mark is not an undue or unreasonable preference or advantage to IGS. FirstEnergy, American Electric Power, Duke Energy, Dominion East Ohio, and Vectren Source and/or their parent companies have all licensed the use of a name similar to a public utility to a non-utility certified supplier. If licensing the use of a name similar to a public utility was a violation of R.C. 4905.35, the Commission has had ample opportunity to make this known. Further, the Commission has crafted rules that govern the use of a utility name by a certified supplier.⁹ By implication of these rules, the Commission has authorized the use of the utility name with proper disclosures. The Commission would not allow certified suppliers to use the utility name for over 10 years now, and draft rules that govern the same, if the use of the utility name was in violation of R.C. 4905.35. For these reasons, Delta's allegations of a violation of R.C. 4905.35 are baseless and do not constitute grounds for holding a hearing on the matter.

⁸ Delta Intervention at 4.

⁹ Those rules can be found in O.A.C. 4901:1-29-05(C).

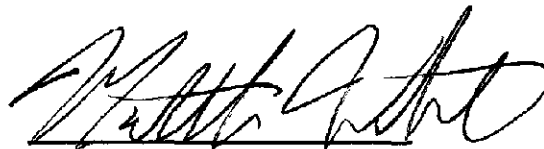
D. A Hearing Should not be held to Determine Whether IGS Created a Utility Affiliation.

In its Motion to Intervene, Delta argues that a hearing may be necessary to determine whether IGS' use of the CRE service mark is an affiliation with a utility which would require IGS to make another material change filing. It would be unnecessary and unduly burdensome to hold an entire hearing, simply to determine whether IGS' licensed use of CRE service mark creates an "affiliation" with a utility. The only result of a determination that IGS was affiliated with a utility would be to require IGS to file a Notice of Material Change of something the Commission is already aware of.¹⁰ Delta, however, may have touched on a point that is worth noting. If it has been determined that IGS created an affiliation with a utility, there would be no dispute as to whether IGS is authorized to use the CRE service mark, because IGS' lack of affiliation with a utility is the only distinction Objecting Parties can make between IGS' use of the CRE service mark and the multiple certified suppliers that are currently marketing under a utility service mark in Ohio.

III. CONCLUSION

For all of the foregoing reasons, IGS respectfully requests that the Commission deny Delta's Motion to Intervene and Motion for Evidentiary Hearing.

Respectfully submitted,



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¹⁰ Whether or not IGS' use of the CRE service mark is considered an affiliation, NiSource granted IGS' the custodial right of the service mark CRE because NiSource felt that IGS would be good stewards of the CRE name. The fact that NiSource has authorized IGS to use the CRE name demonstrates that NiSource trusts IGS to conduct the use of the CRE name in a reputable and trustworthy manner.

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Memorandum Contra Delta Energy, LLC's Motion To Intervene And Request For An Evidentiary Hearing* was served upon the following persons listed below by electronic and regular U.S. mail, postage prepaid, this 30th day of September, 2010.

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