

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In The Matter of the Complaint of)
The Office of the Ohio Consumers')
Counsel, et al.,)
Complainants,)
v.)
Interstate Gas Supply, Inc.)
Respondent.)
In the Matter of the Application of)
Interstate Gas Supply, Inc. for)
Certification as a Retail Natural)
Gas Supplier)

Case No. 10-2395-GA-CSS

Case No. 02-1683-GA-CRS

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MEMORANDUM CONTRA JOINT MOTION TO CONSOLIDATE CASES

I. INTRODUCTION

On August 6, 2010, in accordance with OAC 4901-27-10, IGS filed a notice in its certification docket that IGS had licensed the CRE service mark and filed the appropriate documents regarding use of the service mark with the Ohio Secretary of State's Office. Since that filing multiple entities have attempted to intervene in IGS' certification docket and requested that the Commission hold a hearing to determine whether IGS may use the CRE service mark to market to customers. After each filing, IGS opposed the requested interventions and requests for hearing arguing, *inter alia*, that any issues with IGS' use of the CRE service mark should be raised in a Complaint proceeding. On October 21, 2010, OCC, Stand Energy, Border Energy, NOPEC, and OFBF (all of whom are attempting to intervene in IGS' certification docket) filed a formal

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complaint at the Commission, Case No. 10-2395-GA-CSS ("Complaint"), alleging that IGS should not be allowed to market under the CRE service mark.¹ On November 3, 2010, OCC, Stand Energy, Border Energy, NOPEC and the OFBF ("Joint Movants") filed a Motion to Consolidate Case No. 02-1683-GA-CRS and Case No. 10-2395-GA-CSS into a single proceeding.

II. ARGUMENT

A. The Motion to Consolidate Should be Denied.

Since the first motion to intervene was filed in IGS' certificate docket, IGS has argued that the Joint Movants' and the other Objecting Parties' filings were inappropriate and the Objecting Parties' concerns should be addressed in a Complaint proceeding. By filing the Complaint, Joint Movants have implicitly acknowledged that IGS was correct to the extent that IGS' certification docket is not the proper proceeding to address the Objecting Parties' concerns. Accordingly, the Commission should not consolidate filings from the 02-1683-GA-CRS certificate case into the 10-2395-GA-CSS complaint case since these filings were inappropriate from the beginning and should be denied.

Moreover, even assuming the Objecting Parties' filings in IGS' certificate docket were proper, it is difficult to see how the Commission could consolidate the two dockets.² Contrary to what the Joint Movants argue, the facts in Case No. 02-1683-GA-

¹ Those parties that have filed an intervention in IGS' certification docket include OCC, Stand Energy, Border Energy, NOPEC, OFBF, RESA and Delta Energy. Delta Energy and RESA did not join the Complaint. All parties attempting to intervene in IGS' certification docket hereinafter will be referred to as "Objecting Parties."

² For instance, would IGS' entire certification docket, beginning with IGS' 2002 certified retail natural gas supplier certificate application, be inserted into the Complaint proceeding? Would the basis of the Commission's determination be whether IGS has the managerial, financial and technical ability to serve customers or whether the Joint Movants have met their burden of proof in a complaint case? These questions illustrate the point that IGS' certification docket and the 10-2395-GA-CSS complaint case are distinctively separate and mutually exclusive proceedings.

CRS are not “virtually identical” to the facts in Case No. 10-2395-GA-CSS.³ Case No. 02-1683-GA-CRS is not a “name change case” as the Joint Movants claim, but rather it is a certification docket which is not related to the 10-2395-GA-CSS Complaint proceeding. The two proceedings have different procedures, are governed by different rules and have different evidentiary standards and accordingly it is impossible to reconcile the two.

Finally, there is no practical purpose in consolidating IGS’ certificate docket into the 10-2395-GA-CSS Complaint proceeding. The Joint Movants have filed their complaint, and have initiated a procedure that will allow them to receive the recourse they request if they are able to satisfy their burden of proof and evidentiary standard in that docket. Adding previously filed documents that were inappropriately filed in Case No. 02-1683-GA-CRS will add nothing to the Joint Movants’ claims and will only serve to clutter and confuse the record in the 10-2395-GA-CSS Complaint proceeding.

The simplest (and procedurally proper) way to move forward is to deny all of the outstanding motions that were inappropriately filed in IGS’ certification docket and require the Joint Movants to raise their purported concerns in the Complaint proceeding as they should have from the beginning.⁴ The Joint Movants will have an opportunity to conduct appropriate discovery in accordance with complaint procedure. If parties other than the Joint Movants wish to participate in the 10-2395-GA-CSS proceeding, they may intervene in accordance with complaint procedure. In such an action, IGS retains all of its rights and arguments, legal and factual, and can more fully and appropriately defend against the attacks of the Objecting Parties. However, the Commission should not include additional filings in Case No. 10-2395-GA-CSS that do not comport with the

³ Motion to Consolidate at 3.

⁴ IGS is simply noting that the Joint Movants’ objections are valid, but instead, any objection of the Joint Movants should have been brought in a Complaint proceeding.

Commission's complaint rules.

