

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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PUCO

In the Matter of the Application of Ohio)
American Water Company for Authority to) Case No. 07-1112-WS-AIR
Increase its Rates For Water and Sewer)
Service Provided to its Entire Service Area.)

**MEMORANDUM CONTRA
OF
OHIO AMERICAN WATER COMPANY
TO
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
APPLICATION FOR REHEARING**

On January 23, 2007, The Office of the Ohio Consumers' Counsel ("OCC") filed an Application for Rehearing ("Rehearing Application") from the Entry issued January 9, 2008 ("Entry") by the Public Utilities Commission of Ohio ("Commission"). Ohio American Water Company ("Ohio American" or "Company") opposes the Rehearing Application for the reasons given below and urges the Commission to deny OCC's Rehearing Application. This Memorandum Contra ("Memo Contra") will address the points raised in the Rehearing Application in the order presented therein.

I. Procedural History

OCC's Rehearing Application contained four pages of narrative purporting to set forth a history of the events leading to its Rehearing Application. Although Ohio American could take issue with the characterization of the events set forth, two points are misleading and demand correction.

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The issue that is at the heart of the matter in this Rehearing Application stems from the Stipulation and Recommendation executed by most of the parties, including OCC, and filed on January 10, 2007 ("Stipulation") in the prior Ohio American rate case, Case No. 06-433-WS-AIR. Subsequently, a compliance docket was established for filings associated with the Stipulation, Case No. 07-252-WS-UNC ("Compliance Docket"). As set forth in OCC's Motion and Ohio American's Memorandum Contra and OCC's Reply filed in this instant case,¹ OCC and Ohio American have vehemently disagreed about the meaning of paragraphs 7 and 12 G of the Stipulation.

The first mischaracterization in the Rehearing Application that demands correction concerns Staff's letter of July 13, 2007 filed in the Compliance Docket. OCC alleges that Staff agreed that the Huber Ridge discoloration issue could not be solved until May 2008 (Rehearing Application at 2²). This statement is untrue. Rather, the Staff argued against the implication that Ohio American "fully met" the criteria of the sentence in Paragraph 12 G of the Stipulation that referred to the potential penalty of Ohio American's foregoing the reverse osmosis charge if the discoloration returned.³ Staff further noted that it could not ascertain if the samples from the water treatment plant (as opposed to the distribution plant) complied with the agreed-to standards set forth in other subparts of Stipulation paragraph 12. The Staff also noted that under the Stipulation Ohio American had a continuing duty to make various reports. Ohio American has never disputed its responsibilities in these respects and indeed, has met the reporting

¹ *Motion to Dismiss Ohio American Water Company's Application to Increase Rates for the Area of "Water C" or, in the Alternative, Motion to Amend the Application to Exclude a Rate Increase for the Area of "Water C" or, in the Alternative, Motion to Toll the Application Regarding the Area of "Water C"* filed by OCC on December 13, 2008; *Ohio American's Memorandum Contra* filed on January 4, 2008 and OCC's *Reply* filed on January 11, 2008.

² Throughout this Memo Contra, Ohio American will refer to the page numbers in the Rehearing Application beginning with the "Memorandum in Support" section of the OCC document.

³ Staff's letter in the Compliance Docket, dated July 13, 2007, at 1 and 2.

requirements. It is only OCC who claims that under the terms of the Stipulation, Ohio American has not met, and cannot meet, elimination of discoloration standard until May 2008. OCC is singular in arguing this patently false, tortured and unwarranted interpretation of the Stipulation.

The second mischaracterization concerns the implication that OCC had timely and appropriately acted upon its belief that the publication notice should be corrected. However, OCC had the publication notice under consideration for 34 days before it requested Ohio American to change the notice and 55 days prior to its filing to change the notice.

Below is the sequence of events:

Date	Communication/Pleading	Elapsed Days/Cumulative from Application filing
11/13/07	Ohio American application with proposed publication filed	
11/19/07	OCC e-mail stating that it was reviewing the publication "with an eye towards making it more understandable for customers..."	6
12/17/07	OCC sent proposal by e-mail	28/34
12/27/07	Ohio American sent e-mail response	10/44
1/3/08	Commission Agenda notice that publication would be ruled on	6/51
1/7/08	OCC Motion to amend publication filed	4/55
1/9/08	Commission entry approving publication	2/57

Sixty-two days had passed from the date Ohio American filed the proposed application until OCC filed its motion concerning the publication notice and, moreover, the motion was filed *after* the Commission's agenda indicated that the publication would be considered. Had OCC convened a meeting with the Staff and Ohio American shortly after the proposed publication had been filed, there would have been time to discuss and possibly to negotiate a publication that might have been acceptable to all parties. Indeed, this procedure is precisely what the Commission directed should occur in the next Ohio American rate proceeding. The OCC

delayed too long for a good faith attempt to modify the publication and neither the Commission nor Ohio American should be criticized, directly or implicitly, for OCC's delay.

