FILE

PUBLIC VERSION 45

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.	)	Case No. 10-2395-GA-CSS
Interstate Gas Supply, Inc.	)	
Respondent.	)	

JOINT MEMORANDUM IN OPPOSITION TO IGS' MOTION FOR SUMMARY JUDGMENT AND JOINT POST-HEARING BRIEF OF COMPLAINANTS, THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL AND STAND ENERGY CORPORATION

Public Version

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Table of Contents

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I. INTRODUCTION

This is a case of first impression before the Public Utilities Commission of Ohio ("PUCO" or "Commission"). For the first time in Ohio history, an unregulated retail natural gas supplier, Interstate Gas Supply, Inc. ("IGS"), is being allowed to provide competitive retail natural gas service to consumers in the Columbia Gas of Ohio ("Columbia Gas") service territory using the "Columbia" name and starburst logo, even though IGS is not affiliated with Columbia Gas. The Commission's utility affiliate rules do not contemplate this situation where an unaffiliated third party is using the utility's name and logo.

The unprecedented use by IGS of the utility's name by an unregulated and unaffiliated company: (1) gives IGS an unfair competitive advantage in the Columbia Gas service territory; (2) allows Columbia Gas to have an unregulated "affiliate" without having to go through the

administrative, financial, and regulatory requirements associated with such an affiliation; and (3) results in advertising that is misleading, deceptive, and confusing to consumers.

For the reasons set forth below, the Northeast Ohio Public Energy Council ("NOPEC") and Stand Energy Corporation ("Stand"), complainants in this case, request that the Commission order IGS to cease and desist all marketing in Ohio under the "Columbia Retail Energy" trade name.

II. THE PARTIES

A. Interstate Gas Supply, Inc.

IGS is a for-profit, "independently, privately-owned company"[1] offering competitive retail natural gas service ("CRNGS") in Ohio and eight (8) other states.[2] Incorporated in August 1989, IGS started when Marvin White (the former President of Columbia Gas' local distribution companies) and his children (including current President and CEO, Scott L. White) decided to enter Ohio's deregulated natural gas market.[3] Service by IGS commenced in January 1990.[4]

Based upon the White family's former employment with Interstate Gas Marketing (a CRNGS provider that is no longer in business), the majority of IGS' initial business involved the sale of gas to Interstate Gas Marketing.[5] Since 1990, IGS has grown into one of the largest CRNGS providers in the United States, and currently has approximately 870,000 retail natural gas customers.[6] More recently, IGS began offering competitive retail electric service ("CRES") in

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[1] Tr. Vol. I, p. 25-26.

[2] Tr. Vol. I, p. 27. The eight (8) states include Michigan, Illinois, Indiana, New York, Pennsylvania, Kentucky, and Maryland. Of these states, five (5) have a natural gas utility operated by NiSource and using the Columbia name. Tr. Vol. I, p. 28.

[3] Tr. Vol. I, pp. 17-19.

[4] Tr. Vol. I, pp. 17-18.

[5] Tr. Vol. I, pp. 15 and 20.

[6] Tr. Vol. I, p. 25. IGS currently provides retail natural gas service under a variety of trade names, including IGS Energy and Columbia Retail Energy. Tr. Vol. I, p. 24.

Illinois and Pennsylvania, and obtained CRES certification in Ohio.[7] IGS acknowledged that it could begin offering competitive retail electric service in Ohio as early as the spring of 2012.[8]

Although unaffiliated with any other company (including NiSource, Inc., NiSource Corporate Services Company, or NiSource Retail Services),[9] IGS does have one (1) wholly-owned subsidiary known as The Manchester Group.[10] The Manchester Group offers utility line protection services,[11] and competes with companies such as Columbia Retail Services. Although Columbia Retail Services is a NiSource company, and despite its use of the "Columbia" trade name and starburst logo, it is not Columbia Gas (the utility) and certainly not Columbia Retail Energy/IGS.

Scott L. White serves as IGS' President and CEO, and has done so for approximately 21 years.[12] Although responsible for all aspects of IGS' business,[13] including its approximately 270 employees,[14] only eight (8) employees directly report to Mr. White:[15] (i) Vince Parisi, general counsel and regulatory affairs officer;[16] (ii) Larry Friedeman, compliance officer;[17] (iii) Tom Reichelderfer, marketing officer;[18] (iv) Doug Austin, vice-president of sales and marketing;[19] (v) Nicole Shiring, human resources director;[20] (vi) Ray Hamman, supply director;[21] (vii) Jim Baich,

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[7] Tr. Vol. I, pp 28-29.

[8] Tr. Vol. I, p. 29.

[9] Tr. Vol. I, pp. 25-26.

[10] Tr. Vol. I, p. 25.

[11] Tr. Vol. I, p. 25

[12] Tr. Vol. I, p. 13.

[13] Tr. Vol. I, p. 30.

[14] Tr. Vol. I, p. 15.

[15] Tr. Vol. I, p. 16

[16] Tr. Vol. I, p. 15.

[17] Tr. Vol. I, p. 15.

[18] Tr. Vol. I, pp. 15-16.

[19] Tr. Vol. I, p. 16.

[20] Tr. Vol. I, p. 16.

chief operating officer;[22] and (viii) Dave Warner, chief financial officer.[23] The compliance officer position currently held by Mr. Friedeman was created in the fall of 2010 around the same time that IGS began using the "Columbia Retail Energy" trade name,[24] and that the complaint was filed in the above-captioned proceeding. The focus of Mr. Friedeman's responsibilities as compliance officer is to make sure IGS' marketing practices are legal.[25] Although Mr. White denied that Mr. Friedeman's hiring was in response to the complaint filed in this proceeding, it cannot be a coincidence that IGS hired a compliance officer to focus on the legality of its marketing efforts at the same time IGS began using the "Columbia" service marks despite having no affiliation with Columbia Gas, or any other NiSource entity.

B. The Northeast Ohio Public Energy Council.

NOPEC is a regional council of governments established under Chapter 167 of the Ohio Revised Code, and is the largest governmental retail energy aggregator in the State of Ohio. Comprised of 134 member communities in the ten (10) northeast Ohio counties of Huron, Ashtabula, Lake, Geauga, Cuyahoga, Summit, Lorain, Medina, Trumbull, and Portage, NOPEC provides natural gas governmental aggregation service to approximately 70,000 natural gas customers located in NOPEC member communities served by Columbia Gas. NOPEC also provides governmental aggregation service to approximately 175,000 natural gas customers in the Dominion East Ohio service territory, and approximately 500,000 electric customers in The Cleveland Electric Illuminating Company and Ohio Edison Company service territories.

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[21] Tr. Vol. I, p. 16.

[22] Tr. Vol. I, p. 16.

[23] Tr. Vol. I, p. 16.

[24] Tr. Vol. I, pp. 16-17.

[25] Tr. Vol. I., pp. 16-17.

C. Stand Energy Corporation.

Stand Energy Corporation ("Stand") is a Kentucky corporation certified in Ohio as a competitive retail natural gas supplier, and engaged in the business of marketing and selling natural gas to Ohio industrial, commercial and residential customers as part of the Columbia Gas CHOICE program. Stand was formed in 1984, and is the oldest privately-held natural gas marketing company operating in Ohio. The company currently serves customers in more than 12 states behind more than 30 local distribution companies. Stand Energy's four senior management witnesses in this case have more than 85 years of combined natural gas experience.

III. STATEMENT OF FACTS.

At the heart of this case is a licensing agreement entered into between IGS and NiSource Retail Services allowing IGS to use the "Columbia" trade name and starburst logo to market retail natural gas service to consumers in the Columbia Gas service territory, even though IGS is not affiliated with Columbia Gas—essentially allowing IGS to hold itself out as a company in the "Columbia Gas" family. An analysis of the legal issues in this case, however, requires a detailed understanding of how IGS obtained the use of the "Columbia" name and logo, its dealings with interested parties (including the Commission Staff), and the challenges raised by NOPEC, Stand and the other complainants in this proceeding. This statement of facts will add context to the legal analysis below.

