

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application to Modify, in)	
Accordance with Section 4929.08, Revised Code,)	Case No. 12-1842-GA-EXM
the Exemption Granted to The East Ohio Gas)	
Company d/b/a Dominion Energy Ohio)	

**MEMORANDUM CONTRA DIRECT ENERGY'S MOTION TO INTERVENE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") filed a motion to eliminate the residential Monthly Variable Rate ("MVR" or "Variable Rate") that in various instances has devolved to price-gouging of certain consumers who are randomly assigned without their consent to Marketers. The consumer rip-off under the Variable Rate can especially be seen in the instances where the rate is significantly above Dominion Energy Ohio's Standard Choice Offer. In contrast to the Variable Rate, the Standard Choice Offer is the result of a competitive auction that generally has provided customers with lower or much lower market-based rates than the Variable Rate.

On March 23, 2018, the Marketer Direct Energy Services, LLC and Direct Energy Business Marketing, LLC (collectively, "Direct Energy") moved to intervene in this case (for the third time). This time, Direct Energy asks for intervention "as a full party of record." Direct Energy's motion to intervene should be denied as untimely and contrary to applicable standards.

If the PUCO grants full intervention to Direct Energy, the PUCO should require Direct to consolidate its case (including for examination of witnesses and the presentation of

testimony) with the Retail Energy Supply Association (“RESA”)¹ and the Ohio Gas Marketers Group (“OGMG”), both having substantially similar interests. See Ohio Admin. Code 4901-1-11(D)(2).

II. BACKGROUND

On June 18, 2008, the PUCO granted an exemption authorizing Dominion’s to implement Phase 2 of Dominion’s plan to stop offering natural gas to consumers (known as “exiting the merchant function.”)² On June 15, 2012, Dominion filed a joint motion to modify that order in this docket.³ The OGMG was a joint movant in the motion to modify.⁴ (Direct Energy is a member of the joint movant OGMG.)⁵

On July 27, 2012, the Attorney Examiner set a procedural schedule.⁶ The Attorney Examiner’s entry instructed that the last day to intervene was August 30, 2012.⁷ On August 30, 2012, the OCC, Retail Energy Supply Association (“RESA”), and Direct Energy filed motions to intervene.

Two months later, on October 2, 2012, Direct Energy withdrew its motion to intervene, indicating that it would “participate in this case through its membership in the Retail Energy Supply Association and the Ohio Gas Marketers Group.”⁸

¹ Motion For Leave To Intervene Of The Retail Energy Supply Association at Fn 1 (August 30, 2012). Direct Energy Services, LLC is listed as a member of RESA.

² Case No. 07-1224-GA-EXM, Opinion and Order (June 18, 2008).

³ Joint Motion to Modify Order Granting Exemption, (June 15, 2012).

⁴ Memorandum Ohio Gas Marketers Group Memorandum Contra June 28, 2012 Motions to Intervene and to Dismiss of Ohio Partners for Affordable Energy, (July 13, 2012) at 1.

⁵ *Id.* at Fn 1.

⁶ Entry, (July 27, 2012).

⁷ *Id.*

⁸ Notice of Withdrawal (October 2, 2012).

Then, on April 8, 2015, well after the August 30, 2012 intervention deadline, Direct Energy moved for limited intervention in this proceeding.⁹ Direct Energy requested limited intervention to file a motion for protective order.¹⁰ Direct Energy had voluntarily provided reports to Staff of the PUCO in this proceeding and desired to keep the information confidential.¹¹ On November 2, 2015, Direct Energy, along with other marketers, was granted limited intervention.¹² When granting intervention the PUCO Attorney Examiner noted that the motions to intervene were untimely but were unopposed and appropriate for the sole and limited purpose of seeking protective orders.¹³

On March 9, 2018, OCC filed a motion to re-establish the standard choice offer and eliminate the Variable Rate.¹⁴ Ohio Partners for Affordable Energy (“OPAE”) filed a similar motion on behalf of non-residential customers.¹⁵ On March 23, 2018, Direct Energy again filed a motion to intervene, this time seeking to intervene as a full party of record.¹⁶

III. RECOMMENDATIONS

A. The PUCO should deny Direct Energy's motion to intervene for being untimely and failing to show extraordinary circumstances that justify its granting.

