FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Robert S. Tongren, in his Capacity as The Ohio Consumers' Counsel, Complainant, vs. The Energy Cooperative, Inc., and Cinergy Resources, Inc. Respondents.	)	**Case No. 01-330-GA-CSS**
In the Matter of the Complaints of The Ohio Consumers' Counsel Complainants, vs. Energy Max of N.E. Ohio Inc., Respondent.	)	**Case No. 00-2074-GA-CSS**
In the Matter of the Complaints of the Ohio Consumers' Counsel Complainants, vs. Summit Natural Gas & Power Solutions, Inc.) Respondent.	)	**Case No. 01-329-GA-CSS**

APPLICATION FOR REHEARING

Now comes Robert S. Tongren, in his capacity as the Ohio Consumers' Counsel ("OCC") on behalf of the residential gas consumers of the State of Ohio and, pursuant to Ohio Revised Code § 4903.10 and Ohio Admin. Code 4901-1-35(A), applies for rehearing of the Findings and Orders issued by the Public Utilities Commission of Ohio ("Commission") on February 14, 2002, in these dockets. OCC submits that the

Commission's Findings and Orders were unreasonable or unlawful in the following particulars, as explained in further detail in the accompanying memorandum in support.

I. The Commission erred by failing to provide justification for changing its June 6, 2001, Finding and Order, which determined that the Commission had jurisdiction over gas marketer complaints.

II. The Commission erred by failing to find that it has jurisdiction to hear OCC's complaints.

a. The Commission has subject matter jurisdiction over OCC's Complaints against natural gas marketers.

b. The Commission may exercise personal jurisdiction over natural gas marketers.

c. The Commission's decision in *Yankee Resources* does not apply to the facts in these cases.

d. The Commission should, at a minimum, state in these proceedings that it will not grant Marketers involved in the underlying complaints certification as retail natural gas suppliers.

Wherefore, OCC hereby requests that the Commission grant rehearing on those issues discussed further below.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

INTRODUCTION

During the 2000 – 2001 winter heating season a number of natural gas marketers[1] ("Marketers") failed to supply natural gas to Ohio choice customers. As a result, approximately 30,000 residential choice customers were returned to sales service, losing the benefit of paying lower rates charged under contracts they had with Marketers. Throughout the winter heating season a number of marketers simply stopped delivering gas for their customers to Cincinnati Gas & Electric ("CG&E") and Columbia Gas of Ohio ("COH"), in violation of the choice program tariffs.[2] As a result, OCC filed at the Commission complaints against these marketers.[3] The Commission, in a June 6, 2001 Entry, determined that it had subject matter jurisdiction over OCC's complaints.[4]

Thereafter, on November 16, 2001, OCC and Energy Max filed at the Commission a Stipulation and Recommendation in which Energy Max stipulated, in part, that its "failure to deliver gas under its COH Program contracts constitutes violations of the COH Program Tariffs, entitled "SECTION VI – Full Requirements Aggregation Service."[5] Energy Max further agreed that it would,

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[1] Energy Max of N.E. Ohio, Inc.: The Energy Cooperative, Inc.; Cinergy Resources, Inc.; Liking Rural Electrification, Inc.; and Summit Natural Gas & Power Solutions, Inc.

[2] Marketers are required to "deliver gas to the Company on a firm basis on behalf of the Supplier's pool members in accordance with the requirements of the Gas Supply Aggregation / Customer Pooling Agreement." CG&E's Sheet No. 44.2, pages 3 & 4 of 17 pages, of the RATE FRAS; "deliver gas to Columbia on a firm basis, on behalf of the Marketer's participating customers in accordance with the requirements of the Aggregation Agreement." COH tariff, Paragraph 67(E)(4), First Revised Sheet No. 73.

[3] *Ohio Consumers' Counsel v. Energy Max of N.E. Ohio, Inc.*, Case No. 00-2074. Complaint filed October 27, 2000; *Ohio Consumers' Counsel v. Summit Natural Gas & Power Solutions, Inc.*, Case No. 01-329-GA-UNC, Complaint filed February 1, 2001; and *Ohio Consumers' Counsel v. The Energy Cooperative Inc., et al.*, Case No. 01-330-GA-CSS. Complaint filed February 1, 2001.

[4] See, OCC v. *Energy Max*, Case No. 00-2074-GA-CSS, (Entry, June 6, 2001. The Commission found that it had jurisdiction over complaints and disputes arising from the choice program tariffs.