A. Case No. 02-1683-GA-CRS (the "IGS Certification Docket")

In 2002, IGS first obtained certification as a CRNGS provider in PUCO Case No. 02-1683-GA-CRS.[26] More specifically, IGS is certified in Ohio as a retail natural gas aggregator, broker, and marketer.[27] On June 21, 2010, IGS filed its CRNGS renewal application with the Commission

[26] Tr. Vol. I, p. 32.

[27] Tr. Vol. I, p. 32.

in the IGS Certification Docket. The renewal application did not mention the use of the Columbia service marks, or the new Columbia Retail Energy trade name, and sought to continue IGS' CRNGS certification for the two year time period from July 24, 2010 through July 24, 2012. IGS' renewal CRNGS application was deemed automatically approved by operation of law on or about July 22, 2010, which was before the notice of material change was even filed (described below in more detail), and before IGS notified the Commission Staff of its intended use of the "Columbia Retail Energy" name. The Commission issued a renewal CRNGS certificate to IGS on August 10, 2010. The renewal CRNGS certificate did not include any reference to the Columbia Retail Energy trade name. In simple terms, IGS chose to time its renewal CRNGS application so it would be automatically approved before filing a notice of material change relating to the use of the "Columbia Retail Energy" name.

B. Ohio natural gas utilities and their affiliates.

Each of the natural gas utilities in Ohio, except for Columbia Gas, currently have an unregulated affiliate, and are using the utility's name in offering CRNGS in their respective service territories.[28] For example, Dominion Energy Solutions offers competitive retail natural gas service in Dominion East Ohio's service territory; and Vectren Source offers competitive retail natural gas service in Vectren Energy Delivery of Ohio's service territory. In fact, Columbia Gas (or its parent company) significantly reduced the CRNGS service offerings of its unregulated affiliate (Energy USA) in approximately 2009/2010—around the same time that IGS initiated discussions with NiSource Corporate Services Company regarding the use of the "Columbia" service marks.[29] At that point in time, Columbia Gas became the only natural gas utility in Ohio without an unregulated

[28] Tr. Vol. II, p. 415.

[29] According to the testimony of Mr. Parisi, Energy USA is an unregulated affiliate of NiSource offering CRNGS to commercial and industrial customers. Tr. Vol. II., p. 356.

affiliate in the retail natural gas market, thereby presenting IGS with the perfect opportunity to step in and initiate discussions regarding the licensing of the Columbia name and starburst logo.

C. Preliminary discussions between IGS and NiSource.

[redacted] IGS (specifically Scott L. White) initiated discussions with one of the NiSource entities regarding the licensing of the Columbia name and starburst logo.[31] There is no evidence that IGS approached any other natural gas utility in Ohio regarding the licensing of its service marks.[32] [redacted]

D. The Licensing Agreement.

The agreement at the heart of this case is labeled a Service Mark Licensing Agreement by and between IGS and NiSource Retail Services (the "Licensing Agreement").[34] [redacted]

[redacted]

[31] Tr. Vol. II., p. 359.

[32] Tr. Vol. II, p. 359 (Mr. Parisi admitted that to the best of his knowledge, no other natural gas utilities in Ohio were approached regarding the licensing of their service marks).

[redacted]

[34] Tr. Vol. I, p. 45.

[redacted]

[redacted]

[redacted]

[redacted]

E. The Notice of Material Change filed by IGS in the IGS Certification Docket.

On August 6, 2010 (nearly two months after filing its renewal CRNGS application and just four days before receiving its renewal CRNGS certificate), IGS filed a Notice of Material Change in the IGS Certification Docket.[53] The Notice of Material Change identified "Columbia Retail Energy" as a new trade name that would allow IGS to market retail natural gas service to consumers in the Columbia Gas service territory using the "Columbia" name and starburst logo, even though IGS is not affiliated with Columbia Gas. There is nothing in the Notice of Material Change that explains how or why IGS obtained the use of the "Columbia Retail Energy" trade name.[54]

1. Discussions with the PUCO Staff regarding the use of the "Columbia Retail Energy" trade name.

Rather than contact the PUCO Staff upon execution of the Licensing Agreement, IGS waited until around the same time that the Notice of Material Change was filed to initiate discussions with the PUCO Staff regarding the use of the "Columbia Retail Energy" name.[55] Although the first meeting (and the only in-person meeting) occurred contemporaneously with the

[redacted]

[53] The Notice of Material Change was introduced into evidence at the evidentiary hearing as NOPEC Ex. 3.

[54] Tr. Vol. II, p. 378.

[55] Tr. Vol. II, pp. 360-361.

filing of the Notice of Material Change,[56] this was the only meeting (or communication) in which Steve Punican, the Co-Chief of the Rates & Tariffs/Energy & Water Division, participated.[57] The only other members of the PUCO Staff that participated in any meeting or other communication with IGS were: Jim Drummond; Chris Rhodes;[58] and Paula Vogel.[59] No one from the Attorney General's Office participated in the initial meeting or any other subsequent meeting.[60] The initial, in-person meeting was followed by fewer than ten (10) telephone calls and a number of e-mails between IGS, Mr. Drummond, Mr. Rhodes and Ms. Vogel.[61] Notably, Mr. Rhodes is the only attorney who participated in any of the discussions with IGS on behalf of the PUCO Staff.

2. PUCO Staff "approval" of the use of the "Columbia Retail Energy" trade name.

The meetings between the PUCO Staff and IGS focused not on the appropriateness of using the "Columbia" name and starburst logo, but rather on the disclosures that would be necessary to attempt to avoid customer confusion.[62] After a series of telephone and e-mail communications regarding the disclosure language, the location of the disclosures, and the font size of the disclosures, IGS witness Parisi explained that the PUCO Staff "approved" the use of the "Columbia Retail Energy" trade name provided the agreed-upon disclosures were used. The "approval" from the PUCO Staff took the form of an unidentified e-mail from Mr. Drummond (a non-attorney) indicating that the proposed disclosures comported with Ohio law, specifically Ohio Administrative Code Rule ("OAC") 4901:1-29-05(C)(8)(f) which governs disclosures by the unregulated affiliates

[56] Tr. Vol. II., p. 361.

[57] Tr. Vol. II., p. 363.

[58] Tr. Vol. II, p. 364.

[59] Tr. Vol. II, p. 364.

[60] Tr. Vol. II, p. 364.

[61] Tr. Vol. II, pp. 361-362.

[62] Tr. Vol. II, pp. 361-362.

of natural gas utilities in Ohio.[63] There is, however, nothing in the IGS Certification Docket or any other Commission proceeding in which an Attorney Examiner or the Commissioners approved the use of the "Columbia Retail Energy" trade name by IGS.[64]

3. No regulator in any state, including the PUCO Staff, has seen a copy of the Licensing Agreement.

Although the Licensing Agreement serves as the starting point for IGS' proposed use of the "Columbia" name and starburst logo, **no member of the PUCO Staff ever saw or reviewed the Licensing Agreement**.[65] (Emphasis added). To the best of IGS witness Parisi's recollection, **no member of the PUCO Staff even asked to see a copy of the Licensing Agreement**.[66] (Emphasis added). Perhaps more importantly, no member of any public utilities commission in any state in which IGS is able to use the "Columbia" name and starburst logo (Ohio, Kentucky, Maryland, Virginia, and Pennsylvania) has ever seen a copy of the Licensing Agreement.[67] In fact, no persons (outside of IGS and NiSource), other than the attorneys and Attorney Examiner in this case, have ever seen a copy of the Licensing Agreement.[68]

4. Challenges raised in the IGS Certification Docket.

Concerned about IGS' unprecedented filing, which not only presented an issue of first impression before this Commission but likely any other public utilities commission in the United States, NOPEC and Stand both filed a Motion to Intervene. NOPEC, Stand, and a number of other interested parties, protested IGS' use of the Columbia Retail Energy trade name, including the filing

[63] Tr. Vol. II, pp. 373-374.

[64] Tr. Vol. II, p. 372.

