BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

FILE

In the Matter of the Commission's Review of Chapter 4901:1-15, Ohio Administrative Code, Standards for Waterworks Companies and Sewage Disposal System Companies.	))))	Case No. 07-292-WS-ORD

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

On April 18, 2008, The Office of the Ohio Consumers' Counsel ("OCC") filed an Application for Rehearing ("Rehearing Application") from the Finding and Order issued March 19, 2008 ("Order") 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. Argument

A. The Commission Properly Adopted Rule 4901:1-15-09 That Set Forth Requirements for Transfers of Certificates

OCC argues that where a transferee is already certified by the Commission, the Commission in a transfer of certificate case should require applicants to update the information that the transferee applicant filed when it submitted its certification application. It argues that without the additional information, the Commission implies that a transferee of a certificate has

less oversight than an applicant for a new certificate (Rehearing Application at 3-4). This argument is faulty. Where a transferee of a second certificate already has a prior certificate, it is under the continuing jurisdiction of the Commission. It has filed annual reports, which contain updated information from the information originally supplied in its initial certification application. Furthermore, the Commission and the Commission staff have the unfettered right to request additional information through data requests, a procedure which is used liberally in a variety of cases, including transfer cases.

In addition, most, if not all, of the information that OCC bemoans is not available under this rule, is available in annual reports filed and available on the Commission's website. For example, shareholders, officers and directors are all required to be disclosed in an annual report. One could argue the information is more conveniently available in the commission's annual report section of its website because customers merely have to search under the name of the company to have multiple years of annual reports available, rather than by having to know the case number of the transfer case in order to search for the information in the application.

The fact that this information is readily available to customers and members of the public alike certainly meets the "transparency" objective that OCC cites.

It is interesting that OCC cited Executive Order 08-04S with respect to its transparency argument. OCC did not, however, indicate that a purpose of the Executive Order was to promote outcomes rather than achieve compliance and that the executive order made that point that agency rules should impose the least burden to achieve regulatory objectives. Under paragraph 4, "Developing Common Sense Business Regulation in Ohio," the Executive Order 2008-04S states:

> e. Proposed rules should focus on achieving outcomes rather than a process used to achieve compliance.

They should be based on the best scientific and technical information that can be reasonably obtained and designed so that they can be applied consistently.

f. Agency rules are expected to impose the least burden and costs to business, including paperwork and other compliance costs, necessary to achieve the underlying regulatory objective. This will make Ohio a more attractive place to do business and avoid placing entities doing business in the State at a competitive disadvantage relative to businesses located in other states or countries.

OCC completely disregards the fact that the extra filings that it would have companies make are direct costs to be borne by ratepayers. OCC cites no facts that would support that the extra expense benefits customers. It is not true, based upon the wide variety of information available on the Commission's website, that interested parties cannot have access to the information that OCC claims is necessary.

With respect to OCC's statement that a public hearing be mandated each time there is a transfer and the single case cited in support thereof, OCC fails to take into consideration any problems with Water & Service Company could have been addressed in the transfer case if they had been known at the time and that information about the company was available elsewhere in the public record and/or to the Commission staff. The practice for many years under the current rules has been to not hold public hearings unless the Commission deems them necessary. Under the rules as proposed, the Commission retains exactly the same authority and discretion that it holds currently. While the current rule speaks to a public hearing, the practice and custom has been for applicants to request a waiver from public hearings, which has been routinely granted. The change in the rule merely indicates what has indeed been the case for many years. That is,

the Commission "at its discretion" may hold a public hearing. There is really no change in practice and an argument to the contrary is disingenuous.

B. The Commission Properly Determined That Disconnection Notices Should Not Be Required When It Adopted Rule 4901:1-15-15

OCC takes issue with the fact that the Commission did not modify paragraph (D) of Rule 4901:1-15-15 to require that every waterworks company and sewage disposal company file a copy of "all notices" with its tariff. OCC has really not stated a valid purpose for its requirement. As stated in its reply, Ohio American notes that currently the Commission requires copies of the disconnection notices, application forms, and customer bill of rights forms of each water and sewage disposal company it regulates. OCC fails to take into account that the PUCO staff regularly reviews disconnection notices any time a company files for a rate increase and the Commission conducts its investigation. In addition, the PUCO's Service Monitoring and Enforcement Division ("SMED") conducts periodic reviews of the practices of water companies and at that point looks at the disconnection notices. Finally, the Commission rules require disconnection notices contain certain criteria and, in order to be approved, these criteria must be met. As the Commission noted, nothing more need be required. To require "all notices" be filed would be an unreasonable task.

