

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Joint Application of	)	
Direct Energy Services, LLC,	)	Case No. 17-2358-GA-WVR
Direct Energy Business, LLC,	)	
Dominion Energy Solutions, Inc.,	)	
Interstate Gas Supply, Inc., and	)	
SouthStar Energy Services, LLC	)	
for a Waiver of a Provision of Rule	)	
4901:1-29-06(E) of the Ohio	)	
Administrative Code.	)	

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**MEMORANDUM CONTRA MARKETERS’ MOTION FOR PROTECTIVE  
ORDER THAT WOULD INFRINGE OCC’S DISCOVERY RIGHTS  
BY  
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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**I. INTRODUCTION**

This case involves marketers’ request to diminish safeguards that protect customers against an unlawful change of their natural gas supplier. Rules of the Public Utilities Commission of Ohio (“PUCO” or “Commission”) require independent third party verification of a consumer’s telephonic enrollment to change natural gas suppliers.<sup>1</sup> The applicants in this case (“Marketers”) seek to avoid complying with this rule as it applies to calls they receive from consumers in response to sales offers.<sup>2</sup> This could harm customers who call a natural gas seller in response to a sales offer. Such consumers are just as vulnerable to unscrupulous sales practices as are consumers who receive sales calls from natural gas sellers.

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<sup>1</sup> Ohio Adm. Code 4901:1-20-06(E)(1).

<sup>2</sup> Joint Application for Waiver (November 15, 2017).

The Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Intervene in this case on December 1, 2017, and is a party for discovery purposes under the PUCO's rules.<sup>3</sup> OCC properly served discovery on the Marketers on December 29, 2017, and under the PUCO's rules the Marketers' responses were due on January 18, 2018.<sup>4</sup> The day before their responses to OCC's discovery were due, the Marketers filed a motion for protective order, in which they seek a stay of discovery in this case.

OCC files this Memorandum Contra the Marketers' motion.<sup>5</sup> The Marketers' attempt to stay discovery is contrary to PUCO precedent. Further, the Marketers did not exhaust all reasonable means for resolving their dispute regarding OCC's discovery as required by the PUCO's rules.<sup>6</sup> The PUCO should deny the motion and order the Marketers to respond to OCC's discovery immediately.

## **II. LEGAL STANDARD FOR MOTIONS FOR A PROTECTIVE ORDER**

The PUCO's legal standard for motions for a protective order is contained in Ohio Adm. Code 4901-1-24. Ohio Adm. Code 4901-1-24(A) provides, in part: "Upon motion of any party or person from whom discovery is sought, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order that is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

In addition, Ohio Adm. Code 4901-1-24(B) states, in part: "No motion for a protective order shall be filed under paragraph (A) of this rule until the person or party

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<sup>3</sup> Ohio Adm. Code 4901-1-16(H).

<sup>4</sup> Ohio Adm. Code 4901-1-19(A).

<sup>5</sup> See Ohio Adm. Code 4901-1-12(B)(1).

<sup>6</sup> Ohio Adm. Code 4901-1-24(B).

seeking the order has exhausted all other reasonable means of resolving any differences with the party seeking discovery.”

Further, Ohio Adm. Code 4901-1-24(C) provides, in part: “If a motion for a protective order filed pursuant to paragraph (A) of this rule is denied in whole or in part, the commission, the legal director, the deputy legal director, or the attorney examiner may require that the party or person seeking the order provide or permit discovery, on such terms and conditions as are just.”

### **III. DISCUSSION**

#### **A. The PUCO has rejected arguments similar to those made by the Marketers in a case where it ruled that discovery is not limited to cases involving evidentiary hearings.**

The crux of the Marketers’ argument for a protective order is that the PUCO has not set a procedural schedule for this case and thus they need not respond to OCC’s discovery.<sup>7</sup> The Marketers claim that “discovery is, at best, premature, and responding would subject [the Marketers] to an undue burden and expense that may well prove unnecessary if the Commission determines that no evidentiary hearing is required in this matter.”<sup>8</sup> The Marketers, however, have not cited any case law to support their position. In fact, there is none.