[65] Tr. Vol. II, p. 368.

[66] Tr. Vol. II, p. 368.

[67] Tr. Vol. II, p. 369.

[68] Tr. Vol. II, p. 371.

of: seven (7) Motions to Intervene,[69] three (3) Motions for an Evidentiary Hearing, one (1) Request for a Rulemaking, two (2) Motions to Compel Discovery,[70] one (1) Motion to Cease and Desist, and one (1) Motion for Sanctions.[71] An Entry dated November 10, 2010 denied many of the pending motions based upon the limited nature of the Commission's review of a notice of material change, and suggested that a complaint case would be the proper forum for review.

F. The Complaint Case, PUCO Case No. 10-2395-GA-CSS.

In response to the Commission's November 10, 2011 Entry in the IGS Certification Docket, many of the same parties to that case, including NOPEC and Stand, filed a complaint against IGS in the above-captioned proceeding. The joint complainants generally alleged that IGS' ability to offer retail natural gas service to consumers in the Columbia Gas service territory using the "Columbia" name and starburst logo, even though IGS is not affiliated with Columbia Gas: (1) gives IGS an unfair, competitive advantage in the Columbia Gas service territory; and (2) resulted in marketing, solicitation, and/or sales acts or practices which are unfair, misleading, deceptive, or unconscionable.

[69] Motions to Intervene: OCC (August 20, 2010), Border (August 31, 2010), NOPEC (August 31, 2010), Stand Energy (September 7, 2010), Retail Energy Supply Association ("RESA") (September 7, 2010), Delta (September 15, 2010) and Ohio Farm Bureau Federation ("OFBF") (October 5, 2010).

[70] OCC (September 178, 2010) and NOPEC (September 29, 2010).

[71] OCC, NOPEC, Border, Stand, and Delta (September 28, 2010).

IV. JOINT MEMORANDUM CONTRA IGS' MOTION FOR SUMMARY JUDGMENT

On Tuesday, November 1, 2011 at 4:34 pm, and less than six (6) days before the start of the evidentiary hearing in this case, IGS filed a Motion for Summary Judgment (the "MSJ"). The 39 page MSJ included 15 exhibits totaling over 200 pages. Many of the exhibits are entirely inappropriate for a motion for summary judgment. For example, Exhibits 10 and 11 to the MSJ are documents filed in two different Commission proceedings entirely unrelated to this complaint case (PUCO Case No. 07-1285-GA-EXM and PUCO Case No. 08-1344-GA-EXM) by two (2) OCC employees who did not testify or otherwise participate in the evidentiary hearing in this case.

Almost simultaneously with the filing of its MSJ, IGS filed a motion to quash the subpoena issued to compel the attendance of Mr. White and any other IGS corporate designee to a discovery deposition, as well as a Motion for a Protective Order to prevent the noticed discovery depositions of Scott White and any other IGS corporate designee. Thus, while NOPEC and Stand sought to resolve an important dispute relating to discovery depositions, IGS filed a meritless, eleventh hour dispositive motion to seemingly divert the attention of NOPEC, Stand and the Attorney Examiner from the evidentiary hearing.

For the reasons set forth below, IGS' motion for summary judgment should be denied

A. The Commission's rules do not provide for a motion for summary judgment.

First, and foremost, this Commission long has recognized that "the Commission's rules of practice do not include a provision that would allow a party to seek summary judgment. While many aspects of the rules of civil procedure are similar to the Commission's rules of procedure, there is no equivalent in the Commission's rules for summary judgment." *Chester Simons, d.b.a. Starlink v. ALLTEL Ohio Inc. and Western Reserve Telephone Company*, PUCO Case No. 96-1405-

TP-CSS (Entry dated October 17, 1997 at paragraph 8).[72] Allowing IGS to establish the propriety of summary judgment in this proceeding in which there are genuine issues of material fact, and in which IGS is not entitled to judgment as a matter of law, would be entirely inappropriate.

B. To the best of the Complainants' knowledge, the Commission has never granted a motion for summary judgment.

In a 2002 complaint case between AK Steel Corporation and Cincinnati Gas & Electric Company, one of the few issues agreed upon by the parties was that the Commission has never granted a motion for summary judgment. See page 5 of the Motion for Summary Judgment and Motion to Dismiss AK Steel Corporation's Amended Complaint, Submitted By The Cincinnati Gas & Electric Company filed on August 6, 2002, and page 1 of AK Steel's Memorandum in Opposition filed on August 23, 2002 in Case No. 02-989-EL-CSS. To the best of NOPEC and Stand's knowledge, the Commission still has never granted a motion for summary judgment. The reason is simple:

> summary judgment is a device designed to effect a prompt disposition of controversies on their merits without the need for hearing. Rule 56 of the Ohio Rules of Civil Procedure provides for summary judgment in civil proceedings where there is no genuine issue as to any material fact. There is no similar rule in Rules 4901-1-01 through 4901-1-35 of the Ohio Administrative Code. This action is governed by the requirements of Section 4905.26, Revised Code, which states, in pertinent part, "Upon complaint in writing against any public utility by any person, . . . if it appears that reasonable grounds for complaint are stated, the Commission shall fix a time for hearing. . . ." This statute makes no provision for the dismissal of actions based upon affidavits and other evidence submitted prior to the onset of a hearing. Respondent's motion for summary judgment should, therefore, be denied.

Constance A. Weir v. Ohio Edison Company, PUCO Case No. 89-486-EL-CSS (*Entry* dated May 1, 1989). Reversing course in this proceeding (in which there are genuine issues of material fact and

[72] See also *Debra and Andrew Dennewitz and State Farm Fire & Casualty Company v. East Ohio Gas Company dba Dominion East Ohio,* PUCO Case No. 07-517-GA-CSS (*Entry* dated October 24, 2007) (where the Commission explained that "[t]here is no summary judgment provision in the Commission's Administrative Provisions and Procedures at Chapter 4901-1 of the Ohio Administrative Code").

in which IGS is not entitled to judgment as a matter of law), and overturning long-standing practice before the Commission, not only prejudices NOPEC and Stand but opens up a new array of procedural devices that could be detrimental to future Commission proceedings.

C. IGS' motion for summary judgment cannot, and should not, be granted after the start of the evidentiary hearing.

Ohio appellate courts acknowledge that "[b]ecause summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the non-moving party." *Maghie & Savage, Inc. v. P.J. Dick Inc.*, Franklin App. No. 08AP-487, 2009-Ohio-2164, at ¶ 39 (citing *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-59). The very purpose of a motion for summary judgment is to dispose of a case prior to trial, or in this case, the evidentiary hearing. The evidentiary hearing (in which all parties had the opportunity to address the merits of the case) occurred on November 6-7, 2011 – more than three (3) weeks ago – and the parties are following a briefing schedule established by Attorney Examiner Stenman. Moving forward with summary judgment at this stage of the case is: (i) unnecessary, because a hearing on the merits already has been held; (ii) inefficient and a waste of resources, because a briefing schedule has already been established to address the merits of the legal issues raised in the case; and (iii) prejudicial to NOPEC and Stand because it diverts attention from the true legal issues at hand—namely the misleading and deceptive marketing practices of IGS using the Columbia Retail Energy trade name.[73]

[73] The prejudicial effect of IGS' Motion for Summary Judgment is the same prejudice that IGS alleged in its Motion to Quash. In ruling on IGS' Motion to Quash, the Attorney Examiner's November 2, 2011 Entry concluded that "the subpoena seeking to compel Mr. White's attendance at a [November 3, 2011] deposition at this late stage of the procedural schedule is unreasonable." See Entry, November 2, 2011, ¶ 9. Similarly, allowing IGS to file and proceed with a Motion for Summary Judgment at this late stage of the proceeding (namely on the eve of the evidentiary hearing) is unreasonable and contrary to the earlier procedural rulings in this case.

D. IGS fails to satisfy the standard for granting a motion for summary judgment.

Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. *Civ.R. 56(C); State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183.

