

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Investigation of)	
Dominion East Ohio Gas Company Relative)	
to Its Compliance with the Natural Gas)	Case No. 12-380-GA-GPS
Pipeline Safety Standards and Related)	
Matters.)	

**REPLY TO DOMINION’S MEMORANDUM CONTRA
OCC’S MOTION TO INTERVENE
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

On January 24, 2011, a series of natural gas-related explosions and fires occurred in the Village of Fairport Harbor that resulted in significant property damage estimated at \$1.3 million, including 11 homes being severely damaged, 150 homes requiring appliance repair or replacement, and 13 local fire departments responding to emergency calls.¹ As a result of the incident, the Staff of the Public Utilities Commission of Ohio (“PUCO” or “the Commission”) conducted an investigation into the cause of the natural gas leak that led to the explosions and fires. The severity of Fairport Harbor incident is magnified by the fact that this case represents the second major pipeline safety case with Dominion East Ohio Gas Company (“Dominion” or “the Company”) in the past two years, where the issue of Dominion’s non-compliance with pipeline safety regulations regarding leak surveys and records of such surveys was found to exist by the Staff.²

¹ Staff Report (1-23-2012) at 1.

² *In the Matter of the Investigation of Dominion East Ohio Gas Company Relative to its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 10-105-GA-GPS, Opinion and Order (May 26, 2010).

As a result of the natural gas explosions and ensuing fires, virtually every residential customer in Fairport Harbor was impacted either directly from property damage, or indirectly as the Village was evacuated to deal with the potential threat from leaking natural gas under high pressure, the resulting explosions and fires. Furthermore, residential customers throughout the Dominion service territory were also impacted because of the threat that a similar incident could occur in other villages, townships, or cities where similar violations may have occurred.

Accordingly on February 14, 2012, the OCC filed a Motion to Intervene in this case in order to represent the interests of all of Dominion's residential customers and especially those of the residents of Fairport Harbor. On February 29, 2012, Dominion filed a Memorandum Contra the Office of the Ohio Consumers' Counsel ("OCC") Motion to Intervene ("Dominion Memo Contra"). Dominion wants to exclude OCC, the state's advocate for Ohio's residential utility consumers, from this investigation of the explosions and fires that damaged some consumers' property and threatened lives. Dominion's opposition makes no sense. Here is OCC's reply.

II. ARGUMENT

OCC has previously faced challenges to its intervention efforts in a gas pipeline safety ("GPS") case. In Case No. 10-105-GA-GPS ("2010 Dominion GPS Case"), both Dominion and the PUCO Staff filed pleadings in opposition to OCC's Motion to Intervene.³ Those attempts to exclude the consumers' advocate, OCC, were unsuccessful, and the Commission granted OCC's intervention.⁴ In the present case,

³ *In re 2010 Dominion GPS Case*, Case No. 10-105-GA-GPS, Dominion Memorandum Contra (March 11, 2010), Staff Memorandum Contra (March 12, 2010).

⁴ *Id.* at Finding and Order (May 26, 2010) at 7.

Dominion in its Memo Contra, has abandoned the unsuccessful arguments that it made in the 2010 Dominion GPS Case, and has instead adopted the unsuccessful argument that the Staff presented in that case.

Dominion raised two issues in its Memo Contra: 1) that OCC lacks jurisdiction to intervene in GPS cases,⁵ and 2) that even if OCC has standing to intervene in GPS cases, OCC does not satisfy the intervention standard.⁶ These arguments should meet the same fate as the arguments made against OCC's intervention in the 2010 Dominion GPS Case. The Commission should, therefore, grant OCC's intervention in this case.

A. OCC Has Authority To Participate In These Proceedings.

Dominion argues that OCC does not have authority to participate in gas pipeline safety cases before the Commission. That is wrong. In making the argument that OCC lacks jurisdiction to participate in GPS cases, Dominion is repeating the same unsuccessful argument that the PUCO Staff made in the 2010 Dominion GPS Case in opposition to the OCC Motion to Intervene in that case.⁷ The Staff relied upon the case of *Tongren v. D&L Marketing, LTD*, 149 Ohio App.3d 508, 2002-Ohio-5006, in the 2010 Dominion GPS Case, for the proposition that OCC is a creature of statute and has only the powers and jurisdiction authorized by the General Assembly.⁸ Similarly, Dominion raised the same case for the same proposition in this case.⁹

⁵ Dominion Memo Contra (February 29, 2012) at 3-6.

