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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
APPLICATION FOR REHEARING

I. INTRODUCTION

On August 20, 2010, the Office of The Ohio Consumers' Counsel ("OCC") filed a Motion to Intervene and a Motion for Evidentiary Hearing in the above referenced proceeding, requesting the Commission hold a hearing on IGS' use of the Columbia Retail Energy ("CRE") trade name. On September 9, 2010, IGS filed a Memorandum Contra opposing OCC's motions. On November 10, 2010 the Commission issued an Entry ("November 10th Entry") denying OCC's motions along with multiple other outstanding motions filed in IGS' certification docket. In that Entry, the Commission directed the organizations that attempted to intervene in IGS' certification docket to address their concerns regarding IGS' use of the CRE trade name in a complaint proceeding already filed by OCC and others in Case No. 10-2395-GA-CSS ("Complaint Proceeding").¹ On December 10, 2010, OCC filed an Application for Rehearing requesting that the Commission reconsider the November 10th Entry.

OCC is neither a party to the above captioned proceeding nor is OCC requesting rehearing on a final order of the Commission. Accordingly, OCC does not have the standing that is required by the Ohio Revised Code to file an Application for Rehearing

¹ November 10th Entry at Finding 7.

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of the November 10th Entry. Moreover, in the Application for Rehearing, OCC has not demonstrated that the November 10th Entry is either unlawful or unreasonable. Rather, OCC's Application for Rehearing is merely an attempt to relitigate issues that were inappropriately raised in IGS' certification docket and that are currently being addressed in the Complaint Proceeding. In the November 10th Entry, the Commission correctly denied OCC's motions to intervene and request for a hearing in IGS' certification docket. OCC's Application for Rehearing must be denied as well.

II. ARGUMENT

A. OCC Does Not Have Standing to Request Rehearing of the November 10th Entry.

Ohio Revised Code ("R.C.") 4903.10 states that:

"After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Notwithstanding the preceding paragraph . . . any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any *final order* upon the journal of the commission."

(emphasis added). OCC is nether a party to this proceeding, nor is OCC requesting rehearing of a final order by the Commission. For these reasons, OCC does not have standing to file an Application for Rehearing.

OCC inappropriately filed an intervention in IGS' certification docket, which the Commission correctly denied in the November 10th Entry. In that Entry, the Commission confirmed OCC is not a party to Case No. 02-1683-GA-CRS. As a non-party, OCC cannot file an Application for Rehearing for any order of the Commission pursuant to the first paragraph of RC 4903.10. Rather, OCC must file an application for rehearing pursuant to the second paragraph in RC 4903.10 as "an affected person, firm,

or corporation.” As an affected person, firm or corporation, OCC can only apply for rehearing of *final orders* issued by the Commission.

The November 10th Entry is not a final order of the Commission and therefore RC 4903.10 does not authorize OCC to file an application for rehearing. In fact, the November 10th Entry is not even an order made by the Commission as it is titled an “Entry.”² However, even assuming, *arguendo*, the November 10th Entry is an order, it certainly is not a final order.

In *Ohio Domestic Violence Network v. Pub. Util. Comm.*, the Ohio Supreme Court held that a “final order” is one “affecting a substantial right.”³ The Ohio Supreme Court has also concluded that there is not a final order when a substantial right is contingent on, or potentially modified by, another decision of the Commission.⁴ The November 10th Entry did not affect a substantial right of OCC. The purpose of the IGS certification docket is to determine if IGS has the managerial, technical and financial ability to provide natural gas service to customers.⁵ OCC has raised issues that are not relevant to the purpose of IGS’ certification docket. Accordingly, the November 10th Entry has not affected any rights of OCC, much less a substantial right.

