

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
XOOM Energy Ohio, LLC for)	Case No. 11-4795-GA-CRS
Certification as a Competitive Retail)	
Natural Gas Marketer.)	

**REPLY TO XOOM ENERGY'S MEMORANDUM CONTRA OCC'S MOTION
TO INTERVENE TO PROTECT CONSUMERS
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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Underscoring that XOOM is not a friend of consumers, XOOM now seeks to prevent the consumers' state legal representative, the Ohio Consumers' Counsel (OCC), from participating in this proceeding. That is wrong.

This case is yet another opportunity for the PUCO to prevent a bad actor marketer from further harming Ohioans. The PUCO should deny XOOM the continued privilege to serve consumers in Ohio.

The PUCO already *granted* OCC intervention – over XOOM's objection – in the PUCO's investigation of XOOM.⁶ The PUCO should also grant OCC's intervention here.

Especially given that XOOM is accused of misleading consumers, the PUCO should allow OCC (the statutory representative of Ohio's residential utility consumers) to participate in this proceeding. Consumers are the victims of XOOM's marketing violations. Consumers should have a voice. By law, that voice is OCC.

XOOM raises no rightful basis for denying OCC's motion to intervene. XOOM misrepresents Ohio law regarding OCC's general power to intervene. XOOM ignores PUCO precedent demonstrating OCC's intervention authority in previous natural gas marketer certification proceedings. Finally, XOOM misapplies the intervention standard to OCC's participation in this matter. OCC has authority to intervene and satisfies the standards for intervention. The PUCO should grant OCC's motion to intervene for consumers.

The energy market and Ohio consumers will benefit from denying XOOM the privilege of operating as a natural gas marketer in Ohio. Its certificate should not be renewed.

⁶ Case No. 22-267, Entry (May 20, 2022).

II. ARGUMENT

A. **XOOM's claim is meritless that OCC has no interest in this proceeding. OCC has the authority under state law to intervene in this proceeding to protect consumers from XOOM.**

XOOM erroneously argues that OCC has no statutory legal authority to intervene in a certification proceeding.⁷ XOOM is wrong.

XOOM claims that R.C. 4929.24(C)(1) enumerates exclusively when OCC may intervene in CRNG proceedings and applies to consumer complaints only.⁸ This argument is nothing more than a misdirection, in an attempt to draw the PUCO's focus away from separate statutes and precedent that clearly authorize OCC to intervene. The PUCO must not fall for it.

OCC's authority to intervene is broader than the enumerated powers XOOM cites. The General Assembly wisely wrote into R.C. 4911.02(B)(2) that the Consumers' Counsel has right to protect consumers "[w]ithout limitation because of enumeration...." (Emphasis added.) XOOM ignores this, claiming OCC cannot intervene in a certification action because it is not enumerated. That makes no sense. And this argument is contradicted by the Supreme Court of Ohio's decision in *FirstEnergy Advisors* (a certification case).⁹ In its decision, the Court agreed with OCC and found that the PUCO's decision violated Ohio law.¹⁰ This decision would not exist if OCC had not been

⁷ XOOM Memorandum Contra Office of Consumers' Counsel's Motion to Intervene ("XOOM Memo. Contra"), at 3.

⁸ *Id.*

⁹ See *In re Suvon, L.L.C.*, 166 Ohio St.3d 519, 2021-Ohio-3630, 188 N.E.3d 140 ("FirstEnergy Advisors"); PUCO Case No. 20-0103-EL-AGG.

¹⁰ *Id.*

granted intervention and participated in the certification case.¹¹ Moreover, even what is enumerated – for example, R.C. 4911.02(B)(2)(b) – allows OCC to intervene in this case. This is especially so because the PUCO has found that “...the provisions of Section 4911.02 should be construed *as broadly as possible*.”¹² OCC’s intervention in this case is an “appropriate action with respect to residential consumer complaints concerning quality of service,” which R.C. 4911.02(B)(2)(b) authorizes OCC to take. The PUCO received at least 40 consumer complaints that document XOOM’s inadequate service to Ohioans, specifically a pattern of unfair marketing practices. Consequently, OCC’s intervention in this case is within its enumerated R.C. 4911.02(B)(2)(b) authority.