[5] See, Stipulation and Recommendation filed November 16, 2001, PUCO Case No. 00-2074-GA-CSS.

> never again provide natural gas to residential consumers in the state of Ohio until all residential consumers experiencing economic losses as a result of Energy Max's failure to deliver natural gas and termination from the COH Program have received the benefit of their bargain * * * .[6]

As of February 14, 2002, the Commission had yet to approve the stipulation.

Pursuant to a November 9, 2001 Entry, the Commission consolidated all of the choice complaints filed against Summit at the Commission and scheduled a consolidated hearing for November 29, 2001. The OCC participated in the hearing, offered evidence and filed at the Commission a post-trial brief on December 17, 2001. Summit did not attend the hearing.

On January 10, 2002, the Commission issued and entry dismissing Liking Rural Electrification ("LRE") and The Energy Cooperative ("TEC") as a party respondents, reiterating that it had jurisdiction over natural gas marketers by virtue of the Cincinnati Gas & Electric Company's ("CG&E") gas choice program tariffs.[7] The Commission further ordered Cinergy Resources ("CRI"), the remaining party respondent in the case, to respond to OCC's outstanding discovery requests. The Commission also scheduled a prehearing conference for January 31, 2002. On February 1, 2002, TEC and CRI filed an application for rehearing seeking rehearing, in part, on the Commission's assertion of jurisdiction over gas marketers. Thereafter, in a February 14, 2002 Entry, the Commission granted TEC and CRI's application for rehearing, dismissing all of the complaints filed at the Commission against TEC and CRI. Subsequently, in a February 14, 2002 Entry the Commission, sua sponte, dismissed OCC's and other parties' pending

[6] *Id.* at 5.
[7] See, PUCO Case No. 01-330-GA-CSS, January 10, 2002 Entry.

complaints against Energy Max and Summit.[8]

As a result, OCC has filed this application for rehearing arguing that the Commission erred in dismissing the marketer complaints because the Commission failed to provide justification for changing its June 6, 2001 Entry, where it determined that it had jurisdiction to hear OCC's complaints filed against marketers. Specifically, the Commission erred in failing to find that: it had subject matter jurisdiction over natural gas marketer violations of the choice programs; that it had personal jurisdiction over natural gas marketers; and it had jurisdiction by distinguishing its prior ruling in *Yankee Resources*.[9]

I. The Commission erred by failing to provide justification for changing its June 6, 2001, Finding and Order, finding Commission jurisdiction over gas marketer complaints.

In its February 14, 2002 Entries dismissing the marketer cases for lack of jurisdiction the Commission failed to justify a change from the reasoning it set forth in its June 6, 2001 Entry. In that entry the Commission stated that in its earlier June 6, 2001 Entry it had extended its jurisdiction to contractual disputes between natural gas marketers and their end-use customers.[10] From the plain language of the order it is clear that that was not the case. Rather, the Commission used as its basis of jurisdiction to hear the OCC complaints the fact that it has jurisdiction over complaints or disputes arising from the choice program tariff violations. It is clear that what is at issue in these cases is tariff violations.[11]

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[8] In total, the Commission dismissed 15 of the 18 complaints flied against marketers at the Commission.
[9] *In Re Yankee Resources, Inc.*, Case No. 82-1086-GA-ARJ (Entry, September 9, 1982).
[10] See, February 14, 2002 Entries in PUCO Case Nos. 00-2074-GA-CSS; 01-329-GA-CSS; and 01-330-GA-CSS.
[11] See June 6, 2001 Entry at 4, PUCO Case No. 00-2074-GA-CSS

Before the Commission may change or modify an entry, it must provide justification for doing so. The Ohio Supreme Court has held "[t]he Public Utilities Commission of Ohio must respect its own precedents in its decisions to assure the predictability, which is essential in all areas of the law, including administrative law."[12] The Commission failed to justify the change between its decision on June 6,2001 and its decisions on February 14, 2002.