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<sup>7</sup> See Memorandum in Support at 3. The Marketers also reiterate the basic arguments made in their application. *Id.* at 4-5. OCC will not address these arguments here. Instead, OCC directs the PUCO’s attention to the Motion to Deny the application OCC filed in this case on January 19, 2018. There is no need to speculate, as the Marketers’ have done, regarding the PUCO’s intent in adopting Ohio Adm. Code 4901:1-26-06(E)(1). See *id.* at 4. An examination of intent is necessary only if the language of the rule is ambiguous. See R.C. 1.49. The language of the rule at issue in this case is not ambiguous, and thus an examination of the PUCO’s intent in adopting the rule is unnecessary.

<sup>8</sup> Memorandum in Support at 1.

OCC's right to discovery is ensured by law, rule, and Supreme Court of Ohio ("Court") precedent. OCC is entitled to timely and complete responses to its discovery inquiries. R.C. 4903.082 provides: "All parties and intervenors shall be granted ample rights of discovery." In interpreting this statute, the Supreme Court of Ohio has ruled that parties in PUCO cases have broad rights to discovery.<sup>9</sup> The Court held that the PUCO's discovery rule is similar to Civ. R. 26(B)(1), which governs the scope of discovery in civil cases.<sup>10</sup> The Court noted that Civ. R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.<sup>11</sup> The Marketers admit that OCC's discovery requests are within the scope of discovery contemplated by the PUCO's rules.<sup>12</sup> Thus, OCC is entitled to broad discovery in this case.

In practice before the PUCO, it is typical for discovery to begin as soon as a proceeding commences and parties intervene in the proceeding. Indeed, Ohio Adm. Code 4901-1-17(A) states, in relevant part: "[D]iscovery may begin *immediately after a proceeding is commenced* and should be completed as expeditiously as possible."<sup>13</sup> (Emphasis added.) There is no requirement that a hearing (or any procedural schedule) be set before parties may exercise their discovery rights. In fact, the PUCO has rejected arguments against discovery similar to those made by the Marketers in this case.

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<sup>9</sup> *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (2006).

<sup>10</sup> *Id.*, ¶83.

<sup>11</sup> *Id.*, citing *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661, 635 N.E.2d 331.

<sup>12</sup> Memorandum in Support at 5.

<sup>13</sup> The rule does mention that discovery must be completed before the hearing, but that provision only limits the end date of discovery, not the beginning.

In a case involving Columbia Gas of Ohio (“Columbia”), the PUCO rejected arguments that discovery cannot begin until it determines the procedural posture of the case.<sup>14</sup> Shortly after Columbia filed its application in that case, OCC moved to intervene and served discovery on Columbia.<sup>15</sup> Columbia filed a motion to stay discovery until such time that the PUCO determined whether to conduct further proceedings in the case. Like the Marketers in this case, Columbia asserted that OCC’s discovery was improper and premature because the PUCO had not determined the nature or scope of any future proceedings in the case.<sup>16</sup> And like the Marketers in this case, Columbia contended that the PUCO “may well decide” applications such as the one it filed without a hearing.<sup>17</sup>

Columbia also made other arguments in seeking a stay of discovery. Columbia argued that if the PUCO determined that a hearing was unnecessary, discovery should be permanently stayed.<sup>18</sup> In addition, Columbia claimed that without PUCO guidance as to how the case would proceed, it would be impossible to know whether OCC’s discovery requests are relevant or likely to lead to the discovery of admissible evidence.<sup>19</sup> And Columbia contended that the mere filing of an application does not result in a right to discovery.<sup>20</sup> OCC opposed Columbia’s motion as being contrary to Ohio law, PUCO rules, and Ohio Supreme Court precedent.

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<sup>14</sup> *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Implement a Capital Expenditure Program*, Case No. 11-5351-GA-UNC, Entry (January 27, 2012).

<sup>15</sup> *See id.*, ¶6.

<sup>16</sup> Case No. 11-5351-GA-UNC, Columbia’s Motion to Stay Discovery (December 19, 2011) at 3-5.

<sup>17</sup> *Id.* at 5.

<sup>18</sup> *Id.* at 6.

<sup>19</sup> *Id.* at 5.

<sup>20</sup> *Id.* at 5-6.

