

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of XOOM)
Energy Ohio, LLC for Certification as a) Case No. 13-1453-EL-CRS
Competitive Retail Generation Provider)
and Power Marketer.)

**MOTION TO INTERVENE
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") moves to intervene in this case, involving energy marketer XOOM Energy Ohio ("XOOM"), on behalf of Ohio residential utility consumers.¹ The Public Utilities Commission of Ohio ("PUCO") issued an Entry on April 20, 2022, opening an investigation into the "alleged unfair, deceptive, or unconscionable acts or practices" by XOOM. The alleged bad practices involve XOOM's marketing of electricity and natural gas to Ohioans.²

The PUCO Staff concluded, among other things, that sales agents for XOOM provided misleading information to consumers and enrolled consumers without proper consent.³ XOOM's certificate of authority to market and enroll Ohio consumers in electric service expired on July 21, 2021.⁴ The PUCO subsequently suspended automatic approval of XOOM's application to renew its certificate.⁵

¹ See R.C. Chapter 4911, R.C. 4903.221, and O.A.C. 4901-1-11.

² *In the Matter of the Investigation into XOOM Energy Ohio, LLC's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-267-GE-COI, Entry (April 20, 2022), ¶ 1.

³ Case No. 22-267-GE-COI, Entry (April 20, 2022), ¶ 8.

⁴ See Case No. 13-1453-EL-CRS, PUCO Certificate No. 13-716E(4) (July 23, 2019).

⁵ Case No. 13-1453-EL-CRS, Entry (June 17, 2021).

It appears that XOOM is continuing to market and enroll Ohio consumers in electric service despite the pending investigation into its alleged misleading marketing and enrollment practices. Under law and rule,⁶ Ohio consumers must be protected against fraudulent, misleading, and unfair practices in the marketing of products and services. An energy marketer's certificate case is at the core of providing consumer protection to Ohioans.

The reasons the PUCO should grant OCC's Motion to Intervene are further set forth in the attached Memorandum in Support.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Angela D. O'Brien
Angela D. O'Brien (0097579)
Counsel of Record
Ambrosia Wilson (0096598)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone: [O'Brien] 614-466-9531
Telephone: [Wilson] 614-466-1292
angela.obrien@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
(willing to accept service by e-mail)

⁶ See R.C. 4928.08(D); 4928.10; O.A.C. 4901:1-21-05(C).

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MEMORANDUM IN SUPPORT

The PUCO previously granted XOOM a certificate of authority to market electric service to Ohio consumers.⁷ However, XOOM's most recent certificate expired on July 21, 2021.⁸ XOOM is one of about ten marketers operating under the ownership of NRG Energy, Inc.

XOOM filed an application to renew its certificate to market electric service. But, for consumer protection, the PUCO suspended automatic approval of the renewal application on June 17, 2021.⁹ XOOM apparently has continued to market electricity and enroll consumers in Ohio.

Meanwhile, the PUCO is investigating XOOM for unfair, deceptive, and unconscionable practices in marketing energy services to Ohio consumers.¹⁰ Among other things, the PUCO Staff has alleged that sales agents for XOOM provided misleading information to consumers and enrolled consumers without proper consent.¹¹

⁷ Case No. 13-1453-EL-CRS, PUCO Certificate No. 13-716E(4) (July 23, 2019).

⁸ *Id.*

⁹ Case No. 13-1453-EL-CRS, Entry (June 17, 2021).

¹⁰ Case No. 22-267-GE-COI.

¹¹ Case No. 22-267-GE-COI, Entry (April 20, 2022), ¶ 8.

The PUCO Staff has also identified serious problems with XOOM’s “warm marketing” practices through multi-level marketing companies like ACN, Inc.¹²

OCC moved to intervene in the XOOM Investigation case. XOOM opposed OCC’s intervention that was filed to protect consumers in the investigation case. But the PUCO properly overruled XOOM’s opposition and granted OCC’s motion to intervene for consumers.¹³

The PUCO should grant OCC’s intervention in this case as well to represent the interests of residential utility consumers in Ohio. R.C. 4903.221 provides, in part, that any person “who may be adversely affected” by a PUCO proceeding is entitled to seek intervention in that proceeding. The interests of Ohio’s residential consumers may be “adversely affected” by this case. This is especially so if consumers are unrepresented in a proceeding where a marketer is under PUCO investigation for deceptive marketing practices.

