BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of the Ohio Consumers' Counsel, Stand Energy Corporation, Incorporated, Northeast Ohio Public Energy Council, and Ohio Farm Bureau Federation,	)	
Complainants,	)	Case No. 10-2395-GA-CSS
v.	)	
Interstate Gas Supply, Inc.,	)	
Respondent.	)	

OPINION AND ORDER

The Commission, considering the complaint, the evidence of record, the arguments of the parties, and the applicable law, hereby issues its opinion and order.

APPEARANCES:

Bruce J. Weston, Ohio Consumers' Counsel, by Joseph P. Serio, Larry S. Sauer, and Kyle L. Kern, Assistant Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215, on behalf of the residential utility consumers of the state of Ohio.

Bricker & Eckler, LLP, by Matthew W. Warnock, Thomas J. O'Brien, and Sommer L. Sheely, 100 South Third Street, Columbus, Ohio 43215, on behalf of Northeast Ohio Public Energy Council.

John M. Dosker, 1077 Celestial Street, Suite 110, Cincinnati, Ohio 45202, and McIntosh & McIntosh, by Michael T. McIntosh and A. Brian McIntosh, 1136 Saint Gregory Street, Suite 100, Cincinnati, Ohio 45202, on behalf of Stand Energy Corporation.

Larry Gearhardt, Chief Legal Counsel, 280 North High Street, P.O. Box 182383, Columbus, Ohio 43218-2383, on behalf of the Ohio Farm Bureau Federation.

Chester, Wilcox & Saxbe, LLP, by Mark S. Yurick, Sarah Daggett Morrison, and Zachary D. Kravitz, 65 East State Street, Suite 1000, Columbus, Ohio 43215, on behalf of Interstate Gas Supply, Inc.

OPINION:

I. Background

A. History of the Proceedings

On October 21, 2010, the Ohio Consumers' Counsel (OCC), Border Energy, Inc. (Border), Northeast Ohio Public Energy Council (NOPEC), Stand Energy Corporation (Stand), and the Ohio Farm Bureau Federation (OFBF) (collectively, joint complainants)[1] filed a complaint, alleging that, among other things, Interstate Gas Supply, Inc. (IGS) d/b/a Columbia Retail Energy (CRE) has engaged in marketing, solicitation, sales acts, or practices that are unfair, misleading, deceptive, or unconscionable. By entry issued on February 28, 2011, MXenergy (MX) was granted leave to join the complaint. On March 16, 2011, and May 13, 2011, respectively, Border and MX withdrew from the case.

On November 3, 2010, joint complainants filed a motion to consolidate this case with IGS's certification docket, *In the Matter of the Application of Interstate Gas Supply, Inc., for Certification as a Retail Natural Gas Supplier*, Case No. 02-1683-GA-CRS (02-1683). By entry issued on November 10, 2010, the Commission denied joint complainants' motion to consolidate.

On November 12, 2010, IGS filed an answer to the complaint, as well as a partial motion to dismiss. Joint complainants filed a memorandum contra on November 30, 2010. IGS filed its reply on December 10, 2010.

By entry issued on January 26, 2011, this matter was scheduled for a settlement conference on March 24, 2011. By entry issued on March 23, 2011, the settlement conference was rescheduled for March 28, 2011, at the request of the parties. The parties engaged in several months of settlement discussions which ultimately proved unsuccessful.

By entry issued on June 16, 2011, the attorney examiner set a procedural schedule to move forward with a hearing in this case. Initially, the hearing was set to commence on October 4, 2011; however, the parties requested an extension of the procedural schedule and the hearing was rescheduled to commence on November 7, 2011.

On September 22, 2011, Stand moved to amend the complaint to add Columbia Gas of Ohio (Columbia) and NiSource Corporate Services (NCS) as parties to the case. Memoranda contra were filed by IGS, NCS, and Columbia. In addition, NOPEC filed a memorandum in support of the motion to amend on October 7, 2011. A motion to strike

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[1] At the hearing, OCC and OFBF did not present witnesses and did not actively participate in the prosecution of this complaint, nor did they participate in the post-hearing briefing schedule.

NOPEC's memorandum in support was filed by NCS on October 11, 2011. Numerous additional motions were filed regarding the motion to amend the complaint. By entry issued on November 2, 2011, the attorney examiner denied Stand's motion to amend the complaint.

On November 1, 2011, IGS filed a motion for summary judgment. NOPEC filed a motion to strike IGS's motion for summary judgment on November 4, 2011.

