

Complaint meant to state, as opposed to what it actually states. IGS' Memo Contra also fails to establish any basis for Titan to be subject to claims for treble damages and equitable relief. Accordingly, Titan's Motion must be granted.

II. ARGUMENT

A. IGS' attempts to resuscitate its Third Claim through additional commentary in the Memo Contra, which, even if considered, merely restates the allegations already made in the Fourth Claim.

Titan's Motion showed that IGS' Third Claim must be dismissed. The Complaint simply does not contain the required factual allegations that Titan claimed a specific price advantage, savings, or guarantee that does not exist. Motion, p. 2. IGS, in its Memo Contra, counters that its Complaint makes sufficient factual assertions sufficient to support the Third Claim. In reality, however, IGS' Memo Contra seeks to supplement the Third Claim by adding commentary outside of the plain language of the Complaint. The plain language of the Complaint remains insufficient to support the Third Claim.

The Third Claim states that Titan violated OAC Rules 4901-1-29-05(D)(8)(a), 4901:1-21-05(C)(8)(a), RC 4928.10 and RC 4929.22. These provisions establish that a competitive electric or natural gas provider is prohibited from “[a]dvertising or marketing offers” that “[c]laim that a specific price advantage, savings, or guarantee exists if it does not.” See, e.g., 4901:1-21-05(C)(8)(a). A violation of these provisions requires an *offer of specific price advantage, savings, or guarantee that does not exist*. As a corollary, a complaint claiming the violation of these provisions must allege facts of an offer of a specific price advantage, savings, or guarantee that does not exist.

IGS argues that Paragraph 21 of the Complaint “contains specific factual allegations” to support the Third Claim. Memo Contra, p. 2. For reference, Paragraph 21, *in its entirety*, states the following:

Respondent's representation 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" even when such statement is not true, is a violation of Ohio Admin. Code 4901:1-29-05(D)(8)(a) and 4901:1-21-05(C)(8)(a), which prohibits claiming that a specific price advantage, savings, or guarantee exists if it does not.

IGS' Memo Contra states that Paragraph 21 "specifically alleges that Titan offered a promise of a price advantage." Memo Contra, p. 2. However, the plain language of Paragraph 21 clearly makes no allegation of such a promise. IGS' Memo Contra goes on to state that Paragraph 21 alleges that Titan could not support this (non-existent) promise because "Titan had absolutely no knowledge as to whether the customer was on a fixed rate plan or whether the plan was about to expire." *Id.* Again, the plain language of Paragraph 21 makes no such assertion. Paragraph 21 simply does not make the factual allegations necessary to support the Third Claim, despite IGS' attempts to rewrite it through the Memo Contra.

IGS' Memo Contra then seeks to rely on Paragraph 10 of the Complaint as making sufficient factual allegations to support the Third Claim. Paragraph 10 states:

As part of its sales pitch to IGS' customers, Respondent's representatives inform the customer that his or her "low fixed rate plan" has expired and will rollover to a variable rate plan "that can go very high [in] any given month" ***regardless of whether either statement is true.*** The representative then offers that "since [the customer] is a valued customer," Respondent would be willing to "renew" the low fixed rate so long as the customer contacts Respondent "immediately" to discuss his or her account in more detail.

Emphasis added.

Similar to Paragraph 21, Paragraph 10 does not allege facts necessary to sustain the Third Claim. Under a plain reading of Paragraph 10, IGS alleges that Titan's representative offered to continue the customer's low fixed rate. IGS has made no allegation that the representative could not honor that offer and, certainly, the offer to continue the same price is not a "promise of a

price advantage” as IGS asserts. While IGS is not required to prove its facts in pleadings, it is required to allege facts that would entitle it to relief, and to place Titan on notice of IGS’ grievances so that Titan can defend the complaint. In this regard, IGS’ Complaint is woefully inadequate to state reasonable grounds under R.C. 4905.26.

