

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
Ohio American Water Company) Case No. 07-1112-WS-AIR
To Increase its Rates in Its Entire Service)
Area for Water Service and Sewer)
Service.)

PUCO

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**MOTION TO DISMISS OHIO AMERICAN WATER COMPANY'S
APPLICATION TO INCREASE RATES FOR THE AREA OF "WATER C" OR,
IN THE ALTERNATIVE, MOTION TO AMEND THE APPLICATION TO
EXCLUDE A RATE INCREASE FOR THE AREA OF "WATER C" OR, IN THE
ALTERNATIVE, MOTION TO TOLL THE APPLICATION REGARDING THE
AREA OF "WATER C"**

**BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential utility consumers of the Ohio American Water Company ("OAW" or the "Company"), moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to partially dismiss OAW's rate case. In accordance with the provisions of a settlement agreement OAW signed in its last rate case, OAW cannot request an increase in the rates for residents of Franklin and Portage Counties (known as the "Water C" area) at this time. In the alternative, OCC moves the Commission to amend OAW's Application to exclude "Water C" from an increase in rates at this time or at least toll the Application until OAW has complied with Paragraph 12 of the January 10, 2007 Stipulation and Recommendation ("Stipulation") regarding the water quality issues at Huber Ridge.

The reasons for granting OCC's Motion are further set forth in the attached Memorandum in Support.

Respectfully submitted,

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¹ The Franklin and Portage county customers are referred to as the Water C division in the settlement agreement. The Water C division refers to the former Citizens Utilities Company customers. Stipulation at ¶ 7.

customers. Finally, again, as outlined by Paragraph 12, OAW agreed to additional steps to monitor the discoloration for a period of time prior to declaring the issue resolved.

As discussed below, despite comments from the PUCO staff and OCC in July 2007 that the discoloration issue was not resolved and could not be resolved until 2008, OAW still chose to breach the terms of the Stipulation and file a request for a rate increase on November 13, 2007, for all of its customers, including “Water C.”

II. ARGUMENT

A. Improving the Poor Quality of the Water at Huber Ridge was a Critical Component to Resolving OAW’s 2006 Rate Case.

The water discoloration issue for the Huber Ridge customers was a heated issue throughout OAW’s 2006 rate case. The discolored water was caused, in part, by water chemistry.² The residents of Huber Ridge attended the public hearings in large numbers. Resident after resident testified about the poor water quality and pending rate hike.³

Numerous residential consumers living in Huber Ridge presented testimony at the public hearing and virtually all of those testifying complained about the poor quality of the water.⁴ These customers cited a number of concerns about the quality of the water including: that the water was undrinkable; it had a brown color, and their inability to use the water for basic household needs.⁵

These concerns did not go unnoticed by the Commission. On March 7, 2007, when the Commission approved the Stipulation it expressed great concern about the

² See Stipulation at ¶12.

³ *In re Application of Ohio American Water*, Case No. 06-433-WS-AIR, Finding and Order at 3-4. (March 7, 2007).

⁴ *Id.*

⁵ *Id.* at. 4.

quality of the water delivered to the Huber Ridge customers:

It is especially disturbing to the Commission that any customer of a public utility should be receiving water of such quality. The stipulation provides specific actions to address the discoloration issue.⁶

The Commission's March 7, 2007 Order also gave a detailed explanation of the actions that OAW must take to resolve the discoloration issue.⁷ Finally, the Commission opened a separate compliance docket under Case No. 07-252-WS-UNC to facilitate the overseeing of OAW's compliance with the Stipulation commitments including those directly related to the Huber Ridge discolored water.⁸

1. OAW did not Satisfy the Provisions of Paragraph Twelve of the Stipulation Before Applying for an Increase in Rates from "Water C" Customers.

The Stipulation resolved all outstanding issues in OAW's 2006 rate case.⁹ In accordance with the terms of the Stipulation, drafted by OAW, the Company could not apply for a rate increase for "Water C" until the terms of Paragraph 12 were completed. Specifically, Paragraph 7 states:

Ohio American agrees not to request rate relief for customers in 'Water C', former Citizens water customers in the form of an increase in rates (AIR) until the discoloration issue has been resolved as set forth in Paragraph 12 of this Stipulation.¹⁰

OAW has failed to complete all the requirements in Paragraph 12 to this date. Yet, despite comments from both the PUCO staff and OCC to this effect, OAW still included "Water C" customers in its current rate Application. In fact, as recently as December 3,

⁶ Id. at 14.

