

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Direct Energy) Case No. 22-583-GE-UNC
Services, L.L.C.)

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

I. INTRODUCTION

Direct Energy has been accused by the PUCO Staff of distributing misleading and deceptive marketing materials to consumers, failing to maintain accurate records, and providing incomplete information about consumers who signed up for service.¹ Direct Energy now seeks to prevent consumers’ state legal representative from participating in this case to address findings that Direct Energy harmed Ohioans. All that doesn’t say much in favor of Direct Energy having the privilege of marketing energy to Ohio consumers.

Given that Direct Energy is accused of misleading consumers, the PUCO should follow Ohio law and allow OCC (consumers’ state-authorized advocate) to participate in this proceeding. Consumers are the victims of Direct Energy’s marketing violations, so consumers should have a voice in how these matters are resolved. By law, that voice is OCC.

¹ Case No. 22-583-GE-UNC, Joint Stipulation and Recommendation (June 10, 2022) at Ex. A.

Direct Energy's opposition to OCC's intervention is wrong on law and reason. OCC has authority to intervene and satisfies the standards for intervention. The PUCO should grant OCC's motion to intervene.

II. ARGUMENT

- A. After nearly half a century of Consumers' Counsel interventions per state law and given precedent by the Supreme Court of Ohio and the PUCO, the PUCO should not tolerate unfounded oppositions to OCC's interventions that are tactical devices to delay OCC's case preparation. Direct Energy's opposition should be swiftly denied by the PUCO.**

Direct Energy erroneously argues that OCC has no legal authority to intervene in this case. Direct Energy claims that R.C. 4911.14 and R.C. 4911.15 enumerate exclusively when OCC may intervene in PUCO proceedings.² However, OCC's authority to intervene is broader than the enumerated powers Direct Energy cites. The General Assembly wrote into R.C. 4911.02(B)(2) that the Consumers' Counsel has rights to protect consumers "*Without limitation because of enumeration....*" (Emphasis added.) Direct Energy ignores this, claiming OCC cannot intervene because its power to do so is not enumerated. That makes no sense.

Even what is enumerated – for example, R.C. 4911.02(B)(2)(b) – allows OCC to intervene in this case. This is especially so because the PUCO has found that "the provisions of Section 4911.02 should be construed *as broadly as possible.*"³ OCC's intervention in this case is an "appropriate action with respect to residential consumer

² Direct Energy's Memorandum Contra Office of Consumers' Counsel's Motion to Intervene ("Direct Energy Memo Contra"), at 3-5.

³ *In the Matter of the Complaint of the Office of Consumers' Counsel on Behalf of the Residents of Copley Village Condominium Association I and Copley Village Condominium Association II v. Ohio Edison Company*, Case No. 89-1031-EL-CSS, 1989 Ohio PUC LEXIS 1100, *5 (emphasis added).

complaints concerning quality of service,” which R.C. 4911.02(B)(2)(b) authorizes OCC to take. The PUCO received consumer complaints that Direct Energy has poor service to Ohioans, specifically a pattern of unfair marketing practices. Consequently, OCC’s intervention in this case *is* within its enumerated R.C. 4911.02(B)(2)(b) authority.

Direct Energy’s claim that OCC has no authority to intervene also ignores R.C. 4903.221, which provides “[a]ny other person who may be adversely affected by a public utilities commission *proceeding* may intervene in such *proceeding* [.]” (Emphasis added.) R.C. 4903.221 makes no distinction between a proceeding to consider proposed resolution of a probable noncompliance notice or any other type of PUCO proceeding. This case may adversely affect residential consumers who Direct Energy could continue to harm using unfair sales practices if not subjected to appropriate penalties and corrective action. This is especially likely if OCC is not permitted to represent residential consumers’ interests in this proceeding.

Simply put, where Ohio consumers are adversely affected, as they are by Direct Energy’s (alleged) pattern of deceit, OCC has intervention authority. Consequently, the PUCO should reject Direct Energy’s wrongful interpretation of R.C. Chapter 4911 and find OCC has the power to intervene.