On November 1, 2011, Stand filed a motion for subpoena of Scott White, president of IGS, to appear and testify at the hearing in this case. Also on November 1, 2011, NOPEC filed a motion for a subpoena of Mr. White to compel Mr. White to appear at a deposition prior to the commencement of the hearing. The attorney examiner granted both motions for subpoena on November 1, 2011. IGS filed a motion to quash NOPEC's subpoena on November 1, 2011. Various motions were filed in response to IGS's motion to quash.

On November 2, 2011, the attorney examiner granted IGS's motion to quash. NOPEC filed an application for certification of an interlocutory appeal of the attorney examiner's decision on November 4, 2011. IGS filed a memorandum contra NOPEC's application for certification of an interlocutory appeal on November 14, 2011.

The hearing was held as scheduled on November 7 and 8, 2011. An initial brief was filed by joint complainants on November 29, 2011. Reply briefs were filed by joint complainants and IGS on December 13, 2011, and December 20, 2011, respectively.

Rule XII, Section 2(A) of the Government of the Bar of Ohio (Bar Rule) provides rules governing eligibility to practice *pro hac vice* in Ohio. Pursuant to Section 2(A)(6) of the Bar Rule, motions for admission *pro hac vice* must be accompanied by a certificate of *pro hac vice* registration furnished by the Supreme Court Office of Attorney Services. On January 24, 2012, a motion to practice *pro hac vice* and a certificate of *pro hac vice* registration were filed on behalf of John M. Dosker. The Commission finds that the motion for admission *pro hac vice* should be granted.

B. Factual Background

IGS is an Ohio corporation with its headquarters located in Dublin, Ohio. IGS is also a competitive retail natural gas supplier and has been certified since July 23, 2002. On July 15, 2010, IGS and NiSource Retail Services (NRS) entered into a Service Mark Licensing Agreement (SMLA), which authorized IGS to use the CRE name in marketing its products. IGS witness Vincent A. Parisi further explains that IGS registered the trade name of CRE on August 3, 2012, with the Ohio Secretary of State. IGS asserts that it markets under the CRE trade name and logo for its natural gas operations in Columbia's

service territory in Ohio, Pennsylvania, Virginia, and Kentucky. On August 6, 2010, IGS filed a notice of material change with the Commission, providing notice that it had registered the CRE trade name with the Ohio Secretary of State and that, in the future, IGS would offer service under the CRE name. (IGS Ex. 2 at 2-11.)

II. Procedural Issues

A. Motions for Protective Order

1. Applicable Law

Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. Section 149.43, Revised Code, specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).

Similarly, Rule 4901-1-24, Ohio Administrative Code (O.A.C.), allows the Commission to issue an order to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."

Ohio law defines a trade secret as "information . . . that satisfies both of the following: (a) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (b) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Section 1333.61(D), Revised Code.

2. Discussion

At the hearing, as clarified in its November 29, 2011, motion for protective treatment, IGS requested that the SMLA, entered into by IGS and NRS, and portions of the transcript (confidential transcript) be granted protective treatment. In support of its request, IGS explains that, during the discovery phase of this proceeding, the SMLA was requested by joint complainants. IGS did provide the SMLA in discovery; however, because IGS believed the SMLA to be of such a sensitive nature, IGS provided only a redacted copy of the SMLA to the joint complainants. An unredacted copy of the SMLA

was provided, under a protective agreement that specified that it would only be shared with the joint complainants' attorneys.

On November 6, 2011, IGS explains that it was informed, by NOPEC, that it intended to use the SMLA during the hearing in this case. NOPEC used both the redacted and unredacted versions of the SMLA during its cross examination of IGS witnesses Parisi and White. At the hearing, IGS objected to the use of the SMLA and requested that the portions of the transcript referencing the SMLA be kept confidential. Per IGS's request, questions regarding the SMLA were taken together in a confidential portion of the transcript.

In support of its request for protective treatment, IGS explains that the information and terms contained in the SMLA are competitively sensitive. Moreover, IGS asserts that the SMLA contains highly proprietary business and financial information that falls within the definition of trade secret contained in Section 1333.61(D), Revised Code. IGS explains the SMLA falls squarely within the six-factor test adopted by the Ohio Supreme Court in *State ex-rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997), which sets forth the following factors:

> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*, by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

IGS explains that the proprietary information contained in the SMLA meets the definition of trade secrets because it constitutes business information or plans, including technical information, financial information, and a listing of names. Furthermore, IGS contends that the SMLA derives independent economic value from not being generally known to, and not being readily ascertainable by proper means by other persons who may obtain economic value from its disclosure or use. In addition, IGS states that the SMLA is the subject of efforts that are reasonable under circumstances to maintain its secrecy.

