

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Five-Year Review of )  
Natural Gas Company Uncollectible )  
Riders. )**

**Case No. 08-1229-GA-COI**

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

Pursuant to Rule 4901-1-35(B), Ohio Administrative Code ("O.A.C."), Columbia Gas of Ohio, Inc. ("Columbia"), The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO"), Vectren Energy Delivery of Ohio, Inc. ("VEDO") and Duke Energy Ohio, Inc. ("DE-Ohio") (collectively, the "LDCs") jointly respond to the Application for Rehearing filed by the Office of the Ohio Consumers' Counsel ("OCC") on November 3, 2010. For the reasons set forth below, OCC's Application for Rehearing should be denied.

**I. INTRODUCTION**

On August 19, 2009, the Commission ordered an RFP to select a consultant to evaluate the LDCs' collection practices and policies. On September 30, 2009, the Commission selected NorthStar Consulting Group ("NorthStar") to conduct the audit. NorthStar filed its audit reports in this proceeding on May 3, 2010, as revised on May 7, 2010. Columbia and DE-Ohio filed Motions for Protective Orders to protection from public disclosure confidential information contained in NorthStar's audit reports.

After receiving interrogatories and requests for production from OCC, on July 14, 2010, the LDCs filed a Motion to Stay Discovery in this proceeding. In their Motion, the LDCs explained that OCC was not entitled to discovery unless it intervened in this proceeding. Motion to Stay Discovery (July 14, 2010) at 3-4. OCC then filed its Motion to Intervene on July 30,

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2010 to “remove the Companies’ argument in their Motion to Stay Discovery that they need not respond to OCC’s discovery in absence of intervention.” Motion to Compel at 2. The LDCs filed a Memorandum Contra to OCC’s Motion to Intervene and Reply Memorandum in Support of their Motion to Stay Discovery on August 9, 2010. On August 16, 2010, OCC filed its Reply to the LDCs Memorandum Contra to its Motion to Intervene.

On August 31, 2010, OCC filed a Motion to Compel Production of Documents. In its Motion, OCC argued that “OCC’s right to discovery is assured by law, rule and Supreme Court precedent.” Motion to Compel at 3. In response, the LDCs filed a Memorandum Contra OCC’s Motion to Compel Production of Documents on September 9, 2010, citing similar arguments in both their Motion to Stay Discovery and Memorandum Contra to OCC’s Motion to Intervene.

On November 3, 2010, the Commission ruled solely upon Columbia and Duke’s Motions for Protective Orders. In its Entry, the Commission denied the Motions for Protective Orders, finding that the audit reports did not contain trade secret information. Entry (November 3, 2010) at Finding 1. The Commission then ordered its docketing division to release the unredacted pages of the audit report, and invited comments on the audit report to be filed on January 14, 2011 and February 11, 2011. *Id.* at Findings 11, 12. On December 3, 2010, OCC filed an Application for Rehearing claiming the Commission’s Entry was in error because it failed to grant OCC’s pending Motion to Intervene and Motion to Compel Discovery.

OCC’s Application for Rehearing should be denied because the Commission cannot rehear an issue it did not determine in the original entry. OCC’s Application for Rehearing is premature pursuant to the Commission’s rules because it requests rehearing on a matter not determined in the November 3, 2010 Entry. The Commission further has wide discretion concerning the procedural manner in which it conducts its proceedings. Contrary to the OCC’s

apparent expectations, the Commission is not required to rule upon motions by a certain deadline. Finally, even if the Commission grants OCC's Application for Rehearing, it should deny OCC's Motion to Intervene and Motion to Compel. OCC's intervention in this proceeding is not required to protect its interests, and discovery is not necessary. Therefore, OCC's Application for Rehearing should be denied.