⁶ *Id.* at 7-9.

⁷ *In re 2010 Dominion GPS Case*, Case No. 10-105-GA-GPS, Staff Memorandum Contra, (March 12, 2010) at 2-8.

⁸ *Id.* at 3, 5-6.

⁹ Dominion Memo Contra (February 29, 2012) at 3, 4, 6.

In response to this argument, OCC noted in the 2010 Dominion GPS Case, and again in this case, that R.C. 4911.02 “Consumers’ Counsel – Powers and Duties”, authorizes OCC to participate in this proceeding.¹⁰ R.C. 4911.02(B)(2) states:

(2) Without limitation because of enumeration, the counsel: (Emphasis added).

(a) Shall have all the rights and powers of any party in interest appearing before the public utilities commission regarding examination and cross-examination of witnesses, presentation of evidence, and other matters;

(b) May take appropriate action with respect to residential consumer complaints concerning quality of service, service charges, and the operation of the public utilities commission;

(c) May institute, intervene in, or otherwise participate in proceedings in both state and federal courts and administrative agencies on behalf of the residential consumers concerning review of decisions rendered by, or failure to act by, the public utilities commission;

(d) May conduct long range studies concerning various topics relevant to the rates charged to residential consumers.

It is apparent, in the General Assembly’s above enactment, that the Legislature’s partial list of OCC’s powers is “without limitation because of enumeration.”¹¹ In the 2010 Dominion GPS Case, Staff reached its conclusion through the analysis of only subparts (b), (c) and (d) and ignored the General Assembly’s overarching instruction that the enumerated subparts are merely non-limiting examples of OCC’s powers.¹² Dominion has repeated that same error in this case.¹³

¹⁰ *In re 2010 Dominion GPS Case*, Case No. 10-105-GA-GPS, Staff Memorandum Contra (March 12, 2010) at 4.

¹¹ R.C. 4911.02(B)(2).

¹² *In re 2010 Dominion GPS Case*, Case No. 10-105-GA-GPS, Staff Memorandum Contra (March 12, 2010) at 4.

¹³ Dominion Memo Contra (February 29, 2012) at 3-7.

Contrary to Dominion’s reading, the General Assembly has instructed, by statute, how its enactments are to be read. It is to be “presumed that * * * [t]he entire statute is intended to be effective * * *”¹⁴ Here, the “entire statute” includes a provision that does not limit OCC’s intervention in a PUCO utility service quality and consumer safety case.¹⁵

Dominion also disregarded subpart (a) in its analysis of R.C. 4911.02(B)(2). That subpart states OCC “shall have all the rights and powers of any party in interest appearing before the public utilities commission regarding examination and cross-examination of witnesses, presentation of evidence, and other matters.”

Moreover, the Supreme Court of Ohio confirmed OCC’s right to intervene in PUCO proceedings, in ruling on two consolidated appeals in which OCC claimed the PUCO erred by denying its intervention. In those appeals, FirstEnergy Company, The Dayton Power and Light Company and the PUCO Staff unsuccessfully argued to the Court that OCC was not entitled to intervene because “the Commission does not have to grant intervention when it does not hold a hearing * * *.”¹⁶ However, the Court rejected those arguments and held that intervention is to be “liberally allowed” by the PUCO:

Even if no hearing was scheduled or contemplated when the Consumers’ Counsel sought to intervene, her motions and accompanying memoranda properly addressed the relevant criteria of R.C. 4903.221. In our view, whether or not a hearing is held, intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings

¹⁴ R.C. 1.47(B).

¹⁵ R.C. 49011.02(B)(2)(a).