Further, the issues raised in the Complaint Proceeding are virtually identical to the issues the OCC is asking the Commission to reconsider in the Application for Rehearing. Thus, the purported right of OCC to receive a determination on IGS’ use of

² OAC 4901-1-15 requires that those wishing to appeal a procedural Entry file an application for an interlocutory appeal within five days of the issuance of the Entry. OCC did not file an application for interlocutory appeal within the five day time frame; therefore OCC has waived its right to appeal the November 10th Entry.

³ *Ohio Domestic Violence Network v. Pub. Util. Comm.* (1992) 65 Ohio St.3d 438 at 439.

⁴ *Hall China Co. v. Public Utilities Commission* (1977) 50 Ohio St.2d 206 at 209-210.

⁵ See RC 4929.20. See also, November 10th Entry at Finding 7. In coming to its conclusion to deny OCC’s Motions, the Commission wrote that it “is mindful of the purpose of the certification docket and the limited consideration triggered by the filing of a notice of material change.”

the CRE trade name is subject to the Commission's determination in the Complaint Proceeding and is not appealable at this time. Moreover, from a practical standpoint, there is no need to reconsider issues raised by OCC that are already being considered, and subject to a final determination, in another case.

B. The Commission is Not Required to Issue a Written Opinion.

Even assuming OCC does have standing to file an application for rehearing (which it does not), OCC has not established that the November 10th Entry is either unreasonable or unlawful.⁶ In its first grounds for rehearing, OCC alleges that the Commission erred by not issuing a written Opinion pursuant to RC 4903.09.⁷ The Commission is not required to issue a written Opinion when denying the motions filed in IGS' certification docket and therefore the Commission did not err in this regard.

RC 4903.09 provides:

"In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."

IGS' certification docket is not a contested case. There was no hearing and no testimony filed as contemplated in RC 4903.09; therefore RC 4903.09 does not apply to the November 10th Entry.

As already explained, the purpose of IGS' certification docket is to determine whether IGS is awarded a CRNGS certificate. OCC did not contest the issuance of IGS' renewal certificate in accordance with proper Commission procedure. Rather, OCC

⁶ OAC 4901-1-35(A) provides "An application for rehearing must set forth the specific ground or grounds upon which the applicant considers the commission order to be unreasonable or unlawful."

⁷ Application for Rehearing at 4.

filed motions requesting intervention and a hearing in IGS' certification docket with respect to IGS' material change filing. The OCC *attempted* to turn IGS' certification docket into a contested case with its motions; however, the Commission recognized it was inappropriate to hold a hearing in IGS' certification docket and correctly denied OCC' motions in the November 10th Entry.

Notwithstanding the fact that the Commission is not required to issue a written Opinion, the November 10th Entry does set forth sufficient grounds to deny OCC's motions. R.C. 4903.09 requires that in a written Opinion "the commission's order must show, in sufficient detail, the facts in the record on which the order is based and the reasoning followed by the commission in reaching its conclusion."⁸ The only issues in question in OCC's motions were whether OCC's intervention should be granted and whether a hearing should be held in IGS' certification docket. In the November 10th Entry, the Commission set forth the fact that the Complaint Proceeding had already been initiated by OCC and other parties. Further, the Commission correctly reasoned that the Complaint Proceeding was the appropriate mechanism to address OCC's concerns.⁹ Accordingly, even if a written Opinion was required to deny OCC's motions, the November 10th Entry meets the requirements of RC 4903.09.

C. The Commission is Not Required to Make a Determination Regarding IGS' Notice of Material Change Filing.

In its second grounds for rehearing, OCC alleges that the Commission erred because it did not make a determination as to whether IGS' notice of material change was approved.¹⁰ The Commission is not required to make a determination on IGS'

⁸ *Allen v. Public Utilities Com'n of Ohio* (1988) 40 Ohio St.3d 184, 187.

⁹ November 10th Entry at Paragraph 7.

¹⁰ *Id.* at 5.

notice of material change filing. Therefore, OCC has not established grounds for rehearing on this issue.

