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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)
Heinz Frozen Food Company and Ohio)
Edison Company For Approval of a) Case No. 09-1201-EL-EEC
Special Arrangement Agreement With A)
Mercantile Customer.)

**REPLY TO MEMORANDA CONTRA THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL'S MOTION TO INTERVENE**

I. INTRODUCTION

On August 13, 2009, the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Intervene in this utility-related proceeding. In this case, Ohio Edison Company ("Ohio Edison" or "Company" or "FirstEnergy" or "FE") and Heinz Frozen Food Company ("Customer") (collectively with Ohio Edison, "Applicants") jointly seek approval of a special arrangement under Ohio Adm. Code 4901:1-39-08(B). Approval of this arrangement would permit the Customer to opt-out of paying the Company's Rider DSE2 that recovers from customers the costs associated with compliance with energy efficiency reduction requirements stated in R.C. 4928.66. Approval would also allow the Company to attribute the energy reductions associated with the Customer's projects to the energy efficiency reduction achievements required for Ohio Edison to meet its benchmarks under R.C. 4928.66 that was enacted as part of Sub. S.B. 221 ("S.B. 221").

On August 28, 2009, the Company filed a Memorandum Contra ("Memo Contra") the Office of the Ohio Consumers' Counsel's Motion to Intervene, attacking the OCC's entry into the above-captioned case with regard to the breadth of the criteria that the

PUCO uses to judge motions to intervene. The Company stated that residential customers did not fit those “who may be adversely affected” as stated in R.C. 4903.221(A) and that consideration of the elements stated in R.C. 4903.221(B) reflects unfavorably upon allowing OCC entry in this case. R.C. 4903.221(B) requires the Commission to consider the following criteria in ruling on motions to intervene:

- (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 the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and
- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

OCC meets the requirements stated in R.C. 4903.221, as elaborated upon in OCC’s Motion to Intervene and as further examined in this Reply to Memorandum Contra the Office of the Ohio Consumers Counsel’s Motion to Intervene (“Reply”).

II. ARGUMENT

A. Residential Customers Will Be Adversely Affected By The Outcome Of This Case, Under R.C. 4903.221, If The Special Arrangement Does Not Result In The Energy Savings Claimed By The Applicants.

The Company wrongly argues that residential customers’ rates will not be adversely affected by the outcome of this case because only industrial customers would have to make up for the costs associated with the Customers’ opt-out.¹ But as required under R.C. 4903.221(A), residential customers’ rates may be adversely affected in the

¹ Company’s Memo Contra at 4.

long run if the predicted energy savings are not achieved. The Company is further mistaken in its arguments, because residential customers will, in fact, be economically and physically affected by the results of this case if the energy efficiency savings claimed by the Applicants do not actually result from the proposed special arrangement. R.C. 4928.02(D) clarifies that a goal of S.B. 221 in establishing the benchmarks under R.C. 4928.66 is to:

Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure.

Actually reducing all customers' demand through effective energy efficiency efforts, no matter whether they are industrial, commercial or residential, will provide significant benefits to residential customers. Effective energy efficiency reduces demand for electricity, which will reduce the price for all customers. Effective energy efficiency will replace the need for the generation of electricity, which will reduce the environmental damages caused by electricity generation. These economic and environmental effects of energy efficiency efforts, which are at issue in this case, demonstrate OCC's interest in this case.

B. Residential Customers Meet The Criteria Under R.C. 4903.221(B) That The Commission Must Consider.

- 1. OCC's interests and legal position under R.C. 4903.221(B)(1) and 4903.221(B)(2) are that the energy efficiency benchmarks required under R.C. 4928.66(A)(1)(a) must be actually met and this interest and legal position warrant OCC's intervention in this case.**

OCC's legal position is that the energy efficiency benchmarks established under R.C. 4928.66(A)(1)(a) must be met. Any special arrangements claimed by Applicants to

satisfy a portion of the energy efficiency benchmarks must actually result in the energy savings claimed. OCC has promoted this legal position in numerous proceedings before the Commission because any energy efficiency savings should result in reduced demand, lower rates, and a better physical environment for all customers.

The Company's claim that residential customer rates will not be affected by the outcome of this case² is wrong. If the special arrangement promoted by the Applicants does not result in the energy savings that the Applicants claim, electricity demand will not be reduced to the extent intended and electricity rates will be higher for all customers than if the claimed energy savings were actually effectuated.

