FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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December 10, 2010

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APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC") applies for rehearing of the November 10, 2010 Entry ("Entry") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). Through this Application for Rehearing, OCC seeks to protect all the residential utility customers from the confusion and other problems resulting from the use of the trade name Columbia Retail Energy by Interstate Gas Supply, Inc. ("IGS"), which have been implicitly allowed by the PUCO's decision.

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Order was unjust, unreasonable and unlawful in the following regards:

A. The Commission erred by issuing an Entry that violated R.C. 4903.09 due to the Commission's failure to include a written Opinion setting forth the reasons prompting the decision arrived at, based upon findings of fact.

B. The Commission erred by failing to decide that the thirty day automatic approval provision of R.C 4929.20(a) does not apply to IGS' notice of material change.

C. The Commission erred by allowing IGS' use of the name and logo by a non-affiliate of the local distribution company in violation of Ohio Adm. Code 4901:1-29-05(C)(8).

D. The Commission erred by failing to address the issue of the legality of IGS' use of the trade name, Columbia Retail Energy, consistent with Commission precedent.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and the OCC claims of error, the PUCO should modify its Order.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This case relates to the Notice of Material Change filed by Interstate Gas Supply ("IGS") with the PUCO in connection with IGS' registration of a new trade name, Columbia Retail Energy, with the Secretary of State as required by 4901:1-27-10 Ohio Adm. Code and the impact of that change on Ohio customers.[1] The name change is allegedly pursuant to a licensing agreement with Nisource (the parent company of Columbia Gas of Ohio), and reportedly does not include any affiliate relationship between IGS and Nisource and/or Columbia Gas. This is a case of first impression in Ohio where a provider of natural gas that lacks a corporate affiliation with an Ohio utility has arranged to use the trade name and logo of the Ohio utility, here the local distribution company known as Columbia Gas of Ohio, Inc.

II. PROCEDURAL HISTORY

On August 20, 2010, OCC filed its Motion to Intervene and Motion for an Evidentiary Hearing. OCC served its first set of discovery on IGS on the same day it moved to intervene. Subsequently, on August 31, 2010, Border Energy Inc. ("Border")

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[1] IGS Notice (August 6, 2010) at 1.

and Northeast Ohio Public Energy Council ("NOPEC") filed motions to intervene and motions for an evidentiary hearing.

On September 3, 2010, IGS filed a Memorandum Contra to the OCC, Border, and NOPEC Motions to Intervene and to the Motions for an Evidentiary Hearing. In addition, IGS filed a Motion for a Protective Order.

On September 7, 2010, additional Motions to Intervene were filed by Stand Energy ("Stand") and Retail Energy Supply Association ("RESA").[2] On September 15, 2010, Delta Energy filed a Motion to Intervene. On October 5, 2010, the Ohio Farm Bureau Federation ("OFBF") filed a Motion to Intervene. On November 8, 2010, MX Energy ("MX Energy") filed a Motion to Intervene.

IGS filed a Motion for Protective Order on September 9, 2010. On September 17, 2010, the OCC filed a Motion to Compel. Other procedural pleadings have been filed by the various Intervenors and IGS.

Meanwhile, IGS has been actively advertising and marketing under the Columbia trade name and logo. On September 28, 2010, OCC, NOPEC, Border, Stand, and Delta filed a Joint Motion to Order IGS to Cease and Desist from using the Columbia Retail Energy trade name and logo.

On October 21, 2010, OCC, NOPEC, Stand, Border and OFBF filed a Complaint ("Complaint") with the PUCO against IGS.[3] On November 3, 2010, OCC, NOPEC,

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[2] RESA's members include ConEdison Solutions; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Gexa Energy; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; PPL EnergyPlus; Reliant Energy Northeast LLC; and Sempra Energy Solutions LLC.

[3] *OCC, et al. v. IGS,* PUCO Case No. 10-2395-GA-CSS.

Stand, Border and OFBF filed a Motion to Consolidate the Complaint case with this certificate case.

III. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty (30) days after issuance of an order from the Commission, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."[4] Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[5]

In considering an application for rehearing, Ohio law provides that the Commission "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear."[6] Furthermore, if the Commission grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same * * *."[7]

OCC meets the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10. Accordingly, OCC respectfully requests that the Commission grant rehearing on the matters specified below.

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[4] R.C. 4903.10.

