

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

The Office of the Ohio Consumers' Counsel,)	
)	
Complainant,)	
)	
v.)	
)	Case No. 16-0782-EL-CSS
Ohio Power Company,)	
)	
Respondent.)	

**MEMORANDUM CONTRA MOTIONS TO INTERVENE OF INDUSTRIAL
ENERGY USERS-OHIO, NATIONWIDE ENERGY PARTNERS, LLC, THE
OHIO APARTMENT ASSOCIATION, AND THE INTERNATIONAL COUNCIL
OF SHOPPING CENTERS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

This case centers solely on the plight of residential customers in the Ohio Power Company (“AEP Ohio” or “Utility”) service territory who lack critical protections because they receive electric utility services through a submeterer or other reseller. To remedy the harms to these unprotected residential customers, the Office of the Ohio Consumers’ Counsel (“OCC”) filed a complaint. In its complaint, OCC requested that AEP Ohio amend its tariffs to bar the resale and redistribution of electric services to residential customers by submetering entities or third-party agents (other than landlords) that are operating as public utilities.¹ OCC also asked for a moratorium to stop AEP

¹ Complaint and Request for Relief for Consumers by the Office of the Ohio Consumers’ Counsel at 2 (Apr. 12, 2016) (“OCC Complaint”). Alternatively, OCC requested an order directing AEP Ohio to enforce its tariffs to prohibit submetering. Id.

Ohio from providing new service to those who resell service to submetered residential customers.² These, and only these, are the issues in this case.³

As the Public Utilities Commission of Ohio (“PUCO”) is well aware, a separate docket (“Submetering COI”) has been opened up to investigate the actions of submetering entities throughout Ohio.⁴ The focus of that docket is to determine whether submeterers’ activities fall under the PUCO’s supervisory jurisdiction. That jurisdictional question is not an issue OCC has requested the PUCO decide here. The issues presented in the Submetering COI docket are far broader than the limited issues OCC presented in its Complaint. Stakeholders representing a broad and diverse array of interests participated in the Submetering COI, including the Industrial Energy Users-Ohio (“IEU-Ohio”), Nationwide Energy Partners, LLC (“NEP”), and the Ohio Apartment Association/International Council of Shopping Centers (“OAA/ICSC”) (collectively, “Movants”). The Movants filed comments in the Submetering COI. The PUCO can take their (and others’) interests into account as it decides how best to move forward with that investigation.

The Movants’ presence in this case will open up OCC’s Complaint proceeding to reargue the same issues covered in the Submetering COI. A review of the Movants’ motions to intervene removes any doubt that the Movants will advance the same arguments here as they have in the Submetering COI. IEU-Ohio is concerned about the

² Motion for A Moratorium to Stop AEP Ohio from Providing New Service to Those Who Resell Service to Submetered Residential Consumers by the Office of the Ohio Consumers’ Counsel (Apr. 12, 2016)(OCC Motion for Moratorium).

³ OCC is mindful that AEP Ohio proposed to alter its tariff to address non-residential issues. See AEP Ohio’s Motion for Tariff Amendment at 8-9. OCC opposed that motion because it impermissibly exceeds the scope of the complaint. OCC Memo Contra AEP Ohio’s Motion for Tariff Amendment at 3.

⁴ *In the Matter of the Commission’s Investigation of Submetering in the state of Ohio*, Case No. 15-1594-AU-COI, Entry at 1 (Dec. 16, 2015).

impact this Complaint case may have on commercial and industrial customers⁵ – arguments already fully aired in the Submetering COI.⁶ NEP directly references its participation in the Submetering COI as a reason to justify its limited participation in this case, thereby providing a virtual assurance that its prior arguments on the issue of submetering will be repeated here.⁷ OAA/ICSC assert the concerns of residential and commercial landlords on the issue of submetering⁸ – concerns amply discussed in the Submetering COI.⁹ Allowing such repetitive and irrelevant arguments will only delay OCC’s requested relief and needlessly consume the PUCO’s and the parties’ resources.