2. Due to OCC's concern about residential consumers' benefiting from energy efficiency economic savings and environmental protections intended by the R.C. 4928.66 benchmarks, OCC's intervention is necessary to provide for the full development of the issues in this case as required for intervention under 4903.221(B)(4).

The Company fails to recognize that OCC will have a different role in this case than the Commission, its consultant and the Staff.³ OCC's role in this case will include presenting on behalf of consumers what is the correct methodology to be used and to be relied upon to determine the actual energy savings achieved by the special arrangements. OCC intends to observe and potentially comment on how the Commission, its consultant and the Staff will be determining the actual energy savings resulting from projects. Moreover, OCC is particularly concerned about the amount of information in this case that has been filed with the Commission under seal, considering that regulation is intended as an open transparent process, and believes that without intervention OCC (and

² Company's Memo Contra at 5.

³ Id.

the public) will have no means of determining if the special arrangement will result in the energy savings as intended under law.

OCC may provide suggestions and offer alternatives to the Commission's, the consultant's or the Staff's methodologies and has a right under Ohio law to participate in this way. These special arrangement cases are new for the Commission and all interested parties. This case provides much opportunity for the Applicants, the Commission, the Staff and OCC to learn about existing and potential energy efficiency programs and the challenges and benefits of various approaches to energy efficiency. Allowing OCC to participate will better ensure that the intended demand reduction and environmental benefits of energy efficiency accrue to all customers.

FE wrongly argues that OCC can pursue its interests in the annual reporting process.⁴ The energy reporting process will be an after the fact process and will not provide OCC the opportunity to recommend methods of measurement in energy savings and will not allow OCC to advance its clients' interests in energy efficiency effectiveness in the same way this case will. This case will be the Commission's application of the energy efficiency rules and will involve subtleties not even considered during the rulemaking process. Moreover, the reporting process will not likely identify the presumptions and decisions made by the Applicants, the Commission, the consultant and the Staff. These presumptions and decisions and not the report will have more effect on the actual energy efficiency results of the special arrangement.

⁴ Memo Contra at 5.

3. OCC's intervention will not unduly prolong or delay the proceedings as required under R.C. 4903.221(B)(3).

a. FirstEnergy's argument concerning delay lacks merit.

Because of OCC's expertise in the field of energy efficiency, OCC's discovery will be directed more at the Applicants' application of energy efficiency technology for meeting the requirements of the law, than gaining general knowledge about energy efficiency as it relates to "an energy efficiency project implemented by a large industrial customer."⁵

The Company also complains that the Commission should not permit OCC's intervention because it would set a precedent of allowing OCC's involvement in similar cases.⁶ The Commission has repeatedly stated that it will not grant an intervention to a party concerned with precedent rather than the outcome of the case.⁷ Nor should the Commission deny an intervention on the basis that such intervention would establish precedent. Importantly, FirstEnergy's argument lies outside the bounds of the criteria set out in R.C. 4903.221(B).

The Company unreasonably asserts that OCC's intervention would grind the process to a halt that would unnecessary delay their Customer's opt-out.⁸ OCC looks forward to seeing effective energy efficiency programs implemented and working, and

⁵ Id. at 6.

⁶ Memo Contra at 7.

⁷ *In re Complaint of Dominion Retail v. the FirstEnergy EDUs*, Case No. 00-2526-EL-CSS, Entry at 2 (April 19, 2001).

⁸ Id.

intends to participate without unduly prolonging or delaying the proceeding, per R.C. 4903.221(B)(3).

b. OCC's intervention will more likely prevent undue hardship and unnecessary expense to large industrial and commercial customers.

FirstEnergy argues that OCC's intervention will impose undue hardship and unnecessary expense to large industrial and commercial customers. But OCC's intervention in this case will more likely prevent undue hardship and unnecessary expense to large industrial customers and commercial customers than not permitting intervention would. If OCC is not permitted to provide input into the applications at the beginning, OCC may be required to contest a special arrangement after the arrangement has been implemented and relied upon by a customer for an opt-out. A later contest by OCC would lead to added expenses not expected by the customer on top of requiring the customer to pay Rider DSE2 when the customer had expected that its own energy efficiency efforts would provide an opt-out on the basis of the special arrangement with the Company.

c. FirstEnergy's argument concerning the treatment of confidential information is false and misleading.

FirstEnergy's claim that the Customer's proprietary information will be subject to public disclosure if the OCC is permitted entry into this case is misstated.⁹ Under R.C. 149.43(A)(1)(v), genuinely proprietary information is exempt from public records requests as "[r]ecords the release of which is prohibited by state or federal law."

⁹ Id. at 7-8.

