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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
Ohio American Water Company) Case No. 07-1112-WS-AIR
To Increase its Rates in Its Entire Service)
Area for Water Service and Sewer)
Service.)

**REPLY TO OHIO AMERICAN WATER COMPANY'S MEMORANDUM
CONTRA THE CONSUMERS' COUNSEL'S MOTION TO DISMISS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Respectfully submitted,

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I. INTRODUCTION

On November 13, 2007, Ohio American Water Company ("OAW" or "Company") filed an application ("Application") to increase rates applicable to all of its approximately 51,000 customers in Ohio. OAW's customers are split into three service divisions, the "Water A" division, the "Water C" division and the "Wastewater" division.¹

On December 13, 2007, the Office of the Ohio Consumers' Counsel ("OCC") filed its Motions to dismiss OAW's request to increase rates for the Water C customers or in the alternative to amend OAW's application to exclude Water C residents, or in the alternative to toll the Application as it relates to the Water C customers (collectively referred to as "Motions") on behalf of the residential customers of Water C.

¹ In re Application of Ohio American Water Company, Case No. 07-1112-WS-AIR, Application at 1. (November 13, 2007) (The "Wastewater" division only includes wastewater operations in Franklin and Portage counties). On January 9, 2008, the PUCO accepted the filing of OAW's Application, in paragraph 6 of the Entry. Such ruling did not address OCC's motion to dismiss and OCC reserves its rights to file an application for rehearing.

On January 4, 2008, OAW submitted a Memorandum in Response (“Memo Contra”) in which it presented arguments against the legal positions in OCC’s Motions. In accordance with Ohio Adm. Code 4901-1-12(B)(2) and the ruling of the Attorney Examiner of the Public Utilities Commission of Ohio (“Commission” or “PUCO”) on December 20, 2007², OCC responds to OAW’s Memo Contra.

II. ARGUMENT

OAW’s Memo Contra fails to acknowledge the plain language of Paragraphs 7 and 12 of the Stipulation in Case No. 06-433-WS-AIR, which now bars OAW’s Application to increase rates in the Water C area. OAW asserts that there is only one condition precedent to resolving the discoloration issue - Paragraph 12(G): “Only Paragraph 12G squarely defines the resolution of the discoloration issue and it is only Paragraph 12G that Paragraph 7 is contingent upon.”³ Accordingly, OAW asserts that the remaining nine sections or steps of Paragraph 12 are not relevant to resolving the discoloration issue.⁴ As discussed below, a review of the terms agreed to by OCC, OAW and the PUCO staff (collectively the “Parties”) in Paragraphs 7 and 12 of the Stipulation substantiates OCC’s position. Pursuant to Paragraph 7, all of Paragraph 12 pertains to the discoloration issue and thus, must be resolved prior to OAW applying for a rate increase for Water C.

If the Commission were to conclude that the language of the Stipulation is somehow unclear, which it is not, the Commission would then review extrinsic evidence

² In re Application of Ohio American Water Company, Case No. 07-1112-WS-AIR, Order at 1. (December 20, 2007).

³ Memo Contra, at 3.

⁴ Memo Contra, at 4.

to determine the intent of the parties. In section B, below, OCC will demonstrate that OCC, PUCO staff and OAW have all filed documents demonstrating their intent that all of Paragraph 12 of the Stipulation be completed prior to declaring the discoloration issue resolved.

A. The Clear Language of the Stipulation Requires All of Paragraph 12 be Addressed Before the Discoloration Issue is Considered Resolved and Before OAW Can File for an Increase in the Rates that Customers Pay in the Water C Area.

The terms of the Stipulation addressing the resolution of the discolored water issue are clear. As titled, Paragraph 12 of the Stipulation addresses the Huber Ridge Discoloration Program.⁵ Without full compliance with the terms of Paragraph 12, OAW cannot demonstrate resolution of the discoloration issue and therefore is not allowed to now file for the rate increase in the Water C area.

When the terms of a settlement agreement, like the Stipulation, are clear, the Commission must look to the terms of that agreement. The Stipulation is a contract between the Parties⁶ and the purpose of the Stipulation was to effectuate the positions of the parties.⁷ The positions of the Parties are presumed to reside in the language the Parties used in the Stipulation.⁸ Accordingly, where there is a dispute about the terms of

⁵ In re Application of Ohio American Water Company, Case No. 06-433-WS-AIR, Stipulation Paragraph 12 at 12. (January 10, 2007).