⁷ Id. at 7-8.

⁸ Id at 15.

⁹ Id. at 2.

¹⁰ Stipulation at ¶ 7.

2007, the Blendon Township Board of Trustees filed a letter stating that OAW has not completed the improvements to the system to deliver consistent, acceptable water in the Huber Ridge area.¹¹

There are several requirements under Paragraph 12 that OAW has failed to meet. First, OAW has not met the requirement of Paragraph 12(B)(i) that it must provide twelve consecutive months of results from the sample tap at the treatment plant in which 95% of all samples evaluated are at or below secondary standards for iron and manganese. May of 2007 was the first month for which OAW reported that 95% of all samples evaluated were at or below the secondary standards for both iron and manganese.¹² Under paragraph 12(B)(i) of the Stipulation, OAW must then sample and meet the applicable standards each month for iron and manganese through at least April 2008 – twelve consecutive months assuming that the standard is met each month.

Additionally, Paragraph 12(G) of the Stipulation required OAW to provide six consecutive months of sampling data from the Huber Ridge water distribution system demonstrating that the discoloration issue has been eliminated:

By June 30, 2007, if discoloration continues in the Huber Ridge distribution system, the Company will cease charging the reverse osmosis surcharge each month until the discoloration has been eliminated. . . . *Once the Company has provided water that is not discolored for six (6) consecutive months, the Company may continue to charge the reverse osmosis surcharge without reference to the discoloration standard.*¹³

¹¹ *In re Application of Ohio American Water*, Case No. 07-1112-WS-AIR, Correspondence at 1-2. (December 3, 2007).

¹² *In re Compliance of Ohio American Water*, Case No. 07-252-WS-UNC, Progress report at 3. (June 29, 2007).

¹³ Stipulation at ¶ 12(G). (Emphasis added).

May of 2007 was the first month in which OAW provided water to the Huber Ridge customers that met the applicable discoloration standards in accordance with the parameters of Paragraph 12(G) of the Stipulation.¹⁴ Assuming that OAW can continue to produce water sample results in the acceptable range from the distribution system for six consecutive months, per the Stipulation, then OAW can continue charging the reverse osmosis surcharge. OAW cannot demonstrate compliance with Stipulation Paragraph 12(G) until, at the earliest, December 31, 2007. Until December, 31, 2007, OAW must continue the proper monitoring protocols for the distribution system in compliance with Stipulation paragraph 12(B).

OAW's proposed inclusion of "Water C" in its Application for a rate increase - when it has not resolved the discoloration water in the Huber Ridge area pursuant to Paragraph 12 - violates the terms of Paragraph 7 of the Stipulation. The stipulated terms for resolution of the discoloration issue for the Huber Ridge customers were drafted by OAW, agreed upon by the PUCO staff, and OCC, and then approved by the Commission on March 7, 2007.

The Commission's rules authorize parties to enter into stipulations.¹⁵ Although not binding on the Commission, it is well-settled that the terms of such agreements are entitled to careful consideration and are to be accorded substantial weight.¹⁶ In this case the Stipulation was unopposed, thus adding further support for the agreement.¹⁷

¹⁴ *In re Compliance of Ohio American Water*, Case No. 07-252-WS-UNC, Progress report at 3. (June 29, 2007).

¹⁵ Ohio Admin. Code § 4901-1-30.

¹⁶ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 64 Ohio St. 3d. 123, 125, 592 N.E. 2d 1370 (1992).

¹⁷ *In re Application of Ohio American Water*, Case No. 06-433-WS-AIR Finding and Order at 12. (March 7, 2007).