II. Argument

A. The Commission Properly Accepted the Proposed Publication of Ohio American's Rate Case.

OCC has consistently harped on a theme that Ohio American "refused" to comply with the terms of the Stipulation, and in the Rehearing Application, OCC accuses the Commission of "acquiescing" in the alleged non compliance. By this characterization, OCC fails to acknowledge that it was OCC's position alone that Ohio American had failed to comply with the Stipulation, and that, by directing publication of the notice of the application throughout Ohio American's service territory, the Commission had implicitly agreed with Ohio American that OCC's argument is baseless. OCC's accusation that Ohio American has defied a Commission order (the Opinion and Order in Case No. 06-433-WS-AIR that adopts the Stipulation) and thus has violated a statute requiring adherence to Commission orders is likewise baseless and outrageous. More appalling is OCC's characterization of the Commission as acquiescing in an illegal action. The fact that the Commission disagrees with the OCC's twisted and illogical arguments does not provide a reason for OCC to accuse the Commission of condoning a violation of law.

The standard to determine if discoloration has been corrected in the Huber Ridge service area was the crux of OCC's arguments. OCC claimed that Ohio American must meet several conditions before it has met its obligations set forth in the Stipulation. Ohio American has consistently argued that, while it agreed to undertake a number of activities to address discoloration, the Stipulation set forth one single standard to determine if discoloration was eliminated: the meeting of the 1-NTU standard as measured by sample taken from designated

sites in the *distribution* system. Ohio American reported that the elimination of the discoloration standard had been met by June 30, 2007. Even the Staff in its July 13th letter did not disagree that the 1-NTU standard had been met for April and May though at that time it took the position that the determination that Ohio American had maintained the elimination of the discoloration for six months had not been met (Rehearing Application at 1 and 2).

The Stipulation provided for only one test to determine whether the discoloration had been eliminated as set forth in Stipulation paragraph 12 G, the NTU standard. It also provided for one penalty if the discoloration as measured by the NTU standard was not met by June 30th: the inability to apply for a rate increase for the Franklin County customers until the NTU standard was met. At the time the Stipulation was negotiated and signed, no one knew the cause of the discoloration, but whatever the cause, the parties agreed that there would be the one test to determine if the discoloration was eliminated. The test would be one that assured that, whatever the cause, it would have to be corrected at the distribution system level. Correction at the water treatment plant would not be satisfactory if discoloration continued at the distribution plant. Because the cause of the discoloration was unknown and improvements needed to be made at the water treatment plant as well as at the distribution system, the plan called for separate activities to be undertaken with respect to each type of plant and for separate standards to be met and separate measurements to be taken to assure that potential causes of discoloration were addressed. There were many activities that Ohio American was required to undertake to address the discoloration problem and to assure that discoloration did not return.

It cannot be emphasized enough: the entire program of activities to improve the Huber Ridge system—the water plant and the distribution plant—each had separate criteria. These were set forth in the subparts of paragraph 12 of the Stipulation. In addition, for some of these

activities, penalties were set if Ohio American did not meet the specific requirements. For example, with respect to actions to be taken at the Huber Ridge water treatment plant (as distinguished from the distribution system where the standard for the discoloration elimination was set), if specific levels of iron and manganese were not met by May 31, 2007, the Company was required to meet with Staff and OCC to present an evaluation report concerning chemical additives (Stipulation paragraph 12 F); if the discoloration returned within six months of being eliminated based upon the NTU standard, Ohio American would forfeit its reverse osmosis charges (second sentence of Stipulation paragraph 12 G); if the iron and manganese water plant samples were outside of the 5% criteria by September 30, 2007, Ohio American was required to meet with the Staff and a representative of Ohio EPA to discuss additional steps and a revised time line (Stipulation paragraph 12 H).

OCC has attempted to obfuscate the program that was established to identify and solve the discoloration program at Huber Ridge. In contravention to the language of the Stipulation, OCC would have the Commission ignore the separate measurements and separate requirements of a program to construe them as a single "all or nothing" set of requirements that all had to be met prior to the filing of a rate application that affects Franklin County customers. The Commission made the correct decision in directing Ohio American to publish notice for its entire service area and should deny OCC's contention that Ohio American did not properly file its rate application.