Indeed, IGS concedes that the intent of Paragraph 10 has little to do with the Complaint’s Third Count, but actually supports the Fourth Count of the Complaint, which alleges that Titan misrepresented itself as “IDS.” See Memo Contra, P. 3, in which IGS argues that Paragraph 10 “reinforces IGS’ argument that Titan violated Ohio law by offering a guarantee to *renew* IGS’ customers’ fixed rate agreements even though Titan was *without the authority* to do so.” Emphasis added. Simply put, the alleged wrongdoing by Titan in Paragraph 10 does not contain the elements necessary to support the violations alleged in the Third Claim.

B. Titan is not a public utility and is not subject to treble damages.

In response to Titan’s motion to dismiss IGS’ claims for treble damages, IGS argues that Titan is subject to treble damages because Titan is a “public utility.” Memo Contra, p. 4. The conclusion that Titan is a public utility is a gross misinterpretation of the law.¹

IGS argues that Titan is a public utility because it is a “[competitive] retail natural gas supplier” (“CRNGS”). IGS bases its argument on inadvertent boilerplate “findings” in a Commission order that did not address the merits of whether a CRNGS is a “public utility.” Thus, IGS misrepresents that “holding” of that case.² To be sure, this argument contradicts R.C. 4929.01(G), which expressly excludes a CRNGS from the definition of a public utility:

¹ The conclusion is also baffling, given that IGS, itself a competitive retail electric supplier and a competitive retail natural gas supplier, must also be considered a “public utility” under its own reasoning. If IGS now asserts that it is a “public utility” under R.C. 4905.03, that is a noteworthy shift in its long held regulatory posture...and one that subjects IGS to the Commission’s rate regulation under R.C. Chapter 4905.

² *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.

"Natural gas company" means a natural gas company, as defined in section 4905.03 of the Revised Code, that is a public utility as defined in section 4905.02 of the Revised Code and *excludes a retail natural gas supplier.*

Emphasis added.

IGS also argues that Titan is an “electric public utility” through a tortuous construction of R.C. 4928.01 and 4905.03. IGS argues that, because Titan is an “electric services company” under R.C. 4928.01(A)(9), it also is an “electric light company” under R.C. 4928.01(7). It then reasons that because an “electric light company” in R.C. Chapter 4928.01 has the same definition as contained in R.C. 4905.03, Titan is a public utility subject to R.C. Chapter 4905, including the treble damage provisions of R.C. 4905.61. Memo Contra, p. 4. However, IGS ignores the most fundamental concept of statutory construction: the definitions contained in R.C. Chapters 4928.01 and 4905.03 are reserved for exclusive use in each respective Chapter. Each statute explicitly is prefaced with the language “[a]s used in this chapter.” Although “electric service companies” such as Titan and IGS are considered “electric light companies” for purposes of R.C. Chapter 4928, they cannot by definition be considered “electric light companies” for purposes of R.C. Chapter 4905, nor “public utilities” under R.C. 4905.02

IGS’ analysis ignores the rest of the statutory framework that supports that electric services companies are exempt from the vast majority of provisions of R.C. Chapter 4905, including R.C. 4905.61. Chief among this framework is R.C. 4928.05(A)(1), which expressly excludes from R.C. Chapter 4905 public utility regulation electric service companies like Titan. Specifically, this provision states that “a competitive retail electric service provided by . . . an electric services company. . . shall not be subject to supervision and regulation. . . by the public utilities commission under Chapters 4901 to 4909. . . .” As a result, Titan is excluded from

public utility regulation under R.C. Chapter 4905, and therefore cannot be subject to treble damages under R.C. 4905.61.

C. **The only distinction between IGS' First, Second, and Fourth Claims is an unlawful attempt to recover treble damages.**

IGS' First and Second Claims should be dismissed because they merely restate the Fourth Claim. Motion, p. 4. In response, IGS argues that Titan "misses the distinction between [the] three claims." Memo Contra, p. 6. However, the only distinction between the First and Second Claims and the Fourth Claim is an improper allegation of harm to IGS to support the recovery of treble damages.

