FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of the Office of the Ohio Consumers' Counsel, et al.	)	
Complainants,	)	
v.	)	Case No. 10-2395-GA-CSS
Interstate Gas Supply, Inc.	)	
Respondent.	)	

JOINT REPLY BRIEF OF COMPLAINANTS, THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL AND STAND ENERGY CORPORATION (PUBLIC VERSION)

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PUBLIC VERSION

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I. INTRODUCTION

This case is quite simple: Does the unprecedented use of the "Columbia" name and starburst logo by Interstate Gas Supply, Inc. ("IGS") give IGS an unfair competitive advantage in the Columbia Gas service territory; and/or result in advertising that is misleading, deceptive, and confusing to consumers? Rather than focusing on these two questions, IGS revisits the misguided arguments raised in its motion for summary judgment, ignores the pertinent facts raised at the evidentiary hearing, and continues to rely on the rules of the Public Utilities Commission of Ohio ("Commission" or "PUCO") that are inapplicable to this case of first impression.

For the reasons set forth in the Joint Post-Hearing Brief filed by the Northeast Ohio Public Energy Council ("NOPEC") and Stand Energy Corporation ("Stand" or collectively "Complainants"), and the arguments presented herein, the Complainants request that the

Commission order IGS to cease and desist all marketing in Ohio under the "Columbia Retail Energy" trade name.

II. LEGAL ARGUMENTS

A. The controversial legal issues raised in this case are the same issues raised by NOPEC, Stand and the other Complainants more than 15 months ago.

IGS' statement that the "Complainants failed to show any evidence that the use of the name is actually controversial" is quite far-fetched.[1] Not only has this controversy been percolating at the Commission for approximately 15 months in two separate proceedings, but it has: (i) featured numerous interested parties ranging from the Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Farm Bureau Federation ("Farm Bureau"), to retail natural gas marketers; (ii) generated a significant amount of media attention; and, (iii) had far-reaching political ramifications in the Ohio energy arena.[2]

Perhaps more importantly, the claims raised at this stage of the proceeding are anything but new. The Complainants have continued to raise the same two claims for approximately 15 months, namely that: (i) 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; and (ii) the Licensing Agreement gives IGS an unfair competitive advantage in the Columbia Gas of Ohio service territory, and sets a harmful precedent in Ohio's competitive retail natural gas market. These two claims were first raised shortly after IGS filed its Notice of Material Change on August 6, 2011 in PUCO Case No. 02-1683-GA-CRS (the "IGS Certification Docket").[3] The Notice of Material Change identified "Columbia Retail

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[1] IGS' Post-Hearing Brief, p. 17.

[2] See also Joint Post-Hearing Brief of NOPEC and Stand, pp. 12-13 and the rest of this section of the Reply Brief.

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

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.

Concerned about IGS' unprecedented filing, NOPEC, Stand, and a number of other interested parties protested IGS' use of the Columbia Retail Energy trade name in the following pleadings, all of which were filed more than 12 months ago:

- Seven (7) Motions to Intervene,[4] including NOPEC's motion to intervene which stated: "NOPEC recognizes that the use of the trade name Columbia Retail Energy by an entity not affiliated with Columbia Gas undoubtedly will confuse customers and potentially lead to violations of this Commission's consumer protection provisions in the Ohio Administrative Code."
- Two (2) Motions to Compel Discovery,[5] and
- One (1) Motion to Cease and Desist,[6] which among other things, stated "The PUCO should Order IGS to cease and desist from using the Columbia Retail Energy trade name and logo to avoid irreparable harm to consumers who may be misled by the use of the Columbia trade name and logo into believing that IGS is somehow connected to their natural gas utility distribution company." See p. 2.

The entire focus of the challenges raised by NOPEC, Stand and others in the IGS Certification Docket involved IGS' use of the "Columbia" name and logo in the Columbia Gas of Ohio service territory; in particular, claims that the use of the Columbia name, logo and color scheme in IGS' marketing materials were misleading, confusing, and deceptive.

The Joint Complaint in this case was filed on October 21, 2010 in response to a Commission Entry dated November 10, 2010 in the IGS Certification Docket which suggested

[4] 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 ("Farm Bureau") (October 5, 2010). Notably, three (3) of the intervention motions included requests for an evidentiary hearing and a fourth included a request for a rulemaking.

[5] OCC (September 17, 2010) and NOPEC (September 29, 2010).

