

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Application of the )  
East Ohio Gas Company d/b/a Dominion )  
East Ohio for Approval of Tariffs to )  
Recover Certain Costs Associated with )  
Automated Meter Reading Deployment )  
Through an Automatic Adjustment )  
Clause, And for Certain Accounting )  
Treatment. )**

**Case No. 06-1453-GA-UNC**

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**MEMORANDUM CONTRA MOTION OF OHIO PARTNERS FOR AFFORDABLE  
ENERGY TO INTERVENE**

The East Ohio Gas Company d/b/a Dominion East Ohio ("East Ohio"), pursuant to Rule 4901:1-12(B)(1), Ohio Administrative Code ("O.A.C."), submits its Memorandum Contra Motion to Intervene of Ohio Partners for Affordable Energy ("OPAE").

**I. INTRODUCTION**

OPAE's motion to intervene should be denied for two reasons.

First, OPAE has not advanced a legal position in its motion to intervene as required by R.C. § 4903.221(B)(2). The intervention statute requires the Commission to consider OPAE's *legal position before it may grant intervention*. OPAE's failure to present its position prevents the Commission from considering it, thus removing the Commission's power to grant OPAE's motion. OPAE's failure also renders it practically impossible for East Ohio to frame counterarguments in response. Because both Commission and judicial precedent prohibit the raising of new matters in reply briefs, this error cannot be cured and is fatal to OPAE's application. If OPAE were allowed to file initial arguments on reply, East Ohio would be entitled an opportunity to file a surreply, but allowing another wave of briefing would constitute just the sort of undue prolongation and delay that is discouraged by R.C. § 4903.221(B)(3).

Second, OPAE's constituency of low and moderate-income households is already represented in this proceeding by Office of the Ohio Consumers' Counsel ("OCC"). OPAE's motion to intervene fails to explain why its constituency is not already adequately represented. East Ohio recognizes that OPAE is frequently granted intervention in cases where OCC has also been granted intervention, but continuing this practice in this proceeding would serve no useful purpose. OPAE has not suggested a way in which East Ohio's application would affect different classes of residential customers. Because OPAE has not advanced its legal position in this case, OPAE cannot meet its burden of showing that OCC does not already adequately represent its interests. OPAE's participation therefore would not contribute to a just and expeditious resolution of the proceeding.

For these reasons, OPAE's motion to intervene should be denied.

## **II. ARGUMENT**

A party who may be adversely affected by a Commission proceeding may seek intervention. *See* R.C. § 4903.221. The decision to grant intervention is discretionary. The Supreme Court of Ohio has "rejected the concept of an unlimited right of intervention beyond the procedural control of the commission." *Toledo Coalition for Safe Energy v. Public Util. Comm'n* (1982), 69 Ohio St. 2d 559, 560-61.

In determining whether to grant intervention, the Commission is required to consider:

- (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 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.

R.C. § 4903.221(B)(1)–(4). Thus, under the Commission’s rules governing intervention, the intervenor must show that it has “a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person’s interest is adequately represented by existing parties.” O.A.C. § 4901-1-11(A)(2). To make its determination, the Commission may also consider “[t]he extent to which the person’s interest is represented by existing parties.” *Id.* § 4901-1-11(B)(2).

OPAE has not satisfied the statutory requirements for a motion to intervene. Section 4903.221 permits the Commission to grant intervention “provided . . . [t]hat the commission . . . *shall* consider,” among other things, “[t]he legal position advanced by the prospective intervenor and its probable relation to the merits of the case.” R.C. § 4903.221(B)(2) (emphasis added). Because the Commission may only grant intervention if it has considered OPAE’s legal position, OPAE must present one and demonstrate how it relates to the merits of this case.

