

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of	)	
	)	
Interstate Gas Supply, Inc.	)	
dba IGS Energy	)	
6100 Emerald Parkway	)	
Dublin, Ohio 43016	)	
	)	
Complainant,	)	
	)	Case No. 17-2452-GE-CSS
v.	)	
	)	
Titan Gas LLC	)	
d/b/a Titan Gas & Power	)	
3355 W. Alabama St., Suite 1170	)	
Houston, Texas 77098	)	
	)	
Respondent.	)	

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**MOTION TO DISMISS OF  
TITAN GAS LLC D/B/A TITAN GAS & POWER**

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Pursuant to Ohio Administrative Code (“OAC”) Rule 4901-9-01 and 4901-1-12, Titan Gas LLC d/b/a Titan Power & Gas (“Titan”) moves to dismiss portions of the Complaint filed by Interstate Gas Supply, Inc. d/b/a IGS Energy (“Complainant”) filed December 1, 2017, in the above-captioned proceeding with the Public Utilities Commission of Ohio (the “Commission” or “PUCO”). Titan moves to dismiss Complainant’s First, Second, and Third Claims, as well as its claims for treble damages and equitable relief in Paragraphs 3, 4, and 5 of its prayer for relief. The reasons supporting this motion are stated in the accompanying memorandum in support.

Respectfully submitted,  
Respectfully submitted on behalf of,  
TITAN GAS LLC  
D/B/A TITAN GAS & POWER



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**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

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**I. INTRODUCTION**

Titan submits this Motion to Dismiss Complainant's First, Second, and Third Claims, as well as Paragraphs 3, 4, and 5 of its prayer for relief with prejudice. The Commission should dismiss the Third Claim because the Complaint does not contain any factual allegations which demonstrate that Titan failed to comply with OAC 4901-1-29-05(D)(8)(a), 4901:1-21-05(C)(8)(a), RC 4928.10 or RC 4929.22. Complainant's claim for treble damages also should be dismissed as beyond the Commission's jurisdiction. In addition, the First and Second Claims should also be dismissed as mere restatements of the Fourth Claim. Finally, the Complainant's requests for injunctive and other, undefined, equitable relief should be dismissed as beyond the scope of the Commission's authority to provide.

## II. LAW AND ARGUMENT

### A. Standard of Review

When a motion to dismiss is being considered, all material allegations of the complaint must be accepted as true and construed in favor of the complaining party. See, *In the Matter of the Complaint of XO, Inc. v. City of Upper Arlington*, Case No. 03-870-AU-PWC (July 1, 2003), citing *Phung v. Waste Mgt., Inc.* (1986), 23 Ohio St.3d 100, 23 OBR 260, 491 N.E.2d 1114; *Mitchell v. Lawson Milk Co.* (1989), 40 Ohio St.3d 190, 532 N.E.2d 753. The Commission, however, need not presume the truth of conclusions unsupported by factual allegations. *Mitchell, supra*. In resolving a motion to dismiss for failure to state a claim, a court is confined to the averments set forth in the complaint and cannot consider outside evidentiary materials. *Nelson v. Pleasant* (1991), 73 Ohio App.3d 479, 597 N.E.2d 1137.

### B. **Complainant's Third Claim should be dismissed because the Complaint does not contain any factual allegations which demonstrate that Titan failed to comply with OAC 4901-1-29-05(D)(8)(a), 4901:1-21-05(C)(8)(a), RC 4928.10 or RC 4929.22**

Complainant alleges that Titan violated OAC 4901:1-29-05(D)(8)(a) and 4901:1-21-05(C)(8)(a), which prohibit claiming that a specific price advantage, savings, or guarantee exists if it does not. However, the Complaint does not contain factual allegations which demonstrate that Titan failed to comply with OAC 4901-1-29-05(D)(8)(a), 4901:1-21-05(C)(8)(a), RC 4928.10 or RC 4929.22.

To support its Third Claim, Complainant avers that “[Titan represented] to customers that the customer’s ‘low fixed rate plan’ has expired and will rollover to a variable rate plan ‘that can go very high [in] any given month.’ Complaint, Par. 21. This allegation makes no assertion that Titan made any claim of a specific price advantage, savings, or guarantee that does not exist. Rather, Complainant would have the Commission presume the truth of the conclusions in the

Third Claim, without support of factual allegations. For this reason, the Third Claim is fatally deficient and should be dismissed.