B. The Commission Properly Directed Ohio American to Publish Notice in Franklin County.

OCC, in contending that the Commission erred in directing Ohio American to publish notice throughout its service territory, essentially repeated its arguments from its first contention

above. Thus Ohio American's arguments with respect to the first contention apply equally to OCC's second contention.

C. The Commission Has No Obligation to Specify Consequences for Non Compliance with an Entry.

OCC notes that all of Ohio American's newspaper publications did not comply with its direction with respect to the last paragraph of the public notice. As explained at length in Ohio American's Motion Regarding Newspaper Publication filed on January 28, 2008, the last paragraph containing the incorrect information was caused by an error and it was corrected as soon as Ohio American became aware of it.⁴ When Ohio American learned of the error, which was totally unintentional as evidenced by the facts that (1) the erroneous paragraph contained the case number from the prior case and (2) a faxed copy of the notice to one of the newspapers had the correct version, the Company made immediate efforts to correct the remaining publications.

OCC claims that the Commission had an obligation to specify consequences for non compliance in the Entry. This is a novel concept that has been spun out of whole cloth. It is neither supported by statute nor case law. The argument ignores the fact that Ohio Revised Code Section ("R.C.") 4905.54 requires representatives of all utilities to comply with Commission orders or face monetary penalties for each day's non compliance. Thus the Commission is clearly not under any obligation to specify additional penalties, nor should it. (In the event the Commission determined to specify penalties as a regular custom, it may even be error, depending upon the circumstances, in that such an additional penalty might constitute the Commission's exceeding its statutory authority on the basis *expressio unius est exclusio alterius*.)

⁴ Most parties, upon discovery of the published notice error, in consideration of saving customer confusion and assuring fully correct notice to customers, would have made a courtesy call to Ohio American representatives so that the error could be corrected rather than gloating about the error in an application for rehearing filed after several publications containing the error had been published.

Because OCC's argument is totally without legal or rational basis, the Commission should reject this contention because it does not allege a legal error.

D. The Commission's Direction to Publish Met the Requirements of R.C. 4909.18 (E) and 4909.19

1. The Commission Directed the Publication of a Clear and Concise Notice.

OCC argues that the Commission did not order the publication of a clear and concise publication on the basis that the Commission mentioned in the Entry that the notice *could* be more clear and concise. The argument that a publication could be better does not relate to any standard for "clear and concise." Nearly every writing "could" be more clear or better in some respect. The fact that the Commission noted that the notice could be improved does not equate to an admission that the notice does not provide the reader the opportunity to understand the notice. Indeed, the notice that was proposed is identical in format to the notices that the Commission has approved for at least the last five rate cases of Ohio American. The format was established many years ago with the input of the Commission Staff and it has been used ever since without prior objections from OCC. In each of the prior rate cases the Commission has found that it has met the statutory tests of R.C. 4909.18 and .19.

The earlier rationale of the Staff when Ohio American consulted with the Staff is that more information is more valuable to the customer than less. Thus the notice contains abundant information to the reader so that the reader can determine without difficulty if the reader has an objection. Moreover, the language is clear; there is no "legalese" and the sentences are in simple declarative form. All the current rates and the proposed rates are disclosed. Even OCC does not state that the notice is not clear.

OCC's objection seems to be that the notice is too long! OCC's argument reflects its disdain of customers' cognitive abilities and analytical skills to make decisions based on more complete (rather than less) information. It complains that the notice should be more concise, i.e., provide less information. However, there can be no doubt that the approved notice meets the relevant statutory standards. It certainly sets forth the essential nature and quality of the application, it states the substance and prayer of the application—Ohio American requests the Commission to increase its rates and the format is understandable. The notice contains tables that show the current and proposed rates. In short, as the Commission has found in the prior Ohio American rate case publications, the notice complies with the statutes. OCC could cite no legal standard that was violated.

As evidence of customer interest in Ohio American's rate cases, OCC pointed to the number of people who participated in the last rate case where the published notice was substantially identical. This fact undermines OCC's argument that the publication is not sufficient.

It is interesting that OCC notes the number of people who have filed letters in this case prior to the publication which is not germane to the publication issue. However, the number of letters already filed in this proceeding underscores OCC's activities in actively fostering complaints against Ohio American in this case. OCC's website presents statements about the Ohio American case which likewise appear on the Community Taking a Stand blog, <http://communitytakingastand.blogspot.com/>. A copy of the statement in OCC's website is attached as Exhibit A. In pertinent part the OCC statement exhorts customers to write letters in protest of the rate case:

Rate Increase Requested by Ohio American Water

The Office of the Ohio Consumer's Counsel is encouraging customers of Ohio American Water to voice their opinions about the recently proposed rate increase pending before the Public Utilities Commission of Ohio... (Emphasis added.)

