

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of	)	
	)	
Interstate Gas Supply, Inc.	)	
d/b/a 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, TX 77098	)	
	)	
Respondent.	)	

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**INTERSTATE GAS SUPPLY, INC.’s MEMORANDUM CONTRA TITAN GAS LLC’S  
MOTION TO DISMISS**

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**I. INTRODUCTION**

On December 1, 2017, Interstate Gas Supply, Inc. (“IGS or IGS Energy”) filed a Complaint with the Public Utilities Commission of Ohio (“PUCO” or “Commission”) against Titan Gas, LLC (“Titan”), alleging that it willfully violated Ohio law by engaging in sales and marketing practices that were intended to mislead and deceive commercial and residential electric and natural gas customers.

On December 22, 2017, Titan filed a motion asking the Commission to dismiss a portion of the Complaint with prejudice. Titan asserts that portions of IGS’ Complaint should be

permanently dismissed because it does not contain any factual allegations which demonstrate that Titan failed to comply with Ohio law, nor does it request the type of relief that the Commission has the authority to provide. For the reasons set forth below, Titan's arguments do not support dismissal of the Complaint; therefore, the Commission should deny Titan's Motion to Dismiss.

## II. ARGUMENT

### **A. Titan's Motion to Dismiss IGS' Third Claim Should Be Denied Because the Complaint Supports the Claim that Titan Violated OAC 4901-1-29-05(D)(8)(a), 4901-1-21-05(C)(8)(a), R.C. 4928.10 and R.C. 4929.22 with Facts Sufficient to Allow Recovery.**

Titan moves to dismiss IGS' Third Claim on a finding that the Complaint does not contain factual allegations sufficient demonstrate that Titan failed to comply with OAC 4901-1-29-05(D)(8)(a), 4901-1-21-05(C)(8)(a), R.C.4928.10 or R.C. 4929.22, which prohibit retail natural gas and electric suppliers from advertising or marketing a specific price advantage, savings, or guarantee that does not exist<sup>1</sup> Titan argues that IGS' Third Claim should be dismissed because it has made "no assertion that Titan made any claim of a specific price advantage, savings, or guarantee that does not exist." *Id.* Titan's claim is patently false.

Contrary to Titan's claim, IGS' Complaint contains specific factual allegations to support the claim that Titan violated several provisions of Ohio law and Commission rules. For example, Paragraph 21 of the Complaint, which Titan refers to in support of its Motion to Dismiss, specifically alleges that Titan offered a promise of a price advantage it could not support by informing IGS customers that their fixed rate plan expired and will rollover to a potentially more expensive variable rate plan *when Titan had absolutely no knowledge as to whether the customer was on a fixed rate plan or whether the plan was about to expire.* Paragraph 10 of the Complaint further reinforces IGS' argument that Titan violated Ohio law by offering a guarantee to renew

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<sup>1</sup> Titan Motion to Dismiss, at 2.

IGS' customers' fixed rate agreements even though Titan was without the authority to do so. Accordingly, IGS has presented sufficient facts in support of its Third Claim that Titan violated OAC 4901-1-29-05(D)(8)(a), 4901-1-21-05(C)(8)(a), R.C.4928.10 or R.C. 4929.22.

While reasonable minds may dispute the relationship between the facts recited in the Complaint and Ohio law, what cannot be disputed is the standard of review regarding a Motion to Dismiss. The Commission has previously held that “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.”<sup>2</sup> Before the Commission may dismiss a complaint, it must appear beyond a reasonable doubt that IGS can prove no set of facts warranting a recovery.<sup>3</sup>

Here, Titan seeks to dismiss IGS' Third Claim on a finding that it is factually deficient. What Titan seems to overlook is that IGS is not required to prove its case at the pleading stage. *Id.* at 50. The Court's reasoning when considering whether a Complaint should survive a Motion to Dismiss for failure to state a claim is simple: “[i]f the plaintiff were required to prove [its] case in the complaint, many valid claims would be dismissed because of the plaintiff's access to relevant evidence.” *Id.* What's more, the Court has held, and the Commission should find, that “as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss.” *Id.* IGS' Complaint sets forth a series of facts that warrant recovery under Ohio law. Therefore, Titan's Motion to Dismiss IGS' Third Claim should be denied.

**B. Titan's Motion to Dismiss IGS' Claim for Treble Damages Should Be Denied Because Titan has Violated Commission Orders and Directives, as a Public Utility, is Subject to an Award of Treble Damages Under R.C. 4905.61.**

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<sup>2</sup> *OCC v. Dominion Retail*, Case No. 09-257-GA-CSS, Entry (July 1, 2009) at 3, citing *In the Matter of the Complaint of XO, Inc. v. City of Upper Arlington*, Case No. 03-870-AU-PWC, Entry on Rehearing (July 1, 2003).