As IGS has explained numerous times in the briefs filed in this proceeding, IGS' notice of material change filing is a notice filing, and no additional approval is required by the Commission. The Commission has never issued a determination approving or denying a notice of material change filing. In its Application for Rehearing, OCC has pointed to no statute, Commission rule or caselaw that requires the Commission to make such a determination.

The only issue in dispute in the motions filed by OCC was whether OCC was entitled to intervene and whether the Commission should hold a hearing in IGS' certification docket. Simply because OCC inappropriately raised other issues in its motions does not mean the Commission must make a determination on these issues. In the November 10th Entry, the Commission correctly concluded that OCC was not entitled to intervene and hold a hearing in IGS' certification docket. In that Entry, the Commission was not required to expound further on the issues inappropriately raised by OCC.

Finally, OCC's contention that the Commission has left open important issues raised by OCC is incorrect.¹¹ In the Complaint Proceeding, OCC has raised the issues of whether IGS is operating without a certificate and whether IGS can lawfully use the CRE trade name.¹² The Commission will address those issues in the Complaint Proceeding. OCC has not been denied a determination on the issues it has raised, but

¹¹ Id at 7.

¹² It should be noted that the Commission did authorize IGS to use the CRE trade name in the November 10th Entry, although OCC has also raised this issue in the Complaint Proceeding.

rather the Commission correctly concluded that the determination that OCC seeks should be made in the Complaint Proceeding.

D. The Commission was not Required to Establish Rules For Non-Affiliate Disclosures in the November 10th Entry.

In its third grounds for rehearing, OCC alleges that the Commission erred by not making a determination as to whether IGS is allowed to use the CRE trade name.¹³ First, the Commission did make a determination that IGS is authorized to use the CRE trade name. In the November 10th Entry, the Commission found, with respect to IGS' use of the CRE service mark, "that it is appropriate for IGS to use disclosures and directs IGS to continue to work with staff to ensure proper disclosures are used."¹⁴ Since the Commission found that it was appropriate for IGS to use disclosures when using the CRE service mark, basic logic dictates IGS is authorized to use the CRE service mark, if appropriate disclosures are used.

Further, even though the Commission did authorize IGS to use the CRE service mark, it was not required to make this determination in its Entry. The motions filed by OCC requested intervention and an evidentiary hearing in IGS' certification docket. The November 10th Entry made a determination on those issues, denying OCC's motions. The Commission is not required to make a determination on any other issues raised by OCC.

E. The November 10th Entry is Not Inconsistent with the Decision in the Just Energy Proceeding.

In its fourth and final grounds for rehearing, OCC argues that the November 10th Entry is inconsistent with the proceeding held in Just Energy's certification docket, Case

¹³ Application for Rehearing at 8.

¹⁴ Id.

No. 02-1828-GA-CRS ("Just Energy Proceeding").¹⁵ The Just Energy Proceeding is not relevant to the issues raised in IGS' certification docket and there is nothing inconsistent with the Opinion and Order issued in the Just Energy Proceeding and the November 10th Entry.

The Just Energy Proceeding began after Commission Staff ("Staff") launched an investigation into Just Energy's door-to-door solicitation practices. After the investigation, Staff gave notice to Just Energy that it was in probable violation of the Ohio Administrative Code.¹⁶ As a result of this inquiry, the Commission issued an Entry suspending the automatic approval of Just Energy's renewal certificate application.¹⁷ OCC was only granted intervention in the Just Energy Proceeding after the Commission suspended Just Energy's application and set the matter for hearing.¹⁸

In IGS' certification docket, OCC is seeking a hearing on IGS' notice of material change filing, not a renewal application, as was the case with Just Energy. Also, Staff has not launched an investigation into IGS' marketing practices. To the contrary, Staff has worked cooperatively with IGS to develop disclosures in connection with the use of the CRE trade name. In addition, the Commission did not suspend IGS' renewal application and set the matter for hearing as it did in Just Energy, but rather the Commission approved IGS' most recent renewal application.