The last OAW rate increase went into effect March 2007, increasing water rates 14 percent for customers in the Franklin and Portage counties and 11.7 percent for all other residential customers...

...[W]riting a letter to the PUCO will get your opinion into the case...(Emphasis added.)

Mail a letter to the PUCO at . . .

Or you can file a letter to the PUCO by accessing its online form for comments here [Link to PUCO].

It is disingenuous at best to exclaim about the interest in the Ohio American rate case when the OCC is fomenting dissatisfaction with the Company and "encouraging" customer protests in the case.

2. The Commission Appropriately Declined to Direct OCC and PUCO Contact Information in the Publication.

Because there is no statutory requirement or case law to support the contention that the Commission should have ordered contact information of the OCC or the PUCO to be included in the publication, OCC has no basis to support its contention. Indeed, where there is no violation of statutory or case law, the Commission could not have erred in directing publication without this information. In short, the OCC has not cited an error that merits consideration in an application for rehearing.

III. Conclusion

The OCC Rehearing Application should be denied. OCC has not cited any legal error in the Commission's Entry. The publication that covered the entire Ohio American service area

was proper as was the content of the publication itself. As discussed in Ohio American's Motion Regarding Publication, Ohio American's publication substantially complied with the Entry. OCC did not, and could not, cite any error in the Entry and thus the Rehearing Application should be denied in its entirety.

Respectfully submitted on behalf of
OHIO AMERICAN WATER COMPANY



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S APPLICATION FOR REHEARING was either served by electronic mail or regular U.S. Mail this 1st of February 2008.

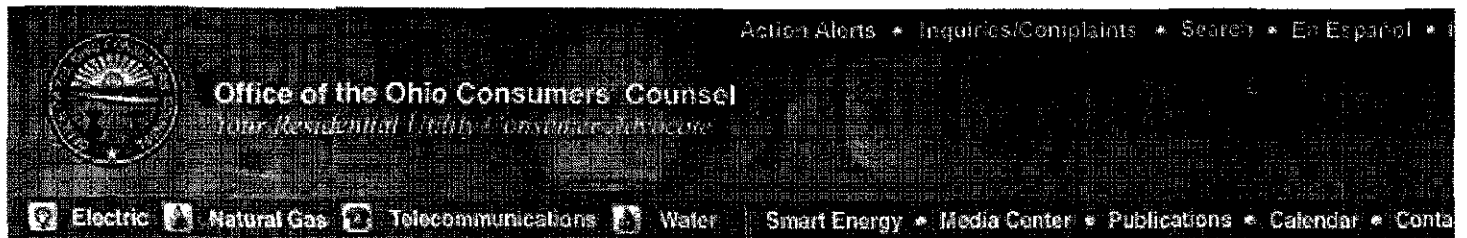

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EXHIBIT A[Action Alerts Home](#)

Ohio American Water Proposed Rate Increases

Rate increase requested by Ohio American Water

The Office of the Ohio Consumers' Counsel is encouraging customers of Ohio American Water to voice their opinions about a recently proposed rate increase pending before the Public Utilities Commission of Ohio. The company's request could affect the typical residential customer by increasing rates between 12 percent and 38 percent, depending on which system serves the customer. The rate increase is proposed for all customers served by Ohio American Water.

The last OAW rate increase went into effect in March 2007, increasing water rates 14 percent for customers in Franklin and Portage counties and 11.7 percent for all other residential customers. Ohio American Water also increased several customer charges including account activation and reconnection charges.

Public hearings will be scheduled for this case where customers will have the chance to give sworn testimony in person. At the hearing, you can testify on the quality of water, the adequacy of service, the proposed rate increase requested by the company or any other issues you feel pertinent to the case. The Public Utilities Commission of Ohio will announce when these hearings will be held.

In the meantime, writing a letter to the PUCO will get your opinion into the case and considered as the PUCO staff evaluates the case and the Commission judges Ohio American Water's request.

Mail a letter to the PUCO at:

Public Utilities Commission of Ohio
Docketing Division
RE: Case # 07-1112-WW-AIR
180 E. Broad Street, 13th Floor
Columbus, Ohio 43215-3793

Be sure to include your name on the letter.

Or you can file a letter to the PUCO by accessing its online form for comments [here](#).



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