Again, this recommendation by OCC appears to violate the Governor's Executive Order 2008-04S Paragraph 4f that directs state agencies to impose the least burden and costs and paperwork to businesses necessary to achieve the underlying regulatory objective.

C. The Commission Appropriately Determined That a Stated Time Frame Within Which To Notify Customers of an Unplanned Change of Address of Telephone Number Should Not Be Included in Rule 4901:1-15-17

OCC takes issue with the Commission's change to Paragraph C of Rule 4901:1-15-17 with respect to unplanned changes. The Commission granted OCC's request to require that

unplanned change notifications be made with the OCC as well as the Commission. It did not change the current language that the water and/or sewage disposal companies were required to notify the Commission and OCC "immediately and its customers as soon as possible" but not later than 30 days. This is the current state of the rule.

OCC proposes no factual basis for having the Commission consider a shorter period which is contrary to Executive Order 2008-04S Paragraph 4e. Furthermore, it appears that OCC fails to consider the circumstances that would lead to an "unplanned" change. Typically, an unplanned change would result from an emergency. The emergency would most probably be of a severe nature, such as a tornado or a fire, which would likely render a company unable to make the proper notifications within a specific period of time. The Commission's current rule and its new rule use the word "immediately" with respect to the Commission and OCC and the term "as soon as possible but in no event longer than 30 days" with respect to customer notifications. This rule is imminently reasonable and takes into account the fact that a circumstance that would constitute an unplanned change is most likely to be of a catastrophic nature. A maximum shorter notification time requirement may well be impossible. The fact that the Commission mandated companies to notify their customers "as soon as possible" has been, and should remain, sufficient. Again, OCC is attempting to impose a time frame which it could not justify on any factual basis and in fact flies in the face of experience of companies who have already faced various types of disasters. The Commission made the appropriate decision to retain the substance of its current rule.

D. The Commission Appropriately Determined in Amended Rule 4901:1-15-19 That It Is Unnecessary to Provide for an Extra Two Free Meter Readings at the Customer's Request Each Year

OCC has taken issue with the current rule, unchanged by the new version of Rule 4901:1-15-19, that does not confer two extra meter readings at the customer's option, free of charge, each year. One of OCC's arguments is that the water "should be consistent with the meter reading for electric customers." OCC Rehearing Application at 10. However, as noted in Ohio American's Reply Comments (at 6) in proposing the new paragraph, OCC has selectively picked and chosen parts of the electric rules but excluded the restrictions of the rule. Rule 4901-10-14(I) contains a sentence following the second actual meter read provision that was omitted by OCC, which the Commission noted in its Order:

> [t]he customer may only request an actual meter read *if the customer's usage has been estimated for more than two of the immediately preceding billing cycles consecutively* or if the customer has reasonable grounds to believe that the meter is malfunctioning.

Order at 29, emphasis added. The Commission properly found that the two provisions were not consistent and that because water meters must be read every three months the extra meter readings were unnecessary. *Id.*

In addition, OCC's arguments did not consider the additional and burdensome costs to the ratepayers, $406,000, caused by additional meter reading that Ohio American set forth in its Reply Comments (at 7). Though OCC cites the self-initiated additional meter readings, some 3,355, OCC fails to note the universe of annual bimonthly meter readings, some 348,000 (number of customers, 58,000, times 6) which means that the self initiated meter readings constituted only 1% of the required quarterly annual meter readings for the Company. Indeed, the actual number of meter readings is higher.

E. Amended Rule 4901:1-15-20(C)(1) Appropriately Omits References to Taste, Odor and Sediment, Etc.

OCC argues that the Commission should have adopted a requirement that rejects the standard of potable water to a subjective standard of "objectionable taste, odor and color." The Commission was absolutely correct in stating that if the Commission were to adopt OCC's proposed language concerning subjective criteria, it would run the risk of overstating its statutory authority. Order at 33. The fact that other states have different standards is dependent in large part upon their own unique statutes and is no basis for a wholesale importation of those subjective standards to Ohio's rules.

Further, Ohio American discussed the problems of subjectivity, the science of corrosion and the Ohio EPA's statutory authority which address OCC's arguments in its Reply Comments (at 8) and hereby incorporates those arguments by reference.

Finally, adopting OCC's language would violate Executive Order 2008-04S which states that rules should be based on the best scientific and technical information that can be reasonably obtained so that they can be consistently applied (at Paragraph 4e).

