

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of the)	
Ohio Consumers' Counsel, Stand)	
Energy Corporation, Northeast Ohio)	
Public Energy Council, and Ohio Farm)	
Bureau Federation,)	
)	
Complainants,)	Case No. 10-2395-GA-CSS
)	
v.)	
)	
Interstate Gas Supply, Inc.,)	
)	
Respondent.)	

ENTRY

The attorney examiner finds:

- (1) On October 21, 2010, the Ohio Consumers' Counsel, Border Energy, Inc. (Border), Northeast Ohio Public Energy Council (NOPEC), Stand Energy Corporation (Stand), and the Ohio Farm Bureau Federation (collectively, joint complainants) filed a complaint, alleging that, among other things, Interstate Gas Supply, Inc. d/b/a Columbia Retail Energy (IGS) engaged in marketing, solicitation, sales acts, or practices that were unfair, misleading, deceptive, or unconscionable. By entry issued February 28, 2011, MXenergy (MX) was granted leave to join the complaint. On March 16, 2011, and May 13, 2011, respectively, Border and MX withdrew from the case. On November 12, 2010, IGS filed its answer denying the allegations contained in the complaint and asserting that it has complied with all statutory and regulatory requirements.
- (2) A hearing on this complaint occurred on November 7 and 8, 2011.
- (3) On August 15, 2012, the Commission issued an opinion and order in this case concluding that the complainants had not met their burden of proof and dismissing this complaint. In

addition, the Commission considered IGS's November 29, 2011, motion for protective order regarding the service mark licensing agreement (SMLA) and confidential portions of the hearing transcript. The Commission directed IGS to file new proposed redacted versions of the SMLA and the confidential transcript in the open record. The Commission specified that IGS must narrowly tailor its redactions to recommendations contained in the opinion and order, and must strive to limit redactions to the SMLA and the confidential transcripts to only include confidential pieces of information, leaving as much of the information public as possible, including numberings, headings, and parts of sentences, where appropriate. If IGS disagreed with the Commission's discussion of the protected material, or was in doubt regarding whether a particular piece of information should be redacted from these documents, it was directed to file, along with its new proposed redactions, an amended motion for protective order, specifically explaining why any information, outside of the scope of what has been delineated for protection by the Commission, should be granted protective treatment.

- (4) On August 23, 2012, IGS filed new proposed redacted versions of the SMLA and the confidential transcript in the public record, without a motion for protective order. By entry issued September 6, 2012, the attorney examiner noted that IGS did not adhere to the Commission's directive that IGS narrowly tailor its redactions. Moreover, IGS failed to file a supplemental motion for protective order explaining why any information, outside of the scope of what has been delineated for protection by the Commission, should be granted protective treatment. Therefore, the attorney examiner again directed IGS to reexamine its proposed redactions to the SMLA and confidential transcript, complying with the Commission's directives, file new redactions, and file a supplemental motion for protective order.
- (5) On September 20, 2012, IGS filed new proposed redacted copies of the SMLA and confidential transcript, along with a supplemental motion for protective order. In support of its supplemental motion for a protective order, IGS explains

that the remaining confidential information, after its most recent redactions, contained in the SMLA constitutes business information or plans and financial information that has economic value to IGS. IGS explains that competitors could potentially use the redacted information to tailor their business plans to market to IGS's customers. With respect to the confidential portions of the transcript, IGS explains that it has only redacted information that refers to confidential portions of the SMLA, and has redacted information that has economic value to IGS and would afford its competitors an unfair advantage. IGS also asserts that all of the information redacted from the confidential transcripts, as well as the SMLA, has actual substantial independent economic value from not being generally know, and not being ascertainable by proper means by persons that would derive economic value from disclosure. IGS further avers that public disclosure of this information could cause substantial harm to IGS's business and competitive interests.

- (6) Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. Section 149.43, Revised Code, specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St. 3d 396, 399, 732 N.E. 2d 373 (2000).
- (7) Similarly, Rule 4901-1-24, Ohio Administrative Code (O.A.C.), allows an attorney examiner to issue an order to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."
- (8) Ohio law defines a trade secret as "information . . . that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally

known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Section 1333.61(D), Revised Code.