**C. Complainant's claim for treble damages should be dismissed as beyond the scope of the Commission's jurisdiction.**

Complainant's request for relief in the form of treble damages (Complaint, Request for Relief at Par. 3) is beyond the scope of the Commission's jurisdiction. As a threshold matter, if a complainant is to seek treble damages, the Commission's jurisdiction is limited to whether a provision in R.C. Chapter 4901, 4903, 4905, 4907, 4909, 4921, or 4925, or an order of the Commission has been violated. R.C. 4905.61. A court of competent jurisdiction, not the Commission, must make a determination of the amount of damages to be awarded. *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St. 2d 191, 10 Ohio Op. 3d 352, 383 N.E.2d 575, 1978 Ohio LEXIS 678 (Ohio 1978).

Moreover, only a "public utility" is subject to an award of treble damages. R.C. 4905.61. Even Complainant recognizes that Titan is not a public utility under R.C. 4905.03. As Complainant acknowledges, Titan is an "'electric services company' as that term is defined in R.C. 4928.01(A)(9), and a 'retail natural gas supplier' as defined R.C. 4929.01(N)." Complaint, paragraph 2. Competitive suppliers simply are not subject to the treble damage provision in R.C. 4905.61. See, also, R.C. 4928.16(D), which limits the applicability of treble damages to "electric utilities." Indeed, Complainants have not alleged a violation of any provision of the Revised Code chapters listed in R.C. 4905.61; rather, the Complainants only allege violations of provisions contained in R.C. Chapters 4928 and 4929.

Finally, under R.C. 4928.16(B) and 4929.24(B) the Commission only has authority to provide certain types of remedies such as ordering the rescission of a contract, restitution to customers, or forfeiture in complaints involving competitive electric or natural gas suppliers. The

Commission does not have the statutory authority to award damages to another competitive supplier. However, that is precisely what the Complainant requests the Commission to do, which would be unlawful.

It is elementary that the Commission lacks authority to award treble damages. Therefore, Complainant's claim for treble damages must be dismissed.

**D. Complainant's First and Second Claims should be dismissed because, absent the improper allegations of damage to Complainant's business and reputation, the claims merely restate Complainant's Fourth Claim.**

Complainant's Fourth Claim alleges that Titan violated O.A.C. 4901:1-21-05(C) and 4901:1-29-05(D) because its representatives claimed to represent "IDS Energy." Complainant's First and Second Claims allege a violation of the same provisions, claiming that Titan represented that it was soliciting customers on behalf of Complainant. In other words, the First and Second Claims, like the Fourth Claim, each alleges that Titan improperly represented that it was "soliciting on behalf of...[another] entity other than [Titan]." O.A.C. 4901:1-21-05(C) and 4901:1-29-05(D).

The only distinction between the claims is that the First and Second Claims also allege that Complainant suffered harm to its business and reputation. The allegation obviously is meant to support Complainant in its unlawful quest for treble damages, discussed above. Because IGS is not entitled to damages in this proceeding, its allegations of harm are irrelevant and render the First and Second Claims to be nothing more than restatements of the Fourth Claim. Accordingly, the First and Second Claims must be dismissed.

**E. Complainant's requests for equitable relief must be dismissed because it calls for relief beyond the Commission's power to provide.**

Just as the Commission should dismiss Complaint's claim for treble damages, above, Complainant's requests for injunctive and other, undefined equitable relief, should also be

dismissed. See, Complaint, Request for Relief, Paragraphs 4 & 5. These requests are beyond the scope of the Commission's jurisdiction.

The Commission is a creature of the Ohio General Assembly and may exercise no jurisdiction beyond that conferred by statute. *Penn Cent. Transp. Co. v. Public Utilities Com.*, 35 Ohio St. 2d 97, 99, 298 N.E.2d 587, 589, 1973 Ohio LEXIS 316, \*3, 64 Ohio Op. 2d 60. Notably, the General Assembly has granted the power of injunctive relief solely to the courts of Ohio. It has conferred no such right upon the Commission, and the Commission, in exercising such power, exceeds its statutory jurisdiction. *Id.* Accordingly, Complainant's request for injunctive relief must be dismissed. Further, Complainant provides no statutory support for its general request for a general equitable remedy. Likewise, the Complainant's Request for Relief in Paragraphs 4 & 5 of the Complaint must be dismissed.

### **III. CONCLUSION**

Complainant's overriding motivation in filing this Complaint is its unlawful quest for treble damages. Titan respectfully requests the PUCO to grant its Motion to Dismiss.

Respectfully submitted on behalf of,  
TITAN GAS LLC  
D/B/A TITAN GAS & POWER



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the forgoing Motion to Dismiss has been served upon the following parties listed below electronic mail, this 22<sup>nd</sup> day of December 2017.



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Teresa Orahod on behalf of Dylan F. Borchers