BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of	)	
	)	
The Office of the Ohio Consumers' Counsel, et al.,	)	
	)	Case No. 10-2395-GA-CSS
Complainants,	)	
	)	
v.	)	
	)	
Interstate Gas Supply d/b/a Columbia Retail Energy,	)	
	)	
Respondent.	)	

INTERSTATE GAS SUPPLY, INC.'S REPLY

I. INTRODUCTION

NOPEC has unilaterally decided to file non-public information in the public PUCO docket in this case. In the midst of a briefing schedule to determine whether the License Agreement between IGS and NRS is confidential or a trade secret, NOPEC has usurped the Commission's authority and decided that certain portions of the Licensing Agreement are not confidential. Under the guise that certain information is already public, NOPEC described portions of the License Agreement in its Memorandum Contra without filing the document under seal.

In support of their argument, NOPEC has cited newspaper articles to argue that the term of the License Agreement is in the public domain. Aside from NOPEC's decision to publicly confirm the information in the article, there was no reason for any of IGS' competitors to believe the accuracy of the information in the article. Now, IGS is at

a competitive disadvantage because its competitors will have a timeframe to consider when to approach NiSource Retail Services for a similar licensing agreement. IGS still requests that the term of the License Agreement be kept confidential because the newspaper article does not give exact specifics to the dates that the contract will expire.

Furthermore, NOPEC made seven other bullet points of information that it alleges are already public.[1] There are similar provisions in the License Agreement that IGS has maintained are confidential and proprietary information or trade secrets, however, the information in NOPEC's bullet points is not the same as the information in the License Agreement. Rather than let the Commission decide if the information is already in the public domain, NOPEC made its own decision that the information was no longer private, and as a result, NOPEC has unilaterally made the determination that the information was not a trade secret. NOPEC's tactics are highly prejudicial to IGS.

However, now that NOPEC has publicly released confidential information, IGS submits under seal redacted versions of the Licensing Agreement[2] and confidential hearing transcript[3] for the Commission's *in camera* inspection. IGS incorporates by reference IGS' Motion for protective treatment to support IGS' redactions based on the State of Ohio's and the Commission's long held preference for the confidentiality of trade secrets.

II. LEGAL ARGUMENT

A. NOPEC has not responded to IGS' claim for trade secret protection.

In IGS' Motion for protective treatment, IGS applied the Ohio Supreme Court's test to determine if a trade secret exists. The test is multi-faceted and requires an

[1] NOPEC's Memorandum Contra at 8-9.
[2] Exhibit A (filed separately under seal).
[3] Exhibits B and C (filed separately under seal).

examination of the definition of "trade secret" pursuant to O.R.C. § 1333.61, which includes a six factor test as outlined by the Ohio Supreme Court in *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*[4]

IGS went through this test and demonstrated that the Licensing Agreement constitutes a confidential trade secret. NOPEC chose not to respond to the Ohio Supreme Court test in its Memorandum Contra, and instead, NOPEC relied on *Ohio Consumers' Counsel v. PUCO*[5] for the proposition that IGS' License Agreement with NiSource Retail Services should receive the exact same protective treatment as Duke Energy Retail Services' ("DERS") private contracts with DERS' customers.

NOPEC's reliance on *Ohio Consumers' Counsel v. PUCO* is unfounded. This case resulted from a proposed settlement in Duke Energy Ohio's Standard Service Offer ("SSO"), which by its nature was a heavily regulated case because it determined the electric rates of the utility for years to come.[6] In that case, the OCC requested the production of private agreements between DERS and private companies that were executed during negotiations for the settlement of the SSO case.[7] In fact, in attempting to seek full disclosure of the agreements, the OCC argued that the agreements were not "normal competitive agreements;" rather, they were actually settlement agreements subject to public inspection.[8]

NOPEC claims that the circumstances that led to protection of the agreements in *Ohio Consumers' Counsel v. PUCO* are not present in the instant case, and therefore, the License Agreement should not receive protective treatment. Specifically, NOPEC