[5] *Id.*

[6] *Id.*

[7] *Id.*

IV. ARGUMENT

A. The Commission Erred By Issuing An Entry That Violated R.C. 4903.09 Due To The Commission's Failure To Include A Written Opinion Setting Forth The Reasons Prompting The Decision Arrived At, Based Upon Findings Of Fact.

Ohio law requires the Commission to issue an Entry that sets forth the Commission's rationale and the findings of fact that were relied upon in support of its decision. R.C. 4903.09 states:

> In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and **written opinions setting forth the reasons prompting the decisions arrived at,** based upon said findings of fact. (Emphasis added).

The Entry issued by the Commission in this proceeding fails to include an opinion or any reasoning stating a decision regarding the legality of IGS's use of the trade name Columbia Retail Energy, and the use of the Columbia starburst logo that is at the heart of the efforts for consumer protection in this case. The numerous parties to this case filed a significant number of pleadings that briefed the issue, but the Commission neglected to decide. The Entry is absent of a written opinion that includes a decision on the issue in controversy, and in the Entry there are no cited findings of fact that were relied upon by the Commission in its rendering of this opinion. Therefore, the Commission's decision violates R.C. 4903.09 and rehearing should be granted on this issue.

The intervening parties argued that IGS is operating without a certificate that would allow IGS to legally market its services under the trade name Columbia Retail Energy. The intervening parties cited two factors for their position opposing IGS's use of the trade name are two-fold. First, the automatic approval clause of R.C. 4929.20 does

not apply in the circumstances of Notice of Material Change filed pursuant to Ohio Adm. Code 4901:1-27-10. Second, the Commission's rule -- Ohio Adm. Code 4901:1-29-05(C)(8)(f) -- provides only for affiliates of the local distribution company ("LDC") to use the LDC's name and logo in marketing to customers. IGS is not an affiliate of Columbia Gas of Ohio, Inc. and should, therefore, be precluded from using the trade name and logo. The Commission's Entry fails to discuss either issue argued by the intervening parties opposing IGS' use of the trade name. Therefore, the Commission decision violates R.C. 4903.09 and rehearing should be granted.

B. The Commission Erred By Failing To Decide That The Thirty Day Automatic Approval Provision Of R.C 4929.20(A) Does Not Apply To IGS' Notice of Material Change.

The Commission's Entry does not approve IGS' filing of its Notice of Material Change or address the issues pertaining to the use of the trade name, Columbia Retail Energy, which are in dispute. The Commission Entry states:

> (1) On June 21, 2010, Interstate Gas Supply, Inc., (IGS) filed an application for renewal of its certification as a competitive retail natural gas marketer,
> (2) In accordance with Section 4929.20(A), Revised Code, which provides that applications for "certification or certification renewal shall be deemed approved thirty days after the filing of the application with the commission unless the commission suspends that approval for good cause shown," the application for certification renewal filed by IGS on June 21, 2010, was automatically approved on July 21, 2010. Accordingly, a certificate was issued to IGS for the period of July 24, 2010 through July 24, 2012.[8]

This background information and discussion of the automatic approval of the IGS certificate, provided by the Commission, predated the filing of IGS' Notice of Material

[8] Entry at 1.

Change filed on August 6, 2010. The remaining discussion contained in the Commission's Entry makes no finding pertaining to the IGS Notice of Material Change, nor explicitly approves IGS's use of the Columbia Retail Energy trade name.

The certification issue simply questions whether IGS has a lawful certificate entitling IGS to market competitive retail natural gas services to Ohio customers using the trade name Columbia Retail Energy. IGS has argued in pleadings in this docket that it has the necessary certificate to use the Columbia Retail Energy trade name; however, IGS' arguments have been inconsistent and lacking citations.[9] OCC and the other intervening parties have argued that IGS has no such certificate, and thus no right to market its services to customers using the Columbia Retail Energy trade name.[10] Both sides expended significant resources to present their cases to the Commission, but the Commission's Entry failed to definitively resolve the issues before it.