Under R.C. 1333.61, the release of trade secrets is prohibited by state law. Accordingly, any of the Customer's information that qualifies as a trade secret is no more subject to public disclosure under a public records request to OCC than it would be to the Commission itself. The only information filed under seal that may be subject to public disclosure is information that is not genuinely trade secret information.

FirstEnergy mischaracterizes that OCC has "insisted on an exemption from non-disclosure . . . when negotiating confidentiality agreements."¹⁰ FirstEnergy states that OCC has sought exemptions, but the Company has entered into numerous confidentiality agreements with OCC (i.e. after delay) that have successfully dealt with the confidential treatment of information. The basic form of those confidentiality agreements—the same as that successfully entered into with other utilities in a variety of regulated industries—has been evaluated by the PUCO on several occasions. As examples, entries addressing refusals by Duke Energy Ohio and American Electric Power to enter into reasonable protective agreements with OCC both resulted in entries that ordered the release of information pursuant to the terms of protective agreements that are essentially the same as those that have been executed with FirstEnergy in other cases.¹¹

FirstEnergy's argument by innuendo that OCC seeks "exemption" is undocumented by any form of citation or example and must be rejected. OCC's confidentiality agreements provide a process whereby its nondisclosure of claimed

¹⁰ Id. at 8.

¹¹ *In re Duke Energy FPP-SRT Proceeding*, Case Nos. 07-723-EL-UNC, et al., Entry at 4 (October 29, 2007). In a response to an OCC Motion to Compel Discovery, AEP was ordered to release documents to the OCC according to conditions that mirrored the OCC protective agreement form. *In re AEP IGCC Case*, Case No. 05-376-EL-UNC, Entry at 4 (July 21, 2005) ("shall be subject to the protective agreement attached to OCC's motion to compel").

proprietary information be withheld from the public for a period of time that permits a court of competent jurisdiction to determine whether the information is actually a trade secret.¹²

III. CONCLUSION

OCC has demonstrated that it has the authority, jurisdiction, and interest under Ohio law, PUCO rule, and Supreme Court precedent to warrant its intervention in this proceeding. Residential customers should be represented and protected under Ohio law. If neither the Customer nor the Company provides sufficient energy savings, then residential customers will not benefit from the price and environmental benefits expected from a reduction in electricity demand. OCC is uniquely situated to represent the

¹² For example: OCC will give the Company notice if OCC receives a public records request for Protected Materials. The Company will have seven (7) business days after service of OCC's notice to file a pleading before a court of competent jurisdiction to prevent disclosure of the Protected Materials in question. During the same seven business day period, OCC will consider its own independent determination under the Public Records Act as to whether such Protected Materials are "public records" subject to mandatory disclosure under Section 149.43 of the Ohio Revised Code and OCC, in its discretion, may consult with the Company regarding any additional information needed in order to reach that determination. Also during the same seven day period OCC will not disclose or produce the Protected Materials in response to the request. OCC will notify the Company within four business days of service of OCC's notice of OCC's determination whether the Protected Materials are "public records" subject to disclosure or if OCC has independently determined that the Protected Materials are not "public records," so that the Company may avoid filing a pleading before a court of competent jurisdiction. If the Company files such a pleading, OCC will continue to protect the Materials as required by this Agreement pending an order of the court. If the Company does not file at a court of competent jurisdiction within seven (7) business days of service of OCC's notice, then such Protected Materials can be deemed by OCC to be non-confidential, not a trade secret, and not subject to this Agreement. Notice in this provision will be affected in the same manner as the notice in Provision 9 of this Agreement.

Alternatively, the Company may provide notice to OCC that the Protected Materials may be disclosed by the OCC in response to a public records request. Notice to OCC in this Provision 11 will be affected by means of the alternatives set out in Provision 9 of this Agreement regarding notice to the Company.

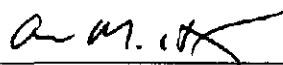
If, under Ohio's public records law, a court awards a relator or person attorney's fees or statutory damages in connection with OCC's non-disclosure or delayed disclosure of Protected Materials, then the Company will pay such awarded fees and/or statutory damages to the relator or person so that the State of Ohio, OCC and OCC's employees and officials are held harmless.

Company's 924,968 residential consumers as their statutory representative in this case.

The Commission should grant OCC's Motion to Intervene.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

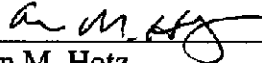


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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Reply* was served on the persons stated below via first class U.S. Mail, postage prepaid, this 8th day of September 2009.



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