

FILE

15

RECEIVED-DOCKETING DIV

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

2010 DEC -3 PM 4:22

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

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

JANINE L. MIGDEN-OSTRANDER
OHIO CONSUMERS' COUNSEL

Joseph P. Serio, Counsel of Record
Larry S. Sauer
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 – Telephone
serio@occ.state.oh.us
sauer@occ.state.oh.us

December 3, 2010

This is to certify that the images appearing are an
accurate and complete reproduction of a case file
document delivered in the regular course of business.
Technician Date Processed 12/3/10

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

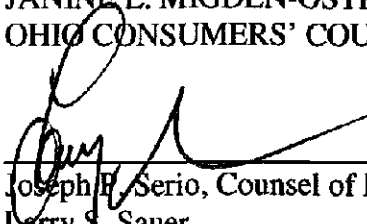
The Office of the Ohio Consumers' Counsel ("OCC") applies for rehearing of the November 3, 2010 Entry ("Entry") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). Through this Application for Rehearing, OCC seeks to protect all the residential utility customers of Columbia Gas of Ohio, Inc. ("Columbia"), The East Ohio Gas Company d/b/a Dominion East Ohio ("Dominion"), Duke Energy Ohio, Inc. ("Duke") and Vectren Energy Delivery of Ohio, Inc. ("Vectren") (collectively referred to as "Companies") from the PUCO decision which has unreasonably and unlawfully limited OCC's ability to participate in this proceeding and to represent residential customers to the extent that the law allows.

- A. The Commission erred by failing to grant OCC's pending Motion to Intervene pursuant to R.C. 4903.221; and
- B. The Commission erred by failing to grant OCC's pending Motion to Compel Discovery pursuant to R.C. 4903.082 and Ohio Adm. Code 4901-1-16.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and the OCC claims of error, the PUCO should grant rehearing.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
OHIO CONSUMERS' COUNSEL



Joseph R. Serio, Counsel of Record
Larry S. Sauer
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 – Telephone
serio@occ.state.oh.us
sauer@occ.state.oh.us

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. PROCEDURAL HISTORY	1
III. STANDARD OF REVIEW	3
IV. ARGUMENT.....	4
A. The Commission erred by failing to grant OCC's pending Motion to Intervene pursuant to R.C. 4903.221; and	5
B. The Commission erred by failing to grant OCC's pending Motion to Compel Discovery pursuant to R.C. 4903.082 and Ohio Adm. Code 4901-1-16.....	6
V. CONCLUSION.....	9

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

1

natural gas companies' collection policies, practices, and performance; and recommend "best practices" to be employed by natural gas companies in the state of Ohio to minimize uncollectible expense."²

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 ordered an investigation of the UEX recovery mechanism 60 months after the implementation of its Order, at OCC's suggestion.³ On November 14, 2008, the Commission opened the docket in this case and upon consideration of the Staff Report and comments filed by interested parties, 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 allegedly contained confidential materials, and OCC entered Protective Agreements with Duke and Columbia in order to receive the previously redacted materials. At the time the NorthStar Report was filed, OCC served discovery on Columbia, Dominion, Duke and Vectren in anticipation of further proceedings including an evidentiary hearing or Commission-solicited comments from interested parties⁴ to create a record pursuant to R.C. 4903.09.

On May 3, 2010, Columbia and Duke filed motions for a protective order regarding certain information contained in the audit report, pursuant to Ohio Adm. Code 4901-1-24. On May 21, 2010, OCC filed a memorandum contra the motions for protective order filed by Columbia and Duke.

² Finding and Order at 6 (August 19, 2009).

³ *In re UEX Proceeding*, Case No. 03-1127-GA-UNC, Finding and Order at 13 (December 17, 2003).

⁴ See Entry at 4.

On July 14, 2010, the Companies filed a Motion to Stay Discovery ("Motion"). On August 2, 2010, OCC filed its Memorandum Contra in response to Companies' Motion. On August 9, 2010 the Companies filed their Reply.

On July 30, 2010, OCC moved to intervene. On that same date, OCC re-served its First Set of Discovery on Columbia, Duke, Vectren and Dominion. On August 9, 2010, the Gas Companies filed their Memorandum Contra to OCC's Motion to Intervene. On August 16, 2010, OCC filed its Reply.

On August 31, 2010, OCC filed its Motion to Compel. The Memorandum Contra Motion to Compel was filed by the Companies on September 9, 2010, and OCC's Reply was filed on September 20, 2010.

The OCC Motion to Intervene and Motion to Compel were not acted on by the Commission in the Entry.

III. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty (30) days after issuance of an order from the Commission, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."⁵ Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."⁶

⁵ R.C. 4903.10.

⁶ *Id.*

In considering an application for rehearing, Ohio law provides that the Commission “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear.”⁷ Furthermore, if the Commission grants a rehearing and determines that “the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same * * *.”⁸

OCC meets the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10. Accordingly, OCC respectfully requests that the Commission grant rehearing on the matters specified below.

IV. ARGUMENT

Between the date the NorthStar Report was filed (May 3, 2010) and the date of the Commission’s Entry (November 3, 2010), six months have passed. During that six-month period OCC filed a timely Motion to Intervene and propounded discovery on the Companies. The Companies opposed OCC’s intervention and sought to prevent OCC from conducting discovery. The Commission’s Entry failed to resolve the existing deadlock.

The Entry did establish a procedural schedule, with Comments due January 14, 2011,⁹ and Reply Comments due February 11, 2011.¹⁰ However, by failing to address the pending intervention and discovery disputes, the Commission is restricting the information that OCC has at its disposal for preparing Comments and Reply Comments.

⁷ *Id.*

⁸ *Id.*

⁹ Entry at 4.

¹⁰ Entry at 4.

A. The Commission erred by failing to grant OCC's pending Motion to Intervene pursuant to R.C. 4903.221.

OCC filed its Motion to Intervene on July 30, 2010, and the pleading cycle pertaining to the Companies' opposition to OCC's intervention was completed on August 16, 2010. The Commission; therefore, had significant and sufficient time to consider OCC's Motion to Intervene and the Companies opposition thereto prior to issuing its Entry on November 3, 2010. However, the Commission opted to disregard the pending pleadings and deny the OCC the opportunity to make a record by leaving the OCC's Motion to Intervene in legal limbo. .

OCC's Motion to Intervene had properly addressed the relevant criteria of R.C. 4903.221.¹¹ The Companies argued in opposition the following:

Here, the Commission has not indicated whether there will be any formal adjudication (or informal adjudication for that matter). (See Finding and Order, Aug. 19, 2009, p. 7; Entry, Sept. 30, 2009, pp. 1-2.). The Commission opened this docket for the purpose of receiving the consultant's reports. The Commission has not invited comments to these reports, and it has not directed Staff to make any recommendations. The Commission may ultimately decide to do nothing and simply close this docket, reserving the right to consider NorthStar's recommendations in the context of future UEX filings by each LDC.¹²

The Entry establishes that the Commission decided that this docket was opened for a purpose beyond just accepting the consultant's report, in as much, as the Commission has set a procedural schedule for Comments and/or Reply Comments. The Companies argument against the OCC intervention was mooted by the Entry and OCC's intervention should have been granted.

¹¹ OCC Motion to Intervene at 2-3 (July 30, 2010).

¹² Companies Memorandum Contra OCC Motion to Intervene at 4-5 (August 9, 2010).

The precedent of the Supreme Court of Ohio is that the Commission should grant interventions liberally. The Court has held, in an appeal, that the PUCO erred by refusing to let the Consumers' Counsel intervene in the proceedings before the Commission. The Supreme Court of Ohio stated:

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.¹³

Having established a real and substantial interest in the proceedings, the Commission should have granted OCC's Motion to Intervene in this proceeding. The Commission erred by failing to grant OCC's Motion to Intervene, and the Commission should therefore grant rehearing on this issue.

B. The Commission erred by failing to grant OCC's pending Motion to Compel Discovery pursuant to R.C. 4903.082 and Ohio Adm. Code 4901-1-16.

OCC filed its Motion to Compel Discovery on August 31, 2010, and the pleading cycle pertaining to the Companies' opposition to OCC's intervention was completed on September 20, 2010. The Commission; therefore, had significant time to consider OCC's Motion to Compel and the Companies' opposition thereto prior to issuing its Entry on November 3, 2010. However, the Commission opted to disregard the pending pleadings

¹³ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶13-20 (2006); See also OCC Motion to Intervene at 4 (July 30, 2010)..

and did not rule on OCC's Motion to Compel. The Commission erred by failing to grant OCC's Motion to Compel.