F. In Adopting Amended Rule 4901:1-15-20(C)(5) The Commission Exercised Sound Reason and Considered Public Policy in Exempting Tank Draining, Street Cleaning and Sewer Flushing from Unaccounted-for-Water and in Retaining the Twelve-Month Rolling Average as the Standard

As in its Comments, OCC took issue with the Commission's longstanding unaccounted-for-water formula of a twelve-month rolling average and claimed that retaining the language was error. OCC's definition of unaccounted-for-water which inserts the term "actual" is overly broad and not supported by common sense or industry standards. As stated in Ohio American's Reply Comments, OCC's:

> * * * insertion of the term "actual" metered and "actual" in paragraph (C)(5) to modify production would include non-metered, but identifiable, water in the calculation of "unaccounted." The

> water industry has never considered unmetered water to be the equivalent to "unaccounted" water. Indeed, Ohio American has a few customers without meters who pay a fixed periodic charge for water. Small water companies also have unmetered customers and the Commission has approved their rates. Accepting the OCC's amendment would exclude the identifiable, but non-metered water exceptions that have been traditionally permitted and accepted by the water industry and by most, if not all, state regulatory commissions.

Ohio American's Reply Comments at 9.

In addition, OCC believes that the Commission erred when it did not adopt OCC's recommendation that affidavits be prepared by those water technicians who estimate water that is excluded from the unaccounted-for-water category. First of all, OCC has cited no support for the assumption underlying this recommendation, which is that currently there is a problem with the estimates. This is a critical fact that should be established before even considering OCC's recommendation. OCC did not even allege that this was a problem in the water industry. As noted in Ohio American's Reply Comments, implementing this suggestion would cost the company time and money to address a non existent problem (at 9-10). Once again, OCC, who ironically cited Executive Order 2008-04S, proposed a rule that violates the specific directions of the Governor that agencies should adopt rules based on facts and the rules should regulate in a manner that imposes the least burden and costs to the industry (Paragraphs 4e and 4f).

OCC's argument that tank draining, street cleaning and sewer flushing should be included within the category of unaccounted-for-water is completely unsupported by any sound public policy. It is interesting that OCC's arguments in favor of its proposal to delete tank draining, street cleaning and sewer flushing water from the unaccounted-for-water category, rejected by the Commission, did not cite any facts with respect to industry standards. All customers benefit by tank training which is a periodic necessary, function to repair and clean tanks. Indeed, the

Commission has requirements for periodic tank painting that require tank draining. Likewise, appropriate sewer management requires that the sewer lines be flushed periodically. Both of these functions benefit all customers. It is not possible to meter the water involved for these activities but they can be and are properly estimated. Municipalities use the water for free to clean the streets. This is also a service to everyone in the community. Under ideal conditions, the municipality informs the water companies of its street cleaning activities so that the companies can estimate the usage. Thus it is unreasonable that street cleaning water should be considered unaccounted-for-water. The Commission was exercising sound judgment and considered sound public policy in permitting tank cleaning, street cleaning and sewer flushing water to be excluded from unaccounted-for-water.

G. The Commission Properly Rejected OCC's Recommendation to Add a Back-Billing Requirement in Rule 4901:1-15-24

OCC argued that the Commission should have promulgated a provision in Rule 4901:1-15-24 that limited back-billing in a manner similar to Ohio Revised Code Section ("R.C.") 4933.28 applicable for electric service. Yet OCC offered no facts to support its proposal (contrary to the direction in Executive Order 2008-04S, Paragraph 4e). The reasons supporting the electric industry's limitations enacted by the Ohio General Assembly were not cited. Typically electric bills are higher by multiples than water bills, but, more importantly, OCC could not say that back-billing *has been a problem* in the water industry.

Most importantly, as noted by Ohio American in its Reply Comments, the Ohio General Assembly specifically excluded the water industry from R.C. 4933.28. An agency may not add provisions to a statute that is plain on its face, a violation of the principle of *expressio unius est exclusivio alterius* which the Ohio Supreme Court defined in *Vincent v. Zanesville Civ. Serv. Comm.* (1990), 54 Ohio St. 3d 30, 32 at fn. 2:

The term is defined in Black's Law Dictionary (6 Ed. 1990) 581, as follows:

> "A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another. *Burgin v. Forbes,* 169 S.W.2d 321, 325; *Newblock v. Bowles,* 40 P.2d 1097, 1100. Mention of one thing implies exclusion of another. When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred. Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded."

The Ohio Supreme Court discussed the situation where the language of the statute was clear and unambiguous, in *Columbus v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 427. It concluded that courts need look no further to interpret such a statute. See, also, *State ex rel. Celebrezze v. Natl Lime and Stone* (1994), 68 Ohio St. 3d 377, 382. Thus the Commission properly denied OCC's proposal and legally committed no error in doing so.