XOOM’s claim that OCC has no authority to intervene also ignores R.C. 4903.221, which provides “[a]ny other person who may be adversely affected by a public utilities commission *proceeding* may intervene in such *proceeding* [].” (Emphasis added). R.C. 4903.221, an intervention protection law four decades ago, makes no distinction between a certification proceeding or any other type of PUCO proceeding in liberally allowing interventions. OCC qualifies for intervention under that Ohio intervention law.

Finally, past PUCO decisions establish that OCC has authority to intervene in certification proceedings.¹³

¹¹ See PUCO Case No. 20-0103-EL-AGG, Finding and Order (April 22, 2020) at ¶11.

¹² *In the Matter of the Complaint of the Office of Consumers’ Counsel on Behalf of the Residents of Copley Village Condominium Association I and Copley Village Condominium Association II v. Ohio Edison Company*, Case No. 89-1031-EL-CSS, 1989 Ohio PUC LEXIS 1100, *5 (emphasis added).

¹³ See *In the Matter of the Application of Commerce Energy, Inc. d/b/a/ Just Energy for Certification as a Competitive Retail Natural Gas Provider*, Case No. 02-1828-GA-CRS, Entry (September 30, 2010), at ¶ 7; and *In the Matter of the Application of Duke Energy Retail Sales, LLC, for Certification as a Competitive Retail Electric Service Provider in Ohio* (“Duke Retail Sales”), Case No. 04-1323-El-CRS, Entry (December 3, 2008) at ¶ 7.

The Supreme Court of Ohio recently heard OCC’s (and NOPEC’s) appeals from a PUCO order in an electric certification case involving FirstEnergy Advisors. The Court’s ruling gave *gravitas* to OCC’s and NOPEC’s consumer interventions by overturning the PUCO decision that lacked a fair process for our consumer advocacy.¹⁴

In *Duke Retail Sales*, OCC moved to intervene and suspend CRES certification, alleging unfair, deceptive, and unconscionable acts.¹⁵ Over the retailer’s opposition, the PUCO found OCC had a “real and substantial interest” in the certification proceeding and that “disposition of this proceeding may impair its ability to protect that interest.”¹⁶ Given the number of consumer complaints against XOOM, OCC similarly has a “real and substantial interest” in ending this marketer’s Ohio operations. This interest may be impaired if XOOM’s certification is renewed without OCC’s input. Clearly, established PUCO practice demands OCC’s intervention be granted in this certification renewal case.

Most recently, the PUCO permitted OCC to intervene in the license renewal of Verde Energy USA, again alleging unfair, deceptive, and unconscionable acts.¹⁷ The PUCO also granted OCC intervention in the XOOM investigation case, against XOOM’s arguments.¹⁸ By allowing any adversely affected party to intervene in a PUCO proceeding, R.C. 4903.221 is broad enough to moot every one of XOOM’s arguments about OCC’s enumerated powers. Simply put, where Ohioans are adversely affected, as

¹⁴ See *FirstEnergy Advisors*; PUCO Case No. 20-0103-EL-AGG.

¹⁵ *Duke Retail Sales* at ¶ 3.

¹⁶ *Id.* at ¶ 6.

¹⁷ *In the Matter of the Application of Verde Energy USA Ohio, LLC as a Competitive Retail Natural Gas Supplier*, (“Verde”), Case No. 13-2164-GA-CRS, Entry (March 3, 2020); see also *In the Matter of Verde Energy USA Ohio, LLC for Certification as a Competitive Retail Energy Supplier*, Case No. 11-5886-EL-CRS.

¹⁸ Case No. 22-267-GE-COI, Entry (April 20, 2022), ¶ 8.

they are by the allegations of XOOM's pattern of deceit, OCC has intervention authority.

Consequently, the PUCO need not address XOOM's mangled interpretation of R.C.

Chapter 4911 and should find OCC has the power to intervene.

B. OCC *does* state its interest in the pending application in this case and OCC satisfies the standards for intervention and should be allowed to participate to protect consumers.

XOOM argues that OCC has not stated any interest in the pending application in this proceeding and has not demonstrated it satisfies the standards the PUCO must consider when ruling on a motion for intervention.¹⁹ R.C. 4903.221 and O.A.C. 4901-1-11 require the PUCO to apply the following criteria:

- (1) The nature and extent of the prospective intervenor's interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and
- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

Regarding the first factor, XOOM argues OCC's interests are defined by statute, and relevant statutes grant OCC no legal interest in marketer certification proceedings.²⁰ XOOM makes a false argument.

