

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

	)	Case No. 14-375-GA-RDR
	)	Case No. 15-452-GA-RDR
In the Matters of the Applications of Duke	)	Case No. 16-542-GA-RDR
Energy Ohio, Inc., for Adjustments to Rider	)	Case No. 17-596-GA-RDR
MGP Rates.	)	Case No. 18-283-GA-RDR
	)	Case No. 19-174-GA-RDR
	)	Case No. 20-53-GA-RDR
	)	Case No. 14-376-GA-ATA
	)	Case No. 15-453-GA-ATA
	)	Case No. 16-543-GA-ATA
In the Matters of the Applications of Duke	)	Case No. 17-597-GA-ATA
Energy Ohio, Inc. for Tariff Approval.	)	Case No. 18-284-GA-ATA
	)	Case No. 19-175-GA-ATA
	)	Case No. 19-1086-GA-ATA
	)	Case No. 20-54-GA-ATA
In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Implementation of the	)	Case No. 18-1830-GA-UNC
Tax Cuts and Jobs Act of 2017.)	
In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Approval of Tariff	)	Case No. 18-1831-GA-UNC
Amendments.)	
In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Authority to Defer	)	Case No. 19-1085-GA-AAM
Environmental Investigation and Remediation)	
Costs.)	

**MEMORANDUM CONTRA RESA AND IGS'S INTERLOCUTORY APPEAL
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The PUCO should deny the interlocutory appeal¹ filed by the Retail Energy Supply Association and Interstate Gas Supply, Inc. (together, the "Marketers"). It does not meet the

¹ Joint Interlocutory Appeal and Request for Certification of the Retail Energy Supply Association and Interstate Gas Supply, Inc. (Nov. 8, 2021) (the "Marketer Appeal").

standard for certification to the Commission. It is a collateral attack on the PUCO's earlier ruling granting the Marketers only limited intervention. And although it is fashioned as an interlocutory appeal, it is, in substance, a request for an advisory opinion about what evidence might or might not be admitted at the November 18, 2021 hearing in these proceedings.

I. ARGUMENT

A. **The Marketers' interlocutory appeal is procedurally improper because it is a collateral attack on the PUCO's ruling granting them limited intervention and effectively seeks an advisory ruling on what will and will not be admissible at the hearing in these cases.**

Nearly a month ago on October 15, 2021, the PUCO granted the Marketers' motions to intervene on a limited basis.² The PUCO explained:

[T]he attorney examiner continues to find that IGS and RESA's interests in these proceedings are limited to the three areas discussed in their motions for leave to intervene, namely Duke's commitment to transition from the GCR mechanism to an SSO competitive auction format for natural gas supply, the proposed SSO price-to-compare message on natural gas bills, and the commitment to provide OCC aggregate shadow billing data on an ongoing basis. ... [U]pon being granted limited intervention, IGS and RESA are entitled to inquire into these specific provisions of the Stipulation and any potential adverse impact that they may have upon the competitive market in Duke's service territory, even if Duke, OCC, and OEG believe there will be no such adverse impact. As such, based on the very unique circumstances presented in these cases, the attorney examiner finds that the motions to intervene filed by IGS and RESA should be granted on a limited basis to address the proposed provisions related to the competitive market, as noted above.³

² Entry (Oct. 15, 2021).

³ *Id.* ¶ 32.

Through this Entry, the Attorney Examiner clearly established the limits on the Marketers' participation in these cases. Neither of the Marketers filed an interlocutory appeal regarding this ruling limiting their intervention. The time has long since passed to do so.⁴

On November 3, 2021, the Attorney Examiner issued an Entry regarding a discovery dispute between Duke and the Marketers. In that Entry, the Attorney Examiner wrote, "RESA and IGS are being provided ample opportunity to offer evidence and/or argument in opposition, consistent with Ohio Adm.Code 4901-1-30, but also within the confines of their limited intervention status."⁵ The phrase "within the confines of their limited intervention status" unambiguously refers to the October 15, 2021 Entry in which the Attorney Examiner granted the Marketers the right to intervene but only on a limited basis.

Now, however, the Marketers have filed an interlocutory appeal regarding the November 3, 2021 Entry claiming that the PUCO must clarify the meaning of "within the confines of their limited intervention status." The Marketers demand that the PUCO issue an order explicitly stating that such language be interpreted to mean that the Marketers shall be allowed, at the hearing and in their briefs, to address "whether the Stipulation is reasonable given the inclusion of the retail market provisions."⁶

But what the Marketers are really asking the PUCO to do is revisit its decision granting them limited intervention. That ruling was unambiguous. The Marketers "are entitled to inquire into these specific provisions of the Stipulation and any potential adverse impact that they may have upon the competitive market in Duke's service territory, even if Duke, OCC, and OEG

⁴ O.A.C. 4901-1-15(C).

⁵ Entry ¶ 28 (Nov. 3, 2021).