[6] RESA also filed a Statement in Support of the Motion to Cease and Desist, which stated "IGS is attempting to take advantage of the regulatory vacuum created by the lack of specific rules governing a non-affiliated CRNGS' use of the NGC's name and logo. Nevertheless, its reckless conduct has violated even the generic regulations forbidding misleading, deceptive and anti-competitive practices." See p. 4.

that a complaint case would be the proper forum for reviewing IGS' use of the "Columbia" name, logo and color scheme. In response to the Commission's Entry in the IGS Certification Docket, many of the same parties to that case, including NOPEC and Stand, filed a complaint against IGS on the issues already raised in the IGS Certification Docket,[7] as well as claims that the Licensing Agreement and IGS' use of the "Columbia" name and logo in the Columbia Gas of Ohio service territory would give IGS an unfair competitive advantage.[8] In this case, the discovery requests, depositions, dispositive motion practice, and evidentiary hearing focused on these same two issues. Likewise, the Joint Post-Hearing Brief filed by NOPEC and Stand also addressed those same two issues, arguing that: (i) 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; and (ii) the Licensing Agreement gives IGS an unfair competitive advantage and undue preference in the Columbia Gas of Ohio service territory, and sets a harmful precedent in Ohio's competitive retail natural gas market. In fact, the Commission rules relied upon in the Complaint [Ohio Administrative Code ("OAC") Rules 4901:1-29-03(A), 4901:1-29-05(C), 4901:1-27-12(I), and 4901:1-29-02(A)] are the same ones referenced in the Joint Post-Hearing Brief filed by NOPEC and Stand. It is disingenuous

[7] See e.g., Claims 2, 3, and 9 in the Complaint.

[8] See e.g., Claims 10-12 in the Complaint.

and untrue for IGS to claim that Complainants ambushed IGS and raised new (or non-controversial) issues at the evidentiary hearing, or in their Joint Post-Hearing Brief.[9]

B. IGS' marketing materials are confusing, misleading and deceptive.

1. IGS' disclosures are not "clear" or designed to avoid confusion among consumers in the Columbia Gas service territory.

Throughout its Post-Hearing Brief, IGS repeatedly characterizes the disclosures on its marketing materials as "clear."[10] The disclosures, however, do not state anything clearly. As explained in NOPEC and Stand's Joint Post-Hearing Brief, the disclosures not only inadequately explain the relationship between IGS, Columbia Retail Energy, Columbia Gas of Ohio and the NiSource entities, but are not easily located in the marketing materials (e.g. in smaller font size or buried in footnotes or other text). Rather than repeating the arguments raised in their Joint Post-Hearing Brief, NOPEC and Stand incorporate by reference the arguments raised on pages 25-30 of their initial Joint Post-Hearing Brief.

2. IGS' marketing materials are confusing, misleading and deceptive regardless of whether there are any disclosures.

IGS' Post-Hearing Brief completely misses the mark by focusing solely on the alleged adequacy of the disclosures in its marketing materials rather than the underlying problem of using the same name, logo, font and color scheme as the utility. The bottom line is that IGS' marketing materials are confusing, misleading and deceptive regardless of whether there are any

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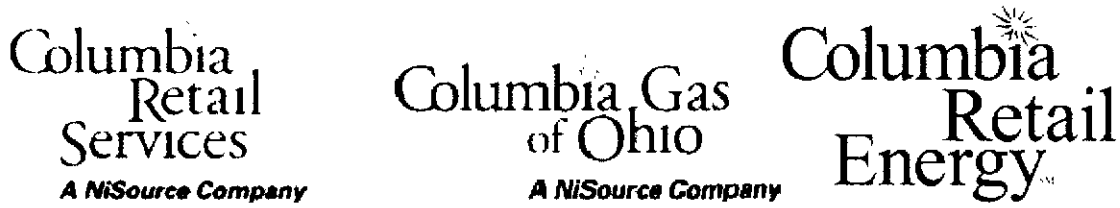
[9] See IGS' Post-Hearing Brief, p. 19. Even if new issues had been raised at the evidentiary hearing (which NOPEC and Stand strongly deny), Rule 15(B) of the Ohio Rules of Civil Procedure states: "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. . . . If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits." It is clear that because the issues currently before the Commission are the same issues raised approximately 15 months ago that there has not been, and is not, any prejudice to IGS.