When the Commission evaluated the terms of the Stipulation, the Commission applied its established three-pronged test.¹⁸ After reviewing the substance of the Stipulation the Commission determined that the Stipulation met the three-pronged criteria, however, the Commission expressed great concern about the quality of the water delivered to the Huber Ridge customers.¹⁹ The Commission's Order also outlined the actions that the parties agreed would resolve the discoloration issue.²⁰ The Commission's Order included the provisions of 12(B)(i) and 12(G) in the summary of the steps necessary to resolve the discoloration issue.²¹

2. OAW Fails to Acknowledge the Significance of its Continuing Obligations under Paragraph 12 of the Stipulation.

The introductory statement of Stipulation Paragraph 12, as drafted by OAW, makes it clear that all of the requirements of Paragraph 12 must be met for the water discoloration issue to be resolved:

*Ohio American agrees to address the discoloration issue in Huber Ridge with additional steps. The Parties agree that the objective of the additional steps is to eliminate discoloration caused by water chemistry in the Company's system Ohio American and Parties agree to the following steps and timetable:*²²

However, on June 29, 2007, OAW filed a progress report declaring that the "discoloration issue in the Huber Ridge system has been solved."²³ In the report OAW suggests that the

¹⁸ Id. Citing *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 547.

¹⁹ *In re Application of Ohio American Water*, Case No. 06-433-WS-AIR, Finding and Order at 14. (March 7, 2007).

²⁰ Id. at 7-8.

²¹ Id.

²² Stipulation at ¶ 12. (Emphasis added).

²³ *In re Compliance of Ohio American Water*, Case No. 07-252-WS-UNC, Progress report at 1. (June 29, 2007).

discoloration issue is resolved for the Huber Ridge customers because OAW was able to submit two months of sample results that were within the acceptable discoloration limits.²⁴

In addition, in a July 20, 2007 correspondence, OAW reiterates its position and states:

The Company agreed not to apply for rates until the discoloration issue was resolved based upon the NTU standard in Paragraph 12[G] by June 30th. The Company takes the position that is *has indeed solved the discoloration issue and that it is now eligible to file a rate increase because it has met Paragraph 7.*²⁵

That averment is contrary to Stipulation Paragraphs 7 and Paragraph 12.

The June 29, 2007 progress report demonstrated that OAW has made progress and met some of the provisions in Paragraph 12 of the Stipulation. However, accepting OAW's position that a couple of months of acceptable sample results resolves the discoloration issue ignores a number of key provisions of Paragraph 12 as discussed above.

Moreover, the PUCO staff and OCC notified OAW promptly, in July 2007, that they could not agree with OAW's assertion that the discoloration problem was solved. The PUCO Staff's filing on July 13, 2007, and OCC's filing on July 20, 2007, state that specific monitoring provisions of Paragraph 12 of the Stipulation have not been met and accordingly, the "discoloration issue" has not been resolved. In fact, in response to

²⁴ "All water distribution samples collected during the months of May and June 2007 were below the SMCL concentrations for iron and manganese respectively and all samples had a turbidity lower than 1.0 NTU. Therefore, Ohio American Water has complied with the Stipulation requirements for solving the discolored water problem in the Huber Ridge service area." *In re Compliance of Ohio American Water*, Case No. 07-252-WS-UNC, Progress report at 3. (June 29, 2007).

²⁵ *In re Compliance of Ohio American Water*, Case No. 07-252-WS-UNC, Correspondence filed by Sally W. Bloomfield at 4. (July 20, 2007). (Emphasis added).

OAW's June 29 report, the PUCO staff stated: "In summary, the Staff *cannot conclude and does not agree* that the Huber Ridge Discoloration issue has been resolved at this time."²⁶

In their respective July 2007 filings, the PUCO staff and OCC put OAW on notice that two specific provisions remained incomplete, Paragraphs 12(B)(i) and 12(G). Both provisions require OAW to monitor the distribution system for a set, agreed upon period of time, to assure the measures attempted by OAW to resolve the discoloration issues are effective.

To this day, the issues raised by the PUCO staff and OCC still have not been resolved.

B. OAW's Application Should be Dismissed as it Relates to the Request to Increase Rates for Customers in the "Water C" Area.

The applicable standards for granting a motion to dismiss are well established. A motion to dismiss for failure to state a claim is procedural in nature and tests the sufficiency of the pleading.²⁷ All factual statements made in the pleading must be accepted as true.²⁸

The facts as they relate to the terms in Paragraph 12 of the Stipulation are not disputed. The main issue that is in dispute is OAW's interpretation that Paragraph 7 of the Stipulation requires something less than complete compliance with Paragraph 12.²⁹

²⁶ *In re Compliance of Ohio American Water*, Case No. 07-252-WS-UNC, Correspondence filed Thomas G. Lindgren, Assistant Attorney General, at 2. (July 13, 2007). (Emphasis added).