Not only does IGS fail to satisfy this standard, but IGS does not even address the issue of whether it is entitled to judgment as a matter of law. Instead, IGS focuses solely on whether there are any genuine issues of material fact (see e.g. Motion for Summary Judgment at p. 3)—a showing that IGS simply cannot make.

1. IGS failed to demonstrate that there are no genuine issues of material fact.

IGS failed to, and cannot, establish that there are no genuine issues of material fact in this case. The testimony elicited at the evidentiary hearing not only demonstrates the absurdity of IGS' Motion for Summary Judgment (in which IGS seeks to usurp the Commission' role as trier of fact), but establishes genuine issues of material fact.

The primary argument in the MSJ is that NOPEC, Stand and the other complainants failed to identify any instances of customers being misled, confused, or deceived by IGS' use of the "Columbia Retail Energy" trade name. See e.g. MSJ at pp. 8, 11, 13, 14, 15, 22, 25, and 28. Not only is this issue strongly contested by the Respondents, but IGS' assertions are completely untrue. In the prefiled testimony of Mr. Parisi, IGS acknowledges that it is "aware of two consumers that allegedly contacted the OCC and allegedly said that they mistakenly purchased natural gas from

CRE thinking that they were purchasing natural gas from the utility."[74] At the evidentiary hearing, Mr. Parisi confirmed this fact.[75]

Even more importantly, Stand's witness Mark Ward testified of having personal knowledge of consumers in the Columbia Gas of Ohio service territory being confused by IGS' use of the "Columbia Retail Energy" name and logo. In fact, Mr. Ward testified:

> Your question is to my knowledge of any individual consumers that were confused or misled by -- I never talked to -- not as vice president of regulatory affairs, but I live here in Columbus, people, my friends and acquaintances, guys I bowled with last night, they all come and say, "Has Columbia gotten back into the marketing business?" I says, "Why do you ask that?" They say, "Well, we got this letter from Columbia." I says, "Read the fine print. It says 'IGS.'" So that is the only direct, just from my personal association with people in Columbia territory.[76]

Despite having worked at Columbia Gas for more than 30 years,[77] served as the Director of Gas Transportation Services for the Columbia Gas local distribution companies,[78] participated in the development of Columbia Gas' CHOICE program, co-authored the Columbia Gas Code of Conduct and Standards of Conduct,[79] and spent the past 10 years working for a CRNGS provider,[80] Mr. Ward identified himself as one of the many customers confused by the use of the "Columbia Retail Energy" trade name, stating: "In fact, again, myself. I received an envelope and I thought it was something to do with my riser that I had gotten correspondence from Columbia on and I opened it and then said oh, it's just IGS. I myself, knowledgeable as I am about these things, I opened it

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[74] Direct Testimony of Vincent A. Parisi filed on November 1, 2001 (hereinafter "Parisi Testimony"), pp. 11-12. See also Parisi Testimony, p. 13.

[75] Tr. Vol. II, p. 404.

[76] Tr. Vol. II, p. 303. See also Tr. Vol. II, p. 307.

[77] Pre-filed Testimony of Mark T. Ward on Behalf of Stand Energy Corporation ("Stand Ex. 5"), p. 2 of 8.

[78] Stand Ex. 5, p. 2 of 8.

[79] Tr, Vol. II, pp. 295-296.

[80] Stand Ex. 5, p. 2 of 8.

up."[81] Mark Ward's testimony alone establishes a genuine issue of material fact (and conclusively establishes a violation of OAC Rule 4901:1-29-03 by IGS).

In addition, testimony at the hearing establishes a genuine issue of material fact relating to the PUCO Staff's alleged "approval" of the use of the "Columbia Retail Energy" trade name. On pages 11-12 of the Motion for Summary Judgment, IGS claims that "a reasonable fact finder could not find that the solicitations used were unfair, misleading, deceptive, or an unconscionable act or practice" (an inaccurate statement in light of Mark Ward's testimony referenced above) because: (i) "IGS' solicitations contained disclosures that IGS vetted with the PUCO Staff;" (ii)"IGS worked with the [PUCO] Staff to craft the disclosures and incorporated all of Staff's suggested changes into the disclosures;" and (iii) the PUCO "Staff determined that the disclosures were compliant with 4901:1-29-05(C)(8)(f)."

This argument is a red herring designed to shift accountability away from IGS onto the PUCO Staff. However, the testimony at the hearing establishes genuine issues of material fact regarding the PUCO Staff's alleged "vetting" and "approval" of IGS' use of the "Columbia Retail Energy" trade name. In reality, the PUCO Staff did not fully vet the issue because they focused only on the proposed disclosures crafted by IGS, not on the appropriateness of using the "Columbia" name and starburst logo.[82] **No member of the PUCO Staff ever saw or reviewed the Licensing Agreement**, which serves as the foundation of IGS' proposed use of the "Columbia" name and starburst logo.[83] (Emphasis added). To the best of IGS witness Parisi's recollection, **no member of the PUCO Staff even asked to see a copy of the Licensing Agreement**.[84] (Emphasis

[81] Tr. Vol. II, p. 308.

[82] Tr. Vol. II, pp. 361-362.

[83] Tr. Vol. II, p. 368.

[84] Tr. Vol. II, p. 368.

added). The lack of due diligence by the PUCO Staff highlights the fact that no regulator has ever fully understood the: (i) entirety of IGS' deal with NiSource; (ii) practical effects on consumers in the Columbia Gas of Ohio service territory based on the use of the "Columbia Retail Energy" trade name; or (iii) impact on competition among CRNGS providers in the Columbia Gas service territory by bestowing an unfair competitive advantage on one CRNGS provider (IGS) to the detriment of others.

Further, the alleged "approval" from the PUCO Staff took the form of an unidentified e-mail from Staff member Drummond (a non-attorney) indicating that the disclosures comported with Ohio law.[85] There is, of course, nothing binding about the PUCO Staff's alleged statements regarding the use of the "Columbia Retail Energy" name. To argue that IGS is entitled to summary judgment based upon the PUCO Staff's alleged vetting and approval of the use of the "Columbia Retail Energy" trade name is disingenuous. The factual and legal issues surrounding the use of the "Columbia Retail Energy" trade name (and whether it comports with Ohio law) need to be determined by the Commission (as the trier of fact), not by a member of the PUCO Staff who is not an attorney, and never saw a copy of the Licensing Agreement.

2. IGS is not entitled to judgment as a matter of law.

IGS is not entitled to judgment as a matter of law. The starting point of this analysis is the issue statement crafted by IGS on page 3 of its Motion for Summary Judgment. The legal issue, as unilaterally determined by IGS, is as follows:

> IGS follows Ohio law when it registered with the PUCO to use the trade name "Columbia Retail Energy" for its natural gas marketing business. In fact, IGS went beyond what was required by law by adding informative and conspicuous disclaimers to every solicitation sent to consumers from Columbia Retail Energy. Nevertheless, Complainants allege that IGS' use of the Columbia Retail Energy trade name will mislead and deceive consumers.

[85] Tr. Vol II, pp. 373-374.

Should IGS be prohibited from using the trade name Columbia Retail Energy?

The Complainants strongly contest the assertion that IGS "went beyond what was required by law" in using the "Columbia Retail Energy" trade name. There is no statute or regulation governing the use of a public utility's name and logo by a non-affiliated CRNGS provider. IGS acknowledged this fact at the evidentiary hearing.[86] This is a case of first impression for this Commission (and likely any other public utilities commission in the United States) where an unregulated CRNGS provider is being allowed to provide competitive retail natural gas service to consumers in the utility's service territory using the utility's name and logo, even though the CRNGS provider is not affiliated with the utility. The propriety of this unprecedented use of the utility's name by an unregulated and unaffiliated company should be independently determined by the entire Commission. The decision cannot, and should not, be based on whether the PUCO Staff provided IGS with a non-binding conclusion (from a non-attorney) that its use of the "Columbia Retail Energy" name may have comported with Ohio statutes and regulations that simply do not exist for the fact situation presented here with an unaffiliated CRNGS provider.