## II. ARGUMENT

### A. The Commission Should Not Prematurely Rehear An Issue It Did Not Determine In The November 3, 2010 Entry.

An application for rehearing is intended to provide an aggrieved party an opportunity to appeal any matter decided in a contested proceeding. OCC's Application requests Commission review of a matter *not determined* in its November 3, 2010 Entry. OCC's request contravenes Ohio law establishing the procedure to apply for rehearing. Pursuant to R.C. § 4903.10, "any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters *determined* in the proceeding." R.C. § 4903.10 (emphasis added). The Commission has held that an application for rehearing is not premature only "with respect to any manner *determined* after an order has been made." *Youngstown Thermal, LP v. Ohio Edison*, Case No. 93-1408-EL-CSS, 1994 Ohio PUC LEXIS 283, Entry on Rehearing (April 7, 1994) at \*8 (emphasis added).

The Commission has previously denied OCC's premature application for rehearing. In Case 05-039-GA-ORD, the Commission received comments regarding the Staff's proposed changes to include reverse migration riders in the Commission's Rules. *In the Matter of the Commission's Review of Certain Uniform Purchased Gas Adjustment Rules in Chapter 4901:1-14, Ohio Administrative Code, Concerning the Reverse Migration Rider*, Case No. 05-039-GA-ORD, Entry (January 19, 2005) at Findings 2, 3. On February 18, 2005, OCC filed an

Application for Rehearing with the Commission alleging its January 19, 2005 Entry was unlawful and unreasonable because the Commission did not consider eliminating the transition rider in conjunction with this proceeding. *Id.*, Application for Rehearing (February 18, 2005) at 1.

In response to OCC's application, the Commission, quoting R.C. § 4903.10, stated that "After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters *determined* in said proceeding." *Id.*, Entry on Rehearing (March 9, 2005) at Finding 3 (emphasis in original). A party may apply for rehearing "within thirty days after the entry of any *final order* upon the journal of the commission...." *Id.* (emphasis in original). The Commission then explained that R.C. § 4903.10 contemplates that a party seeks rehearing of matters actually determined in the proceeding. *Id.* at Finding 4. The Commission concluded that "The entry complained of does not determine the disposition of any matter in this case. Therefore, under the first paragraph of Section 4903.10, Revised Code, OCC's application for hearing seeks rehearing of a non-determinative entry and should be denied." *Id.*

After denying the application for attempting to rehear a non-determinative entry, the Commission then held the application also attempted to rehear a non-final order. *Id.* at Finding 5. According to the Commission, the second paragraph of R.C. § 4903.10 "permits the filing of an application for rehearing for final orders issued by the Commission." *Id.* Contrary to the statute, OCC complained of an entry that was "not a final order in the rule making process." *Id.* Therefore, the Commission found OCC's application for rehearing premature and denied it. *Id.*

In this case, the Commission did not deny or grant OCC's motions in its November 3, 2010 Entry. Instead, the Commission's Entry simply did not address the matter OCC contends

should be addressed. Similar to Case 05-039-GA-ORD, OCC is requesting the Commission to modify an entry to include matters OCC wanted the Commission to originally consider. But, as the Commission has explained, the Commission cannot entertain applications for rehearing on matters not determined in a final order. Therefore, because the Commission did not enter a ruling upon OCC's motions, the Commission should not grant OCC's premature Application for Rehearing.

**B. The Commission Has Wide Discretion To Control The Mode And Manner Of Its Proceedings, Including When It Will Rule Upon Motions.**

The Supreme Court of Ohio has recognized that, "It is well-settled that pursuant to R.C. 4901.13, the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort." *Toledo Coal. for Safe Energy v. Pub. Util. Comm'n*, 69 Ohio St. 2d 559, 560 (1982) (citing *Sanders Transfer, Inc. v. Pub. Util. Comm'n*, 58 Ohio St. 2d 21 (1979); *Consumers' Counsel v. Pub. Util. Comm'n*, 56 Ohio St. 2d 220 (1978)). This discretionary power extends to "permit or deny intervention in its proceedings." *Id.* (citing *Consumers' Counsel v. Pub. Util. Comm'n*, 56 Ohio St. 2d 220 (1978); *Dworken v. Pub. Util. Comm'n*, 133 Ohio St. 208 (1938)). Thus, "The wide discretion of the commission over its order of business has been long recognized by this court." *Consumers' Counsel v. Pub. Util. Comm'n*, 56 Ohio St. 2d 220, 227 (1978) (citing *State, ex rel. Columbus Gas & Fuel Co. v. Pub. Util. Comm'n*, 122 Ohio St. 473, 475 (1930)).

