

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of))	
Interstate Gas Supply, Inc. d/b/a IGS))	
Energy,))	
)	
Complainant,))	
)	
v.))	Case No. 19-362-GE-CSS
)	
Santanna Natural Gas Corporation d/b/a))	
Santanna Energy Services,))	
)	
Respondent.))	

**REPLY TO INTERSTATE GAS SUPPLY INC.'S MEMORANUDM CONTRA
MOTION TO DISMISS BY
SANTANNA NATURAL GAS CORPORATION**

I. INTRODUCTION

The Public Utilities Commission of Ohio (Commission) should not permit Interstate Gas Supply, Inc. (IGS) to prosecute a complaint against a competitor in order to bully that competitor from the market based on general, non-specific allegations and IGS' rewriting of Ohio statutes and Commission rules. In IGS' Memorandum Contra¹ the Motion to Dismiss² filed by Santanna Natural Gas Corporation (Santanna), IGS continues to rely on generalized allegations that do not support its legal claims. IGS also misstates Ohio law, the Commission's rules, and the arguments contained in Santanna's Motion to Dismiss. Close examination of the arguments contained in the Memorandum Contra

¹ Memorandum Contra Santanna Natural Gas Corporation's Motion to Dismiss (March 8, 2019) (Memorandum Contra).

² Motion to Dismiss (February 21, 2019) (Motion to Dismiss).

reveals that IGS' legal contentions lack merit and do not properly respond to the claims in Santanna's Motion to Dismiss. Accordingly, IGS' unsubstantiated claims against Santanna should be dismissed as a matter of law.

Pursuant to Ohio Adm. Code 4901-1-12(B)(2), Santanna submits this Reply to IGS' Memorandum Contra Santanna's Motion to Dismiss. In doing so, Santanna reasserts its request that the Commission find that IGS has not stated reasonable grounds for the Complaint, dismiss the Complaint and claims for relief contained therein, and assess sanctions against IGS for making cookie-cutter, baseless allegations, without any facts or evidence to substantiate its claims, against its competitors in an attempt to harm the reputations of its competitors, to thwart competitors' sales efforts in the market, and/or to eliminate the competitors from the market.

II. STANDARD OF REVIEW

As Santanna stated in its Motion to Dismiss, the Commission must distinguish between factual allegations and unsupported legal conclusions. Factual allegations are accepted as true, but unsupported legal conclusions are not. The Supreme Court of Ohio has determined that "[u]nsupported conclusions of a complaint are not considered admitted and are not sufficient to withstand a motion to dismiss."³ While the Commission is bound to accept factual allegations (not conclusions) as true and construe them in favor of the complaining party for purposes of considering a motion to dismiss,⁴ the Commission must also be able to determine that sufficient factual allegations contained in the four corners of

³ See, e.g., *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 324, 544 N.E.2d 639 (1989) (internal citations omitted).

⁴ See *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1989) (internal citations omitted).

the Complaint exist in order to validate the elements of the claims asserted by IGS.⁵ Thus, the Commission's ruling on this motion to dismiss turns on the question of whether IGS has made factual allegations that, if true, would support its legal conclusions. Here, IGS has not done so and the Complaint should accordingly be dismissed with prejudice.

III. ARGUMENT

A. IGS Is Required to Satisfy a Pleading Standard in Order for Its Complaint to Survive a Motion to Dismiss.

IGS incorrectly states that it is “not required to satisfy an evidentiary standard to survive a motion to dismiss.”⁶ In the sentence immediately following that incorrect assertion, however, IGS acknowledges that there is a pleading standard governing complaints before the Commission.⁷ Specifically, Ohio Adm. Code 4901-9-01(B) requires that a written complaint contain a statement which clearly explains the basis of the complaint and a statement of the relief sought. As described below, although IGS may have partially complied with that standard, its deficiencies are fatal to the Complaint.