OCC initially propounded discovery on the Companies between June 24, 2010 and June 29, 2010. OCC's is merely exercising its rights under law and rule, to obtain discovery in this case.¹⁴ The information OCC seeks is "relevant" to the case, per Ohio Adm. Code 4901-1-23(C)(1)(b), and pertinent to the subject of the pending proceedings. Specifically, the discovery is directly on-point with the issues in this case that relate to the Companies' credit and collection policies and procedures. As can be seen from the most recent UEX recovery cases, the uncollectible expense recovery amounts pending are significant, and the Companies' residential customers will ultimately be required to pay the increasing UEX Rider amounts.¹⁵

In the Initial UEX Case, the Commission ordered the current investigation at OCC's suggestion,¹⁶ 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 ongoing 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.**¹⁷ Now that the anticipated five-year review is ongoing the Commission should welcome OCC's participation in the investigation which OCC had suggested. Instead the Companies have opposed OCC's efforts to obtain discovery in this proceeding, and the Commission has erred by failing to grant OCC's Motion to Compel Discovery.

¹⁴ R.C. 4903.082 and Ohio Adm. Code 4901-1-16.

¹⁵ OCC Motion to Compel at 6 (August 31, 2010).

¹⁶ *In re Initial UEX Case*, Case No. 03-1127-GA-UNC, Finding and Order at 15 (December 17, 2003).

¹⁷ *Id.* (emphasis added).

In addition, the Finding and Order in the instant proceeding provided 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.¹⁸

OCC participated in this proceeding with the filing of Initial Comments and Reply Comments.¹⁹ Discovery is a necessary part of the analysis that OCC must undertake in order to examine the auditor's findings. Therefore, the Commission should have granted OCC's Motion to Compel Discovery and required the Companies to provide an immediate response to OCC's interrogatories and the requests for production of documents, consistent with its earlier Finding and Order.

The Supreme Court of Ohio confirmed OCC's basic right to conduct discovery in *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, when it ruled that the PUCO erred in its decision to deny an OCC Motion to Compel.²⁰ 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.

¹⁸ Finding and Order at 7 (August 19, 2009).

¹⁹ Initial Comments were filed March 23, 2009. Reply Comments were filed April 2, 2009.

²⁰ *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, ¶83 (2006). 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").

26(B)(1), and R.C. 4903.082 which states “[a]ll parties and intervenors shall be granted ample rights of discovery.”²¹

In this proceeding, the Commission erred by issuing an Entry establishing a procedural schedule that contemplates interested parties filing Comments and/or Reply Comments, and in the same Entry the Commission’s inaction limits the information OCC will have at its disposal for participation in the proceedings. The effect of the Commission’s Entry is that justice delayed is justice denied because OCC will be precluded from raising issues in its Comments due to the denial of routine discovery rights. The Commission erred by failing to grant OCC’s Motion to Compel, and the Commission should; therefore, grant rehearing on this issue.

V. CONCLUSION

For all the reasons discussed above, the Commission should grant a rehearing. The Commission erred by failing to grant OCC’s Motion to Intervene and Motion to Compel.

²¹ Id. at ¶82.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
OHIO CONSUMERS' COUNSEL

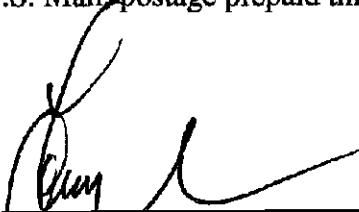


Joseph P. Serio, Counsel of Record
Larry S. Sauer
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 – Telephone
serio@occ.state.oh.us
sauer@occ.state.oh.us

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
Application for Rehearing by the Office of the Ohio Consumers' Counsel has been served
upon the below-named counsel via regular U.S. Mail, postage prepaid this 3rd day of
December 2010.



Larry S. Sauer
Assistant Consumers' Counsel

PARTIES

Brook E. Leslie
Stephen B. Seiple
Columbia Gas of Ohio Inc.
200 Civic Center Drive, P.O Box 117
Columbus, Ohio 43216-0117
bleslie@nisource.com
sseiple@nisource.com

Andrew J. Sonderman
Weltman, Weinberg & Reis Co. LPA
175 South 3rd Street
Suite 900
Columbus, Ohio 43215
asonderman@weltman.com

Mark A. Whitt
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North high Street
Columbus, Ohio 43215
whit@carpenterlipps.com

Amy B. Spiller
Elizabeth Watts
Duke Energy of Ohio, Inc.
139 East Fourth Street, 25 Atrium II
Cincinnati, Ohio 45202
amy.spiller@duke-energy.com
elizabeth.watts@duke-energy.com

William L. Wright
Public Utilities Commission of Ohio
180 East Broad Street
6th Floor
Columbus, Ohio 43215
william.wright@puc.st.oh.us

M. Howard Petricoff
Vorys Sater Seymour & Pease
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216
mhpetricoff@vorys.com