⁶ Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc. (1996), 74 Ohio St. 3d 501, 502.

⁷ Kelly v. Medical Life Ins. Co. (1987), 31 Ohio St.3d 130, 132, 31.

⁸ Id.

the Stipulation, the Commission must review the Stipulation to determine the terms of the agreement.⁹

The plain language in the introduction of Paragraph 12, demonstrates the clear agreement of the parties to incorporate all sections of Paragraph 12 into the resolution of the “discoloration issue.” First, the title of Paragraph 12 is Huber Ridge Discoloration Program.¹⁰ The title identifies the whole section as part of the discoloration “fix.” In addition, a review of the terms and conditions of all nine sections of Paragraph 12, from Paragraph 12.A. through Paragraph 12.I., demonstrates that all of the sections address the discoloration issue. This is true regardless of whether the section is addressing, for example, steps to pre-chlorinate the entire Huber Ridge System,¹¹ creating a plan to evaluate and stop discoloration in the distribution system and at the Water Treatment Plant,¹² or the subsequent monitoring requirements to make sure the issue is resolved.¹³ All of the sections in Paragraph 12 clearly relate to the discoloration issue and the “fix” of the Huber Ridge system.

OAW’s Memo Contra states that “A plain reading of Stipulation 12G shows an unambiguous intent that the discoloration issue be resolved by June 30, 2007.”¹⁴ OAW’s assertions fail on a number of counts. OAW’s interpretation of Paragraph 12(G) as the

⁹ Id.

¹⁰ In re Application of Ohio American Water Company, Case No. 06-433-WS-AIR, Stipulation at 12. (January 10, 2007).

¹¹ In re Application of Ohio American Water Company, Case No. 06-433-WS-AIR, Stipulation Paragraph 12(A) at 12. (January 10, 2007).

¹² Id. Stipulation Paragraphs 12(B) and 12(C) at 12 -13.

¹³ Id. Stipulation Paragraphs 12(B) and 12(G) and (H) at 13-15.

¹⁴ Memo Contra at 3.

only paragraph that addresses the resolution of the discoloration issues fails to recognize that Paragraph 12(G) only relates to the distribution system, “By June 30, 2007, if discoloration continues **in the Huber Ridge distribution system . . .**”¹⁵ In contrast, the introduction to Paragraph 12 states that the discoloration issue incorporates more than the distribution system stating “the Company’s system, **including** the distribution system.”¹⁶ Thus, the position of the Parties was that resolving for customers the discoloration issue had to incorporate more than just completing Paragraph 12(G) which only covered the distribution system.

OAW’s insistence that Paragraph 12(G) is the only paragraph that addresses the resolution of the discoloration issue fails to recognize the requirements for resolving the discoloration issues at the water treatment plant. As of today, OAW still has not completed the requirements of Paragraph 12(B)(i). Paragraph 12(B)(i) requires OAW to monitor the entire Huber Ridge Water Treatment Plant for a set, agreed upon period of time, 12 months, to assure the measures attempted by OAW to resolve the discoloration issues are effective.

12(B) By January 31, 2007, Ohio American shall submit a plan and send a copy to the Staff, OCC and to representatives of Ohio EPA for both the Huber Ridge Water Treatment Plant and for the Huber Ridge water distribution system (“the Plan”)

- (i) The criteria for determining that the remedial actions taken by Ohio American have been and continue to be successful at the **Huber Ridge Water Treatment Plant** shall be that 95% of all samples evaluated at the sample tap shall be at or below the secondary standards for iron and manganese. **Until for a period of 12 consecutive months, 95% of all Ohio EPA reportable samples from the Huber Ridge Water**

¹⁵ Id. Stipulation Paragraph 12(G) at 14.

¹⁶ Id. Stipulation Paragraph 12 at 12.