To be clear, Santanna is not arguing that IGS needs to “prove its case” in the Complaint. Rather Santanna is asking the Commission to hold IGS to the standard delineated in Ohio Adm. Code 4901-9-01. Specifically, Santanna is contending that the facts pled in the Complaint must, if proven to be true, be sufficient to support the violations of Ohio law and Commission rules alleged in the Complaint. Below, as it did in the Motion to Dismiss, Santanna describes how the elements of the specific claims IGS asserts would not be proven, even if every factual allegation asserted in the Complaint were determined

⁵ See *Jim's Steak House, Inc. v. City of Cleveland*, 81 Ohio St.3d 18, 19, 688 N.E.2d 506 (1998).

⁶ Memorandum Contra at 3.

⁷ Id.

to be true at hearing. Dismissing the Complaint with prejudice for IGS' failure of the allegations to amount to actionable claims is not requiring IGS to prove its case in pleadings, it is requiring IGS to meet the Commission's own pleading standards. Ohio Adm. Code 4901-9-01.

B. IGS' Legal Claims Are Not Supported by Sufficient Factual Allegations.

In a complaint case before the Commission, the burden of proof is on the complainant.⁸ This means that the complainant—in this case, IGS—must produce evidence to support each claim contained in the Complaint.⁹ The Commission has ruled that complainants must prove each element of their complaint.¹⁰ Given IGS' burden in this case, Santanna structured its Motion to Dismiss to address the specific elements of each claim that IGS asserted under Ohio law and Commission rules.¹¹ Santanna detailed how IGS failed in its obligation to assert facts that, if true, would support each claim asserted against Santanna.¹² Rather than address each claim individually in its Memorandum Contra, however, IGS only offers a blanket assertion that the facts alleged in the Complaint support all of the claims asserted without tying specific facts to specific claims. Below, Santanna recounts how the facts alleged in the Complaint do not support the claims asserted by IGS.

⁸ *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 190, 214 N.E.2d 666 (1966)

⁹ *Id.*

¹⁰ See *In the Matter of the Complaint of Louvenia Y. Moye v. Columbia Gas of Ohio*, Case No. 04-332-GA-CSS, Opinion and Order at 2-4 (December 15, 2004).

¹¹ See Motion to Dismiss at 8-14.

¹² *Id.*

i. IGS Failed to State a Claim Under R.C. 4928.10 and Ohio Adm. Code 4901:1-21-05(C).

In order to prove a violation of Ohio Adm. Code 4901:1-21-05(C), IGS must show that Santanna, as a Competitive Retail Electric Supplier (CRES), engaged in marketing, solicitation, or sales acts, or practices which are unfair, misleading, deceptive, or unconscionable in the marketing, solicitation, or sale of a CRES.¹³ Notably, IGS does not allege that Santanna committed any of the practices specifically prohibited by Ohio Adm. Code 4901:1-21-05(C),¹⁴ but rather seems to suggest that Santanna generally unfairly, misleadingly, deceptively, and unconscionably marketed its services in violation of Ohio Adm. Code 4901:1-21-05(C).¹⁵

Initially, as noted previously,¹⁶ IGS does not allege that Santanna either expressly or impliedly represented that it was marketing electric services on behalf of IGS. IGS does not allege that Santanna solicited electric customers by stating that it was doing so on behalf of IGS, so there is no allegation of an expressed representation that Santanna was soliciting customers by claiming to be working for IGS. As Santanna stated in its Motion to Dismiss, IGS' claim rests on the single allegation that Santanna representatives claimed to be calling customers on behalf of "IDS Energy," not IGS.¹⁷ IGS does not contest that notion in its Memorandum Contra. Further, despite Santanna's assertion that IGS does not make factual allegations sufficient to create a nexus between Santanna and the individuals allegedly claiming to be account managers for IDS Energy, IGS does not draw the Commission's

¹³ See Ohio Adm. Code 4901:1-21-05(C).

¹⁴ See Ohio Adm. Code 4901:1-21-05(C)(1)-(11).