⁹ Motion for Limited Intervention, (April 8, 2015).

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² Entry, (November 2, 2015).

¹³ *Id.* at 4-5.

¹⁴ Motion and Memorandum in Support to Protect Residential Consumers by Re-Establishing the Standard Choice Offer as Default Service and Eliminating the Monthly Variable Rate, (March 9, 2018).

¹⁵ Motion to Re-Establish the Standard Service Offer for Non-residential Customers and Memorandum in Support, (March 12, 2018).

¹⁶ Motion to Intervene of Direct Energy, (March 23, 2018).

Direct Energy's third Motion to Intervene is untimely, just like its second motion to intervene. Ohio Adm. Code 4901-1-11(F) states "a Motion to Intervene which is not timely will be granted only in extraordinary circumstances." Direct Energy failed to file its latest motion to intervene by the August 30, 2012 deadline. Direct Energy has not offered any extraordinary circumstances that would permit it to intervene nearly six years after the deadline for intervention has passed.

Direct Energy offers no rationale for its out-of-time Motion to Intervene that meets the standard of "extraordinary circumstances" required under the PUCO's rules.¹⁷ Direct Energy's only attempt at showing it has met the out-of-time intervention standard is that it has "a unique business model and its interests and perspective are unique."¹⁸ This indirect attempt to establish extraordinary circumstances, if that is indeed Direct's intent, must fail. The PUCO, under similar circumstances, has ruled that a members' interest diverging from its collective intervening group is not unforeseeable, thus no extraordinary circumstances are present to justify an untimely intervention.¹⁹ In Case No. 14-1297-EL-SSO, the PUCO denied an untimely motion to intervene of a competitive supplier (Noble Solutions) who claimed that its interests had diverged from a collective intervening group (RESA). The PUCO held that it was not unforeseeable that the collective group would take a position that differed from the competitive supplier.²⁰

¹⁷ Ohio Adm. Code 4901-1-11(F).

¹⁸ Motion to Intervene for Direct Energy, at 4 (March 23, 2018).

¹⁹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Company, and The Toledo Edison Company for the Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order at pp 30-31 (March 31, 2016).

²⁰ *Id.* at p 31.

Procedurally, Direct was given ample opportunity to intervene, but chose a different path to that end: It intervened. It withdrew its intervention. It intervened again, three years late, seeking limited intervention. The PUCO granted its untimely limited intervention.²¹ Now it is before the PUCO again seeking to intervene, but this time as a full party.

Direct Energy's most recent intervention is untimely, just like its earlier limited Motion to Intervene. Under the PUCO rules intervention must be timely. The PUCO can grant an untimely motion to intervene "only under extraordinary circumstances." Direct Energy did not address Ohio Adm. Code 4901-1-11(F) and its standard of extraordinary circumstances. And Direct has failed to show that there are any extraordinary circumstances that merit its untimely intervention. Direct Energy's motion to intervene should be denied.

B. Direct Energy does not meet the statutory and administrative requirements for intervention in this case.

R.C. 4903.221 and Ohio Adm. Code 4901-1-11 establish the standard for intervention in a PUCO proceeding. Specifically, Ohio Adm. Code 4901-1-11(A)(2) states "Upon timely motion, any person shall be permitted to intervene in a proceeding upon a showing that the person 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 ability to protect that interest, *unless the person's interest is adequately represented by existing parties*" (emphasis added).

Direct Energy fails to show that it is not adequately represented by existing parties. Instead, Direct Energy – through its pleading and motion for extension – actually

²¹ Entry at 4-5 (November 2, 2015).

illustrates that its interests are adequately represented by existing parties -- RESA and OGMG. In support of its motion to intervene, Direct Energy points out that it was a participating member of OGMG, a signatory party to the issue being challenged in this docket.²²

Direct Energy is not only a participating member of OGMG but is also a member of RESA. Both OGMG and RESA are interveners in this docket. The PUCO has previously denied persons intervention when they were also members of a collective intervening group. In Case No. 08-935-EL-SSO, three individuals were denied intervention because their interests were adequately represented by the organization they participate in.²³ Because Direct Energy is a participating member of both RESA and OGMG, it has failed to prove that it is not adequately represented in this case.