The Commission, under R.C. § 4901.13, may adopt its own rules regulating the mode and manner of its proceedings. *Id.* at 227-8. The Commission's rules do not limit or require Commission action upon motions to intervene or motions to compel discovery within a certain timeframe. See R.C. §§ 4903.082, 4903.221; O.A.C. Chapter 4901-1. Unlike an application for

rehearing, which under Commission Rule 4901-1-35(B) is denied if the Commission does not rule on the Application within 30 days, the Commission's rules regarding motions to intervene and motions to compel do not have a deadline for Commission action.

In its Application, OCC fails to cite any Ohio law that compels the Commission to act upon OCC's Motions within a certain timeframe. Instead, OCC simply alleges the Commission erred by failing to rule on its Motions pursuant to R.C. § 4903.221, R.C. § 4903.082, and O.A.C. 4901-1-16. However, all of the cited statutes and rules are *silent* concerning the timeframe upon which the Commission should rule on a motion. The sections instead provide for Commission discretion in granting intervention and discovery. R.C. § 4903.221 states that a party "*may* intervene in such proceeding," and that the Commission "*may*, in its discretion, grant motions to intervene which are filed [within four days or less prior to a scheduled hearing]." R.C. § 4903.221 (emphasis added). R.C. § 4903.082, solely outlining a right to discovery, is silent concerning motions to compel, and further provides that "Without limiting the commission's *discretion* the Rules of Civil Procedure should be used whenever practicable." R.C. § 4903.082 (emphasis added). O.A.C. 4901-1-16 provides that any party "*may* obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding."

Here, in exercising its discretion, the Commission chose not to rule on OCC's Motion to Intervene and Motion to Compel, and the LDCs' Motion to Stay Discovery. Instead, the Commission's November 3, 2010 Entry did not discuss any Motions and Memoranda Contra filed by OCC or the LDCs. Ohio law and the Commission's rules do not pigeonhole the Commission into a specific timetable, including the timetable advocated by OCC. Therefore, because the Commission possesses discretion as to the mode and manner of its proceedings, the

Commission should deny OCC's Application for Rehearing, and rule upon OCC's Motions when, in its discretion, the Commission chooses to do so.

**C. Even If The Commission Grants The Application for Rehearing, OCC's Motions Should Be Denied Because OCC's Interests Are Being Adequately Represented And Discovery Is Not Warranted In This Proceeding.**

The LDCs, in their multiple filings in this proceeding, explained why OCC should not be permitted to conduct discovery in this proceeding. See LDCs' Motion to Stay Discovery (July 14, 2010), Memorandum Contra to OCC's Motion to Intervene and Reply Memorandum in Support of Motion to Stay Discovery (August 9, 2010), and Memorandum Contra to OCC's Motion to Compel Discovery (September 9, 2010). Though the LDCs do not wish to rehash their arguments presented in prior filings, the LDCs have established that discovery and OCC's intervention in this proceeding is not needed or warranted. OCC has participated in this proceeding by filing comments and reply comments in the docket. Further, OCC's need to discover more information is not necessary since the Commission has not decided to open the proceeding "for a purpose beyond just accepting the consultant's report." Application for Rehearing at 5. The Commission, in its November 3, 2010 Entry, found it appropriate to allow interested persons to file comments on NorthStar's audit report. Entry at Finding 13. This statement does not necessarily imply that the Commission will conduct future proceedings in this docket.

**1. The Commission Should Deny OCC's Intervention Because OCC's Filings In This Uncontested Proceeding Have Been Considered By The Commission.**

Intervention is reserved for nonparties who may be adversely affected by a Commission Order and whose views would not be adequately represented by the existing parties. See R.C. § 4903.211; *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 3000, 2006-Ohio-5789, 856 N.E.2d 213, at ¶ 20. As evidenced by the record in this proceeding, the Commission

has recognized OCC's interest, and has taken into consideration OCC's comments filed on March 23, 2009 and April 2, 2009.