[10] IGS' Post-Hearing Brief at pp. 7-11 and 30.

disclosures. Disclosures do not, and cannot, solve the fundamental problem with IGS' use of the "Columbia Retail Energy" name – that all of IGS' solicitations include 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);[11]

- The use of the same (or substantially similar) blue coloring as Columbia Gas of Ohio and Columbia Retail Services;[12] and



- The use of the same red starburst logo as Columbia Gas of Ohio and Columbia Retail Services.[13]

The use of disclosures cannot mitigate or eliminate the striking and exceedingly confusing similarities between the three (3) Columbia trade names, logos, and color schemes—a marketing

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

[12] *Id.*

[13] *Id.*

scheme that serves no purpose other than to confuse consumers into believing that they are signing up for service with Columbia Gas.[14]

3. IGS ignores evidence of actual confusion and instead focuses on unnecessarily attacking Stand's witnesses; in particular, Mark Ward.

Ignoring the evidence presented at the hearing, as well as a significant portion of the Joint Post-Hearing Brief filed by NOPEC and Stand, IGS devotes six pages of its brief to arguing that there is "no evidence that consumers were misled or deceived by IGS' use of the trade name Columbia Retail Energy."[15] Rather than restate arguments presented in their initial Joint Post-Hearing Brief, NOPEC and Stand incorporate by reference the arguments raised on pages 17-19 and 23-25 of that brief. NOPEC and Stand emphasize, however, that Mark Ward twice testified about knowledge of actual customer confusion,[16] and admitted that he himself, as a customer in the Columbia Gas of Ohio service territory, had been confused when he received IGS' solicitations using the Columbia Retail Energy name.[17]

Rather than acknowledge this evidence, IGS labels it "not credible," contradictory and biased.[18] Mr. Ward's credibility is one thing that cannot be questioned. A veteran of the United States Air Force, Mr. Ward has worked in the natural gas industry for more than 40 years.[19] For approximately 27 years, Mr. Ward worked for the Columbia Gas distribution companies, and served as "Director of Gas Transportation Services for the Columbia Gas Distribution Companies. (Columbia Gas of Kentucky; Columbia Gas of Maryland; Columbia Gas of

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[14] See NOPEC and Stand's Joint Post-Hearing Brief, pp. 30-32.

[15] IGS' Post-Hearing Brief, p. 12.

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

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

[18] IGS' Post-Hearing Brief, p. 14.

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

Virginia; Columbia Gas of Ohio; and Columbia Gas of Pennsylvania)" from 1989 to 1999 under the watch of the same Marvin White who helped form IGS.[20] Among other things, Mr. Ward participated in the development of Columbia Gas' CHOICE program;[21] and, upon retirement from Columbia, went to work for Stand to assist with regulatory, operational and marketing issues with CHOICE customers.[22]

Neither Mr. Ward's retirement from Columbia Gas in 1999, nor current employment with Stand, demonstrates any bias as IGS claims.[23] In reality, IGS simply does not like the fact that Mr. Ward presented evidence of customer confusion and explained the fundamentally inappropriate nature of IGS' use of the Columbia name, logo and color scheme in the Columbia Gas of Ohio service territory. Based upon his experience as a long-time executive at Columbia Gas of Ohio, Mr. 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 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.[24]

(Emphasis added). Such testimony has nothing to do with his relationship with Stand and everything to do with the unprecedented and improper relationship between IGS, NiSource and Columbia Gas of Ohio.

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

[21] Stand Ex. 5, pp. 2-3 of 8.

[22] *Id.*

[23] IGS' Post-Hearing Brief, p. 14.

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

Finally, Mr. Ward's hearing testimony does not contradict his deposition testimony as IGS suggests.[25] At his deposition, Mr. Ward admitted not knowing of consumers who were both confused by the use of the Columbia Retail trade name and then mistakenly signed up for service with IGS based upon such confusion.[26] This question dealt with customers who were both confused and then mistakenly signed up for service with IGS. At the evidentiary hearing, Mr. Ward acknowledged that he knew customers in the Columbia Gas of Ohio service territory who were confused by IGS' use of the Columbia name, logo and color scheme, but not that he knew of customers who mistakenly signed up for service with IGS. More specifically, he stated:

> 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.[27]

The answers provided by Mr. Ward are entirely consistent.[28]

4. The Retail Energy Suppliers Association RESA settlement has no bearing on the outcome of this case.

The moving target faced by NOPEC, Stand, and the other Complainants has been, and continues to be, IGS' marketing materials using the "Columbia Retail Energy" name. The marketing materials and corresponding disclosures have changed multiple times, thereby rendering it extremely difficult for the parties (let alone consumers in the Columbia Gas of Ohio

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[25] IGS' Post-Hearing Brief, p. 14.