B. The Commission Should Deny All Other Outstanding Motions.

Throughout, IGS has argued that all of the motions filed by the Objecting Parties in IGS' certification docket are inappropriate and should be denied. IGS will not restate the reasons the Objecting Parties' motions should be denied, as the record has been exhausted on this matter. However, in light of the recently filed Complaint against IGS, the Commission has further reasons to deny the outstanding motions filed by the Objecting Parties in IGS' certification docket.⁵

For example, ordering a hearing in IGS' certification docket, while simultaneously moving forward with a Complaint proceeding, would give the Objecting Parties two opportunities to attack IGS' use of the CRE service mark. This type of "double jeopardy" is unfair to IGS and should not be permitted by the Commission. Moreover, moving forward with a hearing in IGS' certification docket will waste the resources of all parties and the Commission. A Complaint proceeding, where the complainants have the burden of proof, is the appropriate venue to address any legitimate issues raised by the Objecting Parties rather than the ad-hoc filings that are currently pending in IGS' certification docket.⁶

The Commission should also deny RESA's Motion to Intervene and RESA's Request for Rulemaking and Preliminary Comments. Considering the multiple filings

⁵ IGS asks that the Commission deny the Motions to Intervene and Motions for Evidentiary Hearing filed by the Office of the Ohio Consumers' Counsel ("OCC"), Border Energy, Inc. ("Border Energy"), Northeast Ohio Public Energy Counsel ("NOPEC"), Stand Energy Corporation ("Stand Energy"), Delta Energy, LLC ("Delta Energy") and the Ohio Farm Bureau Federation ("OFBF"); the Retail Energy Supply Association's ("RESA") Motion to Intervene and Request for Rulemaking and Preliminary Comments; Motion to Compel Discovery filed by NOPEC and OCC; and Motion to Order IGS to Cease and Desist From Using the Trade Name Columbia Retail Energy filed by OCC, NOPEC, Border, Stand Energy, and Delta Energy.

⁶ See, *In the Matter of the Application of Duke Energy Retail Services, LLC for Certification as a Competitive Retail Electric Service Provider in Ohio*, Case No. 04-1323-EL-CRS, Entry (December 3, 2008) at Finding 8 (finding that Duke Energy Retail should not be subject to a "collateral attack" in its retail electric supplier certification docket, and the appropriate venue to address OCC's concerns is a Complaint proceeding).

already made by the Objecting Parties in the proceeding, all parties have had ample opportunity to comment on IGS' use of the CRE service mark and the Commission is aware of each party's position on the matter. Further, Ohio law requires the review of all state agency rules every five years.⁷ RESA is free to submit comments and proposed changes to the Commission's rules during the next review. In the meantime, IGS has committed to going beyond what is required in the Commission's rules for the use of the utility service mark by affiliate marketers and therefore an additional rulemaking is unnecessary.⁸ If RESA has any other objections to IGS' use of the CRE service mark, RESA can file an intervention in the Complaint proceeding initiated by the other Objecting Parties.

Finally, the Commission should deny all other outstanding Motions filed by the Objecting Parties in IGS' certification docket, including NOPEC's and OCC's Motion to Compel, and the Motion to Cease and Desist filed by the OCC, NOPEC, Border Energy, Stand Energy and Delta Energy. In the Complaint proceeding, the Objecting Parties will have the opportunity to conduct discovery in accordance with the Commission's rules. Further, as IGS has already demonstrated in its Memorandum Contra Motion to Cease and Desist, there is no legal basis for the Commission to order IGS to cease and desist marketing under the CRE service mark without notice and opportunity for hearing. Even assuming there was a legal basis to order IGS to cease and desist, those issues may be addressed in the Complaint proceeding.

In light of the recently filed Complaint, the Commission should simply deny all outstanding motions filed by the Objecting Parties in IGS' certification docket, rather than consolidate the inappropriate filings into the Complaint proceeding.

⁷ See Ohio Revised Code 119.032.

⁸ IGS' Memorandum Contra RESA's and Stand Energy's Motion to Intervene (Sept. 10, 2010) at 2-3.

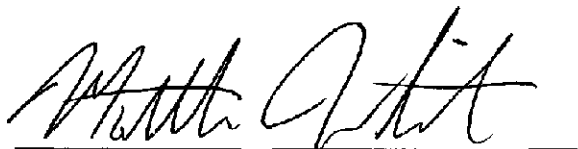
C. The Commission Should Clarify That IGS' Material Change Filing Has Been Deemed Approved.

R.C. 4929.20(A) states in part "certification or certification renewal shall be deemed approved thirty days after the filing of an application with the commission unless the commission suspends that approval for good cause shown." On this issue there can be no debate. Once the thirty (30) days have passed without action by the Commission, an applicant's certification along with all elements of that certification are deemed approved as a matter of law. Accordingly, the Commission should clarify that IGS' material change filing has been deemed approved in accordance with R.C. 4929.20(A).

III. CONCLUSION

For the reasons set forth above, the Commission should deny Joint Movants' Motion to Consolidate. Rather than consolidate the Complaint proceeding with IGS' certification docket the Commission should simply deny all of the motions filed by the Objecting Parties in IGS' certification docket and require the Objecting Parties to raise and prove their alleged claims in the now-pending Complaint proceeding. Further, the Commission should order that IGS' material change filing has been deemed approved in accordance with R.C. 4929.20(A).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Bentine", is written over a horizontal line.

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Memorandum Contra Joint Motion to Consolidate Cases* was served upon the following persons listed below by electronic mail and regular U.S. Mail, postage prepaid, this 8th day of November, 2010.

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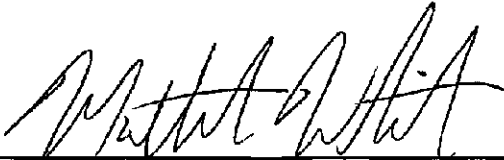
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