To support its intervention, OCC relies upon *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 2006-Ohio-5789, 856 N.E.2d 213. Application for Rehearing at 6. OCC's reliance, however, is misplaced. In *Consumers' Counsel*, OCC attempted to intervene in two contested proceedings considering FirstEnergy Corporation utilities' and Dayton Power and Light Company's applications to defer certain administrative costs resulting from membership in regional transmission organizations. *Id.* at ¶ 1. As quoted by OCC in its Application for Rehearing, the Court indicated that intervention ought to be liberally allowed; however, the Court continued by stating intervention should be allowed when the intervening party's "views would not be adequately represented by the existing parties." *Id.* at ¶ 20. See OCC Application for Rehearing at 6. Examining the parties to the FirstEnergy and Dayton Power and Light proceedings, the Court held that the PUCO abused its discretion denying OCC's motion to intervene because OCC's "interests were not represented by any other party to the proceedings." *Consumers' Counsel*, 111 Ohio St. 3d at ¶ 18. Nonetheless, the Court held,

Even so, the two causes need not be remanded to the PUCO so that the Consumers' Counsel can intervene, because, according to the PUCO's orders in both cases, the PUCO took the Consumers' Counsels' filings into consideration when it made its decision. Because the PUCO concluded in both cases that no hearing was needed on the electric companies' requests for accounting changes, and because the PUCO considered all the documents presented to it by the parties and all prospective intervenors, the Consumers' Counsel's status as a nonparty had no discernable adverse effect on her efforts to advocate for a particular outcome in the two proceedings.

*Id.* at ¶ 21. The Court then affirmed the Commission's orders in both cases because OCC had not been prejudiced by the Commission's decision to deny intervention. *Id.* at ¶ 47.



Here, OCC's comments and reply comments will be taken into consideration by the Commission when it makes a final entry in this proceeding. In its Motion to intervene, OCC conceded it had "fully participated in the proceedings up to this point." Motion to Intervene at 1. Similar to *Consumers' Counsel*, OCC's interests are being adequately represented in this proceeding, especially since the Attorney Examiner granted OCC's Motion to file its Comments out of time and extend the deadline to reply. See Entry (March 23, 2003) at Findings 5, 7. In response to the Entry, OCC filed its comments on March 23, 2009 and reply comments on April 2, 2009. The Commission then considered OCC's Comments in its August 19, 2009 Order, finding that an auditor should be hired to examine the LDC's collection practices. Finding and Order (August 19, 2009) at Findings 7-13. For OCC to argue for its intervention ignores the Commission's recognition of OCC's participation in this case to date. Because the Commission allowed OCC to file comments, there is no reason to grant formal intervention.

**2. The Commission Should Deny OCC's Motion For Discovery Because Discovery Is Neither Warranted In An Investigative Proceeding Nor Required By Ohio Law.**

By its own rules, the Commission is not required to open discovery for every case in its docket. The Commission has specifically rejected this idea. In its most recent rulemaking proceeding reviewing Chapter 4901-1, the Commission rejected the argument that every docketed case constitutes a "proceeding" that entitles a party to discovery. In Case 06-685-AU-ORD, OCC proposed a definition of "proceeding" in Rule 4901-1-01 to encompass "any filing, hearing, investigation, inquiry, or rulemaking which the Commission is required or permitted to make, hold or rule upon." *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, PUCO Case NO. 06-685-AU-ORD, Finding and Order (December 6, 2006) at Finding 7. OCC contended that the change was necessary to allow full

participation in all matters before the Commission. *Id.* The Commission disagreed with OCC's proposed definition, finding it "overly broad and unnecessary." *Id.* at Finding 9. The Commission held, "If OCC's proposal were adopted, any interested person would have a right to intervene, conduct discovery, and present evidence in any Commission case. The Commission does not believe that such rights exist. In addition, OCC's proposed definition would eliminate the Commission's discretion to conduct its proceedings in a manner it deems appropriate and would unduly delay the outcome of many cases. This request is denied." *Id.*

