

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION'S
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

Entered in the Journal on August 26, 2022

I. SUMMARY

{¶ 1} In this Entry, the attorney examiner denies the request for certification of the interlocutory appeal filed by XOOM Energy Ohio, LLC.

II. HISTORY

{¶ 2} XOOM Energy Ohio, LLC (XOOM Energy) is an electric services company as defined in R.C. 4928.01 and a retail natural gas supplier as defined in R.C. 4929.01; is certified to provide competitive retail electric service (CRES) under R.C. 4928.08 and to supply competitive retail natural gas service (CRNGS) under R.C. 4929.20; and is subject to the jurisdiction of this Commission pursuant to R.C. 4928.16 and R.C. 4929.24. Accordingly, XOOM Energy is required to comply with the Commission's minimum CRES standards set forth in Ohio Adm.Code Chapter 4901:1-21, as well as the minimum CRNGS standards set forth in Ohio Adm.Code Chapter 4901:1-29.

{¶ 3} R.C. 4928.08 states that no electric services company shall provide a CRES to a consumer in this state without first being certified by the Commission regarding its managerial, technical, and financial capability to provide such service and providing a financial guarantee sufficient to protect customers and electric distribution utilities from default. Similarly, R.C. 4929.20 states that no retail natural gas supplier shall provide CRNGS to a consumer without first being certified by the Commission regarding its managerial, technical, and financial capability to provide that service and providing

reasonable financial assurances sufficient to protect customers and natural gas companies from default.

{¶ 4} On July 22, 2013, the Commission granted XOOM Energy's application for certification as a CRES provider in this state. XOOM Energy timely filed renewal applications for certification as a CRES provider every two years pursuant to Ohio Adm.Code 4901:1-24-09, and each renewal application was automatically approved by the Commission pursuant to R.C. 4928.08. XOOM Energy's most recent renewal application was filed on May 20, 2021, as amended on May 25, 2021; automated approval of this renewal application was suspended by the attorney examiner on June 17, 2021. *In re the Application of XOOM Energy Ohio, LLC for Certification as a Competitive Retail Electric Service Provider*, Case No. 13-1453-EL-CRS. Additionally, on January 4, 2012, the Commission granted XOOM Energy's application for certification as a CRNGS supplier in this state. XOOM Energy timely filed renewal applications for certification as a CRNGS provider every two years pursuant to Ohio Adm.Code 4901:1-27-09, and each renewal application was automatically approved by the Commission pursuant to R.C. 4929.20. XOOM Energy's most recent renewal application was filed on November 29, 2021; automated approval of this renewal application was suspended by the attorney examiner on December 22, 2021. *In re the Application of XOOM Energy Ohio, LLC for Certification as a Competitive Retail Natural Gas Marketer*, Case No. 11-4795-GA-CRS.

{¶ 5} Both R.C. 4928.08 and 4929.20 allow the Commission to suspend, rescind, or conditionally rescind the certification of any electric services company or retail natural gas supplier issued under these sections if the Commission determines, after reasonable notice and opportunity for hearing, that the electric services company or retail natural gas supplier has failed to comply with any applicable certification standards or has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices in this state. Additionally, R.C. 4928.16 and 4929.24 grant the Commission the authority to order any remedy or forfeiture provided under R.C. 4905.54 to 4905.60 and 4905.64, and to order restitution to customers and rescission of customer contracts.

{¶ 6} On April 18, 2022, Staff of the Commission's Service Monitoring and Enforcement Department filed a letter in the above-captioned docket, stating that, after reviewing customer contacts from both January 1, 2021, to June 21, 2021, and January 1, 2022, to March 1, 2022, during which time the Commission's call center received 19 complaints and 21 contacts, respectively, Staff believes that XOOM Energy has failed to comply with several sections of the Ohio Administrative Code with respect to its consumer enrollment practices. Staff states that the majority of the aforementioned contacts are related to enrollment disputes. Additionally, Staff states that more than one of XOOM Energy's independent channel partner's representatives were engaged in soliciting consumers via telephone and then enrolling them online via XOOM Energy's website while on the phone, which was completed by XOOM Energy's agent, not the consumer.

{¶ 7} Staff states that, on June 21, 2021, a notice of probable non-compliance (notice) was sent to XOOM Energy; however, after many discussions, XOOM Energy and Staff were unable to resolve the issues raised in the notice. Staff concluded that: XOOM Energy sales representatives provided misleading information during telemarketing efforts; XOOM Energy enrolled customers without proof of their consent as required by Ohio Adm.Code 4901:1-21-06(C); XOOM Energy did not properly enroll consumers telephonically by providing a date and time stamped audio recording verify before the completion of the call; XOOM Energy did not properly enroll consumers via the internet; and that, for both internet and telephonic enrollments, XOOM Energy did not obtain proper verification and/or documentation as required by the Ohio Administrative Code which requires that consent shall be obtained by encrypted customer input on a provider's website. As a result of its conclusions indicating probable non-compliance with statutory and rule requirements, Staff recommended that the Commission open a formal proceeding to review XOOM Energy's compliance with Ohio law.

{¶ 8} On April 20, 2022, the Commission found that a hearing should be held at which XOOM Energy shall, among other things, have the opportunity to respond to the findings contained in the Staff notice and show cause why its certification as a CRES

provider and its certification as a CRNGS supplier should not be suspended, rescinded, or conditionally rescinded. The Commission established a procedural schedule whereby motions to intervene were to be filed by May 10, 2022, a Staff Report was to be filed by May 25, 2022, and an evidentiary hearing was scheduled for June 8, 2022.

{¶ 9} On April 29, 2022, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to intervene. OCC cites its advocacy for consumers, who could be negatively affected by XOOM Energy's alleged conduct, and that intervention would not unduly prolong or delay the proceedings.

{¶ 10} On May 9, 2022, Staff and XOOM Energy filed a joint motion for continuance.

{¶ 11} On May 16, 2022, XOOM Energy filed a memorandum contra OCC's motion to intervene. In its memorandum, XOOM Energy argues that OCC does not have statutory authority to intervene in a case where a public utility is not involved, and where OCC has not filed a complaint. XOOM Energy argues that OCC does not have authority to intervene in a Commission Ordered Investigation (COI) case. Further, XOOM Energy argues that any interest OCC may have as the statutory representative of utility consumers, is represented adequately by Staff. Finally, XOOM Energy argues that OCC's intervention would unduly delay the proceedings in this case.

{¶ 12} On May 20, 2022, by Entry, the attorney examiner granted OCC's motion to intervene and set a new procedural schedule in the case. On May 23, 2022, OCC filed a letter in the docket stating that it would have filed a response to XOOM Energy's memorandum contra its motion to intervene, but would not where intervention had, at that time, already been granted.

{¶ 13} On May 25, 2022, XOOM Energy filed an interlocutory appeal of the ruling on OCC's motion to intervene. On May 31, 2022, OCC filed a memorandum contra XOOM Energy's interlocutory appeal.

{¶ 14} On June 6, 2022, Staff filed its Report of Investigation (Staff Report). On June 15, 2022, Staff filed an amended Staff Report with attachments.

{¶ 15} On June 24, 2022, XOOM Energy filed an unopposed motion to suspend the procedural schedule in order to allow the parties to conduct settlement discussions. On June 30, 2022, the attorney examiner, by Entry, granted XOOM Energy's unopposed motion to suspend the procedural schedule.

III. DISCUSSION

{¶ 16} Ohio Adm.Code 4901-1-15 sets forth the standards for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in paragraph (A) of the rule or unless the appeal is certified to the Commission by the attorney examiner pursuant to paragraph (B) of the rule. The ruling in the May 20, 2022 Entry, which is the subject of the interlocutory appeal, is not one of the four specific rulings enumerated in Ohio Adm.Code 4901-1-15(A). Therefore, the interlocutory appeal should be certified to the Commission only if the interlocutory appeal meets the requirements of Ohio Adm.Code 4901-1-15(B).

{¶ 17} Ohio Adm.Code 4901-1-15(B) specifies that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds that the appeal presents a new or novel question of law or policy or is taken from a ruling which represents a departure from past precedent *and* that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties should the Commission ultimately reverse the ruling in question. In order to certify an interlocutory appeal to the Commission, both requirements must be met.

{¶ 18} XOOM Energy initially submits that its appeal meets the requirements to be certified to the Commission. XOOM Energy first argues that, while OCC previously participated in multiple COI cases involving a CRES or CRNGS provider, the "the

Commission did not grant those motions” to intervene in those instances¹. XOOM Energy contends that wherein none of the previous cases where OCC intervened, the question of OCC’s statutory authority to intervene in a COI case was discussed and, therefore, this is a new or novel question for the Commission to address. XOOM Energy’s second argument is that the Entry granting OCC’s motion to intervene is a departure from past precedent where it did not address XOOM Energy’s memorandum contra OCC’s motion to intervene and did not analyze the question of OCC’s intervention. Additionally, XOOM Energy argues that a Supreme Court of Ohio’s decision, does not supersede the Revised Code provisions that govern OCC’s authority to intervene in proceedings before the Commission, citing *Ohio Consumers’ Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 384. XOOM Energy avers that the Supreme Court did not hold that OCC’s statutory powers can be liberally construed. XOOM Energy cites to a gas pipeline safety case in which the Commission denied the motion to intervene filed by OCC, stating that OCC could not establish statutory authority to participate in a case brought under R.C. 4905.91, citing *In re East Ohio Gas Co.*, Case No. 12-380-GA-GPS (*East Ohio*), Entry (Apr. 20, 2012), *see also In re RPA Energy Inc., dba Green Choice Energy (RPA)*, Entry (July 6, 2022). Further, according to XOOM Energy, an immediate determination is needed to prevent the likelihood of undue prejudice or expense to it stemming from OCC’s intervention. XOOM Energy asserts that an immediate ruling is needed, as OCC’s current participation is resulting in unnecessary and harmful discovery expenses.

{¶ 19} Once certified, XOOM Energy contends that the May 20, 2022 Entry should be reversed where OCC does not have statutory authority to intervene in this proceeding and therefore lacks a substantial interest. XOOM Energy states that this case does not involve an application by a public utility, a complaint about a public utility’s rates or service, or a complaint filed by OCC or another entity, or any application or subpoena filed by OCC.

¹ Here, XOOM Energy argues that the Commission “did not grant those motions” which, if it refers to OCC’s respective motions to intervene in the four cases cited, is untrue. In each case, the attorney examiner, by Entry, granted OCC’s motion to intervene, as discussed in Paragraph 23.

XOOM Energy states that this means that OCC's statutory authority to intervene is not found in the subject matter of this case. Further, XOOM Energy argues that any interest OCC might have, is adequately represented by Staff, who represents the interests of utility customers, including residential customers, and that Staff has a duty to balance the interests of all customer classes. Finally, XOOM Energy asserts that OCC's intervention will unduly delay the proceeding where OCC will seek to expand the scope of the proceeding through its discovery requests.

{¶ 20} In its May 31, 2022 memorandum contra XOOM Energy's interlocutory appeal, OCC argues first that XOOM Energy's appeal should not be certified to the Commission. According to OCC, XOOM Energy's appeal does not present a new or novel question of law or policy as XOOM Energy admits in its appeal, that OCC has intervened in prior COI cases involving CRES and CRNGS providers. Next, OCC states that the ruling in the May 20, 2022 Entry is not a departure from past precedent where the Commission's attorney examiners are versed in the standards for granting intervention and that it is not necessary to discuss each of them when evaluating a motion to intervene. According to OCC, it has routinely been granted intervention in similar cases to this one, so the ruling in the May 20, 2022 Entry is not a departure from past precedent. OCC argues next that XOOM Energy will not be prejudiced if the Commission does not immediately rule on its appeal where intervention has already been granted and delay is stemming only from XOOM Energy's continued pushback against OCC's discovery requests. OCC next states that the ruling from the Entry of May 20, 2022, was just, reasonable, and lawful where it is consistent with the Commission's practice in COI cases involving marketers. OCC cites to R.C. 4911.02(B)(2), which provides that OCC's intervention is "Without limitation because of enumeration* * *" and that R.C. 4911.02(B)(2)(b) allows OCC to intervene, which should be construed as broadly as is possible, citing *In re 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.

{¶ 21} OCC further submits that the attorney examiner's ruling was proper. OCC states that its motion to intervene satisfies all standards for granting intervention and will not unduly delay this proceeding. OCC asserts that it meets the standards in R.C. 4903.221. Specifically, OCC states that it showed good cause for intervention where the nature of OCC's interest is in protecting residential consumers, who were potentially harmed by XOOM Energy's actions. OCC states that its legal position is related to the merits of the case where intervention is to be liberally construed and it is the sole entity whose duty is to represent residential utility consumers, which are at the heart of the case. According to OCC, its intervention will not unduly delay the proceedings where its discovery requests constitute due process, not undue delay, and that it will contribute to a fully developed record through its own discovery and longstanding expertise concerning marketer investigations.

IV. CONCLUSION

{¶ 22} The attorney examiner finds the interlocutory appeal should not be certified to the Commission because the interlocutory appeal fails to satisfy the requirements of Ohio Adm.Code 4901-1-15(B). Ohio Adm.Code 4901-1-15(B) requires that, for an interlocutory appeal to be certified, the attorney examiner must find that the appeal either presents a new or novel question of law or policy or is taken from a ruling which represents a departure from past precedent.

{¶ 23} As an initial matter, the attorney examiner notes that the Supreme Court of Ohio has held that intervention should "generally be liberally construed in favor of intervention." *Ohio Consumers' Counsel v. Pub. Util. Comm.* 111 Ohio St.3d 384, 2006-Ohio-5853, 856 NE.2d 940, quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. Of Elections*, 74 Ohio St.3d 143, 144, 656 NE.2d 1277 (1995). XOOM Energy argues that the ruling from the May 20, 2022 Entry departs from past Commission precedent, citing *East Ohio*; however, the attorney examiner finds that XOOM Energy's reliance upon *East Ohio* is misplaced. *East Ohio* is a gas pipeline safety (GPS) enforcement case, where Staff, on behalf of the Commission, opened

an investigation under R.C. 4905.95 following a series of fires, following which Staff investigated the company's compliance with the GPS rules. In *East Ohio*, as discussed above, the Commission opened a gas pipeline safety investigation pursuant to R.C. 4905.91, which provides that the Commission may investigate any service, act, practice, policy, or omission by an operator to determine its compliance with R.C. 4905.90 through 4905.96 and the pipeline safety code. In that case, OCC was denied intervention as the attorney examiner determined there is no express statutory authority in R.C. 4911.02, R.C. 4911.14 or R.C. 4911.15 for OCC to intervene in gas pipeline investigations brought under R.C. 4905.91. *East Ohio*, Entry (Apr. 20, 2012). This case, on the other hand, was initiated pursuant to R.C. 4928.16 and R.C. 4929.24, and both statutes expressly authorize OCC to appear before the Commission as the representative of residential consumers in actions brought under the statutes. The attorney examiner is not persuaded by XOOM Energy's attempt to parse the language of R.C. 4928.16 and R.C. 4929.24 to limit OCC's authority to intervene in cases brought upon complaint by OCC or a residential customer as opposed to a proceeding brought "upon complaint or initiative of the Commission." Moreover, as the attorney examiner noted in the May 20, 2022 Entry, the Commission has granted OCC intervention in numerous COIs brought under R.C. 4928.16 or R.C. 4929.24. *See, e.g., In re RPA Energy Inc., dba Green Choice Energy*, Case No. 22-441-GE-COI, Entry (July 6, 2022); *In re SFE Energy Ohio, Inc., and Statewise Energy Ohio, LLC*, Case No. 20-1216-GE-COI (*SFE Energy*), Entry (Sept. 28, 2020); *In re PALMco Power OH, LLC dba Indra Energy & PALMco Energy OH, LLC dba Indra Energy*, Case No. 19-2153-GE-COI, Entry (Apr. 6, 2020); *In re PALMco Power OH, LLC dba Indra Energy & PALMco Energy OH, LLC dba Indra Energy*, 19-957-GE-COI, Entry (Sept. 3, 2019); *In re Verde Energy USA Ohio, LLC*, Case No. 19-958-GE-COI, Entry (May 16, 2019). Accordingly, the attorney examiner finds that granting intervention to OCC in this proceeding does not represent a departure from past precedent.

{¶ 24} Further, the attorney examiner finds that XOOM Energy does not raise new or novel question of law or policy in its interlocutory appeal. XOOM Energy claims that its appeal presents a novel question of law or policy because XOOM Energy contests OCC's

legal authority to participate in a COI involving a CRES and CRNGS supplier. XOOM Energy also contends that OCC cannot show where it has authority to represent consumers and utility customers in matters that do not involve “a public utility’s rate or service.” XOOM Energy argues further that Chapter 4911 of the Revised Code sets out OCC’s authority to participate in Commission proceedings, and that those matters enumerated in R.C. 4911.02 are those related to public utility rates and services, contrasting with matters related to retail suppliers or marketers. XOOM Energy concludes by arguing that R.C. 4928.16 and R.C. 4929.24 confer authority for OCC to participate in retail supplier matters before the Commission only upon complaint of OCC or by consumers, but not in a matter opened by the Commission on its own initiative pursuant to R.C. 4928.16(A)(1) and R.C. 4929.24(A)(1).

{¶ 25} While XOOM Energy argues that it raises a novel question of law or policy, similar, if not identical, arguments regarding OCC’s legal authority to intervene were raised in both the *RPA* and *SFE Energy* cases. In those cases, the attorney examiner granted OCC’s motions to intervene in cases involving issues related to a CRES and CRNGS providers, rather than a public utility, that the Commission opened on its initiative. The question, therefore, is not a new or novel question of law or policy since it has been addressed previously in *RPA* and *SFE Energy*.

{¶ 26} As another matter, XOOM Energy notes that the May 20, 2022 Entry does not acknowledge its May 16, 2022 memorandum contra OCC’s motion to intervene. While mention of XOOM Energy’s motion was inadvertently left out of the May 20, 2022 Entry, XOOM Energy’s arguments made therein do not change that the attorney examiner’s ruling was proper, as OCC’s ability to intervene in this case is well-established and OCC’s intervention satisfied the standards set in R.C. 4903.221(B). Specifically, the nature of OCC’s interest is squarely within the subject matter of this case, as OCC is the statutory representative of residential utility consumers and this case centers on XOOM Energy’s marketing conduct directly to those consumers. OCC’s contention that it is well-suited to adequately represent residential consumers is well-founded where it is OCC’s sole duty.

OCC's intervention will not prolong or needlessly delay the proceedings where its discovery is limited to the subject matter of the Staff Report and the attorney examiner has set deadlines. Finally, OCC will contribute to the full development and resolution of the factual issues where it has participated in numerous such cases and brings expertise to the fore concerning marketer activities toward residential utility consumers.

{¶ 27} Finally, XOOM Energy argues that OCC's intervention will be prejudicial and unnecessary, causing it hardship. XOOM Energy argues that OCC's discovery requests and participation unreasonably delay and expand the scope of the proceedings and that OCC is not a regulator, but will still attempt to co-opt enforcement from Staff and the Commission. The attorney examiner finds that XOOM Energy cannot demonstrate prejudice from the attorney examiner's ruling in the May 20, 2022 Entry as OCC's inquiries will be limited to those legal and factual issues raised in the Staff Report.

V. ORDER

{¶ 28} It is, therefore,

{¶ 29} ORDERED, That XOOM Energy's request to certify an interlocutory appeal of the May 20, 2022 attorney examiner Entry be denied. It is, further,

{¶ 30} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Nicholas J. Walstra

By: Nicholas J. Walstra
Attorney Examiner

MJA/mef

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Case No(s). 22-0267-GE-COI

Summary: Attorney Examiner Entry denying the request for certification of the interlocutory appeal filed by XOOM Energy Ohio, LLC electronically filed by Ms. Mary E. Fischer on behalf of Nicholas J. Walstra, Attorney Examiner, Public Utilities Commission of Ohio