

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Mark A. Whitt,)	
)	
Complainant,)	
)	
v.)	Case No. 15-697-EL-CSS
)	
Nationwide Energy Partners, LLC,)	
)	
Respondent.)	

**REPLY TO NATIONWIDE ENERGY PARTNERS, LLC’S MEMORANDUM CONTRA
OHIO CONSUMERS’ COUNSEL’S MOTION TO INTERVENE
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

On April 10, 2015, a residential customer, Mark A. Whitt, (“Complainant”) filed a complaint with the Public Utilities Commission of Ohio (“PUCO”) against Nationwide Energy Partners, LLC (“NEP”). Mr. Whitt’s complaint, asserts, inter alia, that NEP is unlawfully providing utility services at rates in excess of what would otherwise be charged by utilities or other service providers. Subsequently, the Office of the Ohio Consumers’ Counsel (“OCC”), which has the statutory authority to represent residential utility customers’ interests, moved to intervene to ensure Ohioans are provided fair and reasonable rates for public utility services. On May 21, 2015, NEP filed a memorandum contra to the motion to intervene filed by OCC (“Memorandum Contra”), to which OCC submits this reply.

II. ARGUMENT

As asserted in its Motion to Intervene and Memorandum in Support, and contrary to NEP's claims, OCC has a statutory interest in this proceeding.¹ OCC has authority under Ohio law to represent the interests of residential utility customers.² Specifically, R.C. 4911.02(B)(2)(b) provides that OCC "[m]ay take appropriate action with respect to *residential consumer complaints* concerning quality of service, *service charges*, and the operation of the public utilities commission."³ Here, OCC is moving to intervene to protect residential consumer interests, in a case before the PUCO in which a residential consumer complains of unlawful utility service charges. Moreover, in *Verizon N., Inc. v. Pub. Util. Comm.*,⁴ the Supreme Court of Ohio held that OCC, in its statutory capacity as representative of the residential customers of telephone service, was a real party in interest and, therefore, could intervene in an appeal by the telephone company concerning access recovery charges. Here, OCC, in its statutory capacity as representative of residential utility customers, is a real party in interest and may take appropriate action with respect to a case concerning unlawful charges to a residential utility customer, which includes intervention.⁵ Therefore, OCC has a statutory right to participate in the above-captioned proceeding in its capacity as representative of residential utility customers. Ohio law provides that any person "who may be adversely affected" by a Commission proceeding is entitled to seek intervention in that proceeding.⁶ Notably, of the four criteria the PUCO considers in ruling on

¹ See, Motion to Intervene by the Office of the Ohio Consumers' Counsel, Memorandum in Support at 1, 3 (May 6, 2015) ("OCC Motion to Intervene").

² R.C. 4911.02(B).

³ R.C. 4911.02(B)(2)(b) (emphasis added).

⁴ *Verizon N., Inc. v. Pub. Util. Comm.*, 101 Ohio St.3d 91, 801 N.E.2d 456, 2004-Ohio-44, 102 Ohio St.3d 1449, 808 N.E.2d 399, 2004-Ohio-2263 (reconsideration denied).

⁵ R.C. 4911.02(B)(2)(a) and (b); also see *supra* n.4.

⁶ R.C. 4903.221.

motions to intervene,⁷ each weighs favorably in support of granting OCC's motion. NEP's attempts to argue otherwise fall flat in the face of the plain fact that OCC, as the statutory representative of residential utility customers, is a real party in interest to a dispute concerning unlawful utility charges to residential customers.

First, the statute provides that the Commission shall consider "[t]he nature and extent of the prospective intervenor's interest."⁸ The issue here is not simply a utility rate billing dispute or contract dispute between one residential customer and NEP (or the condominium association) as alleged in NEP's Memorandum Contra.⁹ Rather, the issues before the PUCO are broader and could affect other residential consumers beyond the Complainant. These issues include whether NEP is unlawfully acting as a public utility, whether NEP is in the business of supplying or arranging for the supply of competitive retail electric ("CRES") and competitive retail natural gas ("CRNG") services and if so, has obtained proper certification, whether NEP is prohibited from resale or redistribution of public utility services to residential customers, and whether NEP is charging just, and reasonable rates consistent with Ohio law.¹⁰ Resolution of these questions affects the Complainant, as well as many other residential customers (who OCC statutorily represents).