Put simply, the PUCO is well aware of the Movants’ positions on submetering. Allowing the Movants to repeat their arguments here and expand the scope of this Complaint case beyond the issues raised in OCC’s Complaint would generate significant costs and provide no offsetting benefits. The PUCO should deny the Movants’ requests to intervene and allow this case to proceed as filed.

II. ARGUMENT

A. Standards applicable to intervention.

In determining whether intervention is appropriate, R.C. 4903.221 directs the PUCO to consider:

⁵ IEU-Ohio Motion to Intervene at 5.

⁶ IEU-Ohio Initial Comments at 8, Case No. 15-1594-AU-COI (IEU-Ohio Submetering Comments).

⁷ NEP Motion to Intervene at 3. While NEP couches its request as seeking “limited” intervention, NEP’s participation in this proceeding is still unnecessary and counterproductive for all the reasons stated in Section II below.

⁸ OAA/ICSC Motion to Intervene at 3-4.

⁹ OAA/ICSC Initial Comments at 2, Case No. 15-1594-AU-COI (OAA/ICSC Submetering COI Initial Comments).

- The nature and extent of the prospective intervenor’s interest;
- The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; [and]
- Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

The PUCO’s rules additionally provide that intervention shall be granted to a “person [that] has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person’s interest is adequately represented by existing parties.”¹⁰ This inquiry mirrors the four factors from R.C. 4903.221, with an additional consideration focusing on the “extent to which the person’s interest is represented by existing parties.”¹¹

In construing the guidelines for intervention, the PUCO “has long held that an interest in the precedential value of a case is not sufficient reason for intervention.”¹² “It is the policy of the PUCO not to grant intervention to entities whose only real interest in the proceeding is that legal precedent may be established which may affect that entity’s interest in a subsequent case.”¹³ To meet the standards for intervention, it is imperative

¹⁰ Ohio Adm. Code 4901-1-11(A)(2).

¹¹ Ohio Adm. Code 4901-1-11(B)(5).

¹² *In the Matter of the Complaint of Whitt v. Nationwide Energy Partners, LLC*, Case No. 15-697-EL-CSS, Entry at 5 (November 18, 2015) (*In re Whitt*).

¹³ *In the Matter of the Complaint of XO Ohio, Inc. v. City of Upper Arlington*, Case No. 03870-AU-PWC, Entry at 14 (May 14, 2003).

that “[t]he nature and extent of an intervenor’s interest * * * be real and direct as to the factual allegations contained in the complaint itself.”¹⁴

Additionally, an intervenor must refrain from expanding the issues beyond those stated in the complaint. The PUCO has rejected a prior attempt to broaden a complaint’s scope, stating that “[t]he hearing in this matter shall be confined to the scope of the complaint.”¹⁵ This promotes the interests of administrative economy by preventing a narrowly-focused dispute from morphing into a wide-ranging inquiry (such as the existing Submetering COI case).

B. The Movants cannot meet the standards required for intervention.

The Movants’ bases for intervening neither meet the controlling statutory and regulatory provisions nor satisfy the PUCO’s longstanding precedent.

1. The Movants are not charged with representing residential customers’ interests and are not required to file tariffs.

R.C. 4903.221(B)(1)-(2) direct the PUCO to consider “the nature and extent” of the Movants’ interests as well as the “legal position advanced” by the Movants and their “probable relation to the merits of the case.”¹⁶ These inquiries weigh decidedly against granting the Movants’ intervention requests. Because the complaint defines the issues in the case, it is essential to first consider the complaint’s scope before deciding whether the Movants’ positions fit within it.

¹⁴ *In re Whitt* at 5.

¹⁵ *In the Matter of the Complaint of OHIOTELNET.COM, INC. v. Windstream Ohio, Inc.*, Case No. 09-515-TP-CSS, Entry at 9 (Dec. 1, 2010). See also, *Cleveland Electric Illuminating Co. v. Medical Center Co.*, Case No. 95-458-EL-UNC, Entry on Rehearing at 3 (Oct. 5, 1995) (“It would be inappropriate to consider additional allegations not raised in the original complaint.”).

¹⁶ See also Ohio Adm. Code 4901-1-11(B)(1)-(2).