Direct Energy's only attempt at showing it is not adequately represented is to claim it has "a unique business model and its interests and perspective are unique."²⁴ The PUCO has previously rejected a similar argument. In Case No. 99-1451-TP-ACE *et al.*, two businesses moved to intervene before the PUCO because they provided a local service to customers in the same service area at question in the proceeding.²⁵ The PUCO denied intervention finding that the standard for intervention was not met simply because businesses provided a local service within the service area at issue in the proceeding.²⁶

²² *Id.* at 3.

²³ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for the Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Entry (October 2, 2008) at Section 4.

²⁴ Motion to Intervene for Direct Energy, (March 23, 2018) at 4.

²⁵ *In the Matter of the Application of Ameritech Communication Services, Inc.*, Case No. 99-1451-AP-ACE, *et al.*, Finding and Order (September 20, 2001) at Section 8.

²⁶ *Id.*

Similarly, Direct Energy's claim that it operates within the territory of Dominion does not establish any uniqueness that sets it apart from others, allowing it to intervene under PUCO rules.

Direct Energy has not met the statutory or administrative requirements of intervention. Direct Energy has failed to show that its interests are not adequately represented by other parties. In addition, Direct Energy failed to offer any proof that it has a unique set of interests in this proceeding. Thus, Direct Energy's motion to intervene should be denied.

C. If Direct Energy is granted intervention it should be limited under Ohio Adm. Code. 4901-1-11(D)(2).

Ohio Adm. Code 4901-1-11(D)(2) allows the PUCO to "require parties with substantially similar interests to consolidate their examination of witnesses or presentation of testimony." If the PUCO does not reject Direct Energy's second untimely motion to intervene (which it should), then at the very least the PUCO should allow Direct only limited, not full, intervention rights. This is because Direct Energy and RESA have substantially similar interests in this proceeding.

Direct Energy previously withdrew from this docket. In its withdrawal, Direct Energy stated that it would participate through its membership with RESA. Direct Energy is still a member of RESA.²⁷

²⁷ <https://www.resausa.org/members?state%5B%5D=13&type%5B%5D=gas>.

RESA claims “Many of [its] members are certified as competitive retail natural gas service providers [marketer] and are active in Ohio retail markets.”²⁸ Direct Energy is a marketer in Ohio,²⁹ And a member of RESA.³⁰

Direct Energy’s interest as a marketer in Ohio directly aligns with RESA’s interest in this case, and does not warrant granting Direct’s intervention. Recently, Direct Energy and RESA sought more time to consider and respond to OCC and OPAE’s motions.³¹ The pleading claims “additional time may possibly allow preparation of one pleading in response to both motions and possibly allow RESA and Direct Energy to prepare a joint response.” Their joint effort is another example of their “substantially similar” interests under the PUCO’s rule. Thus, granting limited intervention under Ohio Adm. Code 4901-1-11(D)(2) would not prevent Direct Energy from representing any interests it may have in this case, if the PUCO decides to allow Direct Energy to intervene at all.

IV. CONCLUSION

Direct Energy has not met the standard of intervention. Direct Energy’s Motion to Intervene is almost six years late. Moreover, Direct does not address the standard for the late filing of a motion to intervene. There are no “extraordinary circumstances” that merit the PUCO granting this untimely Motion to Intervene. Direct Energy also fails to meet the intervention standards under the PUCO’s rule and law that require a party to

²⁸ Joint Motion for Extension of Time and Request for Expedited Ruling, (March 26, 2018) at 1.

²⁹ *Id.*

³⁰ Motion For Leave To Intervene Of The Retail Energy Supply Association at Fn 1 (August 30, 2012). Direct Energy Services, LLC is listed as a member of RESA.

³¹ Joint Motion for Extension of Time and Request for Expedited Ruling, (March 26, 2018) at 1.

show that its interests are unique or not adequately represented in this proceeding. The PUCO should deny Direct Energy's Motion to Intervene.

If the PUCO permits Direct Energy's untimely intervention (which it should not), then the PUCO should at least limit the intervention (consistent with Ohio Adm. Code 4901-1-11(D)(2)). Under limited intervention Direct Energy would be required to consolidate its examination and presentation of witnesses with RESA and OGMG, both of which have substantially similar interests in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission, this 30th day of March 2018.

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