Second, contrary to IGS' contention, its disclaimers were not "informative and conspicuous." This legal issue is governed by OAC Chapter 4901:1-29. The Commission has issued no affirmative guidance on this issue. NOPEC and Stand explain in this joint brief why IGS' marketing materials are not only confusing, misleading, and deceiving, but actually resulted in customer confusion (to the extent people even realize that they have been confused).[87] This legal issue is inappropriate for summary judgment.

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[86] Tr. Vol. II, p. 352.

[87] Many customers who mistakenly signed up with IGS because of the use of the "Columbia Retail Energy" name may not even realize that they made such a mistake.

Third, IGS' issue statement completely ignores the fact that the use of the "Columbia" name and logo gives IGS an unfair competitive advantage in the Columbia Gas service territory. This legal issue stems from the Licensing Agreement, and presents a legal issue to which IGS is not entitled to judgment as a matter of law. NOPEC and Stand do, however, agree with IGS that a fundamental question is whether IGS should even be allowed to use the Columbia Retail Energy name in the Columbia Gas service territory.

Finally, rather than restating the legal arguments supporting the position of NOPEC and Stand, NOPEC and Stand simply incorporate by reference the arguments set forth below in the joint post-hearing brief.

V. JOINT POST-HEARING BRIEF

The rules in OAC Chapter 4901:1-29 governing CRNGS suppliers include two overarching policy considerations. They are to: (1) "[p]rotect customers against deceptive, unfair, and unconscionable acts and practices in the marketing, solicitation, and sale of competitive retail natural gas service;"[88] and (2) "[p]romote non-discriminatory access to competitive retail natural gas services."[89] By its use of the Columbia name and starburst logo, IGS violates both of these fundamental principles.

A. IGS' marketing materials using the "Columbia" name and starburst logo are unfair, misleading, deceptive and unconscionable marketing practices in violation of the Commission's rules.

OAC Rule 4901:1-29-03(A) expressly prohibits CRNGS providers, such as IGS, from engaging in "unfair, misleading, deceptive, or unconscionable acts or practices related to, without limitation. . . (1) Marketing, solicitation, or sale of a competitive retail natural gas service." See also OAC Rule 4901:1-29-05(C). Stand witness Burig captured the essence of the problem in this case at the evidentiary hearing, stating "I've talked to a number of people about -- well, anytime I have discussed or mentioned this type of situation it's difficult to even describe to the person what I'm referring to because they -- because the concept of a company using the logo of such a steadfast entity as a utility is almost absurd to them."[90] By marketing and offering retail natural gas service to consumers in the Columbia Gas service territory using the "Columbia" name and starburst logo, despite no affiliation with Columbia Gas or its parent company, IGS is engaging in marketing practices that are misleading, deceptive, and confusing to customers.

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[88] OAC Rule 4901:1-29-02(A)(3)(C).

[89] OAC Rule 4901:1-29-02(A)(3)(d).

[90] Tr. Vol. I, p. 210.

1. There is strong evidence of actual confusion among consumers in the Columbia Gas service territory.

The testimony in this case confirms that consumers in the Columbia Gas service territory, even respected veterans of Ohio's natural gas industry, have been confused and misled by IGS' use of the "Columbia Retail Energy" trade name. In the prefiled testimony of Mr. Parisi, IGS acknowledges that it is "aware of two consumers that allegedly contacted the OCC and allegedly said that they mistakenly purchased natural gas from CRE thinking that they were purchasing natural gas from the utility."[91] At the evidentiary hearing, Mr. Parisi confirmed this fact.[92]

Even more importantly, Stand witness Mark Ward twice testified of being confused by IGS' use of the "Columbia Retail Energy" name and logo despite having worked at Columbia Gas for more than 30 years,[93] served as the Director of Gas Transportation Services for the Columbia Gas local distribution companies,[94] participated in the development of Columbia Gas' CHOICE program, and spent the past 10 years working for a CRNGS provider.[95] Mr. Ward explained:

> Your question is to my knowledge of any individual consumers that were confused or misled by -- I never talked to -- not as vice president of regulatory affairs, but I live here in Columbus, people, my friends and acquaintances, guys I bowled with last night, they all come and say, "Has Columbia gotten back into the marketing business?" I says, "Why do you ask that?" They say, "Well, we got this letter from Columbia." I says, "Read the fine print. It says 'IGS.'" So that is the only direct, just from my personal association with people in Columbia territory.[96]

A short time later, Mr. Ward identified himself as one of the many customers confused by the use of the "Columbia Retail Energy" trade name and logo, stating: "I received an envelope and I thought it

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[91] Direct Testimony of Vincent A. Parisi filed on November 1, 2001 (hereinafter "Parisi Testimony"), pp. 11-12. See also Parisi Testimony, p. 13.

[92] Tr. Vol. II, p. 403.

[93] Stand Ex. 5, p. 2 of 8.

[94] Stand Ex. 5, p. 2 of 8.

[95] Stand Ex. 5, p. 2 of 8.

[96] Tr. Vol. II, p. 303. See also Tr. Vol. II, p. 307.

was something to do with my riser that I had gotten correspondence from Columbia on and I opened it and then said oh, it's just IGS. I myself, knowledgeable as I am about these things, I opened it up."[97]

2. IGS' marketing materials are confusing and misleading.

Regardless of the evidence of actual confusion (which should be enough to conclusively establish a violation of the Commission's rules), IGS' use of the "Columbia Retail Energy" trade name in its solicitations and other marketing materials is confusing, misleading and deceptive. It is worth emphasizing that nothing in the Commission's rules requires actual evidence of confusion to establish a violation of those rules. Issues of whether IGS' marketing materials are confusing, misleading and deceptive, and whether the disclosures are adequate and conspicuously located, are easily determined by reviewing the numerous (and confusing) versions of the approximately 3.4 million solicitations sent by IGS to consumers in the Columbia Gas of Ohio service territory.

The first use of the "Columbia Retail Energy" trade name occurred in September 2010,[98] likely through the "Columbia Retail Energy" website. The first marketing campaign directly soliciting customers in the Columbia Gas of Ohio service territory using the "Columbia Retail Energy" name began toward the end of September 2010,[99] and ended sometime prior to the start of 2011.[100] This initial marketing campaign involved approximately 700,000 direct solicitations.[101]

As part of this initial marketing campaign, the solicitations included certain minimal disclosures "approved" by the PUCO Staff.[102] In some of the direct solicitations, a customer

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[97] Tr. Vol. II, p. 308.

[98] Tr. Vol. II, p. 379.

[99] Tr. Vol. II, pp. 325-326.

[100] Tr. Vol. II, p. 380.

[101] Tr. Vol. II, p. 386.

[102] Tr. Vol. II, pp. 383-384.

received a letter on 8 ½ x 14 paper (with an enrollment card attached to the bottom), the contract with Columbia Retail Energy, and a Frequently Asked Questions document. All of the documents were sent in an envelope from "Columbia Retail Energy" and addressed to "Columbia Gas of Ohio Natural Gas Customer,"[103] which a customer could easily consider to be a mailing from Columbia Gas of Ohio.[104] The envelope itself included no disclosure whatsoever,[105] and such an envelope disclosure was never even discussed with the PUCO Staff.[106] As a result, approximately 700,000 consumers in the Columbia Gas of Ohio service territory received direct solicitations from IGS (using the Columbia Retail Energy name) that included no disclosure on the envelope, despite the fact that the envelope is the first document seen by any customer being solicited by IGS. There is no doubt that a disclosure-less envelope achieved IGS' fundamental goals of having consumers open envelopes,[107] and then increasing its customer base, throughput volumes, and total sales.[108]

Moving past the confusion caused by the envelope, the letter itself contains only two (2) minimal disclosures in a font size significantly smaller than the majority of the text in the solicitation letter.[109] The first disclosure, which appears underneath the "Columbia Retail Energy" name and starburst logo in the upper, left hand corner, included the following disclosure: "Columbia Retail Energy is not an affiliate of NiSource or Columbia Gas of Ohio."[110] This disclosure assumes that a customer knows what the term affiliate means, and focuses on what Columbia Retail Energy is not. It fails, however, to explain the relationship between Columbia

[103] Tr. Vol. II, p. 385 and p. 393.

