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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of	)	
	)	
The Office of the Ohio Consumers' Counsel 10 West Broad Street, Suite 1800 Columbus, Ohio 43215	)	Case No. 10-2395-GA-CSS
	)	
Stand Energy Corporation 1077 Celestial Street, Suite 110 Cincinnati, Ohio 45202	)	
	)	
Border Energy, Incorporated 9787 Fairway Drive Powell, Ohio 43065	)	
	)	
Northeast Ohio Public Energy Council 31320 Solon Road, suite 20 Solon, Ohio 44139	)	
	)	
Ohio Farm Bureau Federation 280 North High Street Columbus, Ohio 43218-2383	)	
	)	
Complainants,	)	
	)	
v.	)	
	)	
Interstate Gas Supply d/b/a Columbia Retail Energy 5020 Bradenton Avenue Dublin, Ohio 43017	)	
	)	
Respondent.	)	

MEMORANDUM CONTRA INTERSTATE GAS SUPPLY, INC.'S PARTIAL MOTION TO DIMSISS
BY
OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
STAND ENERGY CORPORATION,
BORDER ENERGY, INC.,
NORTHEAST OHIO PUBLIC ENERGY COUNCIL, AND
OHIO FARM BUREAU FEDERATION

I. INTRODUCTION

On October 21, 2010, the Office of the Ohio Consumers' Counsel ("OCC") Stand Energy Corporation ("Stand"), Border Energy, Inc. ("Border") Northeast Ohio Public Energy Council ("NOPEC"), and the Ohio Farm Bureau Federation ("OFBF") collectively "Joint Movants" filed a Complaint pursuant to R.C. Sections 4905.26 and 4929.24, against Interstate Gas supply, Inc. ("IGS"). The Joint Movants argued that IGS had engaged and continues to engage in marketing, solicitation, sales acts, or practices which are unfair, misleading, deceptive, or unconscionable.

The Complaint was not the first effort by Joint Movants, both individually and separately, to have the Public Utilities Commission of Ohio ("PUCO" or "the Commission") act on the allegations that IGS had engaged in marketing, solicitation, sales acts or practices which are unfair, misleading, deceptive, or unconscionable. Despite having taken numerous actions to protest, and attempt to create a public record regarding IGS" marketing practices, Joint Movants determined that IGS' actions were sufficiently egregious as to warrant the filing of a formal Complaint.[1]

IGS responded to the Complaint by filing its Answer and Affirmative Defense on November 12, 2010. IGS also filed a Partial Motion to Dismiss. Joint Movants hereby submit this Memorandum Contra the Partial Motion to Dismiss.

[1] Rather than repeat the numerous individual and joint actions that OCC, NOPEC, various Marketers and the OFBF took in the IGS Certificate Case, Case No. 02-1683-GA-CRS, the Joint Movants incorporate those pleadings and documents by reference.

II. ARGUMENT

As an initial matter, Joint Movants note that the IGS Partial Motion to Dismiss asks that the PUCO dismiss only Claims One, Five, Nine, Ten, Eleven and Twelve.[2] Thus, at a minimum, Claims Two, Three, Four, Six, Seven, and Eight of the Complaint should go forward and the PUCO should set a procedural schedule for an evidentiary hearing. With regard to the remaining Claims, Joint Movants will address them individually below. Moreover, Joint Movants aver that IGS has failed to demonstrate that there are no reasonable grounds for Complaint if all of the factual allegations contained in the Complaint are true,[3] thus the PUCO should set this matter for hearing.

A. Claims One And Five State Claims Upon Which Relief Can Be Granted.

The Joint Movants' First and Fifth Claims turn on the question of whether IGS is required to receive a separate certificate authorizing it to use the Columbia Gas trade name and Columbia logo in its advertising materials. IGS claims that that it is common practice for Marketer's to use a trade name that has not been independently authorized in that Marketer's certification docket or specifically noted on the Supplier Certificate.[4] Moreover, IGS cited a number of cases to support its claim. However, IGS' argument and each and every one of those cases can be distinguished from the current case on two grounds -- grounds which are vital to this case. First, none of the cases cited by IGS

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[2] IGS Partial Motion to Dismiss, (November 12, 2010) at 1.

