

**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.)	

**REPLY OF INDUSTRIAL ENERGY USERS-OHIO
TO A MEMORANDUM OPPOSING ITS MOTION TO INTERVENE BY THE OFFICE OF THE
OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

In a complaint filed on April 12, 2016, the Office of the Ohio Consumers' Counsel ("OCC") sought an order directing Ohio Power Company ("AEP-Ohio") to enforce or amend the resale restriction in its General Terms and Conditions of Service to protect the interests of residential customers. In responsive pleadings, AEP-Ohio proposed a "remedy" that would impose unlawful restrictions on the resale of electric generation services affecting all customers. Additionally, AEP-Ohio sought a new nonbypassable charge to fund the expansion of its facilities if its proposed restriction on resale is authorized. Based on issues that OCC and AEP-Ohio raise in their pleadings, Industrial Energy Users-Ohio ("IEU-Ohio") moved to intervene because the interests of its members operating in the AEP-Ohio service area may be impaired by the outcome of

this case. Motion to Intervene and Memorandum in Support of Industrial Energy Users-Ohio (May 10, 2016) (“IEU-Ohio Motion to Intervene”).

On May 25, 2016, OCC filed a memorandum opposing IEU-Ohio’s Motion to Intervene. 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 (May 25, 2016) (“OCC Memo Contra”). In its Memorandum Contra, OCC asserts that IEU-Ohio lacks sufficient interest in this case to warrant its intervention. *Id.* at 7, citing *Whitt v. Nationwide Energy Partners, LLC*, Case No. 15-697-EL-CSS, Entry (Nov. 18, 2015) (“*Whitt*”). OCC also asserts that IEU-Ohio’s participation in the case will unduly delay the resolution of the case. OCC Memo Contra at 8-9. Finally, OCC asserts that it and AEP-Ohio will adequately address the issues raised in the pleadings before the Public Utilities Commission of Ohio (“Commission”). *Id.* at 9.

As demonstrated in IEU-Ohio’s Motion to Intervene and below, OCC’s claims are not correct. Based on the pleadings, IEU-Ohio has an interest in this matter that may be impaired by the outcome of the case, IEU-Ohio’s participation will not unduly delay the proceeding, and no other party in this matter represents the interests of IEU-Ohio. Motion to Intervene and Memorandum in Support of Industrial Energy Users-Ohio (May 10, 2016) (“IEU-Ohio Motion to Intervene”). Under the requirements of R.C. 4903.211 and Rule 4901-1-11, Ohio Administrative Code (“OAC”), therefore, the Commission should grant IEU-Ohio’s Motion to Intervene.

II. IEU-OHIO HAS A REAL AND SUBSTANTIAL INTEREST IN THE PROCEEDING AND IS SO SITUATED THAT THE DISPOSITION OF THE PROCEEDING MAY, AS A PRACTICAL MATTER, IMPAIR OR IMPEDE ITS ABILITY TO PROTECT THAT INTEREST

Citing the Commission's decision in two unrelated matters, OCC premises its claim that IEU-Ohio does not have a sufficient interest in the case on the assertion that "an intervenor must refrain from expanding the issues beyond those stated in the complaint." OCC Memo Contra at 5. OCC then states that it "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 harm on the Utility's residential customers." *Id.* at 6. Based on its statement of the scope of the case, OCC asserts that IEU-Ohio does not have an interest in the outcome of the case beyond its precedential effect, citing the *Whitt* case. *Id.* at 7-8.

These claims are not supported by the facts or Commission precedent.

Initially, IEU-Ohio is not seeking to "expand the issues" presented in this case beyond those presented by the pleadings.

Under R.C. 4903.221 and Rule 4901-1-11, OAC, a person seeking to intervene in a Commission proceeding must have an interest in the outcome that may be impaired by the disposition of the case.¹ Determining whether such an interest exists is determined by the pleadings in this case. *Ohio Consumers' Counsel v. Pub. Util. Comm'n of Ohio*, 111 Ohio St. 3d 384 (2006).

In the Complaint, OCC has put in issue the current resale restriction contained in AEP-Ohio's General Terms and Conditions of Service. Complaint at 2 (Apr. 12, 2016). AEP-Ohio's Answer and Motion for Tariff Amendment argue that a revision to the resale restriction is necessary. Answer of Ohio Power Company (Apr. 27, 2016); Ohio Power

¹ "The goal of the interest requirement [under rule authorizing intervention] is to dispose of lawsuits involving as many concerned parties as is compatible with efficiency and due process." *Moore's Federal Practice*, Civil § 24.03. See, also, *Donald Lumber, Inc. v. H.C.M.C. Ltd*, 746 P.2d 76 (Colo. App. 1987) (parties permitted to intervene in case in which relief would affect their property rights).