[104] Tr. Vol. II, p. 257.

[105] Tr. Vol. II, p. 392

[106] Tr. Vol. II, p. 394.

[107] Tr. Vol. II, p. 359.

[108] Tr. Vol. I, pp. 46-48.

[109] Tr. Vol. II, p. 386.

[110] See IGS Ex. 1, p.1.

Retail Energy and IGS, or to identify Columbia Retail Energy as a competitive retail natural gas provider.

The second disclosure is buried in a footnote in the letter. To make matters worse, it is written in a very small size and states: "The trademark COLUMBIA RETAIL ENERGY including the starburst design is a trademark of NiSource Corporate Services Company and is used under license by Interstate Gas Supply, Inc. Interstate Gas Supply, Inc., is not an affiliate of NiSource Corporate Services Company or Columbia Gas of Ohio."[111] Rather than explain what IGS and Columbia Retail Energy are (i.e., competitive retail natural gas service providers), the disclosures focus solely on what the companies are not. Even the Frequently Asked Questions ("FAQs") document fails to explain the relationship between IGS, Columbia Retail Energy, Columbia Gas of Ohio, and NiSource. Instead, the FAQs simply state that "Columbia Retail Energy is a natural gas supplier." Furthermore, this disclosure also assumes that a consumer understands what the terms "affiliate" and "license" mean.[112]

Adding to the confusion, IGS also sent out a separate mailing as part of its initial marketing campaign. Although the solicitation letter and Columbia Retail Energy contract included the same disclosures identified above, the enrollment card (which is what customers fill out to sign up for service with IGS) was sent as a separate document. Noticeably absent from the enrollment card is any disclosure whatsoever. Thus, when the customer actually signed up for service with Columbia Retail Energy, there was no disclosure to explain the relationship between IGS, Columbia Retail Energy, Columbia Gas, and NiSource.

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[111] This same disclosure also appears at the end of the first paragraph of the Columbia Retail Energy contract in bold.

[112] As Stand witness Dover explained, "I think that I have encountered the question 'What is an affiliate?' many times from all classes of customers, and I've had to explain what it is. So I believe that residential customers who don't know what the word [Affiliate] is, without further investigation, might have the question 'What is an affiliate?' and looking at the logo may just disregard asking the question because they recognize the brand." Tr. Vol. II, p. 255.

Before initiating the second marketing campaign at the end of 2010/early 2011, IGS worked with the Retail Energy Supply Association (and PUCO Staff) to modify the disclosures.[113] As Mr. Parisi explained on cross-examination, "folks filed in our certification docket, including RESA, and RESA and IGS got involved in some discussions with respect to what their concerns were with respect to the disclosures. What you see on the second campaign is a result of those disclosures."[114] As a result, the second marketing campaign included the following disclosures, which also fail to mitigate or eliminate the inherent confusion associated with IGS' use of the "Columbia" service marks:

- On the solicitation letter, the disclosure under the "Columbia Retail Energy" trade name in the upper, left hand corner changed to "Service is provided by IGS Energy under the trade name Columbia Retail Energy." The previous disclosure stated: "Columbia Retail Energy is not an affiliate of NiSource or Columbia Gas of Ohio."[115] The font size of the disclosure appears to be slightly larger, but remains significantly smaller than, the "Columbia Retail Energy" trade name. Further, the disclosure remains confusing, as it explains the relationship between IGS and Columbia Retail Energy, but fails to identify either as a competitive retail natural gas provider and does not explain the relationship between Columbia Retail Energy and the natural gas utility (Columbia Gas of Ohio).

- The second disclosure remains buried in a footnote, but at least the size of the disclosure was more consistent with the rest of the text in the solicitation letter. The disclosure was modified from the first marketing campaign to state: "Columbia Retail Energy is not the utility and neither Columbia Retail Energy nor Interstate Gas Supply, Inc. ('IGS Energy') is an affiliate of NiSource Retail Services or the utility Columbia Gas of Ohio. The Columbia Retail Energy name and starburst design are used by Interstate Gas Supply, Inc. under a license agreement with NiSource Retail Services." The previous disclosure in the footnote stated: "The trademark COLUMBIA RETAIL ENERGY including the starburst design is a trademark of NiSource Corporate Services Company and is used under license by Interstate Gas Supply, Inc. Interstate Gas Supply, Inc., is not an affiliate of NiSource Corporate Services Company or Columbia Gas of Ohio."[116]

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[113] Tr. Vol. II, p. 390.

[114] Tr. Vol. II, p. 384.

[115] See IGS Ex. 1, p.1.

[116] This same disclosure also appears at the end of the first paragraph of the Columbia Retail Energy contract in bold.

Ohio,"[128] and has a "long record in the industry."[129] Interstate Gas Supply and IGS Energy represent a "strong brand and a strong name,"[130] and IGS contends that it has not lost any brand recognition in the Columbia Gas of Ohio service territory.[131] Although presumably quite profitable, [redacted] IGS has essentially abandoned what it deemed to be a "strong brand," at least in the Columbia Gas of Ohio service territory where the "Columbia Retail Energy" trade name is being used. In fact, most if not all, of IGS' marketing activities in the Columbia Gas of Ohio service territory are done using the "Columbia Retail Energy name.[133] IGS is not directly marketing in the Columbia Gas of Ohio service territory, as the brand is solely being used with existing customers.[134] This marketing strategy is not expected to change in 2011.[135] As a result, and at least through the end of 2011, consumers in the Columbia Gas of Ohio service territory will only see solicitations from Columbia Retail Energy.[136]

With an established brand, "strong name" and "long record in the industry," IGS unexpectedly abandoned the IGS name for a new (and extremely controversial) marketing strategy centering on the use of the "Columbia" service marks solely in the Columbia Gas of Ohio service territory. Acknowledging the value and name recognition associated with the Columbia name in the natural gas industry, [137] IGS is not shy in championing its goal "that customers who see the Columbia name out in the Columbia marketplace will be more inclined to participate in the

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[128] Parisi Testimony at p. 2.

[129] Tr. Vol. II, p. 357.

[130] Tr. Vol. II, p. 357.

[131] Tr. Vol. II, p. 358.

[redacted]

[133] Tr. Vol. II, pp. 346-347.

[134] Tr. Vol. II, pp. 346-347.

[135] Tr. Vol. II, pp. 346-347.

[136] Tr. Vol. II, pp. 346-347.

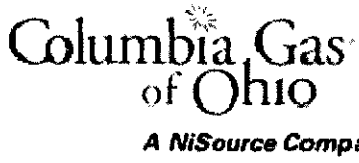
[137] Tr. Vol. I, pp. 46-48.

- A disclosure was added to the envelope stating: "Service is provided by IGS Energy under the trade name Columbia Retail Energy." As set forth above, this confusing statement fails to identify either entity as a competitive retail natural gas provider and does not explain the relationship between Columbia Retail Energy and the natural gas utility (Columbia Gas of Ohio). Although IGS did remove the reference to "Columbia Natural Gas Customer"[117] because of concerns that it would result in customer confusion,[118] there is still the statement on the envelope that "Important Natural Gas Information" is enclosed.

The third and most recent marketing campaign commenced sometime before October 2011, likely in the late summer/early fall of 2011.[119] The disclosures included in the solicitations distributed as part of the second and third marketing campaigns are the same.[120]

To date, IGS has sent more than three (3) million solicitations to residential and small commercial customers in the Columbia Gas of Ohio service territory using the "Columbia Retail Energy" name.[121] Regardless of the language used in the disclosures, the solicitations all included in large, bold font the following:

- The use of the same "Columbia" name as Columbia Gas of Ohio (the utility) and Columbia Retail Services (the warranty provider);[122]



- The use of the same (or substantially similar) blue coloring as Columbia Gas of Ohio and Columbia Retail Services;[123] and

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[117] Tr. Vol. II, p. 396.

