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PUCO

In the Matter of the five-Year Review of)
Natural Gas Company Uncollectible Riders.) Case No. 08-1229-GA-COI

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The uncollectible expense (“UEX”) riders were initially authorized by the PUCO in Case No. 03-1127-GA-UNC (“Initial UEX Case”). As part of that authorization, the Commission adopted OCC’s recommendation, and ordered an investigation of the UEX recovery mechanism 60 months after the implementation of its Order.⁴ On November 14, 2008, the docket in this case was opened and based upon the Staff Report and filed comments the PUCO decided to retain a consultant, NorthStar, to review the Companies’ credit and collection policies.

On May 3, 2010, NorthStar concluded its audit, and filed its report (“NorthStar Report”). Certain portions of the NorthStar Report contained confidential materials, and OCC entered Protective Agreements with Duke and Columbia in order to receive the previously redacted materials. Although the PUCO has not established a procedural schedule, OCC has served discovery on Columbia, Dominion, Duke and Vectren which could be used in this proceeding in anticipation of a paper proceeding or an evidentiary hearing.

On July 14, 2010, the Companies filed a Motion to Stay Discovery (“Motion”). It is ironic that, in a case initiated upon the request of OCC to protect consumers, the utilities seek to prevent OCC from conducting discovery in the case that OCC’s recommendations helped to create. OCC hereby files its Memorandum Contra in response to the Companies’ Motion.⁵

⁴ *In re UEX Proceeding*, Case No. 03-1127-GA-UNC, Finding and Order at 13 (December 17, 2003).

⁵ Pursuant to Ohio Adm. Code 4901-1-12(B)(1), the OCC has fifteen (15) days to file its Memo Contra. Because the OCC was served the Motion to Stay Discovery by mail, pursuant to Ohio Adm. Code 4901-1-07(B) an additional three days shall be added to the prescribed period of time.

II. ARGUMENT

A. OCC Has Intervened And Companies Should Respond To OCC's Discovery.

The Companies have argued that because OCC has not intervened in this proceeding, OCC is not a Party and has no right to serve discovery.⁶ This argument ignores the fact that OCC has fully participated in the proceedings, in this case, up to this point without the need to have filed such a motion.⁷ Although the OCC does not concede that a Motion to Intervene is required in order to engage in discovery or any other activities in this proceeding, the OCC did move to intervene on July 30, 2010, and reserved its First Set of Discovery on Columbia, Dominion, Duke and Vectren. Thus, according to the Commission's rules, OCC is now considered a Party for purposes of discovery, and its discovery requests should be answered.⁸

The Companies have argued that in the event OCC moves to intervene, then the Commission should deny OCC's intervention, in order to prevent responding to discovery.⁹ In support of this argument, the Companies cite to the Initial UEX Case, a case in which OCC's intervention was in fact not granted. This argument ignores the fact that the two cases are different cases and have different docket numbers. Moreover, the Initial UEX Case was at a time when the Commission routinely denied OCC's (and others) interventions, unless the case was scheduled for a hearing. Subsequent to the

⁶ Motion at 3.

⁷ See OCC Comments (March 23, 2009) and OCC Reply Comments (April 2, 2009).

⁸ Ohio Adm. Code 4901-1-16(H).

⁹ Motion at 4.

Initial UEX Case, in *OCC v. Pub. Util. Comm.*,¹⁰ OCC challenged the Commission's decision to deny OCC intervention. In the OCC Intervention Appeal, the Supreme Court of Ohio confirmed OCC's right to intervene in PUCO proceedings, in ruling on an appeal in which OCC claimed the PUCO erred by denying its intervention. The Court found that the PUCO abused its discretion in denying OCC's intervention and that OCC should have been granted intervention.¹¹

Since the Court's decision in the OCC Intervention Appeal, OCC's interventions have been routinely granted. OCC's intervention in this case should also be granted.

Moreover, it is noteworthy that two of the individual Companies in this case -- Columbia and Duke -- treated the OCC as a party and entered into protective agreements with the OCC despite the fact that they now claim that OCC is not a party to the case and has no standing.

