

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of
Interstate Gas Supply, Inc. for
Certification as a Retail Natural Gas
Supplier)
)
)
)

Case No. 02-1683-GA-CRS

PUCO

MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
MOTION TO COMPEL

I. INTRODUCTION

On August 20, 2010 the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Intervene and Motion for Evidentiary Hearing in the above captioned docket. On that same date OCC served IGS with discovery requests seeking, among other things, confidential and proprietary information relating to IGS' licensed use of the Columbia Retail Energy ("CRE") service mark. On September 9, 2010 IGS filed a Motion for Protective Order seeking an Order that discovery may not be had by OCC until it is determined whether OCC's intervention is proper and until it is determined whether a hearing will be held in this proceeding. IGS' Motion for Protective Order seeks to protect IGS from annoyance, embarrassment, oppression, or undue burden or expense caused by OCC's discovery requests. To date, the Commission has not made a determination on IGS' Motion for Protective Order. Nonetheless, OCC filed a motion to compel on September 17, 2010.

As a preliminary matter, IGS cannot, and should not be required to respond to OCC's discovery requests until a determination is made on IGS' Motion for Protective Order. By filing a Motion for Protective Order, IGS has in effect requested that the Commission make a determination as to whether IGS should be required to respond to OCC's discovery requests. By filing a Motion to Compel, OCC has done nothing more than make that same request. The only practical effect of OCC's Motion to Compel is that it has allowed OCC to take yet another opportunity to address an issue that is already under consideration by the Commission.

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While IGS notes that OCC's Motion to Compel is largely a redundant filing, IGS must respond to some of the issues raised in the Motion to Compel.¹ It is IGS' position that discovery should not be had by OCC unless and until OCC's Motion to Intervene and Motion for Evidentiary Hearing is granted. Further, even assuming OCC is entitled to intervene in IGS' certification docket, OCC's discovery requests are not relevant to the proceeding. OCC must not be rewarded for its inappropriate filings by receiving full discovery on the topic of its choosing. Accordingly, for the reasons set forth herein, in addition to the reasons set forth in IGS' Motion for Protective Order, the Commission should deny OCC's Motion to Compel.

II. ARGUMENT

OCC raises a number of issues in its Motion to Compel, many of which were raised in OCC's Memorandum Contra IGS' Motion for Protective Order. Without rehashing its Motion for Protective Order, IGS will simply state that allowing OCC to intervene and conduct discovery in a proceeding where it has not, and cannot, establish its right to intervene would allow OCC to conduct unlimited fishing expeditions in all dockets, regardless of whether OCC's intervention is appropriate. Moreover, even assuming OCC's intervention is appropriate, it does not mean that the Commission will hold a hearing on IGS' notice filing. IGS should not be required to respond to discovery until the preliminary questions regarding OCC's intervention and hearing requests are answered.

Delaying discovery in this proceeding will not prejudice OCC because OCC will have an opportunity to conduct discovery *if* the Commission denies IGS' Motion and later enters an Order approving OCC's motions. However, allowing discovery in this proceeding will prejudice IGS because IGS cannot "take back" the discovery once provided. While OCC may have a right to serve discovery on IGS, IGS has a right to seek a protective order under O.A.C. 4901-1-24(A) to protect IGS from annoyance, embarrassment, oppression, or undue burden or expense. With

¹ Accordingly, IGS incorporates its Motion for Protective Order and Memorandum in Support into this Memorandum Contra OCC's Motion to Compel.

that said, IGS will take this opportunity to address certain specific issues that it did not have an opportunity to address in its Motion for Protective Order.

A. OCC's Discovery Requests are not Relevant or Reasonably Likely to Lead to the Discovery of Admissible Evidence in IGS' Certification Docket.

OCC's presumed right to discovery is based on the fundamentally flawed assumption that IGS' certification docket is the appropriate place to address marketing issues. However, as Ohio Revised Code 4929.20 clearly delineates, a certification docket is for the purpose of determining whether a CRNGS provider has the managerial, financial and technical ability to provide natural gas service to customers. It is unprecedented, and without legal basis, to hold a hearing in a certification docket to determine whether a CRNGS provider should be able to use a particular trade name. If OCC has issues with IGS' marketing practices, there are other procedural mechanisms to address such concerns, but a certification docket is not one of them.