Moreover, the Commission typically does not conduct commenter discovery in Commission initiated investigations. For example, in Case No. 99-190-EL-COI, the Commission opened a case to investigate the high price of electricity in the wholesale market during the summer of 1998. *In the Matter of the Commission's Investigation into the Adequacy of Electricity Generation of Ohio's Investor-Owned Electric Utility Companies*, Entry (October 5, 2000) at Finding 1. Several parties in the proceeding filed motions to intervene and motions to compel discovery. The Commission denied all motions to intervene and motions to compel discovery "[b]ecause it was not the Commission's intent in opening these cases that its investigation become a matter for adjudication, intervention by parties was not an appropriate way to participate in these proceedings." *Id.* at Finding 2. Therefore, the Commission, upon receiving Staff's report, closed the investigation as a matter of record. *Id.* at Findings 3, 4.

Here, discovery is not warranted in this investigation proceeding. Similar to Case 99-190-EL-COI, the Commission established this proceeding to investigate the LDCs' UEX riders. Finding and Order (August 19, 2009) at Finding 1. Furthermore, there is no need for discovery to be conducted in this proceeding. Through the efforts of the Commission's Staff and NorthStar, the LDCs uncollectible expense recovery mechanisms have been thoroughly

investigated. The Commission's Staff submitted a report on February 5, 2009, detailing its findings after an investigation of the LDCs' UEX riders, including a detailed review of the LDCs's UEX rider statistics. Finding and Order (August 19, 2009) at Finding 6. The Commission then ordered and approved NorthStar to audit, evaluate, and recommend improvements in the LDCs' collection policies, practices, and performance, and evaluate whether the LDCs' collection practices and policies minimize uncollectible expense. *Id.* at Finding 14; Entry (September 30, 2009) at 2. The Commission relied upon both of these entities and the comments filed in this proceeding to fully evaluate the LDCs' UEX riders. Finding and Order (August 19, 2009) at Finding 14.

It is evident that OCC filed its Motions to Intervene and Compel Discovery solely to audit the auditors. In its Application for Rehearing, OCC claimed that "Discovery is a necessary part of the analysis that OCC must undertake in order to examine the auditor's findings." Application for Rehearing at 8; Motion to Compel at 5. A more appropriate place for OCC to raise its concerns with the auditor's report would be in its comments due on January 14, 2011 and February 11, 2011, respectively. OCC recognizes that it may file comments in this proceeding, even without intervention and discovery, but claims that by "failing to address the pending intervention and discovery disputes, the Commission is restricting the information that OCC has at its disposal for preparing Commission and Reply Comments." Application for Rehearing at 4. In the event OCC attempts to comment on matters or information external to the audit report, it would be contravening the Commission's November 3, 2010 Entry entertaining "comments *on the audit report*." Entry at Finding 11 (emphasis added). Because OCC may file its comments concerning the audit report, it may actively participate in this proceeding without intervention and discovery.

### **III. CONCLUSION**

For the reasons explained above, the Commission should deny OCC's Application for Rehearing because the OCC is seeking rehearing of an issue not determined in the Commission's November 3, 2010 Entry. If the Commission grants OCC's Application for Rehearing, it should deny OCC's Motion to Intervene and Motion to Compel Discovery.

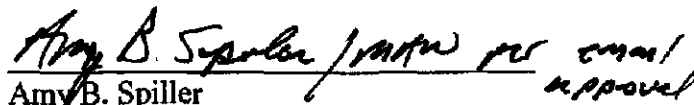
Dated: December 13, 2010

Respectfully submitted,



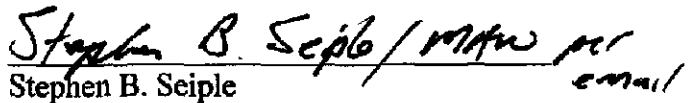
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Memorandum Contra Office of Consumers' Counsel Application for Rehearing was sent by U.S. Mail to the parties listed below on this 13th day of December, 2010.

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