The facts in the Just Energy Proceeding are clearly distinguishable from the facts in IGS' certification docket. Accordingly, the Commission did not err in failing to apply its decision in the Just Energy Proceeding to its November 10th Entry.

¹⁵ Id. at 10.

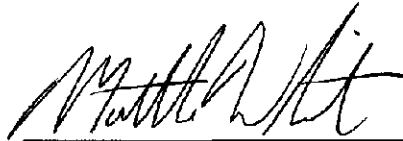
¹⁶ Id., Staff Report (September 20, 2010) at 10.

¹⁷ Case No. 02-1828-GA-CRS, Entry (September 10, 2010).

¹⁸ Id., Entry (September 30, 2010).

III. CONCLUSION

For the reasons set forth in this Memorandum Contra, IGS respectfully requests that the Commission deny OCC's Application for Rehearing.



John W. Bentine (0016388)
Email: jbentine@cwsllaw.com
Direct Dial: 614-334-6121
Matthew S. White (0082859)
Email: mwhite@cwsllaw.com
Direct Dial: 614-334-6172
CHESTER WILLCOX & SAXBE LLP
65 E. State Street, Suite 1000
Columbus, Ohio 43215
Telephone: 614-221-4000
Facsimile: 614-221-4012

Vincent A. Parisi
Email: vparisi@igsenergy.com
IGS ENERGY
6100 Emerald Parkway
Dublin, Ohio, 43016
Telephone: 614-923-1000
Attorneys for Interstate Gas Supply, Inc.

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Memorandum Contra the Office of the Ohio Consumer's Counsel's Application for Rehearing* was served upon the following persons listed below by electronic and regular U.S. mail, postage prepaid, this 23rd day of December, 2010.

Joseph Serio
Larry S. Sauer
OFFICE OF CONSUMERS' COUNSEL
10 W. Broad Street, Suite 1800
Columbus, Ohio 43215
Email: serio@occ.state.oh.us
sauer@occ.state.oh.us

Katie Stenman
Attorney Examiner
PUBLIC UTILITIES COMMISSION OF OHIO
180 E. Broad Street
Columbus, Ohio 43215
Email: Katie.Stenman@puc.state.oh.us

Glenn S. Krassen
BRICKER & ECKLER LLP
1011 Lakeside Avenue, Suite 1350
Cleveland, Ohio 44114
Email: gkrassen@bricker.com

Matthew W. Warnock
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
Email: mwarnock@bricker.com

Carolyn S. Flahive
Ann B. Zallocco
THOMPSON HINE LLP
41 South High Street, Suite 1700
Columbus, Ohio 43215
Email: Carolyn.Flahive@ThompsonHine.com

John M. Dosker
STAND ENERGY CORPORATION
1077 Celestial Street, Suite 110
Cincinnati, Ohio 45202
Email: jdosker@stand-energy.com

Dane Stinson
BAILEY CAVALIERI LLC
10 West Broad Street, Suite 2100
Columbus, Ohio 43215
Email: Dane.Stinson@BaileyCavalieri.com

Juan Jose Perez
Troy B. Morris
PEREZ & MORRIS LLC
8000 Ravine's Edge Court, Suite 300
Columbus, Ohio 43235
Email: jperez@perez-morris.com
tmorris@perez-morris.com

Larry Gearhardt
OHIO FARM BUREAU FEDERATION
280 North High Street
P.O. Box 182383
Columbus, OH 43218-2383
Email: LGearhardt@ofbf.org

Andrew Mitrey
BORDER ENERGY, INC.
9787 Fairway Dr.
Powell, OH 43065
Email: amitrey@border-energy.com

Stephen Howard
RETAIL ENERGY SUPPLY ASSOCIATION
52 East Gay Street
Columbus, OH 43215
Email: smhoward@vorys.com

Eric B. Gallon
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High St., Suite 3000
Columbus, OH 43215
Email: EGallon@porterwright.com



Matthew S. White