¹⁶ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, Case No. 05-1679 Merit Brief of Intervening Appellee The Dayton Power and Light Company at 14-15. See also Merit Brief of Appellee Public Utilities Commission of Ohio at 5 (January 23, 2006); *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, Case No. 05-1621 Merit Brief Intervening Appellee FirstEnergy Company at 12, See also Merit Brief of Appellee Public Utilities Commission of Ohio at 5 (January 18, 2006).

can be considered by the PUCO. The Consumers' Counsel explained her interest in the cases in her motions to intervene and also explained that her views would not be adequately represented by the existing parties. In the absence of some evidence in the record calling those claims into doubt or showing that intervention would unduly prolong or delay the proceedings, intervention should have been granted.¹⁷

The Court found that the PUCO abused its discretion in denying OCC's intervention and that OCC should have been granted intervention.¹⁸ Therefore, in this case, the Commission should follow Ohio law and follow the Court's determination that the Commission should liberally construe the rules in favor of intervention, and grant intervention to OCC that has a substantial interest in the safety of Ohio consumers' lives and property.

In light of the arguments presented by the OCC Contra to the position raised by Staff in the 2010 Dominion GPS Case, the Commission granted OCC's Motion to Intervene. The Commission should similarly reject those same arguments made by Dominion in this case and grant OCC's Motion to Intervene.

B. There Is A Legal Basis For Granting OCC's Intervention.

Dominion argues inappropriately that OCC has not met the requirements of R.C. 4903.221 for intervention.¹⁹ More specifically, Dominion argues that OCC has failed to explain how residential customers could be adversely affected if intervention is denied.²⁰ This argument strains credulity.

¹⁷ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶20 (2006).

¹⁸ *Id.* at ¶13-20.

¹⁹ Dominion Memo Contra (February 29, 2012) at 7-9.

²⁰ *Id.*

First and foremost, the General Assembly determined in R.C. 4903.221 that intervention should be allowed in PUCO proceedings when the criteria are met, as OCC meets them here. And the Supreme Court of Ohio determined that intervention should be liberally granted, in finding error with a PUCO decision to the contrary.²¹

Dominion argues that the OCC interest of “representing the residential customers of Dominion in this case involving intervention and review of Dominion’s compliance or noncompliance with pipeline safety requirements,” is no different than that of the Staff.²² Dominion takes liberties in speaking for what another interest, the PUCO Staff, legally represents.

The Commission, in deciding whether to grant intervention, must consider whether a prospective intervenor’s interests are adequately represented by other parties.²³ First, it should be noted that the PUCO Staff’s role is not as a consumer advocate, which is OCC’s role. That point certainly is not to deny appreciation for the Staff’s very important role. But it is to say that the PUCO Staff balances the interests of all concerned, including utilities such as Dominion, in its work. And Dominion has not suggested that it (Dominion) lacks a role in this case because the PUCO Staff considers impacts on utilities in its work. Dominion’s opposition to OCC’s intervention should be denied.

²¹ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384 (2006).

²² Dominion Memo Contra (February 29, 2012) at 7.

²³ Ohio Adm. Code 4901:1-11 (B) (5).

Moreover, the Commission's rules clearly articulate that "the commission staff shall not be considered a party to any proceeding."²⁴ Therefore, as a result of the Staff's limited party status, the Staff does not represent OCC's interests in this proceeding.

Dominion's analysis interprets the Commission's rules to be exclusive such that only the Company and the Staff should be allowed to participate in gas pipeline safety proceedings. Such an interpretation is untenable, and would essentially hold that pipeline safety -- which directly affects residential customers and is paid for by residential customers -- does not permit participation by the agency whose sole statutory directive is to represent those same very residential customers.

In addition, Dominion's claim does not account for another Commission rule, the very rule that addresses intervention in PUCO proceedings.²⁵ The appropriately inclusive intervention standards for a GPS proceeding can be found in Ohio Adm. Code 4901:1-16-12 which states:

(B) The commission shall conduct GPS proceedings **in accordance with Chapter 4901-1** of the Administrative Code.
(Emphasis added).

By conducting a GPS proceeding in accordance with Ohio Adm. Code 4901-1 the Commission rules contemplate that interested parties may file for intervention,²⁶ conduct discovery²⁷ and participate in hearings.²⁸ Dominion neglected to discuss this code section or the implications of this section in its Memorandum Contra.

²⁴ Ohio Adm. Code 4901:1-10 (C).