IGS relies on its argument that its certificate was automatically-approved. IGS stated:

> * * * the rules that relate to certification timing would apply. O.A.C. 4901:1-27-06(A) provides "If the commission does not act upon an application within thirty

[9] IGS Memo Contra OCC Motion to Intervene at 4 (September 3, 2010) (Three days before the alleged auto-approval and without citation, IGS stated:" It is improper, however, to interject marketing issues into IGS' renewal certification docket, as the Objecting Parties attempt to do here, since (1) the certification is already final ***."); IGS Memo Contra OCC Motion to Compel at 4-5 (October 4, 2010) (IGS argued that "Any attempt at discovery after the thirty day deadline is moot, because the outcome of the proceeding has already been determined."); IGS Memo Contra OCC, et al. Motion to Cease and Desist at 11 (October 14, 2010) (IGS argued without citation that "While IGS does not believe it was necessary to wait 30 days after the filing to use the CRE service mark, out of abundance of caution IGS did not use the Columbia Retail Energy trade name in the market until after September 6, 2010, allowing the full 30 days to expire."; IGS Memo Contra Motion to Consolidate at 6 (November 8, 2010) (IGS recognized the weakness in its argument by seeking confirmation from the Commission that the 30 day auto-approval was applicable by stating: "Once the thirty (30) days have passed without action by the Commission, an applicant's certification along with all elements of that certification are deemed approved as a matter of law. Accordingly, the Commission should clarify that IGS' material change filing has been deemed approved in accordance with R.C. 4929.20(A).").

[10] Joint Motion to Cease and Desist at 5-8 (September 28, 2010).

> days of the filing date, the application shall be deemed automatically approved pursuant to section 4929.20 of the Revised Code on the thirty-first day after the official filing date."[11]

That argument has been refuted in numerous pleadings in this docket.[12] Both Ohio Adm. Code 4901:1-27-06 (Initial Certification Application) and Ohio Adm. Code 4901:1-27-09 (Certification Renewal) includes provisions that establish a 30-day automatic approval process pursuant to R.C. 4929.20. However, Ohio Adm. Code 4901-1-29-10 (Material Changes in Business) -- the provision under review in this case -- **does not** include the same 30-day automatic approval provision. The Commission's Entry fails to address, let alone, resolve this dispute.

The Commission decided that this docket was inappropriate for deciding issues argued by intervening parties in this case. The Commission stated:

> Moreover, the Commission finds that all of the other points mentioned by the movants' are inappropriate for consideration in this docket and are more appropriately addressed in the context of the complaint case filed by several of the movants in Case No. 10- 2395-GA-CSS (10-2395).[13]

The Commission's failure to resolve the issues that are in dispute leaves open the important questions as to whether or not IGS can lawfully use the Columbia Retail Energy trade name, whether or not IGS is operating with the required certificate and if so, at what point in time was the IGS certificate approved. The Commission should have

[11] Memo Contra Motion to Cease and Desist at 11 (emphasis omitted).

[12] OCC Reply to IGS Memo Contra Motion to Compel Discovery at 6 (October 14, 2010).

[13] Entry at 4.

decided that IGS' reliance on the 30-day automatic approval provision of R.C. 4929.20(A) was misplaced. Therefore, the Commission should grant rehearing.

C. The Commission Erred By Allowing IGS' Use Of The Name And Logo By A Non-Affiliate Of The Local Distribution Company In Violation Of Ohio Adm. Code 4901:1-29-05(C)(8).

The Commission's Entry also fails to explicitly approve IGS' filing of its Notice of Material Change or address the issues pertaining to the use of the trade name, Columbia Retail Energy, which are in dispute. Rather, the Commission Entry states:

> Commission finds that it is appropriate for IGS to use disclosures and directs IGS to continue to work with staff to insure proper disclosures are used.[14]

The Commission's rules pertaining to disclosures do not contemplate the use of name and logo by a non-affiliate. This important issue raised by the intervening parties was not addressed by the Commission.

Through its rules, the Commission has recognized that consumers would be misled and deceived if an LDC's competitive retail natural gas affiliate uses the LDC's name and/or logo. To prevent such confusion, the Commission requires an LDC's affiliate to disclose the affiliate relationship in its advertising and marketing materials to customers. Ohio Adm. Code 4901:1-29-05(C)(8)(f) states:

> (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:
>
> * * *

[14] Entry at 3.

> (8) Advertising or marketing offers that:
>
> * * *
>
> (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.

Although the Commission's rules clearly address the need for affiliates to disclaim that their services are not those of the traditional LDC, the rules provide no such standards when an unaffiliated competitive retail natural gas supplier uses the LDC's name and/or logo. Therefore, the Commission should grant rehearing.

D. The Commission Erred By Failing To Address The Issue Of The Legality Of IGS' Use Of The Trade Name, Columbia Retail Energy, Consistent With Commission Precedent.