NEP relies upon *In re Ohio Schools Council, et al. v. First Energy Solutions Corp.*, Case No. 14-1182-EL-CSS (Sept. 4, 2014) as authority to deny OCC's intervention. But this case is

⁷ R.C. 4903.221(B).

⁸ R.C. 4903.221(B)(1).

⁹ Memorandum Contra at 1, 4-5.

¹⁰ See Complaint generally at Count 1 (Unlawful Provision of Noncompetitive Retail Electric Service), Count 2 (Unlawful Provision of Competitive Retail Electric Service), Count 3 (Violation of Certified Territory Act), Count 4 (Unlawful Provision of Water Service), and Count 5 (Unlawful Provision of Sewage Disposal Service); also see R.C. 4933.81, 4933.82, and 4933.83, 4933.25, 4928.08(B) and 4929.20(A), Ohio Adm. Code Chapters 4901:1-21 and 4901:1-27, and *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002-Ohio-4847, citing *Brooks v. Toledo Edison Co.*, PUCO Case No. 94-1987-EL-CSS, 1996 WL 331201 (May 8, 1996).

distinguishable. In that case, the Ohio Schools Council, Ohio School Boards Association, Ohio Association of School Business Offices, and Buckeye Association of School Administrators (collectively “Ohio Schools”) filed a complaint against FirstEnergy Solutions for seeking to pass-through specific PJM costs pursuant to a competitive retail electric service contract.¹¹ Various non-residential consumers and consumer groups (“the movants”)¹² alleging similar contractual issues and billing disputes sought to intervene in the action.¹³ As noted in the passage highlighted by NEP, the motions to intervene filed by the movants was denied, in part because “[t]he particulars of the Movants’ contracts with FES are largely unknown, as they were not set forth in the motions to intervene or otherwise filed in the docket.”¹⁴ The Attorney Examiner also found that the movants’ rights would not be hindered by the results of the pending case and that the movants could file their own complaints to settle their own billing disputes.¹⁵

Unlike the *In re Ohio Schools Council* case, the issues pending before the PUCO in this case are not contractual in nature. Instead the issues go to broader issues concerning whether NEP is unlawfully acting as a public utility — this affects not just the Complainant but all customers who are being served by NEP. Whether NEP is unlawfully acting as a public utility (in accordance with the three-prong test laid out in *In Re Shroyer*)¹⁶ or is otherwise under the

¹¹ *In re Ohio Schools Council, et al. v. First Energy Solutions Corp.*, Case No. 14-1182-EL-CSS, Entry at 1 (Sept. 4, 2014).

¹² The moving parties included: The Timken Company, Marathon Petroleum Company, Wausau Paper Towel and Tissue LLC, ASHTA Chemicals Inc., Columbus Castings, The Lincoln Electric Company, Delphi Corporation, Landmark Plastics Corporation, Navco Enterprises.com, Navco Enterprises of P.V., Inc., Navco Enterprises, Inc., Foodlife International Inc., Navco of York Road, Inc., and the Ohio Manufacturers Association.

¹³ *In re Ohio Schools Council, et al. v. First Energy Solutions Corp.*, Case No. 14-1182-EL-CSS, Entry at 1-2 (Sept. 4, 2014).

¹⁴ *Id.* at 3; *see also*, Memorandum Contra at 5.

¹⁵ *Id.*

¹⁶ *In Re Inscho v. Shroyer’s Mobile Homes*, PUCO Case No. 90-182-WS-CSS, et al., 1992 Ohio PUC LEXIS 137, Opinion and Order (Feb. 27, 1992).

regulation of the PUCO (such as a CRES¹⁷ or CRNG¹⁸) affects countless residential utility customers, and these residential customers have a right to be represented in this proceeding. And, unlike the movants in *In re Ohio Schools Council*, which were private parties, the OCC has a statutory right to represent residential customers whose rights will be directly affected by the result of this case.¹⁹

Moreover, the other distinguishable factor in the case at bar from that in *In re Ohio Schools Council* is that the Complainant in this case is not opposing the intervention requests. The complainant in *In re Ohio Schools Council* specifically opposed the intervention of the consumers and consumer groups alleging that the contracts may be different and asking the PUCO to allow the complainant in that case to prosecute its own case independently. The Complainant in the instant case is not raising similar assertions or requesting to prosecute the case independently.