¹⁵ See Complaint at ¶¶ 14-16.

¹⁶ Motion to Dismiss at 9.

¹⁷ Id.

attention to such factual allegations in its Memorandum Contra to create the necessary nexus between Santanna and the individuals. This is because IGS is unable to allege a sufficient nexus between Santanna and the representatives allegedly calling customers and claiming to be employees of IDS Energy. Even assuming that IGS' claim that Santanna is connected to the telemarketing wrongdoers is correct (which it is not), IGS does not make any factual allegations to create a nexus between IDS Energy and IGS.

As Santanna explained in its Motion to Dismiss, the facts alleged in the Complaint do not support a determination that customers were unfairly or unconscionably misled or deceived.¹⁸ IGS does not offer a response to the assertion that not a single customer accepted an offer for products or services from Santanna under a belief that he or she was accepting an offer from IGS. Accepting IGS' allegations as true, it is apparent that every customer at issue in this Complaint is aware of what a product or service entails and which entity is offering that product or service. As such, the requisite deception and/or misleading required to prove a violation of Ohio Adm. Code 4901:1-21-05 has not been alleged and the first claim of IGS' Complaint should be dismissed.

ii. IGS Failed to State a Claim Under R.C. 4929.22 or Ohio Adm. Code 4901:1-29-05(D).

In order for IGS' second claim to survive Santanna's Motion to Dismiss, it was required under Ohio Adm. Code 4901:1-29-05 to make allegations that, if accepted as true, would support a claim that Santanna engaged in marketing, solicitation, sales acts, or practices which were unfair, misleading, deceptive, or unconscionable in the marketing, solicitation, or sale of a competitive retail natural gas service.¹⁹ This rule essentially

¹⁸ Id. at 8-10.

¹⁹ See Ohio Adm. Code 4901:1-29-05(D).

requires the same elements as Ohio Adm. Code 4901:1-21-05(C), except that it relates to gas suppliers rather than electric ones.

As Santanna noted in the Motion to Dismiss, IGS attempts to use the same purported allegations that it alleged supported its claim under Ohio Adm. Code 4901:1-21-05(C).²⁰ IGS does not contest that these allegations form the basis of its claims, and similar to the faults in the first claim, IGS does not allege sufficient facts that, if true, would lead to a determination that Santanna engaged in or is continuing to engage in unfair or unconscionable deceptive practices in marketing competitive retail natural gas service. Under IGS' own admission, it appears that any customer that would switch from IGS to Santanna is aware at the time they switch that they are signing up for Santanna's products and/or services and are not under any sort of misapprehension that they have engaged with IGS. Thus, IGS' second claim should be dismissed.

iii. IGS Failed to State a Claim Under R.C. 4928.10, R.C. 4929.22, Ohio Adm. Code 4901:1-29-05(D)(8)(a), or Ohio Adm. Code 4901:1-21-05(C)(8)(a).

IGS' third claim relies on provisions contained within the same rules that form the basis for its first two claims. Here, IGS alleges that Santanna used advertising or marketing that claimed that a specific price advantage, savings, or guarantee existed when it did not.²¹ As Santanna explained in the Motion to Dismiss,²² IGS does not allege that Santanna or its representatives claimed that a price advantage, savings, or guarantee existed when none does. In its Memorandum Contra, IGS does not draw the Commission's attention to any

²⁰ Motion to Dismiss at 11.

²¹ See Ohio Adm. Code 4901:1-21-05(C)(8)(a) and Ohio Adm. Code 4901:1-29-05(D)(8)(a).

²² Motion to Dismiss at 12.

allegation that would be sufficient to support a claim under these provisions if accepted as true. Without such an allegation, IGS' third claim should be dismissed.

iv. IGS Failed to State a Claim Under R.C. 4928.10, R.C. 4929.22, Ohio Adm. Code 4901:1-29-05(D)(5), or Ohio Adm. Code 4901:1-21-05(C)(10).