Treatment Plant meet the criteria set forth in the Plan applicable to the plant¹⁷ (emphasis added)

Paragraph 12(B)(i) requires OAW to sample, test and monitor the discoloration issue at the Huber Ridge Water Treatment Plant for a set, agreed upon period of time, 12 months, to determine if the discoloration issue is resolved.¹⁸ Thus, the first month that OAW would be eligible to meet the 12-month requirement of Stipulation Paragraph 12(B)(i) (and to file to increase the rates of customers in Water C) is May 2008.¹⁹

Finally, OAW's reliance on the first sentence of Paragraph 12(G) takes the June 30, 2007 date out of context. The second sentence of Paragraph 12(G) demonstrates that the Parties planned for the possibility that the discoloration problem may not be stopped on the first try. Even if OAW met the June 30, 2007 date the problem may come back. Paragraph 12(G) states in pertinent part:

After June, 30, 2007, once the discoloration has been eliminated for a given month, the Company may reinstate the reverse osmosis surcharge, **but if discoloration returns prior to the elimination of discoloration** for a period of six months²⁰ (Emphasis added)

¹⁷ In re Application of Ohio American Water Company, Case No. 06-433-WS-AIR, Stipulation at 12. (January 10, 2007).

¹⁸ In re Application of Ohio American Water Company, Case No. 06-433-WS-AIR, Stipulation Paragraph 12(B)(i) at 12. (January 10, 2007).

¹⁹ According to OAW's June 29, 2007 filing, June 2007 was the first month that OAW "complied with the Stipulation requirements to produce finished water meeting [secondary maximum contaminant level] concentrations. . . ." as required by the Huber Ridge Water Treatment Plant and Water Distribution System Monitoring Plan Proposal that was filed by OAW in compliance with Stipulation Paragraph 12(B). In re Ohio American Water Company, Case No. 07-252-WS-UNC, Huber Ridge Plan – Progress Report for May and June 2007 at 2. (June 29, 2007).

²⁰ In re Application of Ohio American Water Company, Case No. 06-433-WS-AIR, Stipulation Paragraph 12(G) at 14. (January 10, 2007).

OAW's assertion that the discoloration issue was resolved by the June 30, 2007 date was based on the monitoring results for the months of May and June.²¹

OAW's position that it can demonstrate the resolution of a serious water quality issue through two months of monitoring the water quality limits is disconcerting. The residential customers--who for years have been affected by water that was undrinkable, a brown color, and could not be used for basic household needs²²--will have a hard time believing that two months of results would satisfy this issue.

Addressing poor water quality issues cannot be ensured through a quick fix, nor should the Company attempt to treat two months of acceptable results as such. First, OAW's position that two months of sampling results is acceptable demonstrates a lack of recognition that each season brings different challenges for a water treatment plant. Additionally, it attempts to ignore the numerous monitoring requirements of the Stipulation, put in place, and agreed to by all of the parties, to ensure the ongoing safety of OAW's customers.

The terms of the Stipulation addressing the resolution of the discolored water issue are clear. As titled, Paragraph 12 of the Stipulation addresses the Huber Ridge Discoloration Program.²³ Without full compliance with the terms of Paragraph 12, OAW cannot demonstrate resolution of the discoloration issue.

²¹ In re Ohio American Water Company, Case No. 07-252-WS-UNC, Huber Ridge Plan – Progress Report for May and June 2007 at 1. (June 29, 2007).

²² Id. at 4.

²³ In re Application of Ohio American Water Company, Case No. 06-433-WS-AIR, Stipulation Paragraph 12 at 12. (January 10, 2007).

B. During the Early Stages of Resolving the Discoloration Issue, All of the Parties Stated That Resolving the Discoloration Issue Included More Than Just Completing the Requirements of 12(G).

OAW recognizes that the Stipulation “was carefully crafted pursuant to very contentious negotiations” and asserts that the Commission should give meaning to the words contained in the document.”²⁴ However, as addressed in Section A, above, OAW refuses to recognize the language of Paragraph 12 except for one sentence in Paragraph 12(G). Clearly, OAW’s current reading of Paragraphs 7 and 12 of the Stipulation stands in stark contrast from the reading of the other Parties.

If the Commission determines that the language of the Stipulation is unclear or ambiguous the Commission can then resort to using extrinsic evidence to determine the parties' intent.²⁵ Courts resort to extrinsic evidence of parties' intent “only where the language is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with a special meaning.”²⁶ As discussed below, the extrinsic evidence will show that all of the Parties, including OAW, have made representations that all of Paragraph 12 relates to the discoloration issue.

Prior to June 2007, OAW’s stated position was that resolution of the discoloration issue included more than the first sentence of Paragraph 12(G). In fact, in March, OAW filed a pleading that suggested it also considered compliance with Paragraph 12(B) as part of the resolution of the discoloration issue. On March 19, 2007, OAW submitted an updated Huber Ridge Water Treatment Plant and Water Distribution System Monitoring

²⁴ Memo Contra at 2.