Second, Ohio law provides that the PUCO shall consider “[t]he legal position advanced by the prospective intervenor and its probable relation to the merits of the case.”²⁰ The question at the heart of this matter is whether NEP is unlawfully operating as a public utility, CRES and/or CRNG provider, and/or a third-party reseller of competitive and non-competitive utility services without being certified and/or without proper regulatory oversight. In any event, NEP is subject to the applicable laws and regulations and NEP’s current actions are contrary to Ohio law. What is more, NEP is providing utility services at unjust and unreasonable rates, terms, and conditions and it must be held accountable. As stated in the Motion to Intervene, OCC intends to

¹⁷ R.C. 4928.08.

¹⁸ R.C. 4929.20.

¹⁹ R.C. 4911.02(B).

²⁰ R.C. 4903.221(B)(2).

advance the position that “NEP should not be permitted to charge untariffed rates that are unjust and unreasonable.”²¹

Third, the statute provides that the PUCO shall consider “[w]hether the intervention by the prospective intervenor will unduly prolong or delay the proceedings.”²² OCC’s intervention will not unduly prolong or delay the proceedings. OCC, as the statutory representative of residential utility consumers and with its longstanding expertise and experience in PUCO proceedings, will duly allow for the efficient processing of the case with consideration of the public interest. Cases of this nature in which the PUCO must determine whether the actions of a party are lawful under its rules and regulations generally have broad implication. Any delay that may be caused by enduring interrogatories, requests for production of documents, and depositions²³ to ensure that NEP is not violating Ohio law by operating unlawfully and overcharging Ohio’s residential customers is not *undue* delay. Therefore, OCC’s participation in this case will not unduly prolong the proceeding; rather, it is necessary and an efficient use of the parties’ and PUCO’s time and resources.

Fourth, the statute provides the PUCO shall consider “[w]hether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.”²⁴ NEP’s characterization of the dispute as a simple factual dispute between the Complainant, NEP, and the North Bank Condominium Association is a misrepresentation.²⁵ OCC is not intervening “purely to pursue [its] own agenda.”²⁶ Rather, OCC is intervening to

²¹ OCC Motion to Intervene at 2 (May 6, 2015).

²² R.C. 4903.221(B)(3).

²³ Memorandum Contra at 7.

²⁴ R.C. 4903.221(B)(4).

²⁵ Memorandum Contra at 7.

²⁶ *Id.*

develop the record in this proceeding to assist the PUCO in deciding the very important issues before it pursuant to its statutory authority to represent residential utility customers – whether NEP is unlawfully functioning as a public utility or other service provider. OCC does not doubt the legal abilities of Mr. Whitt,²⁷ but to the extent NEP is found to be acting unlawfully, Mr. Whitt lacks standing to assert the rights of the thousands of other similarly situated customers of NEP. Indeed, full and complete resolution of the factual issues requires the involvement of the statutory representative of all residential public utility consumers.

III. CONCLUSION

OCC has statutory authority to represent residential utility customers' interests,²⁸ and it has correctly moved to intervene in this important matter in an effort to represent those interests. The resolution of the Complaint will not only affect the Complainant himself, but will affect other residential consumers. The Complaint has far-reaching implications and OCC should be permitted to participate in the resolution of the Complaint.

As demonstrated in OCC's Motion to Intervene and as explained above, OCC satisfies the criteria set forth in R.C. 4903.221 and Ohio Adm. Code 4901-1-11. Despite NEP's inaccurate characterizations of the Complaint and OCC's interests, OCC should be authorized to intervene in this proceeding on behalf of residential customers with the full powers and rights granted by the PUCO to intervening parties.

²⁷ See, Memorandum Contra at 8.

²⁸ R.C. 4911.02(B).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on May 28, 2015.

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Commission of Ohio Docketing Information System on

5/28/2015 5:10:12 PM

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Case No(s). 15-0697-EL-CSS

Summary: Reply Reply to Nationwide Energy Partners, LLC's Memorandum Contra Ohio Consumers' Counsel's Motion to Intervene by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Schuler, Michael J.