As was the case with the three claims discussed above, IGS' fourth claim is not supported by allegations that, when accepted as true, substantiate the claim. In its Motion to Dismiss, Santanna explained how IGS has not asserted allegations that connect Santanna to the individuals making calls to customers claiming to be representing IDS Energy.²³ IGS relies on the listing of two specific telephone numbers as the basis for connecting Santanna and/or its representatives to these alleged calls.²⁴ Santanna has already explained that it does not have authorized agents or representatives that use the phone numbers listed to telemarket to customers.²⁵ Further, IGS has not even asserted allegations that the alleged customer contacted was actually misled in any way and was enrolled based upon that misrepresentation. As explained in the Motion to Dismiss, these purported allegations are insufficient to support a claim that Santanna or its representatives engaged in a solicitation that lead the customer to believe that Santanna or its agent is soliciting on behalf of or is an agent of any entity other than Santanna, let alone IDS Energy.²⁶

v. IGS Failed to State a Claim Under R.C. 4929.22 or Ohio Adm. Code 4901:1-29-06(E)(1).

Finally, IGS failed to state a claim under Ohio Adm. Code 4901:1-29-06(E)(1). The rule requires a natural gas supplier to make a "date- and time-stamped recording of the

²³ Motion to Dismiss at 13.

²⁴ Memorandum Contra at 5-6.

²⁵ Motion to Dismiss at 13.

²⁶ See Ohio Adm. Code 4901:1-21-05(C)(10) and Ohio Adm. Code 4901:1-29-05(D)(5).

sales portion of a call, *if the customer is enrolled*, and before the completion of the enrollment process, a date- and time-stamped audio recording by an independent third-party verifier that verifies, as a minimum,” certain specified information.²⁷

First, IGS has not asserted allegations that the alleged customer contacted was actually contacted via phone. Secondly, by claiming that Santanna violated this provision, IGS is asserting that customers were, in fact, enrolled as a result of these practices.²⁸ But the fact remains that when it listed all of its allegations, IGS did not once allege that a single customer enrolled with Santanna’s gas supply services or products or that the customer contacted was actually misled to enroll with Santanna. Without the allegation that the customer was enrolled, Santanna, by definition, could not be found to have violated this provision.

C. IGS’ Requests for Treble Damages and Injunctive Relief Are Beyond the Commission’s Jurisdiction.

IGS next attempts to rebut Santanna’s arguments regarding improper claims for relief asserted by IGS.²⁹ In separate sections, IGS addresses its claim for treble damages and its claim for injunctive relief. Neither argument is persuasive.

i. The Commission Does Not Have Authority to Award Treble Damages.

IGS admits that the Commission cannot award the relief of treble damages as requested in IGS’ Complaint.³⁰ But, instead, asserts that Santanna “misunderstands IGS’

²⁷ Ohio Adm. Code 4901:1-29-06(E)(1) (emphasis added).

²⁸ Memorandum Contra at 6.

²⁹ Id. at 6-10.

³⁰ See id. at 7, Complaint at Request for Relief, ¶ 3.

intentions” when it reads the following statement in IGS’ Complaint as a request for treble damages:

WHEREFORE, Complainant asks the Commission for the following relief:

...

3. Treble damages as provided in R.C. 4905.61

...³¹

It is difficult to read that request for relief, filed with the Commission by IGS, as anything other than a request for the Commission to award IGS treble damages. Yet, IGS incredibly claims that when it asked the Commission for treble damages, it was not actually asking the Commission to award treble damages. In any event, IGS now states that it does not intend to seek treble damages from the Commission directly and only includes the request “to serve as a placeholder and set the foundation for future proceedings in the event of a Commission determination of fault.”³² If this is truly the purpose of the request, then the Commission should dismiss it. IGS filed this Complaint with the Commission. IGS asks the Commission to adjudicate this Complaint. IGS acknowledges that even if the Commission finds that the Complaint has merit, it cannot award treble damages. The Commission should not entertain a “placeholder” request for relief or require Santanna to spend time and resources defending against a request for relief that appears in the Complaint but the Commission has no jurisdiction to award.