According to IGS, the SMLA contains customer names, contract termination dates and other termination provisions, financial consideration for the license and other financial provisions, terms of the license and license limitations, and IGS's throughput schedules. All of this information is not known to businesses other than IGS, NCS, and NRS. Moreover, IGS asserts that the Commission has previously found it appropriate to

keep this type of information confidential. See *In the Matter of the Application of the Cincinnati Gas & Electric Co.*, Case No. 03-93-EL-ATA, Order on Remand (Oct. 24, 2007). With respect to the contract termination information contained in the SMLA, IGS explains that this information could be used against IGS because competitors could know the precise time to market to IGS's customers if the CRE license were terminated. Similarly, IGS contends that the financial consideration for the license and the terms of the licensing fees are highly confidential because a competitor could use the information to negotiate a license to use the CRE name in the future, which could jeopardize IGS's business position and ability to compete.

As a final matter, IGS asserts that it has made substantial efforts to keep the terms of the SMLA confidential as they are not generally available to anyone within IGS, NCS, or NRS, except high-level management and attorneys. Further, IGS explains that it cannot put an exact value on the effort and money expended to obtain or develop the SMLA, as numerous hours and extensive negotiations went into crafting the SMLA.

In response to IGS's request for protective treatment, Stand and NOPEC filed memoranda contra. In its memorandum, NOPEC appears to concede that certain information contained in the SMLA, as well as the confidential portion of the transcript, is in fact confidential, and requests that IGS be ordered to file properly redacted copies of the SMLA and transcript. In particular, NOPEC points out that the attorney examiner ordered IGS to file an appropriately redacted copy of the SMLA and the confidential transcript, along with its motion for protective order, which IGS did not do. (Tr. 438-439.)

NOPEC argues that the SMLA does not contain any of the information specified in Section 1333.61(D), Revised Code. Instead, NOPEC opines that the SMLA is a contract that, for the first time in Ohio history, allows an unregulated retail natural gas supplier to provide competitive retail natural gas service to consumers in Columbia's service territory using the "Columbia" name and logo even though they are not affiliated.

In support of its argument that certain portions of the SMLA should be made public, NOPEC asserts that certain portions of the SMLA have already been made public. Specifically, NOPEC cites the following information as already disclosed to the public through this docket or in news articles: the existence of the SMLA, names of the parties to the SMLA, and the date of the SMLA; the effective date of the SMLA; the states in which the SMLA is in effect; which territories IGS is authorized to use the CRE name in; the fact that the SMLA only covers the marketing of natural gas products. In addition, NOPEC asserts that a newspaper article identified the term of the SMLA as three years.

On December 20, 2011, IGS filed a reply, to which it attached proposed redacted copies of the SMLA and the confidential transcript, as ordered by the attorney examiner at the hearing. In response to NOPEC and Stand's assertions, IGS argues that, aside from

NOPEC's action to publicly confirm the information that has been previously released from the SMLA, there was no reason for any of IGS's competitors to believe the accuracy of the information that they were receiving. Now, IGS argues, it has been put at a competitive disadvantage because its competitors have a timeframe in mind to approach NRS, if they desire to seek a similar licensing agreement.

Despite its filing of proposed redactions, IGS maintains its request that the SMLA should be kept confidential. However, IGS argues that, if the entire SMLA is not granted protective treatment, its proposed redactions are reasonable and warranted because they are specifically tailored to protect the highly confidential nature of IGS's proprietary business information and business plans, and also to protect the competitive sensitivity of the SMLA. IGS reasserts that the SMLA is the first of its kind and should not be publically released, because it would potentially allow competitors to undermine and underbid IGS with respect to its SMLA with NRS. In its redacted version of the SMLA, IGS explains that it redacted the following information: provisions and limitations of the grant of licensure; certain definitions related to IGS's customers, the term and termination of SMLA, and limitations of the SMLA; provisions relating to the licensing fee; business plans with respect to marketing the CRE name; the term and terminations provisions of the SMLA; customer lists; IGS's throughput schedule; payment calculations for the SMLA; and other highly confidential business information, future plans, and terms under which options may be exercisable. IGS maintains that all of this information has been treated as highly confidential by IGS and NRS, and that its proposed redactions do not render the document incomprehensible.

With respect to the confidential transcript, IGS explains that it redacted the trade secret information identified in IGS's proposed redactions of the SMLA and information related to IGS's board of directors.