B. Contrary to Direct Energy’s assertions, OCC has the authority to intervene in all cases where it meets the intervention standard.

Of OCC’s consumer advocacy, Direct Energy asserts that “[b]eing a representative of residential utility consumers . . . does not establish the plenary authority

to participate in every Commission proceeding and, importantly, does not authorize participation in this specific proceeding as discussed above.”⁴ Direct Energy is wrong.

R.C. 4903.221 and O.A.C. 4901-1-11 require the PUCO to apply the following criteria in ruling on a motion to intervene:

- (1) The nature and extent of the prospective intervenor’s interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and
- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

OCC meets that standard, as demonstrated in its motion to intervene. Direct Energy offers no analysis to the contrary. And as described above (in section A), OCC clearly has the *statutory* authority to protect consumers in cases such as this.

Further, the Supreme Court of Ohio confirmed OCC’s right to intervene in PUCO proceedings, in ruling on two consolidated appeals in which OCC claimed the PUCO erred by denying its intervention. In those appeals, FirstEnergy Company, The Dayton Power and Light Company, and the PUCO Staff unsuccessfully argued to the Court that OCC was not entitled to intervene because “the Commission does not have to grant intervention when it does not hold a hearing”⁵

⁴ Direct Energy Memo Contra at 5; *see generally, id.* at 5-7.

⁵ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, Case No. 05-1679 Merit Brief of Intervening Appellee the Dayton Power and Light Company at 14-15; *see also* Merit Brief of Appellee Public Utilities Commission of Ohio at 5 (January 23, 2006); *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, Case No. 05-1621 Merit Brief Intervening Appellee FirstEnergy Company at 12; Merit Brief of Appellee Public Utilities Commission of Ohio at 5 (January 18, 2006).

However, the Court rejected those arguments and held that intervention is to be “liberally allowed” by the PUCO:

Even if no hearing was scheduled or contemplated when the Consumers’ Counsel sought to intervene, her motions and accompanying memoranda properly addressed the relevant criteria of R.C. 4903.221. In our view, whether or not a hearing is held, intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO. The Consumers’ Counsel explained her interest in the cases in her motions to intervene and also explained that her views would not be adequately represented by the existing parties. In the absence of some evidence in the record calling those claims into doubt or showing that intervention would unduly prolong or delay the proceedings, intervention should have been granted.⁶

The Court found that the PUCO abused its discretion in denying OCC’s intervention and that OCC should have been granted intervention.⁷ Therefore, in this case, the PUCO should follow Ohio law and follow the Court’s determination that the PUCO should liberally construe the rules in favor of intervention. The PUCO should grant intervention to OCC that has a substantial interest in protecting consumers from deceptive marketing practices.

Direct Energy cites two cases that are easily distinguishable and therefore inapposite. *Tongren v. D&L Gas Marketing, Ltd.*⁸ involved OCC’s effort to advocate for consumers by “sue[ing] a company which is not a public utility for breach of contract in a representative capacity in common pleas court”⁹ In contrast, this is a case before the

⁶ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶ 20 (2006).

⁷ *Id.* at ¶¶ 13-20.

⁸ 149 Ohio App.3d 508 (Franklin 2002).

⁹ *Id.* at 510.

PUCO involving law and rules over which the PUCO has jurisdiction (involving deceptive marketing by marketers) directly involving residential utility consumers' interests.

*In the Matter of the Investigation of The East Ohio Gas Company d/b/a Dominion East Ohio Relative to Its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*¹⁰ involved gas pipeline safety. It did not involve deceptive marketing *directly aimed* at residential utility consumers.¹¹ As described above (in section A), OCC clearly has the *statutory* authority to protect consumers under such circumstances. OCC has routinely been granted intervention in cases, such as this, involving deceptive marketing to residential consumers.¹² It should be granted intervention here.

C. Because the PUCO Staff considers the interests of all parties – including marketers – it does not represent *consumers'* interests in this case, as OCC would upon intervention.