OCC filed its Complaint on behalf of residential customers against AEP Ohio. OCC sought to prohibit AEP Ohio from providing electric service to submetering and reselling entities that inflict substantial harm on the Utility's residential customers. The Movants' interests are not directly tied to this issue. IEU-Ohio's basis for intervention is tied to the interests of commercial and industrial customers.¹⁷ NEP describes itself as a provider of support services to apartment and condominium properties.¹⁸ And the OAA/ICSC avers that it represents the interests of residential and commercial landlords.¹⁹

None of the Movants represents the interests of residential customers in AEP Ohio's service territory who are charged electricity rates that have been provided through submetering. None of the Movants represent the interests of the utility that is required to file tariffs governing the rendition of electric utility services to residential customers in the AEP Ohio service territory. These are the interests that are affected by OCC's Complaint.

Moreover, if OCC prevails, it will require AEP Ohio and no one else (not even any other electric distribution utilities) to take affirmative steps to comply with the PUCO's order. "AEP Ohio has the exclusive right to provide retail electric service to * * * consumer[s]," in its certified territory.²⁰ Thus, any PUCO order requiring tariff modifications will solely apply to AEP Ohio.

While the Movants may have an interest in the precedent this case may set,

¹⁷ IEU-Ohio Motion to Intervene at 5.

¹⁸ NEP Motion to Intervene at 3.

¹⁹ OAA/ICSC Motion to Intervene at 3-4.

²⁰ *In re Whitt* at 6.

longstanding PUCO precedent instructs that this alone is not grounds for granting intervention. That principle is perfectly captured by the PUCO's decision in *In re Whitt*. There, a residential customer filed a complaint case alleging that NEP provided electric, water, and sewer services without the necessary PUCO approvals. IEU-Ohio, OCC, and OP&E all moved to intervene in the case on the grounds that the interests of residential customers, low and moderate income customers, and certified retail electric service ("Marketer") providers would be adversely affected by the case's outcome. The PUCO denied their intervention requests, however, explaining that a "legitimate interest in the precedent of a complaint case is not sufficient reason for intervention * * *."²¹ Intervention must be grounded in a showing of a "real and direct interest" in the "factual allegations" of the complaint.²²

In re Whitt defeats the Movants' requests for intervention. In spite of that case's residential focus, other residential-customer advocates were barred from participating because the PUCO held that they did not have a "real and direct interest" in the complaint's factual allegations. Here, the question presented is far easier. No Movant purports to even represent the interests of residential customers. Surely, if it was inappropriate for residential-customer advocates to intervene in a residential-customer complaint case, it is even more inappropriate for non-residential-customer advocates to intervene in a residential-customer complaint case. Moreover, even though the outcome of *In re Whitt* may impact the operational aspects of Marketers, the PUCO found that such interests are insufficient grounds to allow intervention. Applying this logic, the Movants are similarly situated to the Marketers in *In re Whitt*. Although the Movants'

²¹ Id. at 3.

²² Id. at 5.

operational aspects may be affected by the outcome of this case, more is required in order to be granted intervention. Movants have failed to raise sufficient grounds for intervention, and therefore, their interventions should be denied.

2. The Movants will prolong this case and burden the PUCO with repetitive arguments that are not germane to this proceeding.

R.C. 4903.221(B)(3)-(4) direct the PUCO to examine whether the Movants “will unduly prolong or delay the proceeding” and evaluate whether they “will significantly contribute to full development and equitable resolution of the factual issues.”²³ None of these considerations favor the Movants.

It is a virtual certainty that the Movants’ presence will unduly prolong and delay the proceeding. If IEU-Ohio is successful, this proceeding will needlessly grow beyond the allegations contained in the residential Complaint to include the interests of commercial and industrial customers. If OAA/ICSC and NEP prevail, this proceeding will unnecessarily expand to include the interests of landlords and others that benefit from submetering and reselling of utility services. The volume of written discovery, depositions, pre-filed testimony, hearing testimony, and briefing all could expand markedly if the Movants are granted intervention. This scenario will drain both the PUCO’s and the parties’ resources.²⁴

Additionally, the Movants’ participation will burden the PUCO with repetitive arguments from other dockets that are not germane to this proceeding. As explained previously, each Movant has already filed comments for the PUCO’s consideration in the

²³ See also Ohio Adm. Code 4901-1-11(B)(3)-(4).

²⁴ This is especially true given the seemingly narrow gap between the OCC and AEP Ohio on draft tariff language. See *Ohio Power Company’s Reply in Support of Its Motion for Tariff Amendment and Memorandum Contra Motion to Hold Case in Abeyance* at 1, Case No 16-0782-EL-CSS (May 19, 2016).

Submetering COI. IEU-Ohio asserted the interests of non-residential consumers in the Submetering COI and seeks to advance those same interests here.²⁵ NEP asserted its interest as a provider of support services to apartment and condominium properties in the Submetering COI and is seeking to advance that interest here.²⁶ OAA/ICSC sought to protect the interests of residential and commercial landlords in the Submetering COI and seeks to advance those same interests here.²⁷ Simply put, the PUCO is well aware of the Movants' positions and interests. Allowing the Movants to broaden the issues in this case and repeat arguments in this case already made in the Submetering COI would not materially contribute to the resolution of this narrower controversy. To do so, would also not generate any new or relevant insights or perspectives, but "will unduly prolong or delay the proceeding."²⁸

3. OCC and AEP Ohio will adequately address the issues set forth in the OCC Complaint.

Ohio Adm. Code 4901-1-11(B)(5) directs the PUCO to examine "the extent to which the person's interest is represented by existing parties." This consideration also does not favor the Movants. OCC is statutorily empowered to represent the interests of residential customers and AEP Ohio is the only entity responsible for administering a tariff that could impact residential customers that receive electric utility services through a submeterer or a reseller. Because the issue in this case will be adequately addressed by OCC and AEP Ohio, the Movants' participation is unnecessary.

²⁵ Compare IEU-Ohio Submetering COI Initial Comments at 8 with IEU-Ohio Motion to Intervene at 5.

²⁶ Compare NEP Submetering COI Initial Comments at 1 with NEP Motion to Intervene at 3.

²⁷ Compare OAA/ICSC Submetering COI Initial Comments at 2 with OAA/ICSC Motion to Intervene at 3-4.

²⁸ See also Ohio Adm. Code 4901-1-11(B)(3)-(4).

III. CONCLUSION

The grounds asserted in the Movants' collective motions to intervene do not meet the controlling statutory and regulatory standards and are inconsistent with prevailing PUCO precedent. The Movants' participation will not only burden the PUCO with repetitive arguments but expand this proceeding beyond the scope of OCC's Complaint. This will prolong the proceedings and interfere with an orderly resolution of this controversy. Much like the interested stakeholders that were denied intervention in *In re Whitt*, the Movants have at most an interest in the precedential value of this proceeding, which is insufficient to meet the requirements for intervention. The Movants should be denied intervention.

Respectfully submitted,

BRUCE J. WESTON (0016973)
OHIO CONSUMERS' COUNSEL

Kyle L. Kern, Counsel of Record (0084199)
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
Telephone (Kern Direct): 614-466-9585
kyle.kern@occ.ohio.gov
(Will accept service via email)

/s/ Kimberly W. Bojko

Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
bojko@carpenterlipps.com
(Will accept service via email)

*Outside Counsel for the
Office of the Ohio Consumers' Counsel*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply was served by electronic mail to the persons listed below, on this 25th day of May 2016.

/s/ Kimberly W. Bojko

Kimberly W. Bojko
*Outside Counsel for the
Office of the Ohio Consumers' Counsel*

SERVICE LIST

fdarr@mwncmh.com
mjsettineri@vorys.com
William.wright@ohioattorneygeneral.gov

stnourse@aep.com
mkeaney@calfee.com

Attorney Examiner:

Bryce.mckenney@puc.state.oh.us

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Summary: Memorandum Memorandum Contra Motions to Intervene of Industrial Energy Users-Ohio, Nationwide Energy Partners, LLC, the Ohio Apartment Association, and the International Council of Shopping Centers by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Bojko, Kimberly W.