Intervention in PUCO proceedings is governed by R.C. 4903.221. That statute expressly states that "[a]ny other person who may be adversely affected by a public utilities commission proceeding may intervene in such proceeding, provided []" that the motion to intervene is timely filed in accordance with R.C. 4903.221(A) and that the

¹⁹ XOOM Memo. Contra, at 6.

²⁰ XOOM Memo. Contra, at 3.

PUCO considers the criteria set forth in R.C. 4903.221(B). The Supreme Court of Ohio has held that “intervention ought to be *liberally allowed* so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO.”²¹ 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 [be] granted.”²²

Ironically, R.C. 4903.221 was part of a reform law decades ago, to advance public participation in PUCO cases. Intervention standards at the PUCO have been reformed. It’s now XOOM that needs reform.

OCC’s motion to intervene demonstrates that it meets the criteria set forth in R.C. 4903.221 and the precedent established by the Supreme Court of Ohio for intervention. After investigating 40 consumer contacts regarding XOOM, the PUCO Staff found “a pattern of unfair, deceptive, or unconscionable acts or practices by XOOM Energy.”²³

Per the PUCO Staff, particularly egregious alleged practices by XOOM include but are not limited to: “XOOM Energy sales representatives provided misleading information during telemarketing efforts; XOOM Energy enrolled customers without proof of their consent as required by [O.A.C.] 4901:1-21-06(C); XOOM Energy did not properly enroll consumers telephonically by providing a date and time stamped audio recording verifying certain items before the completion of the call; XOOM Energy did not properly enroll consumers via the internet; and, for both internet and telephonic

²¹ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 388 (2006) (emphasis added).

²² *Id.* XOOM claims that OCC’s intervention would unduly prolong and delay the proceedings in this case. Below, OCC explains why XOOM’s argument should be rejected.

²³ Case No. 22-267-GE-COI, Entry (April 20, 2022) at 4.

enrollments, XOOM Energy did not obtain proper verification and/or documentation as required by the Ohio Administrative Code which requires that consent shall be obtained by encrypted customer input on a provider's website..”²⁴ Given XOOM's pattern of unfair business practices, there can be no doubt that Ohio's residential consumers that OCC represents “may be adversely affected.”

Next, XOOM argues the legal position OCC advances is not related to the merits of this case.²⁵ How can this be? If granted intervention, OCC would advance the following positions: automatic approval of XOOM's application to renew its certificate should be suspended or, alternatively, denied outright. These positions squarely address the core question in this proceeding: whether the PUCO should renew XOOM's natural gas marketer certification. Consequently, OCC's legal positions are sufficiently related to the merits of this case.

Additionally, XOOM argues OCC will not contribute to development and resolution of factual issues in this case because OCC cites approvingly findings and recommendations PUCO Staff already made.²⁶ However, OCC's support for the PUCO Staff's articulation of XOOM's deceptive behavior emphasizes, rather than eliminates, the need for a dedicated consumer advocate in this case. Further, OCC's recommendations for how the PUCO should rule regarding the factual issues includes a stronger recommendation than the PUCO Staff's positions.

Only OCC, as the statutory representative of Ohio's residential utility consumers, is in the unique position of representing the interests of the residential consumers harmed

²⁴ Case No. 22-267-GE-COI, Staff Letter, Attachment A, at 1-2.

²⁵ XOOM Memo. Contra at 6.

²⁶ *Id.*

by XOOM. The PUCO Staff, by contrast, considers the interests of all consumers *and* the marketer in this PUCO investigation. Consequently, OCC's intervention in this case will aid the development and resolution of the facts.

Finally, XOOM half-heartedly suggests that OCC's intervention in this proceeding will not result in an *expeditious* resolution of the issues because OCC seeks to interject broader issues that OCC is attempting to litigate or should address in other proceedings.²⁷ Yet, XOOM does not identify a single action that OCC took without merit in this case (nor in the investigation case). Further, if this case does not get resolved as quickly as XOOM would like, that is not an *undue* delay. That is due process. As OCC explained in its motion to intervene, OCC's longstanding expertise and experience in PUCO proceedings, and marketer investigations specifically, will duly allow for the efficient processing of the case with consideration of the public interest.