An energy marketer’s certificate case is at the core of providing consumer protection to Ohioans. Thus, this element of the intervention standard in R.C. 4903.221 is satisfied.

R.C. 4903.221(B) requires the PUCO to consider the following criteria in ruling on motions 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;

¹² See Case No. 22-267-GE-COI, Entry (April 20, 2022), ¶ 7; and Case No. 22-267-GE-COI, PUCO Staff Letter (April 18, 2022).

¹³ Case No. 22-267-GE-COI, Entry (May 20, 2022).

- (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.

First, the nature and extent of OCC's interest is representing the residential consumers in this certificate case involving whether XOOM should be allowed to continue serving consumers in Ohio. This interest is different than that of any other party and especially different than that of the marketer whose advocacy includes its own financial interest.

Second, OCC's advocacy for residential consumers will include advancing positions to protect consumers from XOOM, including but not limited to the position that the PUCO should require XOOM to change the way it markets electric service and enrolls consumers. OCC's position is therefore directly related to the merits of this case that is pending before the PUCO. The PUCO is the agency with regulatory authority over energy marketers seeking to supply competitive retail electric service to consumers in this state.

Third, OCC's intervention will not unduly prolong or delay the proceedings. OCC, with its longstanding expertise and experience in PUCO proceedings, will duly allow for the efficient processing of the case with consideration of the public interest.

Fourth, OCC's intervention will significantly contribute to the full development and equitable resolution of the factual issues. OCC will obtain and develop information that the PUCO should consider for equitably and lawfully deciding the case in the public interest.

OCC also satisfies the intervention criteria in the Ohio Administrative Code (which are subordinate to the criteria that OCC satisfies in the Ohio Revised Code). To

intervene, a party should have a “real and substantial interest” according to O.A.C. 4901-1-11(A)(2). As the advocate for residential utility consumers, OCC has a real and substantial interest in this case to renew XOOM’s certificate despite its alleged misleading marketing practices.

In addition, OCC meets the criteria of O.A.C. 4901-1-11(B)(1)-(4). These criteria mirror the statutory criteria in R.C. 4903.221(B) that OCC already has addressed and that OCC satisfies.

O.A.C. 4901-1-11(B)(5) states that the PUCO shall consider “The extent to which the person’s interest is represented by existing parties.” While OCC does not concede the lawfulness of this criterion, OCC satisfies this criterion in that it uniquely has been designated as the state representative of the interests of Ohio’s residential utility consumers. That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio confirmed OCC’s right to intervene in PUCO proceedings, in deciding two appeals in which OCC claimed the PUCO erred by denying its interventions. The Court found that the PUCO abused its discretion in denying OCC’s interventions and that OCC should have been granted intervention in both proceedings.¹⁴

OCC meets the criteria set forth in R.C. 4903.221, O.A.C. 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. On behalf of Ohio residential consumers, the PUCO should grant OCC’s Motion to Intervene.

¹⁴ See *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶ 13-20.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Angela D. O'Brien
Angela D. O'Brien (0097579)
Counsel of Record
Ambrosia Wilson (0096598)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone: [O'Brien] 614-466-9531
Telephone: [Wilson] 614-466-1292
angela.obrien@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Intervene was served on the persons stated below via electronic transmission, this 9th day of August 2022.

/s/ Angela D. O'Brien

Angela D. O'Brien

Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

SERVICE LIST

john.jones@ohioAGO.gov

mjsettineri@vorys.com

glpetrucci@vorys.com

Attorney Examiner:

jacqueline.st.john@puco.ohio.gov

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Summary: Motion Motion to Intervene by Office of the Ohio Consumers' Counsel
electronically filed by Mrs. Tracy J. Greene on behalf of O'Brien, Angela D