BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of the Alternative Rate Plan and Exemption Rules Contained in Chapter 4901:1-19 of the Ohio Administrative Code.	))))	Case No. 11-5590-GA-ORD

MEMORANDUM CONTRA APPLICATION FOR REHEARING OF COLUMBIA GAS OF OHIO, INC., DUKE ENERGY OHIO, INC., THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO AND VECTREN ENERGY DELIVERY OF OHIO
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
OHIO PARTNERS FOR AFFORDABLE ENERGY

The Office of the Ohio Consumers' Counsel ("OCC") and Ohio Partners for Affordable Energy ("OPAE") jointly representing the residential natural gas customers of Columbia Gas of Ohio, Inc. ("Columbia"), the East Ohio Gas Company d/b/a Dominion East Ohio ("Dominion"), Duke Energy Ohio, Inc. ("Duke") and Vectren Energy Delivery of Ohio, Inc. ("Vectren") collectively ("the Utilities"), in accordance with Ohio Admin. Code 4901-1-35(B), file this Memorandum Contra the Utilities' Application for Rehearing of the July 2, 2012 Entry ("Entry") of the Public Utilities Commission of Ohio ("Commission" or "PUCO").

I. INTRODUCTION

Pursuant to the procedural Entry, the Commission opened the docket to Comments and Reply Comments.[1] On January 23, 2012, Comments were filed by OCC, OPAE, Columbia, Dominion, Duke, Vectren, and the Ohio Gas Marketer Group

[1] Entry at 2 (November 22, 2011). As modified by Entry at 2 (December 12, 2011).

("OGMG"). On February 23, 2012, Reply Comments were filed by OCC, OPAE, Columbia, Dominion, Duke, Vectren, OGMG and Retail Energy Supply Association ("RESA").

On July 2, 2012, the Commission issued an Entry directing the Staff "to send its attached comment summary, recommendation drafts of the proposed rules, and [business impact assessment ("BIA")] evaluation to [the Common Sense Initiative Office ("CSI")] for review and recommendations in accordance with Section 121.82."[2]

On August 1, 2012, the Utilities filed their Application for Rehearing from the July 2, 2012 Entry. In the Entry, the Commission does not rule on the Staff's proposed rules. Therefore, the Utilities' Application for Rehearing is ill-founded and should be denied.

II. ARGUMENT

The Utilities' Application for Rehearing seeks rehearing of matters not yet heard by the Commission. Their filing is not well made under law and rule.

Ohio law provides for any party to apply for rehearing, "with respect to any matters determined…" by the Commission:

> After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding.[3]

The Commission, in its Entry, did not determine what will be the final rules. The Commission merely determined that it will send the draft rules to the Common Sense

[2] Entry at 3 (July 2, 2012).

[3] R.C. 4903.10; See also Ohio Adm. Code 4901-1-35(A) ("Any party or any affected person, firm, or corporation may file an application for rehearing, within thirty days after the issuance of a commission order, in the form and manner and under the circumstances set forth in section 4903.10 of the Revised Code.")

Initiative Office. The Utilities did not apply for rehearing on that ruling. But they did apply for rehearing on matters not ruled upon. Since there is no determination by the PUCO, there is no basis for the Utilities' Application for Rehearing.

A recent water industry rules review proceeding provides an example of how a ruling appears when the Commission issues a Finding and Order in a case. The Commission stated:

> ORDERED, that the final rules be effective on the earliest date permitted by law unless otherwise ordered by the Commission, the five-year review date for Chapter 4901:1-15, O.A.C., shall be in compliance with Section 119.032, Revised Code.[4]

In the July 2, 2012 Entry, there is no such Commission order declaring the rules to be final, or establishing an effective date for the final rules. Therefore, the Application for Rehearing filed by the Utilities on August 1, 2012 should be denied by the Commission.

The Commission's July 2, 2012 Entry is not the typical Finding and Order issued by the Commission in rules review cases pursuant to R.C. 119.32. The Commission typically rules on the Comments of interested parties responding to Staff's proposed rules. An example of that type of Commission action can be seen in a recent review of water industry rules. In an example of the Commission ruling on Ohio Adm. Code 4901:1-15-01, the PUCO stated:

> The Commission believes that staff's proposed language is appropriate, in that it encompasses a wide variety of circumstances that could occur with water and/or sewage service. Therefore, OCC's request should be denied. In addition, the Commission observes that a definition of "Commission" as "the public utilities

[4] *In the Matter of the Commission's Review of Chapter 4901:1-15, of the Ohio administrative Code, Standards for Waterworks Companies and Sewage Disposal Companies,* Case No. 11-5605-WS-ORD, Finding and Order at 14 (February 1, 2012).

