

**FILE**

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PUCO

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Investigation into the )  
Development of the Significantly ) Case No. 09-786-EL-UNC  
Excessive Earnings Test Pursuant to S.B. )  
221 for Electric Utilities )

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**MOTION TO INTERVENE  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential utility customers, moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to grant OCC's intervention in these proceedings where the Commission will be evaluating the methodology for determining whether an electric utility has significantly excessive earnings as a result of an approved ESP or MRO. This issue is an important component of S.B. 221, which is intended to prevent electric utilities from charging excessive rates to customers

As part of these proceedings, the Commission Staff will be conducting a workshop to allow interested stakeholders to present concerns and clarify issues raised by the Staff. In addition, upon completion of the workshop, the Commission Staff will develop and file recommendations for the significantly excessive earnings test ("SEET"), and interested stakeholders will be allowed to file comments on the Staff's proposal.<sup>1</sup>

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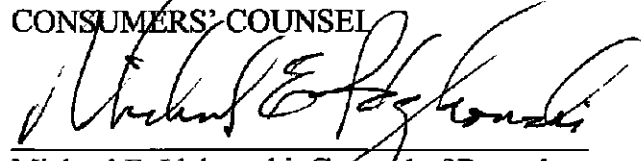
<sup>1</sup> September 23, 2009 Entry in *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to S.B. 221 for Electric Utilities*, at paragraph 2-3.

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OCC's Motion should be granted because OCC meets the legal standards for intervention, as explained in detail in the attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL

A handwritten signature in black ink, appearing to read "Michael E. Idzkowski", is written over a horizontal line.

Michael E. Idzkowski, Counsel of Record  
Assistant Consumers' Counsel

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

On May 1, 2009, the Governor signed into law Amended Substitute Senate Bill No. 221, which amended various statutes in Title 49 of the Ohio Revised Code, including R.C. 4928.14. Under the amended language of R.C. 4928.14, electric utilities are required to provide consumers with a Standard Service Offer ("SSO") consisting of either a market rate offer ("MRO") or an electric security plan ("ESP"). Pursuant to R.C. 4928.142(D)(4) and 4928.143(E) and (F), the Commission shall evaluate the earnings of each electric utility's approved ESP or MRO to determine whether the plan or offer produces significantly excessive earnings for the utility. These statutes are intended to provide protections for customers.

In its September 23, 2009 Entry, the Public Utilities Commission of Ohio ("Commission" or "PUCO") found that the methodology for determining whether an electric utility has significantly excessive earnings as a result of an approved ESP or MRO should be examined in a workshop to be conducted by the Commission and with participation by "interested stakeholders."<sup>2</sup> Upon completion of the workshop, the PUCO

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<sup>2</sup> Id. at paragraph 2.

Staff is to develop and file recommendations for the significantly excessive earnings test (“SEET”) and interested stakeholders will be allowed to file comments on Staff’s proposal.<sup>3</sup>

OCC is the state agency that represents Ohio’s residential utility consumers. As such, OCC is an interested stakeholder in these proceedings. The Commission should grant OCC’s Motion to Intervene in these proceedings so that OCC can fully participate in the workshop and comment process, and in so doing, protect the interests of the Ohio residential electric utility customers.

## **II. INTERVENTION**

Pursuant to R.C. Chapter 4911, the OCC moves to intervene under its legislative authority to represent residential utility customers of Ohio. OCC meets the standards for intervention found in Ohio’s statutes and the PUCO’s rules.

R.C. 4903.221 provides, in part, that any person “who may be adversely affected” by a PUCO proceeding is entitled to seek intervention in that proceeding. The interests of Ohio’s residential consumers may be “adversely affected” by these proceedings, especially if the consumers are unrepresented in proceedings where the Commission is seeking to examine the methodology for determining whether an electric utility has significantly excessive earnings as a result of an approved ESP or MRO. If the Commission establishes a significantly excessive earnings test that is unreasonable or ineffective, that test could render the protections intended under S.B. 221 useless, and could cause residential customers to be denied refunds they deserve or pay more than is reasonable and just for electricity. Thus, residential consumers “may be adversely

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<sup>3</sup> Id. at paragraph 3.

affected” by this proceeding. Accordingly, OCC satisfies the intervention standard in R.C. 4903.221.