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[4] (1997), 80 Ohio St.3d 513, 524-525.
[5] (2009), 121 Ohio St. 3d 362.
[6] *Id.* at 363.
[7] *Id.* at 363-64.
[8] *Id.* at 368.

claims that the "need to further a competitive energy market" is not present in this situation. NOPEC's claim completely misses the point, because the case that NOPEC brought against IGS is totally different than the Duke Energy Ohio's SSO case. The instant case does not arise out of a regulated utility's standard service offer case, and the agreements in question are not electric supply contracts. The terms of an electric supply contract are not the same as the terms in the License Agreement, and they should not set the parameters for the trade secrets in the License Agreement. This case involves two unregulated entities, IGS and NRS, which have formed an innovative business agreement which is novel in the State of Ohio. As stated in IGS' Motion for protective order, the information in the License Agreement is competitively sensitive because it is the first of its kind, and because it contains highly proprietary business information.

Even so, the agreements in *Ohio Consumers' Counsel v. PUCO* were found to contain many trade secrets and were redacted to prevent publication of the trade secrets, which included: (1) customer names, (2) account numbers, (3) customer Social Security numbers or employer identification numbers, (4) contract termination dates or other termination provisions, (5) financial consideration in each contract, (6) price of generation specified in each contract, (7) volume of generation covered by each contract, and (8) terms under which any options may be exercisable.[9] As such, along with the protected information referenced in IGS' Motion for protective order, this information should also remain confidential in the License Agreement and Confidential Transcript.

[9] *Id.* at 369.

While IGS avers that the entire agreement is a confidential trade secret, IGS has provided a redacted version for the Commission's *in camera* review. For the reasons previously stated in IGS' Motion for protective order, IGS' redacted versions of the License Agreement and transcript are reasonable and warranted because they protect the highly confidential nature of IGS' proprietary business information and business plans. The redacted versions also protect the competitive sensitivity of the agreement itself, which is the first of its kind, and should not be publicly distributed so that IGS' competitors can undermine and underbid IGS with respect to its agreement with NRS. Specifically, IGS redacted:

- Provisions and limitations of the grant of licensure (Recitals, Sections 1, 3);
- Certain definitions related to IGS' customers, the term and termination of agreement, and limitations of the agreement (Sections 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 2.10, 2.11, 2.12);
- Provisions related to the licensing fee (Sections 5 and 6);
- Business plans with respect to marketing the CRE name (Section 7.2);
- The term and termination provisions of the agreement (Section 8);
- Customer lists (Ex. C);
- IGS' throughput schedule (Ex. B);
- Payment calculations for the License Agreement (Ex. D);
- Other highly confidential business information, future plans, and terms under which options may be exercisable (Sections 12, 15, 16, 17, 18, 19, 20.1)

All of this information has been kept highly confidential by IGS and NRS. The redactions are reasonable and do not render the document incomprehensible. The confidential

portions of the transcript that IGS redacted track the trade-secrets identified in IGS' redacted version of the License Agreement. Additionally, IGS redacted portions relating to IGS' Board of Directors which IGS has long held as confidential business information of the private enterprise. IGS respectfully requests that the documents be redacted as proposed by IGS in the filing under seal in this docket.

B. NOPEC failed to show how it or the public would be prejudiced by maintaining the confidentiality of the License Agreement and confidential excerpts from the transcript.

NOPEC has not explained how it is prejudiced by maintaining the confidentiality of the License Agreement and confidential portions of the transcript. NOPEC was given an unredacted copy of the agreement for the purposes of pursuing its "case" against IGS. NOPEC freely used the License Agreement as an exhibit at the evidentiary hearing. The Commission has a copy of the unredacted License Agreement so that it can make an informed decision in this case. There is simply no prejudice to NOPEC by keeping these documents confidential.