The First and Second Claims allege Titan violated of O.A.C. Rules 4901:1-21-05(C) and 4901:1-29-05(D), respectively. These claims allege that Titan misrepresented that it was soliciting customers on behalf of IGS. Substantively, the Fourth Claim alleges the same thing, that Titan "was engaging in . . . solicitation that will lead the customer to believe that [Titan] is soliciting on behalf . . . of [another] entity other than [Titan]. The Fourth Claim also cites violation of the exact same Revised Code and Administrative Code provisions already cited to as the basis of the First and Second Claims (OAC Rules 4901:1-29-05(D)(5) and 4901:1-21-05(C), R.C. 4928.10 and R.C. 4929.22).

The *only* substantive difference in the allegations made in the First and Second Claim is that "[IGS] has suffered harm to its business and reputation." However, as discussed in Titan's Motion, this allegation is meant to support IGS' attempt to recover treble damages. Motion, p. 4. Without this allegation of harm, the First and Second Claims are no different than the Fourth Claim and should be dismissed.

IGS, in its Memo Contra, again tries to supplement deficient pleadings with additional commentary. In attempting to distinguish the First and Second Claims from the Fourth Claim, IGS argues that:

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.

Memo Contra, p. 6.

The problem for IGS, however, is that the First and Second Claims do not state this. IGS cannot add words to the Complaint through its Memo Contra. Rather, the actual language of the Complaint demonstrates that the First and Second Claims do not differ from the Fourth Claim and should be dismissed.

D. The Commission's available remedies in this case do not include injunctive and other equitable relief.

The remedies that the Commission may order in this proceeding are defined by statute. As a creature of statute, the Commission has no authority to act beyond its statutory powers. *Disc. Cellular, Inc. v. PUC*, 112 Ohio St. 3d 360, 373 (2007). Here, R.C. 4928.16(C) defines the remedies available to the Commission in instances of violations of R.C. Chapter 4928. For instance, the Commission may order the rescission of a contract or restitution to customers. R.C. 4928.16(B)(1). The Commission may also order:

[A]ny remedy or forfeiture provided under sections 4905.54 to 4905.60 and 4905.64 of the Revised Code upon a finding. . .that the electric services company. . .has violated or failed to comply, regarding a competitive retail electric service for which it is subject to certification, with any provision of sections 4928.01 to 4928.10 of the Revised Code or any rule or order adopted or issued under those sections.

R.C. 4928.16(B)(3).

IGS makes the spurious claim that “the Supreme Court of Ohio has determined that claims for injunctive relief can be heard before the Commission when claims associated with a request for injunctive relief relate to matters within the Commission’s expertise. . . .” Memo Contra, p. 7. In support of this assertion, IGS cites *DiFranco v. FirstEnergy Corp.*, 134 Ohio St.3d 144, 152 (2012). However, *DiFranco* does not support IGS’ claim. In the *DiFranco* case, the Ohio Supreme Court reversed a court of appeals decision that the trial court, not the Commission, had jurisdiction over a fraud claim involving an “all-electric” discount rate for electrical service that was discontinued under an order issued by the Commission. *DiFranco* at 153. The Court found that the fraud claim was, in essence, a claim that the utility was overcharging for electric service, and a claim challenging the rates charged for utility service fall exclusively in the Commission’s jurisdiction. *Id.* The *DiFranco* case simply does not stand for the proposition that the Commission has broad authority to grant injunctive and other equitable relief.

III. CONCLUSION

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



Dylan F. Borchers
Dane Stinson
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: 614-227-2300
Facsimile: 614-227-2390
E-mail: dborchers@bricker.com
dstinson@bricker.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the forgoing Reply has been served upon the following parties listed below electronic mail, this 16th day of January 2018.



Dylan F. Borchers

Michael A. Nugent
Joseph Olikier
Interstate Gas Supply, Inc.
IGS Energy
Regulatory Counsel
6100 Emerald Parkway
Dublin, Ohio 43016
mnugent@igsenergy.com
joliker@igsenergy.com

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

1/16/2018 3:24:59 PM

in

Case No(s). 17-2452-GE-CSS

Summary: Reply of Titan Gas LLC d/b/a Titan Gas & Power to Interstate Gas Supply, Inc.'s Memorandum Contra titan Gas LLC's Motion to Dismiss electronically filed by Teresa Orahod on behalf of Dylan F. Borchers