⁶ Marketer Appeal at 3.

believe there will be no such adverse impact.”⁷ The Attorney Examiner will be guided by this ruling in deciding whether and to what extent any evidence offered by the Marketers at the hearing is admissible, whether any questions asked by the Marketers on cross examination are objectionable, and whether any arguments raised in the Marketers’ briefs should be struck. The Marketers’ improper collateral attack of the PUCO’s October 15, 2021 Entry should be denied.⁸

Alternatively, what the Marketers seem to be asking for is an advisory opinion on what will and will not be admissible at the hearing in these cases. The October 15, 2021 Entry speaks for itself regarding the scope of the Marketers’ participation. If and when the Marketers seek to offer any particular piece of evidence at the hearing, the Attorney Examiner will make a ruling regarding its admissibility. Unless and until the Attorney Examiner denies the Marketers the right to offer evidence that they believe they have a right to offer, they have no grievance. The PUCO should not give the Marketers an advisory opinion on whether any of its evidence might or might not be deemed admissible.⁹

Indeed, it would be impossible for the PUCO to give the Marketers what they want. Without knowing what specific evidence the Marketers want to offer, what questions the Marketers might ask witnesses on cross examination, and what arguments the Marketers might make in their briefs, there is no way to know whether such evidence, questions, and arguments are consistent with the Marketers’ limited intervention.

⁷ Entry ¶ 32 (Oct. 15, 2021).

⁸ See *In re Application of [FirstEnergy] for Authority to Provide for a Standard Serv. Offer*, Case No. 14-1297-El-SSO, Opinion & Order (Mar. 31, 2016) (rejecting party’s attempt to collaterally attack a prior attorney examiner ruling granting intervention).

⁹ See *In re Complaint of WorldCom, Inc.*, Case No. 03-324-AU-PWC, Opinion & Order (June 26, 2003) (“Complainants are correct that the Commission decides cases based upon the record presented and does not give advisory opinions.”).

B. The Marketers' appeal does not present a new or novel question of interpretation, law, or policy.

The Marketers claim that the Attorney Examiner's November 3, 2021 Entry "raises the issue of whether the Commission can preclude a party from opposing a stipulation contrary to the express language of Rule 4901-1-30."¹⁰ This does not present a new or novel question of interpretation, law, or policy, as required by O.A.C. 4901-1-15(B) for an interlocutory appeal.

First, as explained above, the PUCO has not precluded the Marketers from opposing the settlement in this case. The November 3, 2021 ruling merely reaffirms that the Marketers' intervention in this case is limited, and those limits are expressly set forth in the October 15, 2021 Entry. Thus, there is no need, at this time, for the PUCO to address whether it can preclude a party from opposing a settlement. If the Attorney Examiner or PUCO in fact precludes the Marketers from doing so at the hearing, then the Marketers can assert whatever rights they have on appeal at that time. But there is no new or novel question of interpretation, law, or policy to be addressed at this time.

C. An immediate determination by the PUCO is not needed to prevent the likelihood of undue prejudice or expense to the Marketers.

As explained above, the Marketers are essentially seeking an advisory opinion regarding the hearing that has yet to take place in these cases. Because the hearing has not yet taken place, the Marketers cannot have been prejudiced by any rulings that might occur at the hearing. The gist of the Marketers' appeal is that they are worried the Attorney Examiner might unduly limit their participation at the hearing or in their post-hearing briefing. But until that actually happens, they have suffered no prejudice. Thus, there is no need for an *immediate* determination by the PUCO regarding the Marketers' concerns about hypothetical future rulings.

¹⁰ Marketer Appeal at 2.

II. CONCLUSION

In its October 15, 2021 Entry, the PUCO spoke clearly about the scope of the Marketers' participation in these cases. The Marketers declined to challenge that ruling. At the hearing, the Attorney Examiners will rule accordingly on any evidence that the Marketers might offer and on any questions the Marketers might ask when cross examining other witnesses. The PUCO will likely rule on whether the Marketers' post-hearing briefs are consistent with their limited intervention. But there is no need, at this time, for the PUCO to offer an advisory ruling on whether and to what extent the Marketers might make particular arguments regarding approval of the settlement. The interlocutory appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Memorandum Contra was served by electronic transmission upon the parties below this 10th day of November 2021.

/s/ Christopher Healey _____
Christopher Healey
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ATA, 15-0453-GA-ATA, 16-0543-GA-ATA, 17-0597-GA-ATA, 18-0284-GA-ATA,
19-0175-GA-ATA, 19-1086-GA-UNC, 20-0054-GA-ATA, 18-1830-GA-UNC, 18-
1831-GA-ATA, 19-1085-GA-AAM**

Summary: Memorandum Memorandum Contra RESA and IGS's Interlocutory
Appeal by Office of the Ohio Consumers' Counsel electronically filed by Ms.
Patricia J Mallarnee on behalf of Healey, Christopher