The Commission has examined the redacted SMLA and confidential transcripts attached to IGS's reply filed on December 20, 2011, as well as the assertions set forth in the supportive memorandum. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court, the Commission finds that only some of the information redacted from the SMLA and the confidential transcripts constitutes trade secret information. Specifically, the Commission believes that the following information meets the definition of confidential trade secret and should be protected: certain information regarding the scope of the agreement, specific numbers and dates, information regarding the structure of the licensing fee, specific information regarding the duration of the agreement and any possible termination, and technical information contained in the exhibits. However, the Commission is mindful that a significant portion of the information contained in the SMLA that IGS proposes to redact has already been released

as part of this case or can be protected with a smaller scope of redactions. Moreover, the Commission believes that numerous definitions, information on regulatory collaboration, headings in the exhibits, and other information contained in the licensing agreements does not constitute a trade secret and should not be protected.

With respect to the confidential transcript, we direct IGS to make similar edits to its redactions regarding the discussions of information contained in the SMLA. Additionally, upon a review of the confidential transcript, the Commission finds that, with respect to the information redacted from volume I, the following information should be released into the open record: information regarding the identity of IGS's board of directors; information beginning on page 85 of volume II regarding IGS's lobbyists; and information regarding objections and the rulings thereon. With respect to the identity of IGS's board of director's, the Commission has found that information to be readily available in 02-1683, IGS's certification docket, therefore, we do not believe that protective treatment of that information is necessary. Moreover, with respect to the discussion of IGS's lobbyists, later discussions which IGS has proposed to release as part of the public record contain a significantly greater discussion of those issues than the small portion that IGS proposes to redact.

To address our concerns, IGS is directed to file new proposed redacted versions of the SMLA and the confidential transcript by August 23, 2012, in the open record. IGS must narrowly tailor its redactions to the information listed above. Moreover, IGS must strive to limit redactions to the SMLA and the confidential transcripts to only include confidential pieces of information, leaving as much of the information public as possible, including numberings, headings, and parts of sentences, where appropriate.

If IGS disagrees with our discussion of the protected material, or is in doubt regarding whether a particular piece of information should be redacted from these documents, it is directed to file, along with its new proposed redactions, an amended motion for protective order. Any amended motion for protective order should specifically explain why any information, outside of the scope of what has been delineated for protection by the Commission, should be granted protective treatment. Memoranda contra any amended motion for protective order should be filed within five days. Reply memorandum will not be accepted. In addition, the Commission is mindful that there are other documents in this docket filed under seal. Once the Commission is in possession of an appropriately redacted copy of the SMLA, it will rule on the status of the documents.

B. Interlocutory Appeal

1. Applicable Law

Rule 4901-1-15, O.A.C., provides two avenues for parties who are adversely affected by an attorney examiner's procedural ruling to file an interlocutory appeal to the Commission. First, paragraph (A) provides that an immediate interlocutory appeal may be taken to the Commission, if the ruling being appealed: grants a motion to compel discovery or denies a motion for protective order; denies a motion to intervene, terminates a party's right to participate, or requires the consolidation of examination or presentation of testimony; refuses to quash a subpoena; or requires the production of documents or testimony over an objection based on privilege.

Secondly, paragraph (B) of Rule 4901-1-15, O.A.C., provides that, except as provided for in paragraph (A), no party may take an interlocutory appeal to the Commission, unless the appeal is certified to the Commission by the legal department. Moreover, this provision states that an interlocutory appeal shall not be certified to the Commission, unless the appeal "presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the [C]ommission is needed to prevent undue prejudice or expense to one or more of the parties, should the [C]ommission ultimately reverse the ruling in question."

2. Discussion

On November 4, 2011, NOPEC filed an interlocutory appeal of the attorney examiner's November 2, 2011, ruling, which quashed a subpoena seeking to compel IGS witness White to appear for deposition on November 3, 2011. In quashing the subpoena, the attorney examiner pointed out that the motion for subpoena had not been filed until November 1, 2011, despite the fact that the complaint had been pending for over a year at that time. The attorney examiner found that the subpoena seeking to compel Mr. White's attendance at a deposition at this late stage of the procedural schedule was unreasonable, given Mr. White's unavailability during the limited days leading up to the November 7, 2012, hearing in this matter. However, the attorney examiner reminded the parties that NOPEC would have the opportunity to liberally question Mr. White at the hearing. Consistent with that ruling, at the hearing, NOPEC was given addition latitude in its examination of Mr. White, due to its inability to depose him prior to the hearing.

In considering NOPEC's interlocutory appeal, the Commission initially notes that the appeal does not warrant an immediate interlocutory appeal to the Commission under Rule 4901-1-15(A), O.A.C. Furthermore, the Commission does not believe that it warrants certification to the Commission by the legal department under Rule 4901-1-15(B), O.A.C.