The issue of treble damages can be addressed by a court of competent jurisdiction in the event that the Commission issues an order that would allow for such damages to be

³¹ See Complaint at Request for Relief.

³² Memorandum Contra at 7.

awarded by said court. As that order has not been issued, and all parties agree that this proceeding cannot result in an award of treble damages by the Commission, IGS' request that the Commission award treble damages should be dismissed.

ii. The Commission Does Not Have Authority to Issue Injunctive Relief.

In its Complaint, IGS asks the Commission to “preliminarily and permanently enjoin[] Respondent from engaging in the deceptive and unfair practices alleged herein.”³³ As Santanna explained in its Motion to Dismiss, the Commission is a creature of statute and may exercise no jurisdiction beyond that conferred by statute.³⁴ Santanna further noted that the Supreme Court of Ohio has held that the General Assembly has granted the power of injunctive relief solely to the courts and has conferred no such right upon the Commission, and if the Commission exercises such power, it exceeds its statutory jurisdiction.³⁵

In response to this argument, IGS asserts that “the Supreme Court of Ohio has determined that claims for injunctive relief can be heard before the Commission when the claims relate to matters within the Commission’s expertise, and the acts complained of constitute a practice normally authorized by the utility.”³⁶ As support for that claim, IGS cites the Supreme Court of Ohio case *DiFranco v. FirstEnergy Corp.*, 134 Ohio St.3d 144 (2012), 2012-Ohio-5445, 980 N.E.2d 996.³⁷ This citation is deceptive at best. Nowhere

³³ Complaint at Request for Relief, ¶ 4.

³⁴ See Motion to Dismiss at 18; *Penn Cent. Transp. Co. v. Public Utilities Comm.*, 35 Ohio St. 2d 97, 100-01, 298 N.E.2d 587, 1973 Ohio LEXIS 316, *3

³⁵ *Penn Cent. Transp. Co. v. Public Utilities Comm.*, 35 Ohio St. 2d 97, 100-01, 298 N.E.2d 587, 1973 Ohio LEXIS 316, *3

³⁶ Memorandum Contra at 10.

³⁷ *Id.*

in *DiFranco* did the Court address the issue of injunctive relief being heard before the Commission.³⁸ The complainant in that case had requested injunctive relief, as one of the four causes of action against a public utility, along with declaratory judgment, breach of contract, and fraud.³⁹ Importantly, the complainant had requested that relief before a state trial court, not the Commission.⁴⁰ The Court, however, was only considering whether one cause of action (fraud) was within the jurisdiction of the Commission or a state trial court.⁴¹ Thus, this precedent does not stand for the proposition that the Commission has the power to issue injunctive relief despite the General Assembly having not granted it that power via statute. Accordingly, the Commission should dismiss IGS' third request for relief.

D. IGS Fails to Sufficiently Rebut Santanna's Arguments Concerning Ohio Law as It Relates to the Actions of Third-Party Contractors.

Next, IGS attempts to address Santanna's arguments⁴² related to third-party contractors and agency law.⁴³ In making its argument that the individuals allegedly committing the practices complained of in the Complaint are agents of Santanna, IGS overlooks the key distinction between agents and third-party contractors by assuming that the individuals (if any relationship can be proven at all) are in fact agents. IGS does not dispute that Santanna does not control the mode or manner in which their third-party contractors perform their contracted tasks. Instead, it claims, without support, that the individuals allegedly committing unlawful acts in this case are agents of Santanna and cites

³⁸ See *DiFranco v. FirstEnergy Corp.*, 134 Ohio St.3d 144 (2012), 2012-Ohio-5445, 980 N.E.2d 996.

³⁹ *Id.* at ¶ 2.