²⁷ *State ex. rel. Hanson v. Guernsey County Bd. of Comm* (1992), 65 Ohio St. 3d 542, 549.

²⁸ *Lucas County Comm'rs v. PUC*, (1997) 80 Ohio St. 3d 344, 347.

²⁹ *In re Compliance of Ohio American Water*, Case No. 07-252-WS-UNC, Correspondence filed by Sally W. Bloomfield at 4. (July 20, 2007) (emphasis added).

Paragraph 7 states:

Ohio American agrees not to request rate relief for customers in 'Water C', former Citizens water customers in the form of an increase in rates (AIR) *until the discoloration issue has been resolved* as set forth in Paragraph 12 of this Stipulation.³⁰

At this time, OAW has not completed all requirements of Paragraph 12. Those requirements cannot be completed until OAW can demonstrate that the water discoloration is eliminated for twelve consecutive months.³¹ At the very earliest that will be May 2008.

OAW cannot seek a rate increase for customers in "Water C" when it has failed to comply with terms and conditions of Paragraphs 7 and 12 of the Stipulation it agreed to and the Commission approved in the last rate case. It was contemplated in the Stipulation the parties signed and the PUCO approved that the terms of the Stipulation would be enforced:

Except for enforcement purposes of the obligations set forth in the Stipulation, neither this Stipulation, nor the information and data contained therein or attached, shall be cited as precedent in any future proceeding for or against any party, or the Commission itself, if the Commission approves the Stipulation.³²

The PUCO has enforced settlements against utilities to protect the interests of the customers that were intended to be the beneficiaries of settlement terms.³³ In the interest of the Ohio customers whose interest it is the PUCO's duty to protect, the PUCO should enforce the Stipulation by dismissing the part of the Application that OAW is not permitted yet to file.

³⁰ Emphasis added.

³¹ Stipulation at ¶¶ 7 and 12(B)(i).

³² Stipulation at 2.

³³ In Re Ohio Bell Telephone Company, Case No. 93-487, Finding and Order at 3-4. (October 6, 1997).

C. In the Alternative, OCC requests that the Commission Amend OAW's Application and Exclude OAW's Request to Increase Rates for Customers in the "Water C" Area.

Ohio Adm. Code 4901-1-06 states:

Unless otherwise provided by law, the commission, the legal director, the deputy legal director, or an attorney examiner may, upon their own motion *or upon motion of any party for good cause shown*, authorize the amendment of any application. . . .³⁴

In accordance with Ohio Adm. Code 4901-1-06, the Commission should amend OAW's Application to exclude all provisions related to OAW's request to increase rates for "Water C."

There is the required "good cause" to grant OCC's motion to amend the Application. As stated above, OAW failed to comply with the terms of the agreed upon Stipulation that resolved its last rate case. In accordance with Paragraph 12 of the Stipulation, OAW's Application cannot include an increase in rates for customers in the "Water C" area until May 2008 – at the earliest.

Granting OCC's request to amend OAW's Application will allow OAW to move forward with the parts of its Application that are not improperly filed. The amendment of the Application to exclude the part relating to customers in "Water C" will honor the commitment of the parties and the Commission to providing adequate quality water to Ohio customers.

³⁴ Emphasis added.

D. In the Alternative, the Commission Should Toll the Timeline of OAW's Application Regarding the Area of "Water C" Until OAW Complies with the Terms of the Stipulation.

The Commission has the authority to toll the timeline of OAW's Application "until the discoloration has been resolved."³⁵ The tolling can be done either by not accepting the filing date of the Application or by stopping the running of the 275-day period in R.C. 4909.42. In accordance with past precedent, the Commission has tolled the two hundred seventy-five day period of R.C. 4909.42 to give applicants more time to address problems with their applications or to sanction applicants who were not cooperating with the discovery process. Tolling the section of the Application regarding "Water C" would force OAW to adhere to the terms of the Stipulation as determined acceptable by all the parties, and ordered by the Commission.