> commission of Ohio" was inadvertently omitted from this rule. Therefore, such a definition will be added.[5]

In the July 2, 2012 Entry in this case, the Commission recognized that, "pursuant to the statute, the Commission may not file the proposed rules for legislative review under Section 119.032, Revised Code, earlier than the sixteenth business day after the proposed revisions to the rules are submitted to CSI."[6]

In order for the Utilities' Application for Rehearing to be timely, the PUCO's Entry must meet the ripeness test for rulemaking. The United States Supreme Court has ruled that the ripeness test consists of two prongs: (1) the issue must be fit for judicial review and (2) the hardship of parties withholding court consideration must be present.[7] The agency action must be final for the issue to be fit for judicial decision.[8] The agency action must also cause the plaintiff to immediately and significantly change his or her conduct of affairs with serious penalties attached to noncompliance.[9] This two-prong test has also been used by the Ohio Supreme Court in *Burger Brewing Co. v. Liquor Control Com.*, 34 Ohio St. 2d 93 (Ohio 1973). In this case, the Commission's action with regards to the rule-making is not yet final.

The Southern District of Ohio elaborated on the fitness for judicial review requirement. Whether an issue is fit for judicial review depends on three factors: 1) "whether the agency action is final," 2) "whether further proceedings are contemplated,"

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[5] *In the Matter of the Commission's Review of Chapter 4901:1-15, of the Ohio administrative Code, Standards for Waterworks Companies and Sewage Disposal Companies*, Case No. 11-5605-WS-ORD, Finding and Order at 3 (February 1, 2012).

[6] Entry at 2 (July 2, 2012).

[7] *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725. 743 (1997) citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-149 (1967).

[8] Id. at 744.

[9] Id.

and 3) "whether only purely legal questions are presented."[10] The failure to meet any one of the criteria for fitness renders a cause of action "unripe."[11] In this case, the Commission's actions are not final, and further proceedings are contemplated in terms of a future Finding and Order.

There are three kinds of recognized hardships. 1) "Hardship from choice between possibly unnecessary compliance and possible criminal conviction." *Community Treatment Centers, Inc. v. City of Westland*, 970 F. Supp. 1197, 1209 (W.D. Mich 1997) citing *Abbott Labs., supra* 387 U.S. at 148-149. 2) "Hardship where the application of law is inevitable and adverse consequences attach to it." *Id.* citing *Blanchette v. Connecticut General Insurance Corp.* 419 U.S. 102 (1974)." 3) "Hardship because of uncompensable collateral injuries." *Id.* citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). No such hardship can be shown by the Utilities in this case.

The Utilities have failed to demonstrate that the PUCO Entry meets any of the ripeness requirements. In fact, the Utilities even noted in their Application for Rehearing that "[i]t is unclear to the Utilities whether the July 2, 2012 Entry is the Commission's last word on the proposed rules or whether there will be another entry."[12] Because the Commission's Entry has not made determinations--pursuant to R.C. 4903.10--on the Staff's proposed rules, there is no basis in law for claiming the Commission erred.

[10] *Shoe Works v. U.S. EEOC*, 685 F. Supp. 168, 170 (S.D. Ohio 1987).

[11] Id.

[12] Application for Rehearing at 1.

III. CONCLUSION

For all the reasons argued above, the Utilities' Application for Rehearing was not filed in compliance with R.C. 4903.10 and it should be denied by the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the persons listed below, electronically, this 10th day of August 2012.

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Summary: Memorandum Memorandum Contra Application for Rehearing of Columbia Gas of Ohio, Inc., Duke Energy Ohio, Inc., the East Ohio Gas Company d/b/a Dominion East Ohio and Vectren Energy Delivery of Ohio by the Office of the Ohio Consumers' Counsel, and Ohio Partners for Affordable Energy electronically filed by Ms. Deb J. Bingham on behalf of Sauer, Larry S.