However, even if this interlocutory appeal were properly before us, we would affirm the attorney examiner's ruling and deny the interlocutory appeal, as NOPEC had ample opportunity to question Mr. White at the hearing.

III. Discussion and Conclusions

A. Applicable Law

The complaint in this proceeding was filed pursuant to Section 4929.24, Revised Code. Specifically, Section 4929.24(A)(2), provides in pertinent part as follows:

> The commission . . . upon complaint of any person or complaint or initiative of the commission to determine whether a retail natural gas supplier subject to certification under section 4929.20 of the Revised Code has violated or failed to comply with any provision of sections 4929.20 to 4929.23 of the Revised Code regarding a competitive retail natural gas service for which it is subject to certification or any rule or order adopted or issued by the commission for purposes of those sections.

It should be noted that, in complaint cases before the Commission, the complainant has the burden of proving its case. *Grossman v. Public Utilities Commission* (1966), 5 Ohio St.2d 189, 190, 214 N.E.2d 666, 667. Thus, in order to prevail, the complainant must prove the allegations in its complaint, by a preponderance of the evidence.

B. Issues in this Case

At issue in this case is whether IGS violated the Commission's rules contained in Chapter 4901:1-29, O.A.C., in its marketing under the CRE trade name. Despite the filing of a 12-claim complaint, at the hearing in this matter, complainants focused on two issues. Specifically, at issue, is joint complainants' contention that the use of the CRE name and starburst logo is unfair, misleading, deceptive, and unconscionable. Joint complainants assert that IGS violated Rule 4901:1-29-03(A), O.A.C., which provides as follows:

> (A) Retail natural gas suppliers and governmental aggregators shall not engage in unfair, misleading, deceptive, or unconscionable acts or practices related to, without limitation, the following activities:
>
> (1) Marketing, solicitation, or sale of a competitive retail natural gas service.

(2) Administration of contracts for such service.
(3) Provision of such service, including interactions with consumers.

Joint complainants also allege that IGS, marketing as CRE, violated Rule 4901:1-29-05(C), O.A.C., which provides, in pertinent part, as follows:

> (C) No retail natural gas supplier or governmental aggregator may engage in marketing, solicitation, sales acts, or practices which are unfair, misleading, deceptive, or unconscionable in the marketing, solicitation, or sale of a competitive retail natural gas service. Such unfair, misleading, deceptive, or unconscionable acts or practices include, but are not limited to, the following:
>
> ***
>
> (8) Advertising or marketing offers that:
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> ***
>
> (f) Fail 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.

Second, joint complainants argue that the execution of the SMLA gives IGS an unfair competitive advantage in Columbia's service territory and gives NRS a direct financial incentive to encourage customers to sign up for competitive retail natural gas service with IGS, marketing as CRE, is potentially detrimental to the retail natural gas market, and sets a harmful precedent.

C. Complainants' Position

Joint complainants assert that the use of the CRE name and starburst logo by IGS is unfair, misleading, deceptive, and constitutes an unconscionable marketing practice. In support of their claim, joint complainants rely on Rules 4901:1-29-03 and 05, O.A.C. Joint complainants assert that the testimony of IGS witness Parisi acknowledged that IGS was aware of two consumers who contacted OCC and were confused by IGS's marketing strategy. Mr. Parisi indicates that he became aware of these customer contacts through

OCC's discovery responses in the present case. Additionally, joint complainants rely on the testimony of Stand witness Mark Ward, which indicates there is also actual customer confusion resulting from the use of the CRE name by IGS. Specifically, Mr. Ward testified that he has been asked if Columbia has reentered the marketing business after receiving solicitations from IGS marketing as CRE. Mr. Ward also states that he was initially confused upon receiving marketing material from CRE, stating that he believed that the letter was from Columbia relating to his gas riser. Only upon opening the solicitation did he realize it was from IGS marketing as CRE and not Columbia. (IGS Ex. 2 at 11-13; Jt. Br. at 23-25; Tr. at 403-405.)