[118] Tr. Vol. II, p. 397.

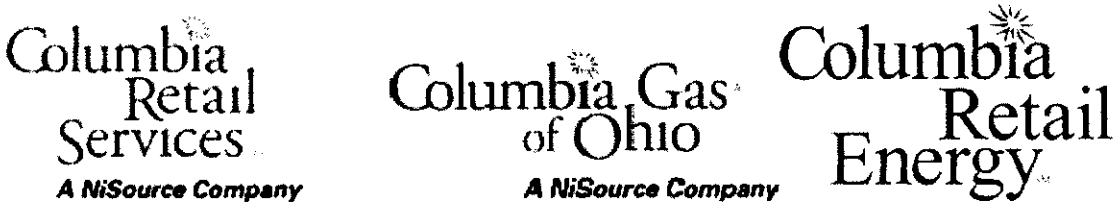
[119] Tr. Vol. II, p. 394.

[120] Tr. Vol. II, p. 395.

[121] Tr. Vol. I, p. 38 (stipulation from counsel for IGS).

[122] Tr. Vol. II, p. 376.

[123] Tr. Vol. II, p. 376.



- The use of the same red starburst logo as Columbia Gas of Ohio and Columbia Retail Services.[124]

The use of disclosures does not mitigate or eliminate the striking and exceedingly confusing similarities between the three (3) Columbia trade names and logos.

Further, the more than 3 million solicitations were only sent to consumers in the Columbia Gas of Ohio service territory—people familiar with the "Columbia" name (which IGS acknowledges has been around for a long time),[125] and logo (which was changed around 2000, but has nevertheless developed certain brand recognition over at least the last decade).[126] Regardless of the disclosures used, the "Columbia" name, color scheme and starburst logo are inherently misleading, confusing and deceptive to customers—a fact confirmed by Stand witness Ward.[127]

3. There is no purpose in IGS using the "Columbia" name and logo other than to confuse customers into believing that they are signing up for service with Columbia Gas.

IGS has been doing business in Ohio's competitive retail natural gas market for more than two (2) decades. As Mr. Parisi explained, "IGS was one of the first natural gas choice suppliers in

[124] Tr. Vol. II, p. 376.

[125] Tr. Vol. II, p. 400.

[126] Tr. Vol. II, p. 400.

[127] Tr. Vol. II, p. 294.

[Columbia Gas of Ohio] CHOICE program;"[138] and specifically, enhance the success of IGS' marketing efforts using the Columbia service marks (e.g., by opening envelopes,[139] and signing up for retail natural gas service with IGS).[140] The only reasonable ground for doing so would be that IGS hoped to take advantage of the "Columbia" name, color scheme, and starburst logo in the Columbia Gas of Ohio service territory, draw the association between "Columbia Retail Energy" and "Columbia Gas of Ohio," and attract new customers who believed they were signing up with the utility, not IGS or any other CRNGS provider. As Stand witness Freeman accurately concluded, "If it doesn't have an advantage, then why are you using it?"[141]

4. IGS' marketing materials violated, and continue to violate, OAC Rule 4901:1-29-05(C).

OAC Rule 4901:1-29-05(C)(1) to (8) identifies specific examples of "unfair, misleading, deceptive, or unconscionable acts or practices," including a variety of advertising or marketing activities. One such unfair, misleading, deceptive, or unconscionable act or practice is the failure "to fully disclose, in an appropriate and conspicuous type-size, an affiliate relationship on advertising or marketing offers that use affiliated natural gas company name and logo." OAC Rule 4901:1-29-05(C)(8)(f).

Throughout this proceeding, IGS relies almost exclusively on the fact that it followed the affiliate disclosure rule found in OAC Rule 4901:1-29-05(C)(8). Even though IGS is unaffiliated with any other company (including NiSource, Inc., NiSource Corporate Services Company, or NiSource Retail Services),[142] the list of "unfair, misleading, deceptive, or unconscionable acts or

[138] Tr. Vol. I, pp. 46-48.

[139] Tr. Vol. II, p. 357.

[140] Tr. Vol. I, pp. 46-48.

[141] Tr. Vol. I, p. 169.

[142] Tr. Vol. I, pp. 25-26.

practices" in OAC Rule 4901:1-29-05(C) is non-exclusive. Simply because IGS is not an affiliate of Columbia Gas of Ohio or any of the NiSource entities does not mean that it is exempt from the Commission's marketing rules or consumer protection provisions. In fact, the marketing practices of IGS (using the Columbia Retail Energy trade name) should receive an even more exacting standard of review from the PUCO Staff than a utility affiliate—something that simply did not happen in this case.

IGS' failure to appropriately and conspicuously disclose the relationship between itself (as Columbia Retail Energy) and the utility (Columbia Gas of Ohio) violates the not only the spirit, but the language of OAC Rule 4901:1-29-05(C)(8). As noted above, the font size of all of the disclosures used by IGS is significantly smaller than the rest of the text. One of the two disclosures in the solicitation letter is not only small in size, but buried in a footnote in the middle of a significant amount of text. Even more importantly, the disclosures do not sufficiently disclosure the relationship between IGS, Columbia Retail Energy, Columbia Gas, and the NiSource entities. There would be no additional cost to IGS to increase the size of the disclosures, or add information sufficient to fully disclose the identity of Columbia Retail Energy and the services it offers. For example, the disclosure tied to the "Columbia Retail Energy" trade name could easily be modified to state: "Competitive retail natural gas service is provided by IGS Energy under the trade name Columbia Retail Energy. Neither IGS Energy nor Columbia Retail Energy is an affiliate of Columbia Gas of Ohio, your natural gas company, or NiSource, the parent company of Columbia Gas of Ohio" (where the underlined portions represent proposed additions). Or, the disclosure buried in the footnote could have been moved to the first paragraph of the solicitation letter and bolded. IGS did neither, presumably to take advantage of the inherently confusing nature of the use of the Columbia Retail Energy name, thereby violating OAC Rule 4901:1-29-05(C).

5. The concept of corporate separation between IGS and Columbia Gas of Ohio is nonsensical to consumers in the Columbia Gas of Ohio service territory.

Notwithstanding IGS' claims that the concerns in the electric industry that resulted in regulations relating to corporate separation are not present "with respect to IGS' use of the trade name [Columbia Retail Energy] because IGS does not have any corporate connection with NiSource or Columbia Gas of Ohio."[143] In fact, IGS contends that "there can be no greater separation than the separation between two completely separate companies with separate employees, property, payroll, equipment, call centers and absolute separation between all utility functions and IGS' functions."[144] This could not be further from the truth. Although the physical assets of the company might be separate, there is little if any separation between the companies when it comes to the physical presentation of the "Columbia" name and starburst logo that customers have seen in receiving the more than 3.4 million solicitations and mailings from IGS. As set forth in detail above, the physical presentation of the "Columbia" name and starburst logo in those solicitations transforms Columbia Retail Energy (IGS) and Columbia Gas of Ohio (the utility) into one and the same company. Both common sense and the Commission's consumer protection regulations prohibit such practices.

B. The Licensing Agreement gives IGS an undue preference in the Columbia Gas of Ohio service territory, and sets a harmful precedent in Ohio's competitive retail natural gas market for consumers.

Simply stated, the Licensing Agreement gives IGS an unfair competitive advantage in the Columbia Gas of Ohio service territory, [redacted]

[143] Parisi Direct Testimony, p. 4.

[144] Parisi Direct Testimony, p. 4.