Since a certification docket is not the appropriate venue to prospectively discuss IGS' marketing efforts, OCC's discovery requests are neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence in **this** docket. Ohio Administrative Code ("O.A.C.") 4901-1-16(B) provides "any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the **subject matter of the proceeding**. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." However, OCC's discovery requests do not meet the relevancy requirement set forth in this rule. OCC's discovery requests are focused solely on marketing issues and have absolutely no relevance to IGS' managerial, technical or financial ability to provide customers with service.

Putting aside the oppression, undue burden and expense OCC's discovery requests will cause IGS (which IGS has demonstrated in its Motion for Protective Order), OCC has no right to conduct discovery that does not satisfy the standards of relevancy set forth in O.A.C. 4901-1-16.

While OCC may desire to have discovery on any topic of its choosing, the relevancy standard in O.A.C. 4901-1-16 was designed to prevent parties from engaging in discovery which is not related to the issues in the proceeding in which the discovery is conducted. Allowing OCC to conduct discovery would allow a party to intervene in any proceeding, select a topic it feels is relevant to that proceeding, and conduct full discovery on that topic.² However, the scope and subject matter of a proceeding is the Commission's determination, not the OCC's. Accordingly, OCC should not be allowed to have discovery in this proceeding until the Commission has made a determination on IGS' and OCC's outstanding motions.

B. Past Supreme Court Cases do not Grant OCC an Unlimited Right to Intervene or an Unlimited Right to Discovery.

OCC has cited the Ohio Supreme Court Decision *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, to conclude that OCC is entitled to discovery in this proceeding. This is similar to the Supreme Court decision *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, routinely cited by OCC to conclude it is entitled to intervene in a proceeding. Just because the Supreme Court has in the past determined that OCC is entitled to discovery or intervention in a proceeding, does not mean OCC is entitled to intervene or conduct discovery in all proceedings. In fact, there are numerous occasions when OCC has been denied intervention and discovery by the Commission.³ Whether a party is entitled to intervene or conduct discovery must be determined on a case by case basis, and in this case, OCC has no right to either.

C. Assuming OCC's Arguments to be Legitimate, the Time Frame for Discovery Has Passed.

² For instance OCC would be able to file an intervention in a utility's long term forecast proceeding, request a hearing on the utility's rate of return, and then demand the right to conduct discovery regarding everything about that utility's rate of return, even though OCC has no right to a hearing on that topic.

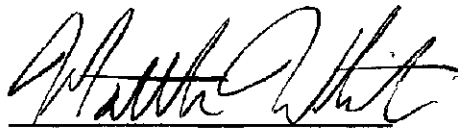
³ See PUCO Case No. 05-1421-GA-PIP, Entry (Feb, 1, 2006) at Finding 7.

Ohio Revised Code 4929.20 specifically states that a certification or renewal shall be deemed approved if it is not acted upon by the Commission within 30 days of filing. More than 30 days have passed since IGS' notice filing. Assuming, *arguendo*, that IGS' notice of its use of the CRE service mark rises to the level of implicating the renewal certification rules, then all of the rules would apply, not just the rules OCC chooses. Accordingly, even if the Commission accepted OCC's faulty contentions, by operation of law, the Commission has accepted IGS' notice filing, since 30 days have past and no action has been taken by the Commission. Any attempt at discovery after the thirty day deadline is moot, because the outcome of the proceeding has already been determined.

III. CONCLUSION

For all of the foregoing reasons, IGS respectfully requests that the Commission deny OCC's Motion to Compel.

Respectfully submitted,



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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Memorandum Contra the Office of the Ohio Consumers' Counsel's Motion to Compel* was served upon the following persons listed below by electronic and regular U.S. mail, postage prepaid, this 4th day of October, 2010.

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