²⁵ Ohio Adm. Code 4901-1-11.

²⁶ Ohio Adm. Code 4901-1-11.

²⁷ Ohio Adm. Code 4901-1-16, et seq.

²⁸ Ohio Adm. Code 4901-1-27.

Dominion also argues that OCC's participation may cause a delay in the proceeding because OCC has "no GPS experience to bring to bear in this case."²⁹ "Experience" is not a standard in the law of intervention, R.C. 4903.221. Also, Dominion's characterization that OCC has no experience to bring to bear is a mischaracterization. OCC has the experience, for instance, that was gained through active participation in Columbia's gas riser case³⁰ that had the element of gas pipeline safety guiding the resolution of that case. But again, Dominion ignores the Supreme Court's holding that intervention is to be liberally allowed by the PUCO.³¹

Dominion also argues that:

OCC has already assured that it will seek to expand the scope of this proceeding to 'investigate the possibility that Dominion has recently cut (or has been cutting over a period of time), or limiting its spending on pipeline safety compliance.'³²

Through this argument, Dominion is claiming that the scope of this case has already been determined and that it is narrowly defined. Such a claim would preclude parties from being able to present to the Commission recommendations that are discerned by the discovery process contemplated by law, rule and Court precedent. Information is key for Commission decision-making, as the PUCO stated in a recent decision in an electric case. The Commission stated:

In the Opinion and Order, the Commission recognized that these rate impacts may be significant, based upon evidence indicating that total bill impacts may, in some cases, approach 30 percent. However, the evidence in the record inadvertently failed to present

²⁹ Dominion Memo Contra (February 29, 2012) at 8.

³⁰ *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval, of Tariffs to Recover, through an automatic Adjustment Clause, Costs Associated with the Establishment of an Infrastructure Replacement Program and for Approval of Certain Accounting Treatment*, Case No. 07-478-GA-UNC.

³¹ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶13-20 (2006).

³² *Id.* at 9.

a full and accurate portrayal of the actual bill impacts to be felt by customers, particularly with respect to low load factor customers who have low usage but high demand.³³

To further the PUCO's ability to have a full and accurate portrayal of the issues presented in a particular case, the Commission should assure that all parties and intervenors are granted intervention and ample rights of discovery.

Dominion also argues that just because the PUCO granted OCC's intervention in the 2010 Dominion GPS Case, there is no requirement to grant OCC's intervention in this case.³⁴ Dominion argues that because the PUCO denied OCC's request for discovery in the 2010 Dominion GPS Case, that granting OCC intervention was meaningless.³⁵ This argument has no basis in law, and in fact flies in the face of the PUCO's reliance on prior precedent and case law that requires the PUCO to follow its own precedent or to show that its prior decisions are in error, and that the PUCO should also respect its own precedents in its decisions to assure predictability which is essential in all areas of the law, including administrative law.³⁶ Dominion has failed to demonstrate any reason for the PUCO not to follow its own precedent and grant OCC's intervention in this case.

Finally, it must be noted that the PUCO Staff, that made many of the arguments relied on by Dominion herein to oppose OCC's intervention in the 2010 Dominion GPS Case, did not file in opposition to the OCC Motion to Intervene in this case.

³³ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, et al, Entry on Rehearing at 11 (February 23, 2012).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Ohio Consumers' Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St.3d 49.

III. CONCLUSION

There was a failure of equipment that regulated the pressure under which natural gas was delivered to Dominion's customers, resulting in explosions and fires. Property damage was extensive. Fortunately there was no loss of life. The PUCO rightfully opened a docket to review the circumstances and to address the paramount issue of public safety. OCC, the state's advocate for residential consumers, moved to intervene. Dominion's next step in this public process was to ask the PUCO to exclude the consumer advocate from the process. What Dominion wants doesn't make sense for Ohio under law, rule, Court precedent, or common sense. Indeed, OCC was granted the right to intervene in a prior Gas Pipeline Safety case for Dominion.

For all the above-stated reasons, the PUCO should grant the OCC's intervention in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply* has been served upon the below-named counsel by electronic service this 7th day of March 2012.

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Summary: Reply Reply to Dominion's Memorandum Contra OCC's Motion to Intervene by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.