<sup>3</sup> *Sacksteder v. Senney*, 2d Dist. Montgomery No. 24993, 2012-Ohio-4452, at 49.

Titan moves to dismiss IGS' request for treble damages. In its Motion, Titan argues that it is not a "public utility" as defined under R.C. 4905.03 and is therefore not subject to the Commission's jurisdiction for an award of treble damages under R.C. 4905.61. Titan also argues that the Commission is without the authority to award treble damages to IGS, or any other competitive electric or natural gas suppliers, under the Ohio Revised Code.

Titan's claim that it is not a "public utility" and therefore not subject to an award of treble damages is incorrect. Titan's Motion concedes that it is an "electric services company" as that term is defined in R.C. 4928.01(A)(9).<sup>4</sup> As provided in R.C. 4928.01(A)(7), any "electric services company" is also an "electric light company"; therefore, Titan would also be an "electric light company" under the Revised Code. Finally, an "electric light company" is defined as a "public utility" pursuant to R.C. 4905.03(C), "when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state." Because Titan supplies electricity for light, heat, or power purposes, it is an electric "public utility" as defined in R.C. 4905.03(C) that is subject to an award of treble damages.

Titan's Motion also concedes that it is a "retail natural gas supplier" as defined in R.C. 4929.01(N). This Commission has previously held that competitive retail natural gas suppliers are "public utilities" and are therefore subject to the jurisdiction and supervision of the Commission.<sup>5</sup> Therefore, because Titan is also a natural gas "public utility" as defined in R.C. 4905.03 it is subject to an award of treble damages.

Titan also argues that treble damages are inappropriate because IGS has not alleged a violation of any provision of the Revised Code chapters listed in R.C. 4905.61 necessary for

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<sup>4</sup> Titan Motion to Dismiss, at 3.

<sup>5</sup> See, *In the Matter of the Application of Commerce Energy, Inc. d/b/a Just Energy for Certification as a Competitive Retail Natural Gas Provider*, Case No. 02-1828-GA-CRS, Entry (November 22, 2010) at 12.

recovery. Titan again misses the point. To recover under 4905.61, a party must aver that the act committed by the “public utility” must be “declared to be unlawful” or in violation of an “order of the public utilities commission.” The Complaint alleges that Titan committed several acts that the Commission has declared to be unlawful by Commission order. Treble damages are appropriate under R.C. 4905.61 because, as alleged in the complaint, Titan violated several provisions of Ohio law in its capacity as a “public utility.”

Finally, Titan asserts that the Commission does not have the authority to award treble damages to competitive electric or retail natural gas suppliers under the Ohio Revised Code.<sup>6</sup> Titan seems to misunderstand IGS’ intentions. The Court has plainly stated that a *prerequisite step* to an award of treble damages at the court of common pleas is a determination of fault by the Commission.<sup>7</sup> To be clear, IGS did not necessarily include its request for treble damages in the pleading to seek an award from the Commission directly. Rather, IGS’ request for relief was intended to serve as a placeholder and set the foundation for future proceedings in the event of a Commission determination of fault. Notwithstanding the foregoing, Titan’s Motion to Dismiss IGS’ claim for treble damages should be denied because Titan has violated Commission orders and, as a “public utility,” is subject to an award of treble damages under R.C. 4905.61.

**C. Titan’s Motion to Dismiss IGS’ First and Second Claims Should be Denied Because IGS Alleges Separate and Distinct Violations of the Law in Each Cause of Action.**

Titan alleges that IGS’ First and Second Claims are restatements of its Fourth Claim and should therefore be dismissed. In support, Titan argues that since IGS’ First, Second, and Fourth Claims allege violations of the same provisions of law, IGS inappropriately alleges an identical

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<sup>6</sup> Titan Motion to Dismiss, at 4.

<sup>7</sup> See, *Northridge Invest. Corp. v. Columbia Gas*, 49 Ohio App. 2d (1974) at 74.

claim in multiple causes of action. Titan's assertion misses the distinction between IGS' three claims, which relate to different provisions of the law and different factual assertions.

IGS' First and Second Claims refer generally to Titan's electric and natural gas sales and marketing practices that mislead and deceive customers into believing that (1) his or her electric or natural gas fixed rate plan has, or will, expire; and (2) the customer will save money off his or her current rate plan by enrolling with Titan. Titan makes both claims absent any knowledge as to whether either statement is true. Conversely, IGS' Fourth Claim specifically relates to Titan's electric and natural gas sales and marketing practices that mislead customers into believing that as "IDS Energy," Titan is, or is affiliated with, a market participant that it is not. Indeed, Titan has no affiliation with IGS Energy and the entity IDS Energy is not certified by the Commission. Therefore, the Complaint alleges several separate and distinct violations of the law, which are identified in separate causes of action. Accordingly, the Commission should deny Titan's Motion to Dismiss IGS' First and Second Claims.