[3] *Lucas County Commissioners v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344 at head note 1; *Cleveland Electric Illuminating Company v. Pub. Util. Comm* (1996), 76 Ohio St.3d 521 at head note 2; *In the Matter of the Complaint of Toledo Premium Yogurt, Inc., dba Freshens Yogurt v. Toledo Edison Company, New Towne Mall Company, New Towne Developers, and M.S. Management Associates, Inc, dba Simon Management Company*, Case No. 91-1528-EL-CSS, Entry (September 17, 1992), at 2.

[4] IGS Partial Motion to Dismiss (November 12, 2010) at 5.

involves a non-affiliate using the name of a Local Distribution Company ("LDC"). Rather, this situation is one of first impression before the PUCO.

Second, there was no opposition to any of the name changes proposed in the cases cited to by IGS. Clearly that is not true in this case, as numerous parties (including other Marketers) have voiced their concern and opposition to the proposed IGS name change.

In addition to these factors, IGS argues that its notice of material change was automatically approved because the PUCO did not act within thirty days.[5] That is incorrect. In support of its position, IGS relies upon the fact that R.C. 4929.20 states that a certification or renewal certification shall be deemed approved if not acted upon within 30 days of filing.[6] The problem with the IGS argument is that the notice of material change is not a certification or a certification renewal case, so the statute is inapplicable. Ohio Adm. Code 4901:1-27-06 (Application Approval or Denial) and Ohio Adm. Code 4901:1-27-09 (Certification Renewal) both include a provision that establishes a 30-day automatic approval process. However, Ohio Adm. Code 4901-1-29-10 (Material Changes in Business) **does not** include the same 30-day automatic approval provision. It is this rule that is applicable to IGS' name change and this rule does not have auto-approval. For all of these reasons, IGS has failed to demonstrate that there are not reasonable grounds for Claims One and Five and the PUCO should find that Joint Movants have established reasonable grounds for the Complaint.

[5] IGS Partial Motion to Dismiss, (November 12, 2010) at 6.

[6] IGS Memo Contra OCC Motion to Compel Discovery (October 14, 2020) at 5.

B. Claim Nine States A Claim Upon Which Relief Can Be Granted.

IGS argues that Claim Nine should be dismissed because the PUCO has authorized affiliate marketers to use a utility's trade name for over ten years.[7] That may be true for affiliate Marketers; however, this case does not involve an affiliate marketer. IGS is not an affiliate -- at least not yet.

IGS also argues that the PUCO has already authorized it to use the Columbia trade name as long as the proper disclaimers are employed.[8] However, contrary to the IGS claim, there has been no explicit PUCO authorization -- a factor that IGS acknowledged when it noted: "**Implicit** in the **Commission's statement** is that IGS is authorized to market under the CRE service mark, as long as IGS uses the proper disclosures."[9] IGS' claims and interpretation aside, the fact remains that the PUCO has not issued an **order** that authorized IGS to use of the Columbia trade name and Columbia logo.

Finally, with regard to the IGS' argument that the use of the Columbia name is not in and of itself confusing to customers, OCC notes that the Complaint included six concrete examples of Ohio residential consumers expressing concern over the confusion caused by the IGS use of the Columbia trade name and Columbia logo.[10] IGS may ignore those complaints, but the PUCO cannot. For example, complaints regarding the door to door solicitation practices of Just Energy recently resulted in the PUCO suspending the Just Energy certification renewal process. Customer complaints were

[7] IGS Partial Motion to Dismiss, (November 12, 2010) at 6.

[8] IGS Partial Motion to Dismiss, (November 12, 2010) at 8.