- (9) The attorney examiner has examined the information covered by the supplemental motion for protective order filed by IGS, on September 20, 2012, as well as the assertions set forth in the supportive memorandum. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court,¹ the attorney examiner finds that the information redacted from the SMLA and confidential transcripts constitutes trade secret information. Release of this information is, therefore, prohibited under state law. The attorney examiner also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Finally, the attorney examiner concludes that, unlike prior attempts, the redacted copies of the SMLA and the confidential transcript filed on September 20, 2012, have been reasonably redacted to remove the confidential information contained therein. Therefore, the attorney examiner finds that IGS’s motion for protective order, as supplemented, is reasonable and should be granted. The attorney examiner also finds that IGS’s supplemental motion for protective order, filed under seal on September 20, 2012, should also be afforded protective treatment, as it discusses with specificity the protected information contained in the SMLA and confidential transcript, setting forth why that protected information is worthy of protective treatment.
- (10) Rule 4901-1-24(F), O.A.C, provides that, unless otherwise ordered, protective orders issued pursuant to Rule 4901-1-24(D), O.A.C, automatically expire after 18 months. Therefore, confidential treatment shall be afforded for a period ending 18 months from the date of this entry or until

¹ See *State ex-rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

May 5, 2014. Until that date, the docketing division should maintain, under seal, the SMLA, the confidential portions of the transcript, and the detailed supplemental motion for protective order, filed on November 14, 2011, July 9, 2012, and September 20, 2012, respectively.

- (11) In addition to IGS's proposed redactions to the SMLA and confidential transcript required by the attorney examiner, NOPEC filed proposed redactions to the SMLA and confidential transcript on December 13, 2011. In light of our review of IGS's redactions, we find it unnecessary to separately consider NOPEC's proposal and to the extent the SMLA and confidential transcripts contain material we have found to be the appropriate subject of protective treatment, NOPEC's proposed revisions filed on December 13, 2011, should be granted protective treatment.
- (12) Rule 4901-1-24(F), O.A.C., requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If IGS wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to IGS.
- (13) As an additional matter, the attorney examiner notes that previously redacted versions of the SMLA and the confidential transcript have been filed under seal in this case by IGS. Accordingly, previously redacted versions of the SMLA filed on November 14, 2011, and December 20, 2011, and redacted versions of the confidential transcript filed on December 20, 2011, which would protect a greater amount of information than the attorney examiner has found appropriate for protective treatment, should be released on November 15, 2012.
- (14) Finally, the attorney examiner notes that NOPEC and Stand filed a confidential initial brief and reply brief on November 29, 2011, and December 20, 2011, respectively. IGS is directed to provide NOPEC and Stand appropriately redacted versions of the initial brief and reply brief by November 20, 2012, which NOPEC and Stand are directed to

file by November 27, 2012. The unredacted versions of the initial brief and reply brief filed on November 29, 2011, and December 20, 2011, respectively, will remain under seal until May 5, 2014.

It is, therefore,

ORDERED, That the supplemental motion for protective order filed by IGS be granted with regard to the redacted information contained in the SMLA, the confidential transcripts, and the supplemental motion for protective order. It is, further,

ORDERED, That the Commission's docketing division maintain, under seal, the unredacted SMLA, confidential portions of the transcript, and the detailed supplemental motion for protective order filed on November 14, 2011, July 9, 2012, and September 20, 2012, respectively; NOPEC's proposed redactions to the SMLA and confidential transcript filed on December 13, 2011; and, the initial and reply briefs filed by NOPEC and Stand on November 29, 2011, and December 20, 2011, respectively, for a period of 18 months, ending on May 5, 2014. It is, further,

ORDERED, That the Commission's docketing division release into the public record, on November 15, 2012, the previously redacted versions of the SMLA filed on November 14, 2011 and December 20, 2011, and redacted versions of the confidential transcript filed on December 20, 2011. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Katie Stenman

By: Katie L. Stenman
Attorney Examiner

JRJ/sc

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in

Case No(s). 10-2395-GA-CSS

Summary: Attorney Examiner Entry granting supplemental motion for protective order. -
electronically filed by Sandra Coffey on behalf of Katie Stenman, Attorney Examiner, Public
Utilities Commission of Ohio