While joint complainants assert that they demonstrated evidence of actual customer confusion, they also argue that evidence of actual confusion is not a prerequisite to proving a violation of the Commission's rules. Joint complainants begin their explanation with the IGS's first use of the CRE trade name, which occurred in September 2010. The first marketing campaign directly soliciting customers under the CRE trade name was sent to customers in the Columbia service territory and included only minimal disclosures. Specifically, the envelope was from CRE and was addressed to a "Columbia Gas of Ohio Natural Gas Customer." Joint complainants argue that receiving a mailing from CRE addressed to a Columbus customer could cause a mailing recipient to believe it was receiving a mailing from Columbia, as the envelope, at that time, contained no disclosures regarding the identity of CRE. In addition to the disclosure-free envelope, joint complainants point out that the letter itself contained only two disclosures, which were in a font size that was significantly smaller than the font size used on the rest of the envelope. The first disclosure, which appeared under the CRE name and starburst logo, at the top of the letter, stated that "Columbia Retail Energy is not an affiliate of NiSource or Columbia Gas of Ohio." Joint complainants argue that this disclosure is insufficient, as it assumes that a customer understands what the term affiliate means and understands what this means CRE is not. However, joint complainants take issue with the fact that this disclosure does not explain the relationship between CRE, Columbia, or IGS, and does not identify CRE as a competitive retail natural gas provider. The second disclosure in this solicitation was contained in a footnote, written in small font, and stated "[t]he 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" (emphasis in original). Joint complainants assert that this disclosure also fails to explain who these companies are, but rather focuses on who these companies are not, leading to increased customer confusion. Moreover, joint complainants opine that the frequently asked questions section of the solicitation does not explain these relationships and merely states that CRE is a natural gas supplier. (Tr. at 379-394; Jt. Br. at 25-27; IGS Ex. 1.)

Joint complainants explain that IGS sent out a separate mailing, as part of its initial marketing campaign, which included the same disclosures discussed above, but with an enrollment card on a separate document that did not contain any disclosures. According to joint complainants, this only served to add to the potential confusion. (Jt. Br. at 27; IGS Ex. 1.)

Before IGS's second marketing campaign, joint complainants acknowledge that IGS worked with Retail Energy Supply Association (RESA) and Staff to craft mutually agreeable disclosures. However, joint complainants maintain that those disclosures are still insufficient to mitigate or eliminate potential confusion. During the second solicitation, IGS changed the disclosure under the CRE name, appearing at the top of correspondence, to read "[s]ervice is provided by IGS Energy under the trade name Columbia Retail Energy" in larger font than was previously used in the initial solicitation. With respect to the disclosure contained in the footnote, the size of the disclosure was more consistent with the rest of the text in the solicitation than in the previous solicitation and stated that "Columbia Retail Energy is not the utility and neither Columbia Retail Energy or 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." In addition, a disclosure was added to the envelope stating "[s]ervice is provided by IGS Energy under the trade name Columbia Retail Energy. Despite the additional disclosure language, joint complainants aver that these are confusing statements because they do not explain the relationship between CRE and Columbia. Joint complainants explain that IGS used the same disclosures in its third marketing campaign using the CRE name. (Jt Br. at 28-29; IGS Ex. 1.)

In further support of their contention that IGS's use of the CRE trade name is purely designed to be deceptive, joint complainants cite the fact that, to date, more than three million solicitations have been sent out to residential and small commercial customers by IGS marketing as CRE, but only in the Columbia territory. Accordingly, joint complainants assert that there is no purpose behind the use of the CRE name by IGS, other than the intent to confuse customers into believing that they are signing up for service with Columbia. Otherwise, joint complainants question why IGS would abandon what IGS witness Parisi termed "a strong brand." In particular, joint complainants point out that IGS has conceded that customers who see the Columbia name in the Columbia service territory may be more likely to participate in the choice program. (Jt. Br. at 28-32; Tr. at 345-370.)

Joint complainants also assert that IGS's marketing materials violated Rule 4901:1-29-05(C), O.A.C. Specifically, joint complainants assert that marketing materials should fully disclose, in an appropriate font size, an affiliate relationship. Moreover, joint complainants contend that IGS's failure to adequately describe the relationship between

itself, marketing as CRE, and Columbia, NiSource, and CRS, represents a major flaw in IGS's disclosures and shows that IGS was only trying to take advantage of the inherently confusing nature of its use of the CRE name, violating Rule 4901:1-29-05(C), O.A.C. Furthermore, because IGS is not an affiliate of Columbia, joint complainants opine that it should be the subject of greater scrutiny than if it were an affiliate company. (Jt. Br. at 32-33.)

In an effort to remedy what they perceive as problems with IGS's disclosures, joint complainants recommend that IGS be required to increase the size of the disclosures, or add information sufficient to fully disclose the identity of CRE and the services it offers. Specifically, joint complainants recommend the following disclosure "[c]ompetitive 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." (Jt Br. at 33.)