[9] IGS Partial Motion to Dismiss, (November 12, 2010) at 8 (emphasis added).

[10] Complaint (October 21, 2010) at Attachment 5

sufficient to warrant PUCO action with regard to Just Energy, and customer complaints constitute a reasonable basis for the Complaint to go forward here.

C. Claim Ten States A Claim Upon Which Relief Can Be Granted.

In Claim Ten, the Joint Movants argued that the Licensing Agreement between IGS and Nisource does not promote non-discriminatory access to retail Choice because Columbia -- through its parent company Nisource -- has a financial incentive in the success that IGS may have in signing up residential customers for the Columbia Choice Program. Nisource's (and Columbia's) financial incentive may include IGS signing up residential customers to IGS Choice offers over other non-affiliated Marketers and over the Standard Service Offer.[11] Instead of responding to that Claim, IGS incorrectly characterizes Claim Ten as being one of customer confusion.[12] IGS' failure to properly address the merits of Claim Ten combined with the very real financial incentives that Columbia now has to favor IGS over other competing Marketers is reasonable grounds for the PUCO to go forward with the Complaint.

D. Claim Eleven States A Claim Upon Which Relief Can Be Granted.

IGS argues that Claim Eleven is not ripe for review.[13] This argument is wrong because it ignores the fact that the Licensing Agreement between IGS and Nisource provides Nisource with revenues and provides Columbia with an incentive to favor IGS over other Marketer during the course of any discussions with Columbia regarding its exit of the merchant function. Inasmuch as the Columbia Stakeholder group is currently

[11] Complaint at 17-18.

[12] IGS Partial Motion to Dismiss, (November 12, 2010) at 7.

[13] IGS Partial Motion to Dismiss, (November 12, 2010) at 8.

engaged in such discussions, as mandated by the 2007 GCR Case Stipulation,[14] any advantage that IGS has as a result of its business agreement with Nisource is ripe for review now and constitutes reasonable grounds for complaint.

E. Claim Twelve States A Claim Upon Which Relief Can Be Granted.

Claim Twelve argues that IGS' limited use of the Columbia trade name and Columbia logo to only the Columbia service territory in Ohio constitutes recognition that the value of the Columbia name is limited to areas where customers are already familiar with the Columbia name and logo, thus leading to customer confusion. IGS' decision to pick and choose where to use the Columbia trade name and Columbia logo is real, as is the customer confusion caused by those decisions. The PUCO should find reasonable grounds for complaint.

III. CONCLUSION

For all of the reasons stated above, Joint Movants respectfully request that the PUCO deny IGS' Motion to dismiss and find that the Complaint stated reasonable grounds, and set this matter for an evidentiary hearing.

[14] *In the Matter of the Regulation of the Purchased Gas Adjustment Clauses Contained Within the Rate Schedules of Columbia Gas of Ohio, Inc. and Related Matters,* Case Nos. 04-221-GA-GCR, et al. Joint Stipulation and Recommendation (December 28, 2007) at 24-25.

Respectfully submitted,

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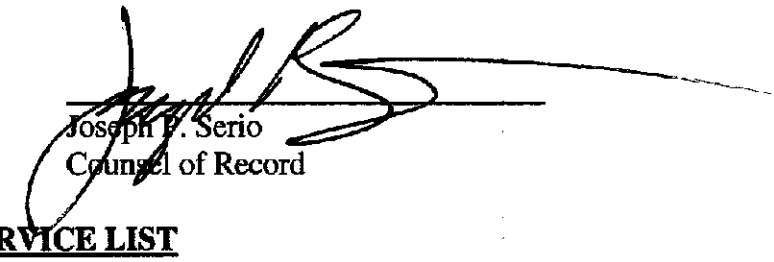
CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing *Memorandum Contra IGS Motion to Dismiss* was provided to the persons listed below via first class U.S. Mail, postage prepaid, this 30th day of November, 2010.



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