[26] Mr. Ward did, however, acknowledge that he, as a Columbia Gas of Ohio customer, was actually confused by the use of the Columbia Retail Energy name by IGS.

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

[28] And, the fact that counsel for IGS failed to ask follow up questions about the people identified by Mr. Ward as having been confused is not the fault of Mr. Ward, Stand, or NOPEC.

service territory) to analyze them. One thing remains clear, however: IGS' settlement with the RESA is not evidence that the disclosures used by IGS are adequate or compliant with Ohio law.

The settlement with RESA is the settlement of a legal dispute; nothing more, nothing less. The fact that RESA agreed to certain disclosures in Ohio and other states does not render IGS' use of the Columbia Retail Energy name in Ohio appropriate. No regulator in Ohio or any of the other states in which IGS is using the Columbia Retail Energy name has seen the Licensing Agreement or truly understood the deal. As Stand witness Freeman explained at the evidentiary hearing, "like my mom and dad used to say, just because Tom did something wrong doesn't mean I get to do it just because he did something wrong."[29]

5. The "affiliate" disclosure rule set forth in OAC Rule 4901:1-29-05(C)(8) does not apply to this case.

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). On page 9 of its Post-Hearing Brief, IGS argues: "[b]oth IGS and Staff wanted the disclosures to comply with Ohio Administrative Code Section 4901:1-29-05(C)(8)(f), which governs marketing and solicitation disclosures of affiliates of utility's using a similar name as the utility. Although arguably this code section is not directly on point, IGS believed it was appropriate to apply the standards set forth therein for its use of the CRE name."

Not only is the affiliate disclosure not directly or indirectly on point, but it should in no way govern the outcome of this proceeding. 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.[30] This is a case of first impression for this Commission. The

[29] Tr. Vol. I, p. 140.

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

unprecedented use of the utility name by an unaffiliated and unregulated retail natural gas provider combined with the confusing 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. Yet, this did not happen in this case.

In fact, no one on the PUCO Staff or in the Attorney General's office has fully vetted IGS' use of the "Columbia" name, logo or color scheme in the Columbia Gas service territories. Yet, IGS claims that it did not intend to mislead or deceive customers because the "perpetrator [IGS] does not provide the victim [consumers in the Columbia Gas service territory] with all the information about who it is and what it is doing, and the perpetrator [IGS] certainly does not ask legal regulators what disclosures it should properly make."[31] This could not be further from the truth.

IGS has not provided "all of the information" about the Licensing Agreement or its use of the Columbia name, logo and color scheme to any regulator in any state. Although IGS did have minimal discussions with three PUCO Staff members (Mr. Drummond, Mr. Rhodes and Ms. Vogel[32]), no member of the PUCO Staff (including Mr. Rhodes, the only attorney involved in discussions with IGS on behalf of the PUCO Staff) ever saw or reviewed the Licensing Agreement,[33] or even asked to see a copy of the Licensing Agreement.[34] (Emphasis added). Further, and despite the innumerable legal issues flowing from the Licensing Agreement and IGS' use of the "Columbia" name, logo and color scheme, no one from the Attorney General's

[31] IGS' Post-Hearing Brief, p. 18.

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

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

[34] *Id.*

Office participated in any of the discussions with IGS.[35] Although IGS labels this fact as "irrelevant" and "prejudicial,"[36] it reaffirms that neither the PUCO Staff nor any other regulator (because they were not provided access to the Licensing Agreement) fully understood the: (i) entirety of IGS' deal with NiSource; (ii) practical effects on consumers in the Columbia Gas of Ohio service territory flowing from 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 IGS.