Violating state standards for protection of Ohioans has consequences under Ohio law. For a marketer like XOOM, those consequences include a state investigation and consumer representation by the Ohio Consumers' Counsel. XOOM wants to make a mockery of the state's system for consumer advocacy.

C. The Ohio Consumers' Counsel is the statutory representative of Ohio's residential consumers, and no other party represents that interest.

1. The PUCO Staff cannot be substituted for OCC as the consumer advocate.

XOOM argues that OCC should be denied intervention in this case because "any interest OCC has is already represented by Staff."²⁸ This argument is meritless. It

²⁷ XOOM Memo. Contra at 9.

²⁸ XOOM Memo. Contra at 8.

demonstrates XOOM's misinterpretation of relevant statutes, rules, and PUCO precedent that are well known at this point in the PUCO's history involving OCC's interventions. It also misses the point of the state's creation of OCC, which is to serve as a watchdog for consumers in the state's utility regulatory processes. And the Supreme Court of Ohio's decision in *FirstEnergy Advisors* demonstrates the importance of OCC's participation in energy marketer cases.²⁹

The PUCO Staff and OCC are distinct entities, serving distinct purposes. OCC is an independent state agency serving as the statutory representative of more than four million residential consumers throughout the State of Ohio. Ohio law (R.C. 4911.02) provides that OCC is authorized to "participate in proceedings in both state and federal courts and administrative agencies on behalf of the residential consumers."³⁰

On the other hand, the PUCO Staff does not *represent* residential consumers, as XOOM claims.³¹ The PUCO Staff might *consider* the interests of residential consumers when taking a position. But the Staff might also consider numerous other interests, including those of nonresidential customers, utilities, marketers, environmental advocates, and the public interest more generally.

Further, the PUCO Staff is not an independent consumer advocate such as OCC. The PUCO Staff is employed by the PUCO, the same agency where Commissioners and Attorney-Examiners judge the cases. As distinct from OCC, the PUCO Staff generally does not file applications for rehearing to contest PUCO orders under R.C. 4903.10.

²⁹ See *FirstEnergy Advisors*.

³⁰ R.C. 4911.02(B)(2)(c).

³¹ See XOOM Memo. Contra at 8 ("...any interest OCC has is adequately represented by the Staff.").

If, as XOOM claims, the PUCO Staff represents OCC's interests, then they would also represent XOOM's interests, and there would be no need for XOOM to participate in these cases either. Surely XOOM is not willing to step aside and simply defer to the PUCO Staff when it comes to advocating XOOM's position. Nor should OCC's consumer advocacy be ignored on account of the PUCO Staff participating in the case.

2. The intervention statute does not permit the PUCO to deny intervention based on an allegation that one party's interest is represented by another party.

As explained above, the PUCO Staff's role is not to represent residential consumers. That is OCC's role, as created by statute. But even if it were, that still would not allow the PUCO to deny intervention.

The law sets standards for intervention. Under R.C. 4903.221, the PUCO, "in ruling upon applications to intervene in its proceedings, shall consider the following criteria:

(1) The nature and extent of the prospective intervenor's interest; (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case; (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues." As explained in its motion to intervene, OCC easily satisfies these criteria.

Notably, the statute does *not* allow the PUCO to deny a party intervention based on an allegation that some other party to the case has a similar interest. The PUCO's intervention rule contains an element that purports to allow such a consideration, in O.A.C. 4901-1-11(D)(2). But that rule is at odds with the intervention reform statute.

In sum, XOOM's arguments regarding OCC and the PUCO Staff fail at every turn. XOOM fails first because the OCC statute qualifies it for intervention. XOOM fails because the PUCO Staff and OCC do not represent the same interests. And XOOM fails because R.C. 4903.082 does not allow the PUCO to deny a party's intervention simply because another party represents a similar interest.

OCC meets all four prongs of the statutory intervention standard. Consequently, the PUCO should grant its motion for intervention.

III. CONCLUSION

The PUCO should stop this misuse of process by XOOM and parties like it. XOOM raises invalid objections to OCC's intervention despite well-settled law under Ohio's 40-year old intervention reform statute. The result is an advantage of delay that disrupts OCC's legal right to intervention and case preparation under Ohio law. XOOM's arguments opposing OCC's intervention are wrong and should be rejected. OCC's motion to intervene should be granted in the interest of Ohio consumers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Reply* was served on the persons stated below
via electronic transmission, this 31st day of August 2022.

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