Direct Energy argues OCC's interest is already represented in this case by PUCO Staff because Staff issued the notice of probable non-compliance.¹³ That mistaken position is insulting to the legislature's intent considering that it created OCC with

¹⁰ Case No. 12-380-GA-GPS.

¹¹ It is also a case that contradicted the PUCO's own authority. *See In re 2010 Dominion GPS Case*, Case No. 10-105-GA-GPS, Finding and Order (May 26, 2010) (granting OCC's motion to intervene over PUCO Staff's objection).

¹² *See, e.g., In the Matter of the Application of Energy, Inc dba Green Choice Energy*, Case No. 22-441-GE-COI, Entry (July 6, 2022); *In the Matter of the Commission's Investigation Into SFE Energy Ohio, Inc. and Statewise Energy Ohio, LLC's Compliance with the Ohio Revised Code and Ohio Administrative Code and Potential Remedial Action*, Case No. 20-1216-GE-COI, Entry (September 28, 2020), at ¶¶ 11, 13; *In the Matter of Commission's Investigation Into PALMco Power OH, LLC dba Indra Energy and PALMco Energy OH, LLC dba Indra Energy's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-2153-GE-COI, ("PALMco 2 Investigation"), Entry (April 6, 2020), at ¶¶ 10, 19.

¹³ Direct Energy Memo Contra at 7.

awareness of the PUCO Staff and gave OCC intervention authority on behalf of consumers.

The PUCO Staff's articulation of Direct Energy's deceptive behavior emphasizes, rather than eliminates, the need for a dedicated consumer advocate in this case. OCC, as the statutory representative of Ohio's residential utility consumers, is in the unique position of the state-designated representative of the interests of the residential consumers who may be harmed by Direct Energy. As stated, the legislature's creation of OCC reflects that the PUCO Staff is not a substitute for OCC's consumer advocacy under the law.

D. OCC's intervention will not unduly delay proceedings.

Finally, Direct Energy complains that OCC's intervention will unduly delay these proceedings by causing additional discovery, hearings, and briefing.¹⁴ Direct Energy is complaining about what otherwise is known as justice and due process in America.

It has become quite clear that Ohioans need more justice and due process with regard to energy marketing, not less. Indeed, it's time for the state to question, for consumer protection, whether the energy marketing experiment should continue in Ohio for residential consumers. Note that the utility standard offers are providing Ohioans with competitively priced energy. Government aggregation is also available or can be available.

Consumers have been given a voice, by the legislature, in the Consumers' Counsel. Under law, the PUCO needs to hear the consumer voice through OCC. This case is but one instance in a rash of recent instances involving marketers' deceptive

¹⁴ Direct Energy Memo Contra at 8.

conduct.¹⁵ Thorough factfinding and consideration of the issues with consumer advocacy is not an *undue* delay. That is due process. That is consumer protection.

As OCC explained in its motion to intervene, OCC's longstanding expertise and experience in PUCO proceedings, and marketer investigations specifically, will allow for the efficient processing of the case with consideration of the public interest.

III. CONCLUSION

Direct Energy's arguments opposing OCC's intervention are wrong and the PUCO should reject them. It is well settled and long settled that R.C. 4911.02(B)(2)(b) and R.C. 4903.221 give OCC authority to intervene in this matter. OCC also meets the intervention criteria set forth in R.C. 4903.221 and O.A.C. 4901-1-11. Consequently, the PUCO should promptly grant OCC's motion to intervene.

Respectfully submitted,

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¹⁵ See, e.g., note 12, *supra*; see also *In the Matter of Xoom Energy Ohio, LLC*; Case No. 22-267-GE-COI.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply to Direct Energy’s Memorandum Contra the Consumers’ Counsel’s Motion to Intervene was served on the persons stated below via electronic transmission, this 25th day of July 2022.

/s/ William J. Michael
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The PUCO’s e-filing system will electronically serve notice of the filing of this document on the following parties:

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of Michael, William J.