**D. Titan's Motion to Dismiss IGS' Request for Injunctive and Other Equitable Relief Should be Denied Because the Commission has Jurisdiction to Hear Those Claims Which Are Within the Commission's Area of Expertise.**

Titan also moves to dismiss IGS' requests for injunctive and other equitable relief arguing that both requests are beyond the scope of the Commission's jurisdiction. In its memorandum, Titan asserts that the Commission may exercise no jurisdiction beyond that conferred by statute, and since the General Assembly has granted the power of injunctive relief exclusively to the courts of Ohio the Commission is without the authority to provide the remedies requested in the Complaint.<sup>8</sup> Here again, Titan inappropriately seeks to deprive the Commission of its lawful authority to issue a remedy in this proceeding.

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<sup>8</sup> Titan Motion to Dismiss, at 5.

Contrary to Titan's argument, the Supreme Court of Ohio has determined that claims for injunctive relief can be heard before the Commission when the claims associated with a request for injunctive relief relate to matters within the Commission's expertise, and the acts complained of constitute a practice normally authorized by the utility.<sup>9</sup> It is not the form of the action, but rather the substance of the allegations in the complaint that the Court examines to determine the proper jurisdiction. *Id.* Moreover, it is the Commission that is charged with regulating market behavior, and IGS' claims of misrepresentation in violation of OAC Chapters 4901:1-29-05, 4901:1-21-05 and Revised Code Chapters 4928 and 4929 require the kind of review and analysis that the Commission is best suited to provide. Here, Titan's normal business practices have repeatedly violated the *Commission's* consumer protection rules. Because the violations alleged in the Complaint are practices normally engaged in by a public utility, it is the Commission that is best suited to adjudicate the claims and should deny Titan's Motion to Dismiss IGS' request for injunctive relief.

With respect to Titan's Motion to Dismiss IGS' request for equitable relief, IGS emphasizes that the request is intended to serve as a placeholder reserving its right to receive any and all relief that the Commission may authorize. IGS' request is worded no differently than any other request for equitable relief that is found in every complaint in each and every jurisdiction across the United States. Accordingly, the Commission should similarly deny Titan's Motion to Dismiss IGS' request for equitable relief.

**E. The Commission Should Reject Titan's Request to Dismiss Portions of the Complaint with Prejudice Because IGS' Filed Its Complaint in Good Faith and Has Not Demonstrated Any Failure to Comply with a Court or Commission Order.**

Titan seeks to dismiss portions of IGS' Complaint with prejudice based on what appears

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<sup>9</sup> See, *DiFranco v. FirstEnergy Corp.*, 134 Ohio St.3d 144 (2012), at 152, citing *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824.

to be a failure to prosecute under Ohio Civ.R.41(B)(1). Pursuant to Ohio Civ.R.41(B)(1), a case may be permanently dismissed where the plaintiff fails to comply with the procedural rules or any court order. Dismissals with prejudice are subject to heightened scrutiny and are affirmed only when “the conduct of a party is so negligent, irresponsible, contumacious, or dilatory to provide substantial grounds for dismissal under [Ohio Civ.R.41(B)(1)].”<sup>10</sup> Here, Titan’s Motion does not provide any support for a claim that IGS flagrantly disregarded the court rules. IGS filed its Complaint in good faith and has not demonstrated any failure to comply with a court order that would otherwise justify dismissal on procedural grounds. Accordingly, if the Commission does find sufficient grounds to dismiss any portion of this Complaint, the dismissal should be granted *without* prejudice.

### **III. CONCLUSION**

Titan’s Motion to Dismiss is based on flawed arguments. More importantly, IGS’ Complaint provides reasonable grounds for a hearing pursuant to R.C. 4905.26. Based on the foregoing, the Commission should dismiss Titan’s Motion and set the Complaint for hearing.

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<sup>10</sup> See, *Quonset Hut v. Ford Moto Co.*, 80 Ohio St. 3d 46, at 48, citing *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St. 3d 621, 632.



Respectfully submitted,

Interstate Gas Supply, Inc.

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Memorandum Contra has been served upon the following persons, via electronic mail, this 8<sup>th</sup> day of January 2018.

**/s/ Michael A. Nugent**

Michael A. Nugent  
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**Case No(s). 17-2452-GE-CSS**

Summary: Memorandum electronically filed by Mr. Michael A Nugent on behalf of Interstate Gas Supply, Inc.