Turning to its second contention, joint complainants argue that the licensing agreement between IGS and Columbia gives undue preference in the Columbia territory to IGS, and sets a harmful precedent in Ohio's competitive retail natural gas market because joint complainants believe the agreement encourages Columbia to encourage its customers to take service with IGS, to the exclusion of other marketers. Joint complainants assert that, if Columbia makes money based on the volume of IGS's sales as CRE, then Columbia would be incented to encourage customers to choose IGS when shopping for natural gas. Joint complainants assert that Columbia's preferential treatment of IGS dates back to an investigation by the Federal Energy Regulatory Commission (FERC) in 2004, in *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), (2004 FERC Matter), in which IGS was one of three companies who received confidential storage information from a Columbia employee. (Jt. Br. 34-38.)

Finally, joint complainants argue that the licensing agreement is flawed because it was not the result of a transparent process in which all competitive retail natural gas suppliers could participate. If NRS wanted to make the process transparent, it could have given notice to all competitive retail natural gas providers doing business in Ohio, issued a request for proposals, accepted bids, and contracted with the highest bidder. Instead, NRS privately negotiated with IGS, which complainants claim was improper. (Jt. Br. at 39-40.)

In sum, joint complainants ask the Commission to find that IGS's use of the CRE name is contrary to Commission precedent because IGS's advertising is misleading, deceptive, and confusing to consumers, and it provides and unfair competitive advantage to IGS in the Columbia service territory. Therefore the joint complainants request that the

Commission order IGS to cease and desist all marketing under the CRE name. (Jt. Br. at 40.)

D. IGS's Position

In response, IGS explains that, prior to using the CRE trade name and logo in its marketing, IGS met with Staff to discuss its proposed disclosures. After numerous discussions, IGS explains that it worked with Staff to make sure that its disclosures complied with Rule 4901:1-29-05(C)(8)(f), O.A.C., which governs disclosures where there in an affiliate relationship with the utility, despite IGS's belief that it was not governed by the rule. However, IGS explains that its final disclosures clearly state that it is not an affiliate of NiSource or Columbia, that the CRE name and logo is a trademark of NiSource, that the CRE name is being used under license by IGS, and that IGS is not an affiliate of NiSource of Columbia. IGS maintains that these disclosures comply with the Commission rules regarding affiliate relationships and were approved by Staff. IGS maintains that it acted diligently by working with Staff to craft appropriate, clear disclosures and has committed to using those disclosures. IGS witness Parisi further explains it also met with RESA to discuss its concerns, regarding the disclosures and agreed to RESA's request to add language to its disclosures, stating "[s]ervice is provided by IGS Energy under the trade name Columbia Retail Energy." (IGS Ex. 2 at 3-9; IGS Br. at 7-10.)

IGS explains that, on the first substantive page of any solicitation materials uses to enroll new customers, IGS discloses the following:

> 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, Inc. or the utility Columbia Gas of Ohio. The Columbia Retail Energy name and starburst design are used by Interstate Gas Supply, Inc. under license agreement with NiSource.

IGS also asserts that it uses clear, plain disclosure language on all marketing materials utilizing the CRE trademark, with the exception of merchandising materials such as t-shirts and golf balls. (IGS Br. at 10-11.)

In response to joint complainants' contentions, IGS argues that they failed to meet their burden of proof in demonstrating that IGS's solicitations were unfair, misleading, deceptive, or an unconscionable act or practice. Specifically, IGS asserts that joint complainants brought no factual evidence to prove their allegations, other than the testimony of Stand witness Ward. However, in response, IGS asserts that Mr. Ward testified in his deposition that he was unaware of anyone who was confused by the use of the trade name of CRE, and who purchased gas from CRE by mistake, believing it was Columbia providing the service. Furthermore, IGS asserts that, through the hearing, joint

complainants were unable to present any evidence of anyone who purchased service from IGS, acting as CRE, thinking they were associated with Columbia Gas of Ohio. (IGS Br. at 12-14; Tr. at 256, 280, 305.)

Instead of showing evidence of actual customer confusion, IGS maintains that joint complainants only offered evidence of Stand's employees' opinions that IGS's agreement to use the CRE trade name is anticompetitive and discriminatory. However, IGS points out that joint complainants did not provide any evidence that any marketers have been discriminated against by Columbia or that IGS has received preferential treatment from Columbia. (Tr. 250-305; IGS Br. at 12-13.)

