

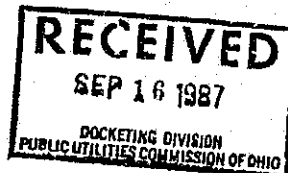
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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of:
The Suburban Fuel Gas, Inc.,
Complainant

vs.

Columbia Gas of Ohio, Inc.,
Respondent



Case No. 86-1747-GA-CSS

COMPLAINANT'S MEMORANDUM CONTRA
AND MOTION TO STRIKE THE MOTION OF
THE EAST OHIO GAS COMPANY
FOR LEAVE TO FILE, INSTANTER, MATERIALS
IN SUPPORT OF RESPONDENT'S
APPLICATION FOR REHEARING

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CAMERA OPERATOR *[Signature]* DATE PROCESSED 9-17-87

MULDOON, PEMBERTON & FERRIS
2733 West Dublin-Granville Road
Worthington, OH 43085-2710
(614) 889-4777

Dated: September 16, 1987

By: David L. Pemberton

ATTORNEYS FOR COMPLAINANT
THE SUBURBAN FUEL GAS, INC.

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COMES NOW The Suburban Fuel Gas, Inc., by its attorneys,
and, for the reasons set forth in its accompanying memorandum,
respectfully moves the Commission for an order striking from
its files the "Motion Of The East Ohio Gas Company For Leave
To File, Instant, Materials In Support Of Respondent's Application
For Rehearing" filed in the above-docketed proceeding on Septem-
ber 10, 1987.

Respectfully submitted,

MULDOON, PEMBERTON & FERRIS
2733 West Dublin-Granville Road
Worthington, OH 43085-2710
(614) 889-4777

By David L. Pemberton
David L. Pemberton

ATTORNEYS FOR COMPLAINANT
THE SUBURBAN FUEL GAS, INC.

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MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION TO STRIKE

The subject motion constitutes a gross abuse of this Commission's rules of practice and of established law. The movant is not only not a party to this proceeding, it has not even sought to become one. It has not sought to become one because any such attempt would be clearly untimely under both the Commission's rules of practice and Section 4903.10 of the Ohio Revised Code, the controlling statute.

Rule 4901-1-11 of the Ohio Administrative Code governs intervention in proceedings of this Commission. That rule provides that intervention be obtained upon motion timely filed by the person seeking intervention. That rule also provides that, except where a specific deadline is established by an order of the Commission in a particular proceeding, a motion to intervene will not be considered timely if it is filed later than five days prior to the scheduled date of hearing. A motion to intervene which is not timely will be granted only under extraordinary circumstances. In the instant case, the movant alleges none.

But, even if the movant were to have properly sought intervention under Rule 4901-1-11, O.A.C., its participation in this case is barred by Section 4903.10 of the Revised Code. That statute specifically addresses and governs interventions attempted subsequent to the issuance of an order of this Commission and specifically requires "any affected person" to "make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission" (Emphasis added).

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In the instant case, the order complained of was entered in the Commission's journal on August 4, 1987; and the movant's attempted intervention in this case is clearly prohibited by the governing statute even if the Commission were inclined to disregard its own rule.

Complainant submits that it was in recognition of the untimeliness of its attempted intervention that the movant did not formally seek to intervene in this case. Instead, it seeks to obtain standing in this proceeding by the bare expedient of alleging that it is simply attempting to support the respondent's application for rehearing in this case. At the same time, however, movant inconsistently alleges that its "interests are not represented by any other party to this proceeding" (East Ohio Motion, Page 2, Paragraph 2). Complainant submits that movant cannot have it both ways--either its interests are the same as the respondent's or they are different. They cannot be both! In either case, however, the movant's identity or lack of identity of interests with those of the respondent cannot be relied upon to circumvent the clear requirements of Rule 4901-1-11, O.A.C., and of Section 4903.10 of the Revised Code.

WHEREFORE, complainant respectfully prays that the movant's pleading be stricken from the Commission's files.

COMPLAINANT'S MEMORANDUM CONTRA

Should the Commission deny complainant's motion to strike, despite East Ohio's blatant disregard for established procedure,

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complainant submits the following observations regarding East Ohio's memoranda.

The first nine pages of the movant's initial memorandum in support of the respondent's application for rehearing (that originally filed in Case No. 87-304-GA-AEC) have nothing whatsoever to do with the issue sought to be briefed by the movant in this case and should, therefore, be disregarded. The balance of that memorandum and the movant's second memorandum resolve themselves into a single question: Can rate agreements, which the movant concedes cannot be lawful unless filed with and approved by the Commission, nonetheless be effective prior to such filing and approval? The movant expends a great deal of effort distinguishing Sections 4905.31 and 4909.17 of the Revised Code and otherwise attempting to contort logic and precedent to support its position that they can or, more specifically, that they "should be." However, movant's arguments totally disregard Section 4905.32 of the Revised Code which expressly provides:

"No public utility shall charge, demand, exact, receive, or collect a different rate...for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time." (Emphasis added)

Complainant submits that until rates established under Section 4905.31 are filed and approved, the foregoing language of Section 4905.32 governs; and the only rates which are "applicable" to the proposed service are those otherwise filed with the Commission and "in effect at the time." That is the clear language

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and intent of Section 4905.32. Only filed and approved rates can be charged by a public utility. To adopt the movant's position and hold otherwise, complainant submits, would not only ignore the legislature's clear intent, it would result in the anomaly that lawfully filed rates could be superseded by unlawful, unfiled rates by the mere agreement of a public utility and its customer. Complainant submits that that cannot be the Ohio law.

WHEREFORE, complainant respectfully prays that the movant's memoranda be disregarded in their entirety.

Respectfully submitted,

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2733 West Dublin-Granville Road
Worthington, OH 43085-2710
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a copy of the foregoing memorandum contra and motion to strike to Kenneth W. Christman, Esquire, Columbia Gas of Ohio, Inc., P. O. Box 117, Columbus, OH 43216; Evelyn R. Robinson, Esquire, Office of the Consumers' Counsel, 137 East State Street, Columbus, OH 43215; and Charles M. Kennedy, Esquire, The East Ohio Gas Company, 901 Lakeside Avenue, Cleveland, OH 44114, by first class mail, postage prepaid, this 16th day of September, 1987.


David L. Pemberton

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in

Case No(s). 86-1747-GA-CSS

Summary: Memorandum Complainant's memorandum contra and motion to strike the motion of The East Ohio Gas Company for leave to file, instant, materials in support of respondent's application for rehearing filed by D. Pemberton. electronically filed by Docketing Staff on behalf of Docketing