[redacted] As Stand witness Stacee Dover testified, "[w]here you're gaining an advantage of a logo and a name brand, especially one of a trusted local distribution company, it does give an upper edge to be able to create sales in a quicker fashion than that of a Stand Energy or an IGS."[146]

1. IGS' use of the "Columbia" trade name and logo is unfairly prejudicial.

Anyone can see that something is just not right about IGS' use of the "Columbia" trade name and logo. Historically, there appeared to be nothing wrong with IGS (as a company), IGS (the brand), or IGS (the name). [redacted] Then, suddenly, IGS essentially abandoned its established brand name in the Columbia Gas of Ohio service territory to enter into a Licensing Agreement with NiSource to use the "Columbia" name and starburst logo. As Stand witness Freeman noted: "In my opinion this is clearly something that's of great value. And the fact that all of the details surrounding it have been so protected and so restricted from the public, in my mind, suggests that there's something going on and I don't see why it is that people can't know about it. If it's something that's unimportant, then why can't people know?"[148] Based upon his experience as an executive at Columbia Gas of Ohio, Stand witness Mark Ward explained: "when I was director of gas transportation, I had to enforce the code of conduct and the standard of conduct. At any time if Columbia would have come to me and say 'We're going to let Enron use our name, what do you think, Ward? What do you think?' I would as -- it would have been my responsibility to say it doesn't look right and **it looks like favoritism through a marketer. I think it would be a ruse that Enron or any marketer would use**. And that's why -- I don't know if the person who's taken

[redacted]

[146] Tr. Vol. II, p. 271.

[redacted]

[148] Tr. Vol. I, p. 156.

my place at Columbia now, they may have expressed that concern, I don't know. They should have, but I don't know if they did."[149] (Emphasis added).

[redacted]

[redacted] This creates a terrible precedent and runs contrary to standard industry practice.[153]

[149] Tr. Vol. II, p. 301.

[redacted]

[153] See e.g. NEMA Code of Conduct (NOPEC Ex. 8), p. 3 [explaining that "Regulated utility services must not preferentially be tied to products or services provided by non-regulated market participants (affiliated or nonaffiliated)"]. See also .ORC 4929.02(A)(8), which implements a state policy designed to "[p]romote effective competition in the provision of natural gas services and goods by avoiding subsidies flowing to or from regulated natural gas services and goods."

3. The undue preference shown to IGS by Columbia Gas of Ohio started long before this case.

The favoritism shown by Columbia Gas and its affiliated NiSource companies toward IGS began long before this case. Perhaps the most blatant example of such favoritism became public knowledge as part of an investigation by the Federal Energy Regulatory Commission ("FERC") in 2004. As part of FERC Case No. IN04-2-000, an investigation was conducted regarding the "unauthorized communication of non-public natural gas storage inventory information" by three (3) interstate natural gas pipeline companies (including Columbia Gas Transmission Corporation).[154] More specifically, the three interstate pipeline companies, including Columbia Gas Transmission Corporation ("TCO"), "communicated their respective companies' actual storage injection or withdrawal volumes over extended periods of time."[155] In TCO's case, the confidential storage information was communicated to only three (3) individuals at three (3) companies, including IGS. The FERC affirmatively noted that, contrary to Mr. White's testimony at the evidentiary hearing,[156] "[n]one of the storage inventory information was public at the time it was communicated."[157]

Perhaps more importantly, the FERC explained:

> The investigation in this docket has revealed that a number of market participants have sought to obtain and exploit non-public storage inventory information to gain a competitive advantage in wholesale gas markets. Most or all of the natural gas traders and other natural gas industry participants that received the non-public storage inventory information from. . . Columbia apparently valued it because they believed it provided insight with respect to one or more of the following: (a) NYMEX natural gas contract futures prices immediately following the Thursday 10:30 a.m. Eastern Time release by the United States Department of Energy's Energy Information Administration (EIA) of its Weekly Natural Gas Storage Report; Co) off- exchange traded

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[154] *Dominion Resources, Inc.; Dominion Transmission, Inc.; Dominion Energy Clearinghouse; Northern Illinois Gas Company; and Columbia Gas Transmission Corporation,* FERC Docket No. IN04-2-000, Order Approving Stipulation and Consent Agreements 108 FERC ¶ 61,110 (August 2, 2004) ("FERC Order") at p. 1.

[155] FERC Order. at p. 1.

[156] See Tr. Vol. I, pp. 97-99.

[157] FERC Order. at p. 1.

> natural gas-based instruments; (c) fluctuating price differentials between major receipt and delivery points; (d) general market conditions; (e) the value of storage as a price hedging mechanism; or (f) pipeline operations affecting transportation or storage of gas.[158]

Among the companies to receive this confidential gas storage information was IGS. In fact, only three individuals at three separate companies (including IGS) received this confidential information from TCO.[159] Scott White is the only person in the position of President to have received the confidential information from TCO,[160] and his testimony confirmed that he personally asked TCO for such confidential information.[161] In fact, and noting the cozy relationship between IGS and Columbia, Mr. White testified "**our** team members from Columbia Transmission gave us information about their storage volumes pretty consistently based on our requests for that information."[162] (Emphasis added).

According to the Stipulation filed with the FERC, and directly contrary to Mr. White's statements at the hearing,[163] TCO "knew or should have known that the Recipients [including IGS] would be in a position to use the non-public storage inventory information she was providing them to help them better understand operational activity on Columbia's system or price-related commodity activity."[164] Such confidential information was obtained by IGS (and personally by Mr. White) for a little more than two (2) years from 2001-2003.[165] Although IGS ultimately was not

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[158] FERC Order at p. 2.

[159] *Columbia Gas Transmission Corporation,* FERC Docket No. IN04-2-000, Stipulation and Consent Agreement ("Columbia FERC Stipulation") at p. 3.

[160] Columbia FERC Stipulation" at p. 3.

[161] Tr. Vol. I, pp. 96-99.

[162] Tr. Vol. I, p. 97.

[163] Tr. Vol. I, p. 107.

[164] Columbia FERC Stipulation" at p. 5.

[165] Columbia FERC Stipulation" at p. 3.

penalized for its involvement, TCO received a civil penalty of $2.5 million,[166] likely due to the "prolonged and persistent nature of the communications weakened the desired practices that commodity trading be based on public information and that all pipeline customers be apprised of transportation-related information equally."[167]

4. The Licensing Agreement was a privately negotiated agreement that did not result in a transparent process where all Ohio CRNGS providers could participate.

The Licensing Agreement is the result of private negotiations between IGS and NiSource. Although IGS claims that any CRNGS provider could have approached NiSource about the licensing of the "Columbia" name and starburst logo, the fact remains that NiSource chose to negotiate with, and enter into the Licensing Agreement with, IGS and IGS only. If NiSource truly wanted to make the process fair and transparent, all it had to do was give notice to the CRNGS providers doing business in Ohio, prepare a request for proposals, accept bids, and select the CRNGS provider submitting the highest and best bid. However, rather than using a competitive bidding process to receive the best deal for NiSource, it chose to privately negotiate with only one CRNGS provider— the same company with whom it already had a cozy relationship. In fact, Mr. Parisi acknowledged that NiSource could have gotten a better financial deal had it bid out the use of the "Columbia" name and starburst logo. When asked why Stand did not approach NiSource about doing so, Stand witness Freeman admitted the asking price would have been too expensive, which Stand witness Ward explained that it would have been improper and contrary to established industry practice.

[166] FERC Order at p. 4.

[167] FERC Order at p. 5.

VI. CONCLUSION

This is a case of first impression before the Commission. It presents important public policy issues relating to fair competition in Ohio's deregulated natural gas market, marketing of retail natural gas services in Ohio, and protection of consumers against sharp marketing practices. Stand witness Freeman captured the essence of the problem at the evidentiary hearing: "I think the crux of the problem is that you have an entity that is. . . their own marketing company, and they're using the brand name of the utility to market themselves. I mean, you're setting yourself totally apart from an unknown marketer that has no established name and using the name of the utility which people know, and that in itself sets a terrible precedent."[168]

The unprecedented use by IGS of the utility's name runs contrary to the Commission's consumer protection rules because IGS' advertising is misleading, deceptive, and confusing to consumers, and makes bad public policy because IGS is given an unfair competitive advantage in the Columbia Gas service territory. For the reasons set forth in this Joint Memorandum Contra and Joint Post-Hearing Brief, NOPEC and Stand respectfully request that the Commission order IGS to cease and desist all marketing in Ohio under the "Columbia Retail Energy" trade name.

[168] Tr. Vol. I, p. 134.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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