

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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PUCO

REPLY TO UTILITIES' MEMORANDUM CONTRA
OCC'S MOTION TO INTERVENE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION AND STATEMENT OF FACTS

On August 9, 2010, four natural gas utilities jointly filed a Memorandum Contra OCC's Motion to Intervene ("Memo Contra") in this case where the Commission deemed it necessary to retain a consultant to "audit, evaluate, and recommend improvements in the collection policies, practices and performance of the four largest natural gas companies."¹ The Commission is also intending to: "evaluate whether the collection practices and policies are effective in minimizing uncollectible expense [that customers are asked to pay]." The UEX riders were initially authorized by the PUCO in Case No. 03-1127-GA-UNC. As part of that authorization, the Commission ordered an investigation of the UEX recovery mechanism to occur 60 months after the implementation of its Order.² That time has come and on November 14, 2008, the docket in this case was opened and based upon the Staff Report and filed comments the PUCO retained a consultant, NorthStar, to review the credit and collection policies of four

¹ Finding and Order at 6 (August 19, 2009).

² *In re UEX Proceeding*, Case No. 03-1127-GA-UNC, Finding and Order at 13 (December 17, 2003).

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public utilities: Vectren Energy Delivery of Ohio, Inc. (“Vectren”), Dominion East Ohio Gas Company (“Dominion”), Duke Energy Ohio, Inc. (“Duke”), and Columbia Gas of Ohio, Inc. (“Columbia”) (or collectively “Companies”).

On May 3, 2010, NorthStar concluded its audit, and filed its report (“NorthStar Report”). Certain portions of the NorthStar Report contained materials claimed to be confidential, and OCC entered Protective Agreements with Duke and Columbia in order to receive the redacted materials, although the OCC also filed a Memorandum Contra the requests for a protective order.

Although the PUCO has not yet established a procedural schedule, in anticipation OCC has served discovery on Columbia, Dominion, Duke and Vectren. On July 14, 2010, the Companies filed a Motion to Stay Discovery (“Motion”), and in part supported their argument for the Motion because OCC has not yet intervened in the case. OCC has fully participated in the proceedings up to this point without intervention, and for that reason did not concede that a Motion to Intervene is required in order to engage in discovery or other activities in this proceeding and therefore disagrees with the Companies’ argument that intervention is required.³ Moreover, the PUCO has not issued an Entry stating that intervention was required in order to participate. Nonetheless, to remove as an issue the Companies’ assertion about OCC’s intervention status, and in an attempt to alleviate the discovery dispute, on July 30, 2010, OCC moved to intervene and re-served its First Sets of Discovery to the Companies.⁴

³ See OCC Comments (March 23, 2009) and OCC Reply Comments (April 2, 2009).

⁴ OCC does not concede there is a need for it to re-serve its discovery already sent.

On August 9, 2010, the Companies filed their Memorandum Contra to OCC's Motion to Intervene ("Memo Contra"). OCC hereby replies to the Companies' Memo Contra.⁵

II. ARGUMENT

A. OCC's Motion To Intervene Should Be Granted.

The Companies argue that the Supreme Court precedent cited by the OCC can be distinguished.⁶ Additionally, the Companies argue that agreeing to a protective agreement does not bolster OCC's claimed right to intervene.⁷ In reality, the Companies are merely using these arguments against intervention as a smokescreen to avoid responding to OCC's discovery.

Most importantly, the General Assembly determined in R.C. 4903.221 that intervention should be allowed in PUCO proceedings when the statutory criteria are met, as OCC has done in this case. Moreover, the Supreme Court of Ohio in *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 384, 388 determined that intervention should be liberally granted, in finding error with a PUCO decision to the contrary.

The Companies' argue against the Supreme Court of Ohio precedent that OCC relies upon in support for its Motion to Intervene. The Companies' suggest that the underlying PUCO case OCC appealed was decided in the context of a formal

⁵ Pursuant to Ohio Adm. Code 4901-1-12(B)(2), the OCC has seven (7) days to file its Memo Contra. Because the Commission has not issued an Entry authorizing electronic service, and because the OCC was served the Memo Contra by mail, pursuant to Ohio Adm. Code 4901-1-07(B) an additional three days shall be added to the prescribed period of time.

⁶ Memo Contra at 4.

⁷ Memo Contra at 4.

Commission adjudication of utility deferral requests.⁸ And the Companies assert that the Commission has not indicated whether there will be any formal adjudication (or informal adjudication for that matter).⁹ The Companies' arguments ring hollow.

First, 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.¹⁰ The Companies even admit that the Court determined that R.C. 4903.221 should be liberally construed to permit intervention.¹¹ Yet the Companies try to distinguish this precedent by tightening the intervention standards.

Second, through their efforts to distinguish *Ohio Consumers' Counsel*, the Companies attempt to add requirements to the intervention statute that do not exist. The Companies' argue that OCC's Motion to Intervene should be denied due to the absence of the Commission to state an intention to adjudicate the issues in this case.¹² The intervention statute, R.C. 4903.221(B) requires the PUCO to consider the following -- and only 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;

⁸ Memo Contra at 4.