OPAE, however, has developed only a single argument in its motion—that it represents unique interests—which, if accepted, satisfies only one of the four prongs of R.C. § 4903.221, namely, subsection (B)(1) which states that a prospective intervenor must demonstrate “the nature and extent of its interest.” OPAE’s representation of a certain constituency is not a “legal position.” Indeed, OPAE’s motion and memorandum give little to no hint of its legal position, thus hamstringing the Commission (and East Ohio) in responding to its motion. Failing to satisfy a basic statutory requirement of a motion to intervene, the Commission should deny OPAE’s motion.

OPAE should not be permitted to cure this error on reply. The requirements of R.C. § 4903.221 are plain and not difficult to meet; OPAE has simply failed to meet them. Having

deprived East Ohio the opportunity to marshal counterarguments, OPAE's initial motion should stand on its own. OPAE had, and missed, its chance. *See W.D.I.A. Corp., Inc. v. Cincinnati Bell Tel. Co.*, No. 91-1905-TP-CSS, Opin. & Order, at 9 n.4 (March 10, 1994) (“[Complainant] inappropriately raised the issue . . . for the first time in its reply brief and, therefore, the arguments will not be considered by the Commission.”); *cf. In re Amendment of Provisions of Chapter 4901:1-15, Ohio Administrative Code*, No. 01-2775-WS-ORD, Entry at 3 (Nov. 21, 2002) (“Since [the commenter] raised this issue for the first time in its reply comments, it would not be fair to consider this issue without the comments of the other parties as to its impact.”).

If OPAE does submit its legal position for the first time in reply, East Ohio should be permitted an opportunity to surreply. Permitting another wave of motions, memoranda contra, and further replies, however, would “unduly prolong or delay the proceedings,” and provide yet another reason, according to R.C. § 4903.221(B)(3), to deny OPAE's motion.

Independent of its failure to satisfy R.C. § 4903.221, OPAE also runs afoul of the Commission's intervention rule. Assuming that OPAE has shown it has a “real and substantial interest in the proceeding,” that is insufficient by itself to warrant intervention; OPAE's “interest is adequately represented” by OCC. *See* O.A.C. § 4901-1-11(A)(2) (stating that if intervention prerequisites are met, intervention shall be granted “unless the person's interest is adequately represented by existing parties”).

OPAE's constituency is already represented in this proceeding by OCC. OCC represents *all* residential consumers, including low and moderate-income families. *See* R.C. § 4911.02(B)(2)(c) (empowering OCC to “intervene . . . on behalf of . . . residential consumers” without qualification); *see also* <http://www.pickocc.org> (visited on April 23, 2007) (OCC is “the residential utility advocate” for all Ohio households; it “represents the interests of 4.5 million

households in proceedings before state and federal regulators and in the courts.”). Because OCC represents all Ohio households, it necessarily represents the same low and moderate income households that OPAE represents. OPAE fails to explain how lower income families are not already adequately represented in this proceeding or how they will be impacted differently than other East Ohio customers by a Commission decision in the case.

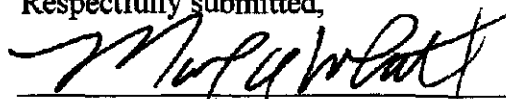
The fact that OPAE and OCC are often granted leave to intervene in the same cases does not warrant OPAE’s intervention here. It is true that in some cases certain issues may particularly implicate the function and concern of OPAE; for instance, a case in which the interests of different segments of residential consumers may be at odds with one another. But OPAE has not even suggested, much less shown, that to be the case here. And because OPAE has not advanced its legal position in its initial brief, it cannot be determined whether it will present any arguments in this proceeding that have not already been made by OCC. OPAE therefore cannot meet its burden of showing that its interests are not already adequately represented under O.A.C. § 4901-1-11. Intervention should be denied.

### **III. CONCLUSION**

*For the reasons stated above, the Commission should deny OPAE’s motion to intervene.*

Dated: April 27, 2007

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Ohio Partners for Affordable Energy Motion to Intervene was sent by regular U.S. Mail to the following this 27th day of April, 2007:

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