OCC also meets the criteria for intervention in R.C. 4903.221(B), which requires the PUCO, in ruling on motions to intervene, to consider the following:

- (1) The nature and extent of the prospective intervenor’s interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and
- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

First, the nature and extent of the OCC’s interest is to represent the residential customers of electric utilities regarding rates paid by residential customers, terms for obtaining that service, and the service quality provided by the Companies—all of which are likely to be important topics in this proceeding. This interest is different than that of any other party and especially different than that of electric utilities whose advocacy includes the financial interest of stockholders.

Second, OCC’s legal positions include, without limitation, that the rates paid by residential customers and the service provided for those rates should be reasonable and lawful. This legal position directly relates to the merits of the case.

Third, OCC’s intervention will not unduly prolong or delay this proceeding, but should provide insights that will expedite the PUCO’s effective evaluation of the methodology for determining whether an electric utility has significantly excessive earnings as a result of an approved ESP or MRO. OCC, with its longstanding expertise

and experience in various PUCO proceedings, including each one of the electric utility's SSO filings, will duly allow for the efficient processing of this proceeding with consideration of the public interest.

Fourth, OCC's intervention will significantly contribute to the full development and equitable resolution of the factual issues. This case significantly relates to the recent enactment of Sub. S.B. 221, about which OCC has extensive knowledge. OCC will obtain and develop information that the PUCO should consider for equitably and lawfully deciding this proceeding in the public interest.

OCC also satisfies the intervention criteria in the Ohio Administrative Code (which are subordinate to the criteria that OCC satisfies in the Ohio Revised Code). To intervene, a party should have a "real and substantial interest" according to Ohio Adm. Code 4901-1-11(A)(2). As the residential utility consumer advocate for the State of Ohio, OCC has a real and substantial interest in this proceeding where the outcome can have an effect on the electric service rates paid by residential consumers.

In addition, OCC meets the criteria of Ohio Adm. Code 4901-1-11(B)(1)-(4). These criteria mirror the statutory criteria in R.C. 4903.221(B) that OCC already has addressed and that OCC satisfies.

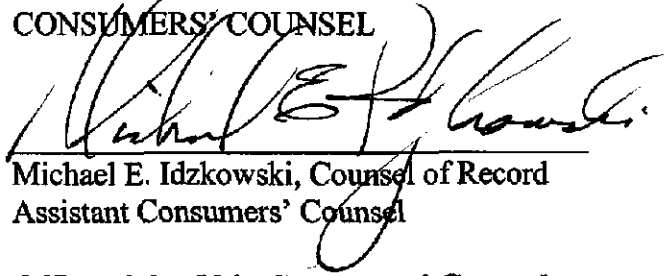
Ohio Adm. Code 4901-1-11(B)(5) states that the Commission shall consider the "extent to which the person's interest is represented by existing parties." While OCC does not concede the lawfulness of this criterion, OCC satisfies this criterion in that it uniquely has been designated as the state representative of the interests of Ohio's residential utility consumers. That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio confirmed OCC's right to intervene in PUCO proceedings, in ruling on an appeal in which OCC claimed the PUCO erred by denying its intervention. The Court found that the PUCO abused its discretion in denying OCC's intervention and that OCC should have been granted intervention.<sup>4</sup>

OCC meets the criteria set forth in R.C. 4903.221, Ohio Adm. Code 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. On behalf of Ohio's residential consumers, the Commission should grant OCC's Motion to Intervene.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL



Michael E. Idzkowski, Counsel of Record  
Assistant Consumers' Counsel

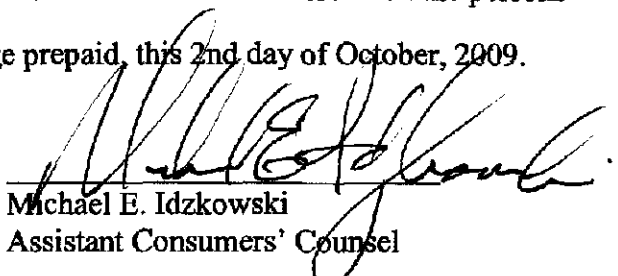
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<sup>4</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶13-20 (2006).

### CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Motion to Intervene* was served on the persons stated below via first class U.S. Mail, postage prepaid, this 2nd day of October, 2009.

  
Michael E. Idzkowski  
Assistant Consumers' Counsel

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