²⁵ State v. R.J. Reynolds Tobacco Co., (2004), 104 Ohio St. 3d 559, 564.

²⁶ Id.

Plan (“Plan”) as part of the requirement under Paragraph 12(B).²⁷ The purpose of the plan was to “develop data on the characteristics of the water quality being produced at and pumped from the Huber Ridge water treatment plant [SIC] into the Huber Ridge water distribution system”²⁸ As part of the plan’s summary OAW states “The purpose of this plan is to define a program with the goal of **resolving the [discoloration] problem** in the Huber Ridge water service area.”²⁹

In addition, OCC and the PUCO staff have made their positions clear that all of Paragraph 12, including Paragraph 12(B) must be completed for the discoloration issue to be resolved. As discussed in OCC’s Motions, OAW stated in its June 2007 filing that it had completed the requirements of Paragraph 12(G) and thus had resolved the discoloration issue.³⁰ At that time, in July 2007, both the PUCO staff and OCC made it clear to OAW that resolving the discoloration required compliance with all of Paragraph 12.³¹ The July 2007 letters filed by PUCO staff and OCC regarding this issue and discussed in OCC’s Motions, demonstrate the clear perspective of those two agencies that the discoloration issue was not resolved and could not be resolved until May 2008.

²⁷ In re Ohio American Water Company, Case No 07-252-WS-UNC, letter from Sally W. Bloomfield at 1. (March 19, 2007).

²⁸ In re Ohio American Water Company, Case No. 07-252-WS-UNC, Huber Ridge Water Treatment Plant and Water Distribution System Monitoring Plan Proposal (revised) at 1. (March 12, 2007).

²⁹ Id. at 5.

³⁰ In re Ohio American Water Company, Case No 07-252-WS-UNC, Huber Ridge Water Treatment Plant and Water Distribution System Monitoring Plan at 4. (June 29, 2007).

³¹ In re Ohio American Water Company, Case No 07-252-WS-UNC, letter from Thomas Lindgren at 2. (July 13, 2007) (“In summary, the Staff cannot conclude and does not agree that the Huber Ridge Discoloration issue has been resolved at this time.”); In re Ohio American Water Company, Case No 07-252-WS-UNC, letter from Maureen R. Grady at 1. (July 20, 2007) (“Contrary to the statements in the Report filed on June 29, 2007, OAW has not “resolved” the discolored water problem in the Huber Ridge areas because it has not met all of the standards mandated by the settlement agreement. . . OAW will not be able to meet all of those requirements until at least May 1, 2008.”).

Despite, the clear language of the Stipulation and the clear statements of all the Parties, OAW still chose to breach the terms of the Stipulation and file a request for a rate increase on November 13, 2007, for all of its customers, including Water C.

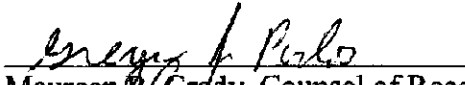
III. CONCLUSION

For the reasons stated above, the Commission should dismiss OAW's Application to increase rates for customers in the Water C district or, in the alternative, order OAW to amend the Application to exclude a rate increase for customers in Water C, or in the alternative, toll the Water C portion of the Application until at least May 2008.

OAW has not met the requirements of Stipulation Paragraph 12 that it signed with OCC and the PUCO staff to settle its last rate case and resolve the problem of discolored water that plagues its customers in Huber Ridge. The requirements of the Stipulation are such that OAW cannot file an application to increase rates for customers in the Water C area until it demonstrates that the water discoloration issue is eliminated for twelve consecutive months. At the very earliest it will be May 2008, before OAW can file to increase the rates of the customers in the area of Water C—and OAW will need to exercise the patience in awaiting the effectuation of the Stipulation it signed just as its customers had to wait an even longer time for the repair of the water quality problem.

Respectfully submitted,

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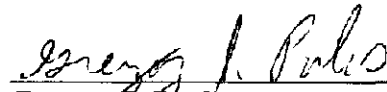
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's forgoing *Reply to Ohio American Water Company's Memorandum Contra* was provided to the persons listed below via first class U.S. Mail, postage prepaid, this 11th day of January, 2008.



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