The PUCO agreed with OCC, denied Columbia's motion, and allowed the discovery process to continue. In so doing, the PUCO stated: "Section 4903.082, Revised Code, requires the Commission to ensure ample rights of discovery, while Rule 4901-1-17(A), O.A.C, generally provides that discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible."<sup>21</sup> The PUCO also noted that the discovery process would aid parties in preparing their comments and reply comments, and, ultimately, would "better inform the Commission's review of the application."<sup>22</sup> The PUCO ordered Columbia to respond to OCC's discovery within ten days.<sup>23</sup> In the instant case, the PUCO should rule consistent with the precedent set in the Columbia case and allow discovery to proceed.

The Marketers cannot determine unilaterally what does or does not constitute a proceeding where they are obligated to respond to discovery. And they cannot decide unilaterally when discovery would be appropriate in a proceeding.<sup>24</sup> The Marketers' position would unreasonably narrow OCC's rights of discovery recognized under Ohio law, the PUCO's rules, and case law.<sup>25</sup> The Marketers' motion to stay discovery should be denied, and they should be ordered to respond immediately to OCC's discovery.

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<sup>21</sup> Case No. 11-5351-GA-UNC, Entry (January 27, 2012), ¶8. OCC notes that Columbia had responded to earlier discovery from OCC before seeking a stay of discovery. However, that apparently was not a factor in the PUCO's decision, and the PUCO did not limit its decision to those cases where the party seeking a protective order had previously responded to discovery.

<sup>22</sup> *Id.* The PUCO established a procedural schedule in the same Entry. *Id.*, ¶5.

<sup>23</sup> *Id.*, ¶8.

<sup>24</sup> Further, it is irrelevant that no other parties have yet intervened in this case. See Memorandum in Support at 6, n. 11.

<sup>25</sup> See also *In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell Its Generation Assets*, Case No. 13-2420-EL-UNC, Entry (May 30, 2014), ¶9 (denying DP&L's motion for protective order to stay discovery until the PUCO ruled on DP&L's motion to waive the required hearing: "Until the Commission makes a decision on DP&L's waiver request, this case should proceed as if it were going to hearing.").

**B. Discovery is needed to help the PUCO determine whether the Marketers' proposed waiver would aid or hinder protection for consumers who call natural gas companies and change suppliers.**

OCC is entitled to discovery within the scope provided by the PUCO's rules: "[A]ny party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding."<sup>26</sup> The Marketers admit that OCC's discovery requests are within the scope of discovery contemplated by the PUCO's rules.<sup>27</sup> Their only issue is with the timing of the requests.<sup>28</sup>

Discovery is a necessary part of the analysis that OCC must undertake in order to evaluate the effect of the Marketers' waiver application on consumers. Discovery is especially needed in this case because of the lack of information, explanation, or supporting data in the application. The Marketers claim that they incur extra costs associated with third-party verification,<sup>29</sup> but do not quantify those costs. They also assert that the rule has resulted in consumer complaints,<sup>30</sup> but do not provide information regarding the number of consumer complaints. In addition, they assert that some consumers have terminated the enrollment process because of the rule,<sup>31</sup> but do not quantify the rule's effect on their sales.

This information is important for the PUCO to determine whether complying with the rule is sufficiently burdensome on the Marketers to grant the application. The

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<sup>26</sup> Ohio Adm. Code 4901-1-16(B).

<sup>27</sup> Memorandum in Support at 5.

<sup>28</sup> *Id.*

<sup>29</sup> Application at 13.

<sup>30</sup> *Id.* at 12.

<sup>31</sup> *Id.*

Marketers have the burden of proof in this case and should have included this information in the record of this case. They did not. OCC's discovery delves into these issues.<sup>32</sup>

Discovery is a very important part of the PUCO's regulatory process, especially in this case where the Marketers seek to avoid complying with an important consumer protection. Rather than stay discovery, the PUCO should order the Marketers to provide immediate responses to OCC's interrogatories and the requests for production of documents. This will aid parties in preparing their comments and reply comments, and, ultimately, will better inform the Commission's review of the application.