On June 6, 2001, the Commission made a lawful order finding that it had jurisdiction over natural gas marketers stating,

> We believe the authorization of the choice program assumed the Commission's continuing jurisdiction over the implementation of the program. The Commission did not relinquish its subject matter jurisdiction over the choice program tariff by allowing Columbia to contract with marketers for the supply of natural gas. * * * The tariff clearly contemplates the Commission's jurisdiction in the dispute resolution section. Therefore, we must agree with the OCC and find that the Commission does have subject matter jurisdiction over complaints or disputes arising from the choice program *tariff*.[13]

(Emphasis added)

The Commission further clarified in its June 6, 2001 Entry, that "[I]t is clear to the Commission that, although there may be contractual rights and liabilities, this complaint was initiated by the allegation that there was a violation of a tariff provision."[14] There can be no doubt from a reading of this Entry that the Commission was exercising

[12] *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403.
[13] Commission's June 6, 2001, Entry, *In the Matter of the Complaint of the Ohio Consumers' Counsel v. Energy Max of N.E. Ohio, Inc.*, Case No. 01-2074-GA-CSS, ¶ 8.
[14] See, PUCO Case No. 00-2074-GA-CSS, June 6, 2001 Entry at ¶ 7.

jurisdiction over complaints or disputes arising from the choice program tariffs, not contractual disputes with end users.

However, the Commission, in its February 14, 2002 Entries, stated,

> We have reviewed our finding of jurisdiction over natural gas marketers prior to June 26, 2001, and have determined that, to the extent our assuming jurisdiction *extended to contractual disputes* between natural gas marketers and their end-use customers, this is in error.[15]

(Emphasis added)

and

> We continue to believe that we have subject matter jurisdiction over implementation of the gas choice programs in Ohio. However, we believe our prior *finding of jurisdiction in contractual disputes* between natural gas marketers and their end-use customers was in error.[16]

(Emphasis added)

The Commission's statement is its February 14, 2002 Entries has shifted the focus of the jurisdictional inquiry away from tariff violations to contractual rights and responsibilities which the Commission stated clearly in its June 6, 2001 Entry, was not at issue in the complaint initiated by OCC.[17] The discrepancy between the June 6, 2001 Entry and February 14, 2002 Entries remain unexplained.

As additional support for its February 14, 2002 Entries, the Commission referenced the passage of H.B. 9 as a dispositive date, reasoning that "since there was no statute in effect prior to June 26, 2001, giving the Commission authority over natural gas marketers or to adjudicate their historical actions vis-`a-vis their end use customers, the

[15] Commission's February 14, 2002, Entry, at 4, Case No. 01-330-GA-CSS.
[16] Commission's February 14, 2002, Entry at 4, Case Nos. 00-2074-GA-CSS and 01-329-GA-CSS.
[17] *Id.* at ¶ 7.

Commission has no such authority prior to that date."[18] This reasoning misses the point on two counts. First, what is at issue here is not adjudication of historical actions vis-'a-vis end use customers – what is at issue is a violation of the applicable tariffs. Second, the Commission's June 6, 2001 Entry did not depend on H.B. 9 as a basis for jurisdiction. Rather, it was based on the Commission's authority to adjudicate matters of utility company tariff violations.[19] Nothing changed in the Commission's underlying authority over tariff violations between June 26, 2001 and February 14, 2002. The Commission's Entries fail to address this point.

Lastly, the Commission stated in a footnote, to one of its February 14, 2002 Entries, that

> Allegations of tariff violations alleged by a number of the complainants, if substantiated, could result in Commission orders directing the underlying local distribution companies to either suspend or terminate the subject natural gas marketers from the involved gas choice program. Some of the natural gas marketers have already ceased their participation and, therefore, adjudication of such alleged violations may be for naught. Any remaining issues involving rights and responsibilities of customers under their contracts with natural gas marketers prior to June 26, 2001, as well as any claims for monetary or other relief are properly pursued in a court of law. [20]

[18] *Id.* at 2. Sub. H.B. 9 was effective June 26, 2001. Further, the Commission noted that under H.B. 9, natural gas marketers will need to be certified by the Commission after July 26, 2002, and that the Commission will consider any historical events such as those raised by the complainant's in these matters. The Commission should definitively set forth that it will not grant any of the Respondents in these matters, whether operating under any other trade name or not, certification to provide retail natural gas service in the state of Ohio after July 26, 2002.

[19] All natural gas tariffs are filed with and must be approved by the Commission before they can take effect, Ohio Rev. Code § 4905.22. In the instant matters, the Commission has approved, *Columbia Gas of Ohio*, Case No. 96-113-GA-ATA; *Cincinnati Gas & Electric*, Case No. 98-1167-GA-ATA.

[20] See Commission's February 14, 2002 Entry in PUCO Case Nos. 01-329-GA-CSS and 01-330-GA-CSS, footnote 2 at 5.