For all the reasons argued above, OCC should continue to be treated as a Party in this proceeding, and the Companies should be required to respond to OCC's discovery.

B. OCC's Discovery Is Not Premature And The Companies Should Respond To OCC's Discovery.

The Companies have asked the PUCO to stay discovery because the Commission has not established a procedural schedule in this case, and therefore, the Companies argue they should not be required to respond to OCC's discovery requests. The Companies are

¹⁰ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853 (2006) ("OCC Intervention Appeal").

¹¹ *Id.* at ¶13-20 (2006).

mistaken.¹² No such requirement exists in the PUCO's discovery rules. In fact, under the PUCO's rule, "discovery may begin immediately after a proceeding is commenced...."¹³

OCC's right to discovery is assured by law, rule and Supreme Court precedent.¹⁴ OCC is entitled to timely and complete responses to its discovery inquiries. R.C. 4903.082 provides that "[a]ll parties and intervenors shall be granted ample rights of discovery." Therefore, the Commission should deny the Companies' Motion and instruct Columbia, Dominion, Duke and Vectren to respond to OCC's discovery *post haste*.

In the OCC Discovery Appeal, the Supreme Court of Ohio ruled that the PUCO erred in its decision to deny an OCC Motion to Compel.¹⁵ The Court held that the Commission's discovery rule is similar to Civ.R. 26(B)(1), which governs the scope of discovery in civil cases. Civ.R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding. The Court based its decision on Ohio Adm. Code 4901-1-16, Civ.R. 26(B)(1), and R.C. 4903.082 which states "[a]ll parties and intervenors shall be granted ample rights of discovery."¹⁶ Finally, the Court decided that the Commission abused its discretion when it denied OCC discovery; therefore, the Commission should not deny OCC its discovery rights in this proceeding.¹⁷

¹² Motion at 4.

¹³ Ohio Adm. Code 4901-1-17(B).

¹⁴ *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (2006) ("OCC Discover Appeal").

¹⁵ Id. at ¶83. See also, *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661, 635 N.E.2d 331 ("The purpose of Civ.R. 26 is to provide a party with the right to discover all relevant matters, not privileged, that are pertinent to the subject of the pending proceeding").

¹⁶ Id. at ¶82.

¹⁷ Id. at ¶95.

The Companies assert certain Commission precedent in an unreasonable attempt to escape their obligations to respond to OCC discovery.¹⁸ The Companies look to the Duke Merger Case as precedent supporting their argument. However, in making their argument, the Companies failed to note that the Duke Merger Case, which involved the merger of Duke and Cinergy, did not result in the Commission halting discovery because OCC conducted a significant amount of informal discovery that Cinergy responded to.

The Companies argument also ignores that in a merger case the Commission's jurisdiction is significantly limited.¹⁹ Whereas this case involves the Commission's review of the Companies' credit and collection policies that contribute to the recovery of uncollectible expenses through a special collection mechanism -- a mechanism which is highly regulated by the PUCO. Discovery is important and relevant in this case where the Companies credit and collection policies are being evaluated with a goal of minimizing uncollectible expense -- an expense recovered from Columbia's, Dominion's, Duke's and Vectren's residential customers.

The OCC is entitled to discovery within the scope provided by the Commission's rules: "[A]ny party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding."²⁰ The Companies have challenged OCC's right to seek discovery, and have refused to provide information responsive to OCC's discovery inquiries.²¹ The Companies have not moved for a protective

¹⁸ *In re Duke Merger Case*, Case No. 05-732-EL-MER.

¹⁹ R.C. 4905.402(B).

²⁰ Ohio Adm. Code 4901-1-16.

²¹ Motion at 4-5.

order pursuant to Ohio Adm. Code 4901-1-24, and their refusal to respond to OCC's requests is inappropriate.

In addition, in the Initial UEX Case, the Commission ordered the current investigation at OCC's suggestion,²² and placed a duty on the gas companies to provide OCC with credit and collection policies and procedures within 60 days of the Order, to notify OCC about on-going changes in credit and collection policies and procedures, and to work in good faith with OCC to address issues that were raised in the case.²³ Refusing to provide discovery in this proceeding is not working in good faith with OCC, and thus is in violation of the Commission's Finding and Order.²⁴

In addition, the Finding and Order in the instant proceeding provides OCC and other interested participants with the right to examine the Northstar Report's conclusions, results, or recommendations. The Commission stated:

Any conclusions, results, or recommendations formulated by the consultant may be examined by any participant to this proceeding.²⁵

OCC participated in this proceeding with the filing of Initial Comments and Reply Comments.²⁶ Discovery is a necessary part of the analysis that OCC must undertake in order to examine the auditor's findings. Rather than Stay discovery, or continue the unnecessary delay in responding to discovery, the Commission should order the

²² *In re Initial UEX Case*, Case No. 03-1127-GA-UNC, Finding and Order at 15 (December 17, 2003).

²³ *In re Initial UEX Case*, Case No. 03-1127-GA-UNC, Finding and Order at 15 (December 17, 2003).

²⁴ Motion at 1. ("This proceeding is an offshoot of the December 17, 2003 Finding and Order in Case No. 03-1127-GA-UNC * * *.")

²⁵ Finding and Order, at 7.

²⁶ Initial Comments were filed March 23, 2009. Reply Comments were filed April 2, 2009.

Companies to provide an immediate response to OCC's interrogatories and the requests for production of documents.

The Companies argue that OCC believes that it is necessary to audit the auditors.²⁷ To the contrary, OCC merely seeks its rights under law and rule to obtain discovery in this case where the uncollectible expense recovery amounts, pending in other proceedings, are significant, and the Companies' residential customers will ultimately be required to pay the increasing UEX Rider amounts. The Table below provides the current amounts that the Companies are seeking to collect from customers through the 2010 UEX process.

Utilities' Cost Recovery Requested in the 2010 UEX Applications

Company	Case Number	Recovery Amount Proposed in Application to Collect from Customers
Dominion East Ohio	10-319-GA-UEX	\$21,653,713
Columbia Gas of Ohio	10-578-GA-UEX	\$28,476,128
Vectren Energy Delivery	10-320-GA-UEX	\$6,309,765
Duke Energy	10-726-GA-UEX	\$13,665,046

Especially in light of the significant amounts of uncollectible expense that the Companies are trying to collect from customers, OCC has a compelling and imperative reason to review the information the Companies provided NorthStar, as well as, additional information that OCC is seeking through discovery, in order to evaluate whether these four Companies' collection practices and policies are effective in minimizing uncollectible expense for residential consumers.

²⁷ Motion at 2.

In Case No. 09-2011-GA-PIP, where Dominion was seeking to collect \$270 million from customers, Dominion opposed OCC's intervention on the basis that OCC had no real interest in the recovery process for \$270 million in PIPP balances. The Commission's Finding and Order in that case resulted in the Commission granting OCC intervention.²⁸ The Companies should not be permitted an opportunity for unjust and reasonable delay tactics in the instant proceeding, by unreasonably opposing OCC's intervention.

OCC has seen an increasing trend in the efforts of utility companies to circumvent their discovery obligations. Ohio law, the Commission's rules and Supreme Court of Ohio precedent give the Commission more than enough bases in this area to assure that utility companies comply with discovery. Therefore, the Commission should deny the Companies' Motion to Stay Discovery. And it should order the Companies to provide full responses to OCC's interrogatories and provide copies of all documents requested by OCC.

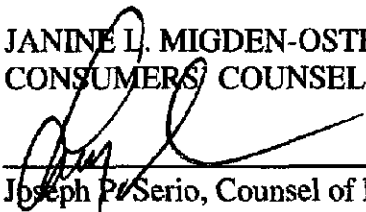
III. CONCLUSION

WHEREFORE, the Motion to Stay OCC's Discovery should be denied, and the Companies should be ordered to respond to OCC's discovery *post haste*.

²⁸ In Re DEO PIPP Case, Case No. 09-2011-GA-PIP, Finding and Order at 2 (March 24, 2010).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum Contra Motion to Stay Discovery* was served by first class United States Mail, postage prepaid, to the persons listed below, on this 2nd day of August 2010.



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