H. The Commission Properly Found That Any Remedy for a Tenant's Situation Where the Landlord Does Not Pay a Water Bill Should Not Be Included in Rule 4901:1-15-27(E) at this Time, But Be Explored to Determine Feasibility

The Commission staff did not propose to change paragraph (E) and the Commission did not amend this paragraph. In its initial Comments (at 15, 18), OCC argued that the paragraph should be amended to require water companies to provide the tenants with additional information to avoid disconnection.[1] However, in its Rehearing Application, OCC attempts another bite at the comment apple when in its Rehearing Application it raised new issues with the current rules. OCC complained that the Commission should have defined "consumer" and should have clarified the term, "company." OCC also argued that the Commission should standardize the 10-day notice and even proposed a specific notice---all for the first time! If these issues were not

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[1] OCC Comments filed in this proceeding on April 30, 2007.

raised initially, they are not proper issues for OCC to raise on rehearing. The Commission considered all the comments it had before it and these issues were not among them.

With respect to the issue that OCC did raise in its Comments, inserting language that requires companies to provide to tenants information that contains a summary of remedies for disconnection and a list of procedures and forms to prevent disconnection or to restore service, OCC merely says that tenants have an unspecified "right" to receive more information. Ohio American also made a recommendation to ameliorate the tenant situation, but the Commission rejected it as well.

It is obvious that the Commission considered tenants' plights when it held that the issue should be considered at another time. This is an issue that deserves attention with full discussion of facts, legal issues, feasibility of any additional proposed requirements and a host of other issues. They should be discussed in precisely the manner that the Commission indicated. OCC did not have any factual or policy support for the recommendation that it made. In rejecting OCC's proposal, the Commission agreed that it should be considered at a later date. Thus OCC does not have a legitimate ground for error on this ruling.

I. The Commission Properly Found That an Across-the-Board Spanish Language Requirement Was Not Appropriate to Insert in Rule 4901:1-15-27

In its Comments, OCC had argued that the Commission should add a new paragraph to Rule 4901:1-15-27 that would require Class A and B waterworks companies to provide disconnection notices in both Spanish and English. The Commission noted that several parties pointed out that OCC had provided no data that this approach is needed in the first place and that the expense for this activity was not documented (Order at 44). The Commission determined that it was not appropriate to target a particular segment of the population (Order at 45). Indeed there was no showing in this record indicating a significant Spanish-speaking customer bases

exists in the Class A and B water companies. Consistent with Ohio American's Comments stating that a customer may call the toll free number to the Customer Service Center and request a Spanish speaking attendant who will speak Spanish to the customer and translate the bill or any other writing from Ohio American, the Commission noted that it was its "expectation that a company will work with its customers who do not read English to ensure that the customers are able to understand the information provided in the notices" (*Id.*). Based on the lack of data in this proceeding to justify across the board Spanish notices, the Commission did not err in rejecting OCC's proposal.

J. The Commission Properly Denied the OCC Recommendation to Add Requirements to the Curtailment Program in Rule 4901:1-15-34 and That Further Clarification Concerning the Customers Who Were Subject to Curtailments Was Unnecessary

OCC raised two objections to the Commission's amended Rule 4901:1-15-34. It argued that curtailment programs should be applied to both residential and non residential customers and proposed language referring to non residential customers. However, this first modification is not warranted because the rule as amended and the current rule do not limit the curtailment programs to residential customers. Nor did OCC present any argument, let alone data, that suggested that water companies were not uniformly curtailing all customers when that action was necessary. The rule does not specify that only certain classes of customers are to be curtailed and thus the only rational interpretation is that curtailment applies across the board. In short, the OCC has failed to cite an error in the Commission's reasoning in denying OCC's recommendation.

OCC also sought to add specific language to substitute what it believed was a better curtailment program than the requirements that have been retained in the amended rule and have been in existence for decades. No support whatever was given for the proposed changes; merely OCC thought it had a better idea that should be imposed on the water industry. The Commission

properly noted, that before it would adopt any of the OCC new curtailment recommendations, it required information to support them (again, consistent with Executive Order 2008-04S, Paragraph 4e). Thus the Commission properly rejected its recommendation; indeed one can argue that it would have been error to adopt it without factual support.

Conclusion

The Commission properly decided the rules in Chapter 4901:1-15 with which OCC takes issue for the reasons given above. In all cases OCC presented no data of any kind to show that the Commission erred. Moreover, the "errors" alleged were in large part OCC's opinion of what the rules should be. The Commission, not OCC, has been invested with the quasi-legislative authority and responsibility to adopt rules. There can be no serious allegation that the Commission did not act reasonably in promulgating the rules

Respectfully submitted on behalf of
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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 28th of April 2008.

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