⁴⁰ *Id.*

⁴¹ *Id.* at ¶ 18.

⁴² See Motion to Dismiss at 14-16.

⁴³ Memorandum Contra at 10-12.

cases related to the *respondeat superior* doctrine that do not apply to third-party contractors.⁴⁴ Despite IGS' arguments regarding this doctrine, the fact remains that IGS has not combatted Santanna's claim that Santanna uses third-party contractors, not agents, to conduct its telemarketing.

Moreover, IGS' policy argument that adopting Santanna's position would lead to an absurd result⁴⁵ is unavailing. It is not within the Commission's purview to make policy regarding agency law or third-party contractors. Those decisions are left to the legislators, as the Commission can only exercise that power which is conferred upon it by statute.⁴⁶ If the legislature has written and the courts interpreted agency law and the law regarding third-party contractors in one way, it is not the Commission's place to disrupt that interpretation on policy grounds.

E. Santanna's Motion for Sanctions Is Proper and Supported by Ohio Law.

Finally, IGS asserts that Santanna's request for the Commission to issue sanctions against IGS for using the Commission's complaint process as a means to eliminate its competition is procedurally improper.⁴⁷ This assertion is not supported by Ohio law or the Commission's rules, and IGS does not attempt to cite either in making its argument.

As an initial matter, IGS does not deny that its Complaint against Santanna is essentially a carbon copy of a complaint that it previously filed against a different supplier. IGS appears to agree that this Complaint and its Complaint against Titan Gas LLC⁴⁸ are

⁴⁴ Id.

⁴⁵ Id. at 11-12.

⁴⁶ *Penn Cent. Transp. Co. v. Public Utilities Comm.*, 35 Ohio St. 2d 97, 100-01, 298 N.E.2d 587, 1973 Ohio LEXIS 316, *3

⁴⁷ Memorandum Contra at 12.

⁴⁸ *IGS v. Titan Gas*, 17-2452-GE-CSS, Complaint (December 1, 2017).

strikingly similar.⁴⁹ In defending against the claim that the Complaint is a frivolous attempt to force a competitor from the market, IGS relies on its prior assertions that this is a properly pled Complaint that alleges facts sufficient to support its claims. As discussed above and in the Motion to Dismiss, however, the Complaint is not properly pled and should be dismissed for failure to state a claim for which relief can be granted.

Regarding IGS' assertion that Santanna's contention that the Commission should issue sanctions against IGS is procedurally improper, IGS is incorrect. Santanna has asked the Commission to dismiss IGS' Complaint through a Motion pleading, so asking for sanctions for bringing the frivolous Complaint is appropriate in that Motion pleading. The request for sanctions was filed in a Motion pleading. Nonetheless, to the extent that IGS believes that a specific motion is necessary, Santanna hereby moves the Commission to assess sanctions against IGS for filing a form, cookie-cutter Complaint in an attempt to eliminate competition from the market and cites the arguments contained in this Reply and the Motion to Dismiss and Memorandum in Support as a basis for issuing those sanctions.⁵⁰

IV. CONCLUSION

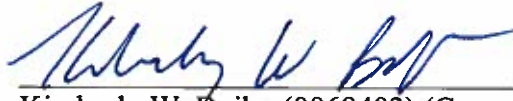
IGS' Memorandum Contra does not adequately address the arguments for dismissal contained within Santanna's Motion to Dismiss. As articulated herein and in the Motion to Dismiss, IGS has not alleged facts that, if accepted as true, would support the five claims it makes under Ohio law and the Commission's rules. Moreover, IGS' claims for injunctive relief and treble damages are not supported by Ohio law and should be dismissed. Finally, IGS has failed to address the reality that the individuals allegedly

⁴⁹ Memorandum Contra at 12.

⁵⁰ See Motion to Dismiss at 18-19.

committing the acts complained of are not, in fact, authorized agents of Santanna to provide telemarketing services.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Kimberly W. Bojko', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on March 15, 2019.


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