The Commission has decided not to address the issues raised by the Parties in opposition to the IGS name change due to the limited purpose of the certification docket. The Commission Entry stated:

> In considering movants' motions for intervention, as well as the various discovery-related and procedural motions that have been filed in this docket, **the Commission is mindful of the purpose of the certification docket and the limited consideration triggered by the filing of a notice of material change**, Specifically, Rule 4901:1- 27-10,0.A.C., provides that the Commission may suspend, rescind, or conditionally rescind a retail natural gas supplier's or governmental aggregator's certificate if it determines that the material change will adversely affect the retail natural gas supplier's or governmental aggregator's fitness or ability to provide the services for which it is certified; or to provide reasonable financial assurances sufficient to protect natural gas companies and the regulated sales service customers from default.[15]

[15] Entry at 3 (emphasis added).

But the Commission should have addressed the parties' issues. The Commission's decision in this case for a number of reasons that are discussed below cannot be reconciled with the Commission's recent Opinion and Order in the Commerce Energy, Inc. d/b/a Just Energy ("Just Energy") Certification Case ("Just Energy Case").[16]

First, in this docket, the Motions to Intervene filed by OCC, Border, NOPEC, Stand, RESA, Delta and OFBF were denied.[17] While in the Just Energy Case, OCC was granted intervention.[18] In both Motions to intervene, the OCC noted that its intervention was necessary in order to help customers and consumers to avoid confusion, whether it be in the form of the name a company used in its marketing,[19] or from tactics used in door to door solicitations.[20] Both the IGS and Just Energy cases involved issues related to how customers are solicited and what constitutes proper behavior. The PUCO demonstrated concern for the limited door-to-door tactics yet ignored the more widespread mass marketing concerns with the IGS case.

The OCC agrees with the PUCO's concern in the Just Energy case, as well as, the Commission's actions which send a signal to the industry regarding how door-to-door solicitations should be conducted. However, door-to-door solicitations are limited to each individual instance whereas the IGS name change affects virtually hundreds of thousands of customers and consumers with each IGS mailing or advertisement. Because

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[16] *In the Matter of the Application of Commerce Energy, Inc. d/b/a Just Energy for Certification as a Competitive Retail Natural Gas Provider,* Case No. 02-1828-GA-CRS, Opinion and Order (November22, 2010) ("This case is before the Commission upon an Application being filed by *** Just Energy for renewal of Certificate No. 02-023").

[17] Entry at 4.

[18] *Just Energy Case,* Case No. 02-1828-GA-CRS, Entry at 2 (September 30, 2010).

[19] OCC Motion to Intervene and Protest at 1 (August 20, 2010).

[20] *Just Energy Case,* Case No. 08-1828-GA-CRS, OCC Motion to Intervene at 1 (September 27, 2010).

of the more wide-spread nature and implications of the IGS name change through advertising, there is also a great need for PUCO action in the IGS case.

Second, in this docket, the Commission opined that "no movant has raised a credible point regarding IGS' fitness or ability to provide the services for which it is certified or IGS' financial fitness. Instead, assertions raised in this docket have ranged from concerns regarding customer confusion, to whether IGS is gaining an improper competitive advantage."[21] To the extent that the IGS name change may cause customer confusion, the most basic questions are raised regarding the IGS certificate and whether IGS is capable of providing the service that customers are thinking they are purchasing. From a customer perspective, confusion over the entity that is offering a service goes to the very heart of whether a service provider is fit to provide the service for which a certificate is issued.

In the Just Energy Case, the Commission Staff filed a report of investigation after receiving a significant number of contacts to the Commission's call center from consumers complaining about the marketing, solicitation and customer enrollment practices of Just Energy's door-to-door sales agents. The consumer complaints involved allegations of deception/misrepresentation, misleading information, and unconscionable practices.[22] In this case, OCC and numerous other parties raised concerns that the IGS name change could cause customer confusion between IGS and their natural gas utility – Columbia Gas of Ohio, Inc.[23] Where the Commission was unwilling to entertain similar

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[21] Entry at 3.

[22] *Just Energy Case*, Case No. 02-1828-GA-CRS, Opinion and Order at 1 (November 22, 2010).

[23] OCC Motion to Intervene at 2 (August 20, 2010); Border Motion to Intervene at 4 (August 31, 2010); NOPEC Motion to Intervene at 2-3 (August 31, 2010); RESA Motion to Intervene at 8 (September 7, 2010); Joint Motion to Cease and Desist at 8-9 (September 28, 2010).

consumer-related allegations involving confusion that the IGS name change could cause in this docket, the Commission without hesitation delved into issues that were not limited to Just Energy's fitness or ability to provide the services for which it is certified or Just Energy's financial fitness in the Just Energy Case.