**C. The Marketers have not shown that they have exhausted all other reasonable means of resolving any differences with OCC regarding the discovery, and thus have not met the PUCO's standard for protective orders.**

The Marketers' "efforts" to resolve the differences regarding discovery are inadequate under the PUCO's rules. The PUCO's discovery rules are intended to minimize PUCO intervention in the discovery process.<sup>33</sup> This means that the party seeking protection must exhaust *all other* reasonable means of resolving any differences with the party seeking discovery *before* filing a motion for protection. The Marketers failed to follow the PUCO's rules and, thus, their motion does not satisfy these PUCO requirements.

OCC served discovery on the Marketers on December 29, 2017. Under Ohio Adm. Code 4901-1-19(A) the Marketers were required to respond within 20 days. So, the Marketers' responses to OCC's discovery were due on January 18, 2018. But none of the Marketers attempted to contact OCC about the discovery issue until January 16, 2018

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<sup>32</sup> See Motion, Attachment A at 10-21.

<sup>33</sup> Ohio Adm. Code 4901-1-16(A).



– just two days before their responses were due. The initial contact was by telephone, when counsel for one of the Marketers left a voice mail message with OCC’s counsel. OCC received no emails from any of the Marketers concerning an issue with OCC’s discovery.

A series of voice mail messages ensued, and it was not until the next day, January 17, that counsel for the Marketers discussed the discovery issue with OCC’s counsel.<sup>34</sup> This was the first time that OCC became aware of the Marketers’ position that “discovery is premature at this juncture.”<sup>35</sup>

Even then, the Marketers’ attempt to satisfy the requirement was to ask OCC to agree to a complete halt of discovery.<sup>36</sup> When OCC declined the suggestion, the Marketers filed their motion the same day. The Marketers offered no alternatives, such as extending the response time for discovery served or considering another resolution or compromise. Their “take it or leave it” offer to halt discovery is hardly an effort to exhaust all other reasonable means of resolving differences over discovery.

The Marketers discussed the issue of discovery just once with OCC – in a very brief conversation held the day the Marketers filed their motion (which was the day before discovery responses were due). The PUCO should not issue a protective order based on such inadequate efforts to resolve discovery issues. The PUCO should deny the Marketers’ motion.

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<sup>34</sup> See Motion, Attachment B, ¶5.

<sup>35</sup> *Id.*, ¶3.

<sup>36</sup> See *id.*, ¶5.

#### IV. CONCLUSION

OCC is entitled to ample rights of discovery on behalf of consumers in this case. The Marketers attempt to unreasonably and unlawfully limit OCC's discovery rights. Their motion is contrary to Ohio law, PUCO rules, and precedent from the Supreme Court of Ohio and the PUCO. In addition, the Marketers have not exhausted all reasonable means for resolving their discovery dispute with OCC. The Marketers do not meet the PUCO's standard for a motion for a protective order. To protect consumers, and to better inform the PUCO's review of the application, the PUCO should deny their motion and order them to respond to OCC's discovery immediately.

Respectfully submitted,

BRUCE WESTON (0016973)  
OHIO CONSUMERS' COUNSEL

/s/ Terry L. Etter

Terry L. Etter (0067445), Counsel of Record  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

65 East State Street, 7<sup>th</sup> Floor

Columbus, Ohio 43215-4213

Telephone: (614) 466-7964 (Etter direct)

[Terry.etter@occ.ohio.gov](mailto:Terry.etter@occ.ohio.gov)

(willing to accept service by e-mail)

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Contra was served by electronic mail to the persons listed below, on this 1<sup>st</sup> day of February 2018.

/s/ Terry L. Etter

Terry L. Etter  
Assistant Consumers' Counsel

## **SERVICE LIST**

[William.wright@ohioattorneygeneral.gov](mailto:William.wright@ohioattorneygeneral.gov)  
[BarthRoyer@aol.com](mailto:BarthRoyer@aol.com)  
[sdismukes@eckertseamans.com](mailto:sdismukes@eckertseamans.com)  
[mnugent@igsenergy.com](mailto:mnugent@igsenergy.com)  
[aemerson@porterwright.com](mailto:aemerson@porterwright.com)

Attorney Examiner:  
[Stacie.cathcart@puc.state.oh.us](mailto:Stacie.cathcart@puc.state.oh.us)

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Summary: Memorandum Memorandum Contra Marketers' Motion for Protective Order That Would Infringe OCC's Discovery Rights by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Etter, Terry Mr.