As discussed above, the Commission has considered tolling R.C. 4909.42 in situations where the applicant has attempted to take liberties with the application process. In a case involving Cincinnati Bell, the PUCO's Staff requested that the Commission use its authority to toll the two hundred seventy-five day period of R.C. 4909.42 to thwart the company's delays in responding to discovery.³⁶ The Commission agreed with the Staff that it had the authority to toll the two hundred seventy-five day period of R.C. 4909.42, but chose to postpone taking action until absolutely necessary.³⁷ *Cincinnati Bell* is not an isolated instance of the Commission contemplating tolling the two hundred seventy-five

³⁵ Application at ¶7.

³⁶ *In re Application of Cincinnati Bell Telephone Company*, Case No. 84-1272-TP-AIR, Finding and Order at 3-4. (May 7, 1985). ("Cincinnati Bell").

³⁷ *Id.* at 4.

day period. The Commission has deferred its acceptance of the filing date of an application when needed and reserved its right to toll the time period in other cases.³⁸

If the Commission does not grant OCC's motion to dismiss or, in the alternative, OCC's motion for amendment, the Commission should toll the Application regarding the "Water C" area until at least May 1, 2008. Tolling the filing date for the section of the Application regarding "Water C" until at least May, 2008, would provide compliance with the PUCO-approved settlement of OAW's last rate case. Tolling the filing date would provide the Commission with the time necessary to ensure for customers that the discoloration water issue at Huber Ridge has been resolved -- or allow the Commission to evaluate how to proceed in the event the water problem is not corrected. Either way, tolling the section of the Application regarding "Water C" until May 2008 or after would require OAW to complete its obligations under the Stipulation and would reinforce the Commission's commitment to resolve the discolored water issue at Huber Ridge. The tolling would include, among other things, not approving the publishing of the notice of the Application, under R.C. 4909.18(E) and 4909.19, with regard to "Water C."

III. CONCLUSION

For the reasons stated above, the Commission should dismiss OAW's Application to increase rates for customers in the "Water C" district or, in the alternative, order OAW

³⁸*In re Application of Lake Buckhorn Utilities*, Case No. 86-518-WW-AIR, Finding and Order at 5. (April 5, 1988). (The Commission granted the applicant's request for an extension to file the two month update; however, as a condition of the extension the Commission suspended the 275-day requirement imposed by R.C. 4909.42.) *In re Application of Central Telephone Company of Ohio*, Case No. 84-1431-TP-AIR, Finding and Order at 3. (May 29, 1985). See also *In re Application of the Toledo Edison*, Case No. 85-554-EL-AIR, Finding and Order at 2-3. (July 23, 1985).

to amend the Application to exclude a rate increase for customers in “Water C,” or in the alternative, toll the “Water C” portion of the Application until at least May 2008.

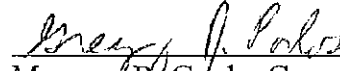
OAW has not met the requirements of Stipulation Paragraph 12 that it signed with OCC and the PUCO staff to settle its last rate case and resolve the problem of discolored water that plagued its customers. The Commission approved the Stipulation with great concern for customers and with every intention that OAW would meet the requirements of the settlement to solve this discolored water problem for customers. The requirements of the Stipulation are such that OAW cannot file an application to increase rates for customers in the “Water C” area until it demonstrates that the water discoloration issue is eliminated for twelve consecutive months. At the very earliest that will be in May 2008.

The Commission stated in its March 7, 2007 Order that it was alarmed by the water discoloration at Huber Ridge and that it would be closely monitoring this situation.³⁹ The Commission further stated that if OAW failed to meet its obligations in accordance with the Stipulation, then the Commission would take appropriate actions. Accordingly, OCC is now requesting the Commission to take the appropriate action to dismiss OAW’s Application for a rate increase, as it relates to “Water C,” until OAW has complied with the terms of the Stipulation, and more specifically, Paragraph 12.

³⁹ *In re Application of Ohio American Water*, Case No. 06-433-WS-AIR Finding and Order at 15. (March 7, 2007).

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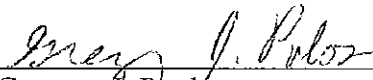
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's forgoing *Motions* was provided to the persons listed below via first class U.S. Mail, postage prepaid, this 13th day of December, 2007.



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