IGS also refutes joint complainants' claim that IGS had the intent to mislead and deceive consumers into mistakenly purchasing gas from CRE by holding itself out as a member of the "Columbia gas family." Instead, IGS contends that the evidence demonstrates that IGS informed Staff of its intention to use the CRE trade name immediately after it entered into the license agreement, and worked with Staff to create appropriate and conspicuous disclosures, so that consumers would not be confused by the CRE name, but instead the use of the CRE name would serve to encourage consumers to participate in the choice market. IGS argues that, if its intent in using the CRE name was to mislead or deceive, it would not have sought out Staff's assistance in crafting appropriate disclosures and informed Staff of the name change prior to commencing any solicitation under the CRE name. (IGS Br. at 17-18; Tr. at 356-358.)

IGS also maintains that it has not engaged in anticompetitive behavior by entering into the licensing agreement with NRS. IGS points out that any time a competitive retail supplier uses the name of the utility, regardless of its affiliation with the utility, there is a risk of customer confusion, but there is no rule prohibiting such use. If there were such rules, all utilities would be prohibited from allowing affiliates to use similar names and logos, or all affiliates would have an unfair advantage. Instead of focusing on bright-line rules, IGS argues that the Commission's focus should be on mitigating the risk of customer confusion through requiring the use of clear and conspicuous disclaimers in marketing materials. Moreover, IGS avers that entering into the licensing agreement was not an anticompetitive act and joint complainants have presented no evidence that Columbia has a financial incentive to favor IGS or has favored IGS over other competitive providers. As a final matter, IGS denies any wrongdoing in connection with the 2004 matter before FERC and points out that FERC absolved IGS of any wrongdoing. (IGS Br. at 36-40.)

Accordingly, IGS asserts that joint complainants have failed to meet their burden of proof with respect to any of their allegations.

CONCLUSION:

As an initial matter, the Commission is mindful that, in this case, joint complainants have the burden of proof. However, joint complainants have offered no evidence that IGS's use of the CRE name and starburst logo is unfair, misleading, deceptive, or unconscionable in violation of Rules 4901:1-29-03(A) and Rule 4901:1-29-05(C), O.A.C. Particularly, we believe that the disclaimers used by IGS, marketing as CRE, are appropriately crafted so that consumers receiving a solicitation from CRE can readily discern who the solicitation is from and what the relationship is between IGS, Columbia, and NiSource. Moreover, although IGS's use of the CRE name does not specifically fall under the Commission's affiliate rules contained in Rule 4901:1-29-05(C), O.A.C., we believe that IGS acted appropriately in adhering to those rules.

Turning to joint complainants' argument that the execution of the SMLA gives IGS an unfair competitive advantage in Columbia's service territory and gives NRS a direct financial incentive to encourage customers to sign up for competitive retail natural gas service with IGS, marketing as CRE. We do not believe that the evidence of record substantiates the joint complainants' allegation that the use of the CRE trade name gives IGS an unfair competitive advantage in Columbia's territory. With respect to joint complainants' contention that the SMLA would give NRS a financial incentive to encourage customers to sign up with IGS, joint complainants have not proven that Columbia has acted to encourage customers to take service from IGS. The mere possibility that something could happen is not a violation of the Commission's rules.

Accordingly, upon reviewing the evidence presented in this case, along with joint complainants' arguments, we conclude that the complaint should be dismissed and the requests for relief should be denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) IGS is a competitive retail natural gas supplier as defined in Section 4929.01(J), Revised Code, is certified to provide competitive retail natural gas service pursuant to Section 4929.20, Revised Code, and is subject to the jurisdiction of the Commission pursuant to Section 4929.24, Revised Code.

(2) On October 21, 2010, joint complainants filed a complaint against IGS.

(3) The hearing in this matter was held on November 7 and 8, 2011.

(4) An initial brief was filed by joint complainants on November 29, 2011. Reply briefs were filed by joint complainants and IGS on December 13, 2011, and December 20, 2011, respectively.

(5) The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Public Utilities Commission* (1966), 5 Ohio St.2d 189, 214 N.E.2d 666.

(6) The complainants have not met their burden of proof that IGS violated any Commission rule or any provision of Title 49.

ORDER:

It is, therefore,

ORDERED, That the motion for admission *pro hac vice* filed by John M. Dosker on January 24, 2012, be granted. It is, further,

ORDERED, That IGS should comply with our procedural directives regarding its pending motion for protective order with regard to the SMLA and the confidential transcripts, by August 23, 2012. It is, further,

ORDERED, That NOPEC's request for certification of its interlocutory appeal is denied. It is, further,

ORDERED, That the complaint is dismissed and the requests for relief are denied. It is, further,

ORDERED, That a copy of this opinion and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

Lynn Slaby

KLS/sc

Entered in the Journal

AUG 15 2012

Barcy F. McNeal

Barcy F. McNeal
Secretary