Hence, the Commission recognizes, at least implicitly, it has jurisdiction over tariff violations. The Commission's reasoning therefore is inconsistent. The basis for jurisdiction over these complaints is violation of the tariffs. It seems that in one breath the Commission asserts it has subject matter jurisdiction over such violations yet in the next, it says it does not. This lack of explanation for the Commission's change, especially in light of the above language that continues to support the Commission's assertion of jurisdiction in tariff matters, violates the Commission's duty to explain deviation from its precedent and requires correction.

II. The Commission erred by failing to find that it has Jurisdiction over Natural Gas Marketers in these Matters.

a. The Commission has subject matter jurisdiction to adjudicate OCC's Complaints.

As discussed above, the Commission can exercise its authority in these cases by virtue of its authority over public utility tariffs. The central issue in these cases is whether COH and CG&E tariffs, which are Commission authorized, were violated.[21] All natural gas tariffs are filed with and must be approved by the Commission before they may take effect.[22] The Commission reviews all tariff filings and typically issues an entry directing their adoption. In some instances, the Commission has even specifically drafted its own language for incorporation into utility tariffs.[23] The Commission interprets tariffs and determines whether parties comply with the relevant tariff provisions. In order to do

[21] *Columbia Gas of Ohio*, Case No. 96-1113-GA-ATA; *Cincinnati Gas & Electric*, Case No. 98-1167-GA-ATA.
[22] Ohio Rev. Code §4905.22.
[23] For a recent example, see PUCO Case No. 99-661-GA-COI, Entry (January 4, 2001).

so, the Commission must possess subject matter jurisdiction with respect to decisions involving tariffs. Therefore, the Commission has jurisdiction here.

b. The Commission may exercise personal jurisdiction over Natural Gas Marketers.

The Commission may also exercise personal jurisdiction over Marketers. Any party with the capacity to consent can consent to the authority of a tribunal. For instance, non-residents of Ohio can agree to resolve disputes in Ohio's courts despite the fact that Ohio's courts do not have personal jurisdiction over them.[24] In the same manner that a non-resident can agree to be bound by the decision of an Ohio court, Marketers have agreed to submit to the authority of the Commission.[25] Such consent to jurisdiction, or as it is sometimes referred to, a "waiver" of the objection to personal jurisdiction, requires certain elements. First, there must be an existing right. Second, the party must have knowledge of his right. Third, the party must have an intention to waive his right.[26] Fourth, when the waiver is obtained through an agreement, the party must be given consideration in exchange for that waiver.[27]

All the elements are satisfied in these cases and there are effective waivers of the objection to personal jurisdiction. First, Marketers had the right to object to personal jurisdiction at the Commission. Second, Marketers were aware of their right to object to personal jurisdiction. This is evidenced by their previous assertions that the Commission

[24] See Ohio Rev. Code § 2307.382 pertaining to personal jurisdiction within Ohio's Long-Arm Statutes, and Ohio Civ. R. 12(H)(1) pertaining to the waiver of the defense of lack of personal jurisdiction.
[25] *Id.*
[26] "The generally accepted definition of waiver is 'intentional relinquishment of a known right.'" *Michigan Auto Ins. Co. v. Van Buskirk* (1927), 115 Ohio St. 598, 605 quoting 27 Ruling Case Law, 904-908; *Bennecke* v. *Connecticut Mutual Life Ins. Co.* (1881), 105 U.S. 35.
[27] *Marfield v. Cincinnati D&T Traction Co.* (1924), 111 Ohio St. 139, 145.

does not have jurisdiction in these matters.[28] Third, by agreeing to abide by the Commission authorized choice program tariffs, Marketers intended to relinquish their right to object to personal jurisdiction. Marketers effectively waived personal jurisdiction by contractually agreeing that a complaint may be brought to the Commission through its normal complaint handling procedures if the Marketer failed to negotiate or resolve any dispute with a customer.[29] Fourth, Marketers received consideration for the waiver of their objection to personal jurisdiction at the Commission. In exchange for agreeing to abide by all the provisions in the choice tariffs, including the dispute resolution provisions, Marketers were permitted to participate in the customer choice program and to make a profit by selling natural gas to consumers. Indeed, by participating in the Commission authorized choice programs Marketers transacted business with approximately 30,000 Ohioans.

c. The Commission's decision in *Yankee Resources* does not apply to the facts in these cases.