⁹ Memo Contra at 4.

¹⁰ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶13-20 (2006).

¹¹ Memo Contra at 4.

¹² Memo Contra at 4.

- (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.

The Companies argument places an additional and unreasonable intervention standard on OCC -- a standard that does not appear in R.C. 4903.221(B) and thus should be rejected. The Court stated -- and the Companies admitted¹³ -- that the intervention statute should be liberally construed; however, the Companies are attempting to make the criteria more restrictive by adding criteria that do not exist in R.C. 4903.221. The Commission should disregard the Companies' arguments and grant OCC's Motion to Intervene.

Finally, the Companies argue that intervention should be denied because this case has not been set for hearing. *Ohio Consumers' Counsel* confirmed OCC's right to intervene in PUCO proceedings even if a hearing was not scheduled. The Court held:

Even if no hearing was scheduled or contemplated when the Consumers' Counsel sought to intervene, her motions and accompanying memoranda properly addressed the relevant criteria of R.C. 4903.221. In our view, whether or not a hearing is held, intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO. The Consumers' Counsel explained her interest in the cases in her motions to intervene and also explained that her views would not be adequately represented by the existing parties. In the absence of some evidence in the record calling those claims into doubt or showing that intervention would unduly prolong or delay the proceedings, intervention should have been granted.¹⁴

Therefore, in this case, the Commission should follow Ohio law and the Court's determination that the Commission should liberally construe the rules in favor of

¹³ Memo Contra at 4.

¹⁴ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶20 (2006).

intervention, and grant OCC's intervention.

In addition, the Companies argue that the Commission has not invited comments to these reports, and it has not directed the Staff to make any recommendations.¹⁵

However, in the Finding and Order, in the instant proceeding, the Commission 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.¹⁶

The Commission's Finding and Order clearly contemplates that there will be activity in this docket giving interested participants the right to share with the Commission the results of any examinations. OCC should be granted intervention so that it can further participate, through discovery, in order to examine the auditor's conclusions, results and recommendations. The Commission should therefore, grant OCC's Motion to Intervene.

The Companies further argue against OCC's Motion to Intervene because the Commission has not established a procedural schedule, let alone set a hearing date, in this case.¹⁷ Again, there is no standard or requirement that intervention should only be granted in cases where a procedural schedule or a hearing date has already been established. In addition, there are PUCO cases in which, despite the lack of a procedural schedule or a hearing date, OCC has been granted intervention. In Case No. 09-2011-GA-PIP, where Dominion was seeking to collect \$270 million from customers, Dominion

¹⁵ Memo Contra at 4.

¹⁶ Finding and Order at 7.

¹⁷ Memo Contra at 5.

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.¹⁸

Furthermore, in Case No. 10-105-GA-GPS, OCC moved to intervene in a Dominion gas pipeline safety case. Staff and Dominion both argued against OCC's intervention.¹⁹ Despite the fact that the Commission did not set the matter for hearing or establish a procedural schedule, OCC's Motion to Intervene was granted.²⁰

The Companies argue that agreeing to a protective agreement does not make OCC a party nor bolster OCC's claimed right to intervene.²¹ But if the Companies did not believe OCC had already achieved party status or could through intervention achieve Party status, Duke and Columbia never would have agreed to allow OCC to see the protected information.

The Companies argue that OCC's true motive is to audit the auditors.²² To the contrary, OCC merely seeks its rights under law and rule to obtain discovery in this case where the uncollectible expense amounts, pending in other proceedings, are significant, and the Companies' residential customers will ultimately be asked to pay the increasing UEX Rider amounts. The Table below provides the current amounts that the Companies

¹⁸ In Re DEO PIPP Case, Case No. 09-2011-GA-PIP, Finding and Order at 2 (March 24, 2010).

¹⁹ *In re Dominion Gas Pipeline Safety Case*, Case No. 10-105-GA-GPS, Staff Memo Contra OCC Motion to Intervene (March 12, 2010), see also Dominion Memo Contra OCC Motion to Intervene (March 11, 2010).

²⁰ *In re Dominion Gas Pipeline Safety Case*, Case No. 10-105-GA-GPS, Finding and Order at 7 (May 26, 2010).

²¹ Memo Contra at 6.

²² Memo Contra at 6.

are seeking to collect from customers through the 2010 UEX process, and demonstrates the importance of this issue.

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

In light of the significant amounts of uncollectible expense that the Companies are trying to collect from customers and how the Companies' collection practices affect such expenses, OCC has a compelling and imperative reason to intervene in this proceeding. Here, OCC has the right 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.

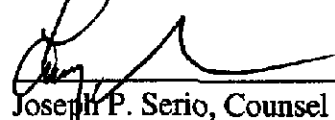
For all the reasons discussed above, the Commission should grant OCC's Motion to Intervene.

III. CONCLUSION

For all the reasons stated above, OCC's Motion to Intervene should be granted. The Companies should be rejected in their efforts to foreclose OCC from intervening in this case on behalf of consumers and from scrutinizing the auditor's report toward advocating in the public interest.

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CERTIFICATE OF SERVICE

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