C. Stand's Memorandum Contra fails to address the confidentiality of the License Agreement and the transcript.

The crux of Stand's Memorandum Contra seems to be that IGS has not proved that NiSource Retail Services, Inc. has the authority to license the name "Columbia." Stand argues that "[t]he mere existence of the Service Mark License Agreement with seemingly appropriate signatures affixed thereto does not prove anything."[10] This case has never been about establishing a chain of title to the "Columbia" name, and, obviously, publishing the License Agreement in the docket will not answer these questions for Stand. Stand's claims are irrelevant to any claims made in this Complaint

[10] Stand's Memorandum Contra at 3.

case, and its claims are especially irrelevant with respect to the issue of whether or not the License Agreement contains trade secrets.

Stand also argues that Columbia Gas stockholders and rate payers have a right to know the issues in this case.[11] How Stand has standing to argue on behalf of Columbia Gas is unknown, but IGS avers that the issues in this case are in the public domain. The only information that is not in the public domain constitute trade secrets. While it may upset Stand, it is the State of Ohio's and the Commission's policy to keep trade secrets confidential and under seal.

Moreover, during the evidentiary hearing, Stand never once questioned whether NRS had the authority to license the Columbia name. Now, Stand wants the "proof."[12] These issues are obviously not related to the confidentiality of the documents, nor are they relevant to the claims in this case of whether IGS' use of the CRE name is allegedly misleading or deceptive. Stand apparently wants a second bite of the apple to add new issues to the Complaint case. This tactic is wholly inappropriate. Clearly, Stand is using the briefing schedule for the Motion for protective order as an attempt to shift the burden of proof on to IGS for new issues that have never been addressed or briefed. Stand's tactics are transparent and prejudicial. Stand's new claims should be disregarded by the Commission.

Stand has also made utterly frivolous claims that "political considerations and political contributions" played a role in this case.[13] In addition to having nothing to do with the Motion for protective order, this claim is not true. Stand has no evidence to support this claim, because no evidence exists to support this claim.

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[11] *Id.* at 5.
[12] *Id.* at 3-5.
[13] *Id.* at 6.

Stand has incorrectly argued that the Commission should deny IGS' Motion for protective order because the Commission has authority under R.C. § 4905.03(4) to regulate IGS and NiSource.[14] However, Chapter 4905 of the Ohio Revised Code regulates public utilities. IGS and NiSource are not public utilities. Stand is not a public utility. None of these companies are regulated under this chapter of the Revised Code. Stand's argument is simply wrong.

The remainder of Stand's Memorandum Contra continues what Stand has proven it is best at throughout these proceedings – making baseless accusations against its competitor. Stand does not even try to hide the fact that they are no longer addressing issues of confidentiality, and instead, argue that Title 49 will be violated if "NiSource/Columbia" is enriched by the use of the name Columbia Retail Energy, and that IGS use of the CRE trade name is anticompetitive.[15] These arguments lack any factual support and are completely undeserving of any merit by the Commission. While IGS will not address all of the irrelevant claims, IGS is particularly astonished by Stand's claims that IGS' motion for protective order is a "red herring" to distract Attorney Examiner Stenman from the issues presented at the hearing and to drive up legal costs. Apparently, Stand forgot that (1) Stand is the Complainant in this case and brought this case against IGS; (2) IGS is afforded due process to fully defend itself against Stand's meritless accusations; and (3) Attorney Examiner Stenman issued a separate briefing schedule to bifurcate the issues at the hearing from the confidentiality issues present in this case. Finally, if any party is driving up legal fees, it is Stand, who spilled ten pages of ink in its Memorandum Contra on issues unrelated to the confidentiality of the

[14] *Id.* at 7.
[15] *Id.* at 7-10.

documents at issue in this case.

III. CONCLUSION

For the foregoing reasons, IGS respectfully requests that the Commission redact the License Agreement and confidential portions of the transcript as proposed by IGS in its corresponding confidential filing in this docket.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Interstate Gas Supply, Inc.'s Reply* was served this 20th day of December, 2011 by U.S. First Class mail and electronic mail upon the following:

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