Finally, and despite having limited discussions with the three PUCO Staff members identified above, none of those discussions focused on anything other than the proposed disclosures crafted by IGS. Such discussions did not involve the appropriateness of IGS using the "Columbia" name and starburst logo.[37] Even assuming those discussions constituted due diligence (which NOPEC and Stand in no way concede), the alleged "approval" from the PUCO Staff (not the Commission) took the form of an unidentified e-mail from PUCO Staff member Drummond (a non-attorney) indicating that the disclosures comported with Ohio law.[38] There is, of course, nothing binding about the PUCO Staff's alleged statements regarding the use of the "Columbia Retail Energy" name. The propriety of IGS' unprecedented use of the utility's name by an unregulated and unaffiliated company (and whether it comports with Ohio law) should be independently determined by the entire Commission as the trier of fact. A non-binding e-mail communication from a member of the PUCO Staff who is not an attorney and never even saw a copy of the Licensing Agreement is not sufficient.

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

[36] IGS Post-Hearing Brief at p. 8.

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

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

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

NOPEC and Stand incorporate by reference the arguments set forth on pages 34-40 of their Joint Post-Hearing Brief demonstrating that IGS' use of the "Columbia" trade name and logo results in an unfair competitive advantage for IGS, and that the Licensing Agreement gives Columbia Gas of Ohio and its sister NiSource companies a direct financial incentive to push customers to IGS. NOPEC and Stand do, however, offer a brief response to IGS' bald (and incorrect) assertions that the "Complainants did not present any evidence that (1) Columbia Gas of Ohio has a financial incentive to favor IGS over other CRNGS providers or (2) that Columbia Gas of Ohio favored IGS over other CRNGS providers."[39]

[redacted] Although it is unclear exactly how Columbia Gas of Ohio's transition from SSO to SCO will impact the Licensing Agreement, the Complainants remain concerned that the close relationship between IGS and Columbia

[redacted]

Gas/NiSource established under the Licensing Agreement threatens the underpinnings of the SCO by encouraging Columbia Gas and NiSource to [redacted] This creates a terrible precedent and runs contrary to standard industry practice.[43]

2. Evidence that a CRNGS provider (other than IGS) was denied a request to license the Columbia name and logo is not the only way to establish an unfair competitive advantage.

IGS is correct that, to the best of the general public's knowledge, no other CRNGS provider approached IGS about licensing the use of the "Columbia" name, logo and color scheme. When asked why Stand did not approach NiSource about doing so, Stand witness Freeman explained "[b]ased upon my experience in the industry, I would never have envisioned that as something that is normal or standard in our industry."[44] Stand witness Ward confirmed

[43] 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 .Ohio Revised Code Section ("R.C.") 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."

[44] Tr. Vol. I, p. 142.

that approaching NiSource about licensing the Columbia name and logo would have been contrary to established industry practice, including the practices of Columbia Gas of Ohio.[45]

IGS', however, relies upon a statement in a Commission Entry in the IGS Certification Docket noting that "although many of the [parties] in this case indicate that they believe IGS is receiving a competitive advantage, none of the [parties] indicate that they sought a similar licensing agreement and were denied." With one fell swoop of the pen, IGS believes the Commission openly endorsed the practice of allowing unregulated and unaffiliated competitive energy providers to use the utility's name, logo and color scheme as long as no one presents any evidence that someone else asked to use the utility's name and was refused. Such a policy not only sets a bad precedent (providing a strong economic incentive for utilities to enter into licensing agreements with unaffiliated third-parties—and, even then, still possibly compete with the third-parties through their own unregulated affiliates), but runs contrary to standard industry practice. And, even if the Commission were to approve such a practice (which NOPEC and Stand certainly do not want), the only reasonable approach to doing so would involve an open and transparent process in which NiSource provides notice to all of the CRNGS providers doing business in Ohio, prepares a request for proposals, accepts bids, and selects the CRNGS provider submitting the highest and best bid. Unfortunately, neither IGS nor NiSource were interested in transparency. Instead, the two companies privately negotiated a deal, thereby continuing the cozy relationship between IGS and Columbia Gas of Ohio/NiSource.

III. CONCLUSION

The unprecedented use by IGS of the utility's name: (i) runs contrary to the Commission's consumer protection rules because IGS' advertising is misleading, deceptive, and

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

confusing to consumers; and, (ii) makes bad public policy because IGS is given an unfair competitive advantage in the Columbia Gas of Ohio service territory.

For the reasons set forth in the briefs submitted by NOPEC and Stand, the Joint Complainants respectfully request that the Commission order IGS to cease and desist all marketing in Ohio under the "Columbia Retail Energy" trade name.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following parties of record by electronic mail and regular U.S. mail this 20th day of December 2011:

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