In this docket, the level of opposition to the IGS proposal was significant, as evidenced by the fact that over 20 parties , either individually or as groups, submitted numerous pleadings filed with the Commission including: seven (8) Motions to Intervene,[24] three (3) Motions for an Evidentiary Hearing, one (1) Request for a Rulemaking, two (2) Motions to Compel Discovery,[25] one (1) Motion to Cease and Desist and one (1) Motion for Sanctions,[26] all opposing the name change. The Commission in its Entry denied all Motions that had been filed in opposition in this case.[27] In contrast, without any explanation, in the Just Energy Case, the Commission on it own volition, without motion, "suspended the 30-day automatic approval process," and "scheduled a hearing for October 14, 2010."[28]

The case law recognizes the PUCO's authority to change its position; however, it cannot be done without appropriate considerations. In *Office of Consumers' Counsel v. Public Utilities Commission,* the Court stated:

> * * * Although the Commission should be willing to change its position when the need therefore is clear **and** it

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[24] Motions to Intervene: OCC (August 20, 2010), Border (August 31, 2010), NOPEC (August 31, 2010), Stand (September 7, 2010), Retail Energy Supply Association ("RESA") (September 7, 2010), Delta (September 15, 2010) and Ohio Farm Bureau Federation ("OFBF") (October 5, 2010) MX energy, Inc. (November 8, 2010).

[25] OCC (September 178, 2010) and NOPEC (September 29, 2010).

[26] OCC, NOPEC, Border, Stand, and Delta (September 28, 2010).

[27] Entry at 4-5.

[28] *Just Energy Case*, Case No. 02-1828-GA-CRS, Opinion and Order at 2 (November 22, 2010).

> is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure predictability which is essential in all areas of the law, including administrative law. (Emphasis added.)[29]

In this case, the Commission neither demonstrated clear need to change its position in its Entry or that the Just Energy decision was in error. The Commission's decision in this case is inconsistent with the Commission's recent decision in the Just Energy Case, and the Commission's decisions fail to illuminate the Commission's rationale for its actions in either case.

The Commission had numerous opportunities to rule on issues surrounding IGS' use of the trade name Columbia Retail Energy within the Entry, but chose not to. The Commission recognized its authority over the issues before it by stating:

> Specifically, Rule 4901:1-27-10, O.A.C., provides that the Commission may suspend, rescind, or conditionally rescind a retail natural gas supplier's or governmental aggregator's certificate if it determines that the material change will adversely affect the retail natural gas supplier's or governmental aggregator's fitness or ability to provide the services for which it is certified; or to provide reasonable financial assurances sufficient to protect natural gas companies and the regulated sales service customers from default.[30]

In the Just Energy Case, the Commission appropriately conducted the proceedings in a manner that was consistent with the Commission's rules. However, the Commission in

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[29] *Office of Consumers' Counsel v. Pub. Util. Comm.*, (1984) 10 Ohio St.3d 49, 50, 461 N.E.2d 303, quoting *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, (1975) 42 Ohio St.2d. 431, 330 N.E.2d 1. See also *State, ex rel. Auto Machine Co. v. Brown* (1929), 121 Ohio St. 73, 166 N.E. 903. See also Atchison v. Witchita Bd. of Trade, 412 US 800, 806, 93 S.Ct. 2367 (In 1973 the U.S. Supreme Court set a limit on the power of federal agencies to change prior established policies stating that, while an agency may flatly repudiate its norms, "whatever the ground for the departure [whether it is completely disregarding a policy or simply narrowing its applicability] *** it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate."); Williams Gas Processing v. FERC, 475 F.3d 319, 326 (D.C. Cir. 2006) (The Court further added that, although not bound by precedent, a demonstration of "reasoned decision-making necessarily requires consideration of relevant precedent.").

[30] Entry at 3.

this case, failed to decide the issues that are in dispute, and of more concern failed to explain why two similarly situated cases were handled and seemingly judged on radically different standards. In this case, the PUCO inexplicably found "all of the other points mentioned by the movants' are inappropriate for consideration, in this docket and are more appropriately addressed in the context of the complaint case ***."[31] Because the Commission has failed to conduct the proceedings in this case consistent with the precedent that it set in the Just Energy Case, the Commission should grant rehearing.

V. CONCLUSION

For all the reasons discussed above, the Commission should grant OCC's Application for Rehearing.

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[31] Entry at 4.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Application for Rehearing by the Office of the Ohio Consumers' Counsel* has been served upon the below-named counsel via regular U.S. Mail, postage prepaid this 10th day of December 2010.

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