Company's Motion for Tariff Amendment at 1 (Apr. 27, 2016) ("AEP-Ohio Motion" or "Motion"). As AEP-Ohio explains in its Motion, the Commission should authorize a revision to "clarify" the resale restriction. AEP-Ohio Motion at 3. AEP-Ohio then proposes an amendment that would permit AEP-Ohio to terminate service to any customer and restrict resales of electricity service "where the Customer, the Customer's agent, or any other entity assesses any charge for electric service to occupants, tenants, or any other end-user, except where the Customer passes on the Company's charges without markup to occupants or tenants and such charges are allocated based on each occupant's or tenant's actual usage." *Id.*, Exhibit B-2 (Redline Copies of Proposed Schedule Sheets). In addition to the revision of the resale restriction, AEP-Ohio is seeking authority to recover the costs of expanding its facilities if the Commission authorizes AEP-Ohio's proposed amendment of the resale restriction. AEP-Ohio Motion at 5 n.1.²

As IEU-Ohio explained at length in its memorandum supporting its Motion to Intervene, its opposition to AEP-Ohio's Motion, and above, IEU-Ohio's interest in this case arises from the pleadings; IEU-Ohio is not "expanding" the issues in the proceeding. The pleadings place in issue restrictions on resale and termination of service that may adversely and unlawfully affect shared service arrangements of commercial and industrial customers. IEU-Ohio Motion to Intervene at 3-7; Memorandum Opposing Ohio Power Company's Motion for Tariff Amendment by Industrial Energy Users-Ohio at 4-8 (May 10, 2016) (proposed resale restriction is

² In a separate proceeding, AEP-Ohio is seeking authorization of a Submetering Rider to collect these costs. *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.*, Ohio Power Company's Application to Amend its Electric Security Plan at 13-14 (May 13, 2016).

unlawful under R.C. 4928.40(D)). Additionally, AEP-Ohio is seeking to transfer the cost of implementation of any new restrictions to all customers. Thus, contrary to OCC's assertion that IEU-Ohio's intervention will expand the issues in this proceeding, the pleadings support a finding that IEU-Ohio has an interest that may be impaired or impeded by the outcome of this case.

Moreover, the legal authority on which OCC relies does not support OCC's claim that IEU-Ohio does not have an interest that justifies its intervention.

Initially, OCC cites *OHIOTELNET.Com, Inc. v. Windstream Ohio, Inc.*, Case No. 09-515-TP-SCC, Entry at 9 (Dec. 1, 2010) and *Cleveland Electric Illuminating Co. v. Medical Center Co.*, Case No. 95-458-EL-UNC, Entry on Rehearing at 3 (Oct. 5, 1995) for the proposition that "an intervenor must refrain from expanding the issues beyond those stated in the complaint." OCC Memo Contra at 5. Neither case, however, supports OCC's claim. In *OHIOTELNET.Com*, the Commission granted a motion to strike prefiled testimony of the complainant because the testimony presented issues that it did not raise in its complaint. In *Medical Center*, the Commission rejected an assignment of error in an application for rehearing in which the complainant attempted to raise an issue not presented in its complaint. Both cases required the complainant to limit the issues presented to the Commission to those contained in its pleadings. Neither case addressed the right of a person to intervene based on the issues raised by the complaint and responsive pleadings.

Even if the *OHIOTELNET.Com* and *Medical Center* cases had held that an intervenor may not "expand" the issues presented in the pleadings as OCC argues, the

cases are inapposite because IEU-Ohio's intervention would not expand the issues before the Commission, as previously discussed.

Likewise, OCC's assertion that the Commission should deny IEU-Ohio's Motion to Intervene based on the *Whitt* case is without merit. In *Whitt*, the complainant sought a finding that the respondent was operating as a public utility and in violation of Commission rules. Addressing motions to intervene, the Commission held that "[t]he nature and extent of an intervenor's interest must be real and direct as to the factual allegations contained in the complaint itself." *Whitt*, Entry at 5. Finding that several persons seeking intervention had argued that their interests in the case "are regarding the broad policy and precedent that may be set as result of this complaint," the Commission denied their motions to intervene "because they have no actual interest in the particular facts of this proceeding." *Id.*³

As discussed above, IEU-Ohio members in the AEP-Ohio service territory have an "actual interest in the particular facts" of this proceeding. *Id.* The pleadings place in issue the resale restrictions contained in AEP-Ohio's General Terms and Conditions. If the Commission revises the resale restrictions, the revision may impair or impede the interests of commercial and industrial customers participating in or considering shared

³ In contrast to the Commission's holding in *Whitt*, federal courts applying Federal Rule of Procedure 24 have held that a person's interest in the precedential outcome is sufficient basis to support intervention. For example, in *Huron Environmental Activist League v. EPA*, 917 F. Supp. 34 (D.D.C. 1996), the court permitted industry groups to intervene because the complaint sought to enjoin meetings between the EPA and the industrial groups. The court concluded industrial groups should be permitted to intervene because the relief sought by the plaintiff would prevent the EPA from relying in any way on the product of its meetings with the industrial groups and thwart the useful interaction. "Because any injunctive relief would likely eviscerate their substantial work product, and because it would establish a rule of law unfavorable to them, the Court [concluded] that the movants are entitled to intervene." *Id.* at 43. See, also, *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994). As several courts of appeals have found, a party may demonstrate sufficient interest if the precedent established by the case would adversely affect that party. See *Jansen v. Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990); *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 829 (5th Cir. 1967).

service arrangements. Accordingly, IEU-Ohio has an interest in the outcome of this proceeding under R.C. 4903.221 and Rule 4901-1-11, OAC.