Regardless of the Commission's finding in *Yankee Resources*,[30] the Commission has jurisdiction over OCC's complaints. The Commission has jurisdiction to the extent that the Commission has authority to rule upon public utility tariffs. *Yankee Resources*

[28] See, PUCO Case No. 00-2074-GA-CSS, Respondents' Motion to Dismiss filed December 6, 2000; PUCO Case No. 01-330-GA-CSS, Respondents' Motion to Dismiss filed March 29, 2001; and PUCO Case No. 01-329-GA-CSS, Respondent's April 2, 2001 letter expressing intent to file motion to dismiss.
[29] See, Cincinnati Gas & Electric Tariff, Sheet No. 44.2, page 7, Consumer Inquiries and Dispute Resolution (f) of the RATE FRAS "If a Supplier fails to negotiate or resolve any dispute that arises from its contract with a customer, a complaint may be brought to the Commission through its normal complaint handling procedures which are provided by statute or by the Commission's rules and regulations"; and Columbia Gas of Ohio, Inc., Second Revised Sheet No. 75, 67(F)(1)(d). "If a Marketer fails to negotiate or resolve customer disputes that arise from the contract, complaints may be brought to the Commission through its normal complaint handling procedures.
[30] *In Re Yankee Resources, Inc.*, Case No. 82-1086-GA-ARJ (Entry, September 9, 1982).

did not involve an interpretation of utility tariffs by the Commission. Thus, *Yankee Resources* is not binding authority here. *Yankee Resources* is also factually distinguishable. In *Yankee Resources*, a marketer sought exemption from certain provisions of the public utility code. The Commission granted those exemptions.[31] In these cases the Commission is considering an entirely different situation: a complaint case where the marketers have agreed to Commission jurisdiction.

Moreover, Marketers are operating in a restructured environment not contemplated by the *Yankee Resources* decision. *Yankee Resources* was decided in 1982 - before any Ohio residential customer choice programs existed, and before the Commission approved the very tariffs by which the Marketers agreed to be bound. The Commission has a greater interest in asserting jurisdiction under these circumstances. In *Yankee Resources*, 90% of Yankee Resources' volumes were transferred to interstate pipelines,[32] presumably under special contracts. In these cases, Marketers' volumes are distributed to residential consumers of the State of Ohio under an approved program governed by public utility tariffs the Commission has approved. Whereas the Commission's interest in protecting interstate pipelines was minimal, the Commission's interest in enforcing the rules of Commission approved gas choice programs is substantial. *Yankee Resources* does not apply to the facts of these cases

d. The Commission should, at a minimum, state in these proceedings that it will not grant Marketers certification as retail natural gas suppliers.

If the Commission does not grant OCC's application for rehearing, the Commission should, at a minimum, state in these proceedings that it will not certify

[31] *Id.*
[32] *Id.* at Finding 2.

Marketers as retail natural gas suppliers until such marketers make their customers whole for costs and damages resulting from the respective marketers violation of choice program tariffs. Indeed, one of the marketers involved in an underlying complaint at issue here, Energy Max, has already agreed to such a condition.[33] It is clear that they lack the necessary managerial, technical and financial capabilities to operate in Ohio's choice programs. As a result, if OCC's application for rehearing is not granted, the Commission should, at a minimum, state in these proceedings that it will not grant certification to any of the Marketers in these matters, regardless of whether that Marketer is operating under a different trade name, until that Marketer has made its customers whole.

CONCLUSION

The Commission's February 14, 2002 Entries, changing its June 6, 2001 Entry, and dismissing OCC's complaints failed to provide justification for changing its prior finding of jurisdiction over these matters. Additionally, the Commission has jurisdiction over OCC's complaints by virtue of the Commission's authority over the choice program tariffs. It has personal jurisdiction over marketers due to their agreement to be bound by decisions of the PUCO in disputes with customers. Furthermore, the Commission, at a minimum, should definitively state that it will not grant any of the Marketers in these matters, whether operating under a different trade name or not, certification to provide retail natural gas service in the state of Ohio after July 26, 2002 until that Marketer has made its customers whole. For the above reasons the Commission should grant OCC's application for rehearing in the above captioned matters, determine it has jurisdiction

[33] Joint Stipulation at 4, filed in PUCO Case No. 00-2074-GA-CSS.

over the subject matter of complaints and the marketers' persons and proceed expeditiously to bring these matters to resolution.

Respectfully submitted,

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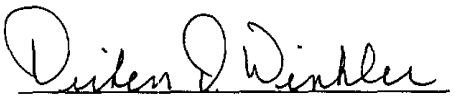
CONSUMERS' COUNSEL



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Ohio Consumers' Counsel's Application for Rehearing and Memorandum in Support, have been served upon the following parties this 15th day of March 2002.

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