III. IEU-OHIO'S PARTICIPATION WILL NOT UNDULY PROLONG OR DELAY THE PROCEEDINGS

As IEU-Ohio explained in its Motion to Intervene, its participation will not unduly prolong or delay this proceeding, and it will significantly contribute to the full development and equitable resolution of the factual and other issues. IEU-Ohio Motion to Intervene at 7. It is familiar with the shared services agreements of commercial and industrial customers that would be affected by a revision of the resale restriction and has been an active participant in the Commission's investigation of submetering. *In the Matter of the Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI. IEU-Ohio was also a participant in the electric transition proceedings when the Commission directed AEP-Ohio and other electric distribution utilities to bring their tariff provisions into compliance with resale restrictions contained in Amended Substitute Senate Bill 3. *See In the Matter of the Application of First-Energy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, PUCO Case Nos. 99-1212-EL-ETP, *et al.*, Entry (Jan. 18, 2001). Thus, IEU-Ohio can significantly contribute to the full development and equitable resolution of the factual and other issues in this proceeding.

In its Memorandum Contra, however, OCC states that IEU-Ohio should not be permitted to intervene because "this proceeding will needlessly grow beyond the allegations contained in the residential Complaint to include the interests of commercial and industrial customers." OCC Memo Contra at 8.

As discussed above, however, IEU-Ohio's participation will not inject new issues into this proceeding. The issues regarding resale restrictions that IEU-Ohio is concerned about are the result of the pleadings submitted by OCC and AEP-Ohio. Because the pleadings squarely raise issues that IEU-Ohio seeks to address in this proceeding, OCC's claim that IEU-Ohio's intervention will unduly delay this proceeding is not correct.

IV. NO OTHER PARTY ADEQUATELY REPRESENTS THE INTERESTS OF IEU-OHIO IN THIS MATTER

In its Memorandum Contra, OCC asserts IEU-Ohio's participation is "unnecessary." OCC Memorandum Contra at 9. As IEU-Ohio demonstrated in its Motion to Intervene, however, the interests of IEU-Ohio will not be adequately represented by OCC and AEP-Ohio. IEU-Ohio Motion to Intervene at 7. OCC brought the complaint as the residential advocate. AEP-Ohio's interest is in protecting its service territory and increasing its revenue. Neither has any duty or incentive to assure that the interests of commercial and industrial customers that may be impaired by the outcome of this proceeding are identified and protected.⁴

V. CONCLUSION

⁴ Under Federal Rule of Civil Procedure 24(a)(2), federal courts hold that a person should be granted intervention when the named parties are unlikely to advance claims of the person. For example, bondholders sought intervention in a suit brought by the issuer of the bonds to correct an alleged error in the terms of the bonds as issued against the trustee. The court granted the bondholders' motion to intervene so that they could present an affirmative defense that the court determined the trustee would not advance. *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Ams.*, 2005 U.S. Dist. Ct. Lexis 5378 (S.D.N.Y. Mar. 31, 2005). Similarly, IEU-Ohio has an interest in the remedy the Commission may order and OCC has no standing to raise those issues or any apparent interest in doing so and AEP-Ohio is expressly seeks authorization of the unlawful restrictions.

In a case in which federal court was presented with a consent decree, persons that would be adversely affected by the proposed remedies were permitted to intervene and contest the terms of the consent decree since they would be adversely affected if a court adopted the decree without amendment. *Edwards v. City of Houston*, 78 F.3d 983 (5th Cir. 1996). See, also, *Bradley v. Pinellas County School Bd.*, 961 F.2d 1554, 1557-58 (11th Cir. 1992) (intervention proper if persons seeking intervention would raise concerns where school system was frustrating intervenors' desired outcomes).

Based on the pleadings, IEU-Ohio has a real and substantial interest in this case and is so situated that its disposition may, as a practical matter, impair or impede its ability to protect that interest. IEU-Ohio's intervention will significantly contribute to the proceeding without unduly prolonging or delaying it. Further, no other party will represent IEU-Ohio's interests in the case. Accordingly, the Commission should grant IEU-Ohio's Motion to Intervene under R.C. 4903.221 and Rule 4901-1-11, OAC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In Accordance with Rule 4901-1-05, Ohio Administrative Code, "The PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties." In addition, I hereby certify that a service copy of the foregoing *Reply of Industrial Energy Users-Ohio to a Memorandum Opposing its Motion to Intervene by the Office of the Ohio Consumers' Counsel* was sent by, or on behalf of, the undersigned counsel for Industrial Energy Users-Ohio to the following parties of record June 1, 2016, via electronic transmission.

/s/ Frank P. Darr

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**ON BEHALF OF THE OHIO APARTMENT
ASSOCIATION AND THE INTERNATIONAL
COUNCIL OF SHOPPING CENTERS
("OAA/ICSC")**

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Summary: Reply of Industrial Energy Users-Ohio to a Memorandum Opposing its Motion to Intervene by the Office of the Ohio Consumers' Counsel electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio