

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA INTERLOCUTORY APPEAL OF DIRECT
ENERGY
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

Nearly half a century after the legislature’s creation of the Office of the Ohio Consumers’ Counsel (“OCC”), as a utility and regulatory watchdog for residential consumers, there continue to be spurious challenges by industry to OCC’s statutory right to intervene. An example of such ill-founded challenges to OCC’s intervention is the interlocutory appeal by Direct Energy – an energy marketer accused by the PUCO Staff of deceiving Ohioans.

OCC has a right under Ohio law¹ to intervene for residential consumers, including those the PUCO Staff found Direct Energy to have deceived.² OCC moved the Public Utilities Commission of Ohio (“PUCO”) to intervene in this case. Direct Energy opposed OCC’s intervention. OCC was properly granted intervention by Attorney Examiner Entry dated September 16, 2022 (“Entry”). Direct Energy has moved to certify an interlocutory appeal of that Entry.

Direct Energy’s appeal should not be certified. Direct Energy’s arguments do not meet the standards for interlocutory appeal found in O.A.C. 4901-1-15. There is nothing

¹ See R.C. Chapter 4911, R.C. 4903.221 and Ohio Adm. Code 4901-1-11.

² See Joint Stipulation and Recommendation, Exhibit A (June 10, 2022).

new or novel about OCC's intervention in this case. Further, this ruling does not represent a departure from precedent. Finally, Direct Energy has not shown it will suffer undue prejudice or expense without an immediate determination.

But Ohio consumers would be prejudiced by Direct Energy's attempt to unlawfully deny them their state advocate, OCC, in this case where the PUCO Staff has accused Direct Energy of deceiving Ohioans through energy marketing. OCC's intervention was properly granted by the PUCO. OCC's authority to intervene is well-settled many times over.³ The PUCO should not certify Direct Energy's interlocutory appeal.

II. ARGUMENT

Direct Energy fails to meet the standard for certification of interlocutory appeal established in O.A.C. 4901-1-15(B), which states an applicant must demonstrate:

...the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and 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.

Direct Energy has not demonstrated a new or novel issue, departure from precedent, or need for an immediate ruling to prevent likelihood of undue prejudice or expense. The PUCO should not certify this interlocutory appeal.

³ See also *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 ("SFE Investigation"), Entry (September 28, 2020), at ¶¶ 11, 13; and *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.

A. Direct Energy’s appeal fails to present a new or novel question of interpretation, law, or policy.

Direct Energy claims that its appeal should be certified because it “presents a new or novel question of interpretation, law, or policy.”⁴ It does not. PUCO intervention standards and OCC’s right to intervene are well-established. In the PUCO’s investigation of marketer XOOM Energy Ohio⁵, XOOM made the same arguments to oppose OCC’s intervention that Direct Energy now raises.⁶ The Attorney Examiner rejected them under controlling Supreme Court of Ohio precedent.⁷ In granting OCC’s motion to intervene, the Attorney Examiner stated:

Under Ohio Adm.Code 4901-1-11, any person shall be permitted to intervene upon timely motion that shows both that the person has a conferred right to intervene by statute, and that the person has a real or substantial interest in the proceeding that is not adequately represented by the existing parties. The attorney examiner notes that the Supreme Court of Ohio has held that statutes and rules governing intervention should be “generally liberally construed in favor of intervention.” *Ohio Consumers’ Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 384 (quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections* (1995), 74 Ohio St.3d. 143, 144).⁸

The PUCO has already considered Direct Energy’s arguments and rejected them pursuant to binding Ohio Supreme Court authority. Consequently, Direct Energy raises no new or novel question in its application. Direct Energy has not met the PUCO’s

⁴ Direct Energy Memorandum in Support of the Interlocutory Appeal, Request for Certification and Application for Review (“Direct Energy Memo”) (September 21, 2022) at 5.

⁵ *In the Matter of the Investigation of XOOM Energy Ohio, LLC’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-267-GE-COI, (“XOOM Investigation”), Entry (May 20, 2022), at ¶¶ 10-11.

⁶ *See* XOOM Investigation, Memorandum Contra of XOOM Energy Ohio, LLC to OCC’s Motion to Intervene (May 16, 2022), at 2-3.

⁷ *See* XOOM Investigation, Entry (May 20, 2022), at ¶¶ 10-11.

⁸ *Id.* at ¶ 10.

interlocutory appeal standard under O.A.C. 4901-1-15(B). This appeal should not be certified.

B. Direct Energy’s appeal fails to show the PUCO Entry is a departure from precedent.

Direct Energy claims that the Entry is a departure from precedent because the Attorney Examiner purportedly did not consider Direct Energy’s arguments or properly analyze the question of OCC’s intervention.⁹ Direct Energy also claims the Entry relies on irrelevant authority.¹⁰ Direct Energy is wrong, and its arguments should be rejected.

First, Direct Energy’s contention that the Attorney Examiner Entry did not consider its arguments fails. The Entry *does* in fact address Direct Energy’s arguments¹¹ before rejecting them.¹² Even if the Entry had not addressed Direct Energy’s arguments, this would not convert a decision based on well-settled law into a departure from precedent.

In fact, PUCO precedent – specifically, the PALMco 2 Investigation¹³ – affirms OCC has authority to intervene in this case. In granting OCC’s motion to intervene in PALMco 2, the Attorney Examiner stated the following:

Upon consideration of OCC’s motion to intervene in this proceeding, the attorney examiner finds that OCC’s motion is supported by statute, the Commission’s intervention rule, and prior Commission precedent, and should be granted. OCC has satisfied the intervention criteria set forth in R.C. 4903.221 and Ohio Adm.Code 4901-1-11 because OCC’s

⁹ Direct Energy Memo at 7.

¹⁰ Direct Energy Memo at 7-8.

¹¹ Entry (September 16, 2022) at ¶ 6.

¹² Entry (September 16, 2022) at ¶ 8.

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.

participation in this case on behalf of residential customers will significantly contribute to full development and equitable resolution of the issues identified by Staff without causing any unreasonable delay in the proceeding. Further, the Commission has permitted OCC to previously intervene in Commission-initiated enforcement proceedings.¹⁴

The Attorney Examiner's decision to grant OCC intervention in this case is on-point and directly relevant to the Attorney Examiner's decision to grant OCC intervention in this case. The PUCO routinely grants OCC's intervention as the statutory representative of residential utility consumers over marketer opposition. Direct Energy also fails in its attempt to distinguish the types of cases cited in the Entry supporting OCC's intervention from the current proceeding. R.C. 4903.221 makes no distinction between the types of proceedings in which a potentially adversely affected party may intervene. Consequently, Direct Energy has not shown that OCC's intervention departs from precedent.

Direct Energy has not met the second prong of the PUCO interlocutory appeal standard under O.A.C. 4901-1-15(B). The PUCO should not certify Direct Energy's appeal.

C. Direct Energy's appeal fails to show an immediate PUCO determination is needed to protect Direct Energy from likely undue prejudice or expense.

Direct Energy claims that it will incur undue expense litigating against OCC because any interest it has in this case is already represented adequately by PUCO Staff.¹⁵ This not so. Only OCC, as the statutory representative of Ohio's residential utility

¹⁴ PALMco 2 Investigation Entry at ¶ 19 (Emphasis added).

¹⁵ Direct Energy Memo at 10.

consumers, is in the unique position of representing the interests of the residential consumers Direct Energy allegedly harmed. The PUCO Staff, by contrast, considers the interests of all consumers *and* marketers in this PUCO investigation.

Further, as noted above, it is well-settled that OCC can intervene in marketer investigation cases and participate in discovery immediately after filing a motion to intervene.¹⁶ Violating state standards for protection of Ohio energy consumers has consequences. For a marketer like Direct Energy, those consequences include consumer representation by the Ohio Consumers' Counsel. Consequently, the cost Direct Energy incurs in defending its alleged mistreatment of Ohio consumers is not *undue* expense. That is due process and the cost of doing business in Ohio, where laws and rules protect consumers from unfair marketing of energy.

Direct Energy fails to establish the third prong of the PUCO interlocutory appeal standard under O.A.C. 4901-1-15(B). The PUCO should not certify Direct Energy's appeal, especially since Direct Energy is the party causing delay and expense.

D. The Attorney Examiner properly granted OCC's motion to intervene.

Direct Energy argues that OCC cannot intervene in this proceeding because its authority to do so is not enumerated.¹⁷ This ignores statutes that sets forth OCC's authority to act on behalf of residential consumers. R.C. 4911.02(B)(2) provides OCC's rights to protect consumers are "*without limitation because of enumeration....*" (Emphasis added.) Enumeration is irrelevant, given this broad language. Even so, what is enumerated – for example, R.C. 4911.02 – allows OCC to intervene in this case. This is

¹⁶ O.A.C. 4901-1-16(H).

¹⁷ Direct Energy Memo at 5.

especially so because the PUCO has found that “...the provisions of Section 4911.02 should be construed *as broadly as possible*.”¹⁸

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 resolve 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. This is especially likely if OCC is not permitted to represent residential consumers’ interests in this proceeding. For these reasons, the Attorney Examiner properly granted OCC’s motion to intervene.

III. CONCLUSION

Direct Energy fails to meet the standards that allow an appeal to be certified to the PUCO for further review. The Attorney Examiner’s decision to grant OCC intervention is not new or novel and does not depart from precedent. Granting OCC’s intervention was consistent with prior precedent allowing OCC to intervene in PUCO investigations of marketers, over their opposition. Further, Direct Energy has not shown that an immediate determination is needed to prevent the likelihood of undue prejudice or expense to it, should the PUCO ultimately reverse the ruling in question. The PUCO should not certify Direct Energy’s appeal.

¹⁸ *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).

The Attorney Examiner properly granted OCC's motion to intervene. OCC meets the criteria set forth in R.C. 4903.221, Ohio Adm. Code 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. Consistent with law for nearly half a century, OCC's intervention gives a voice to Ohio consumers – including those that Direct Energy allegedly abused.

The PUCO should deny certification of Direct Energy's appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra Interlocutory Appeal of Direct Energy was served on the persons stated below via electronic transmission, this 26th day of September 2022.

/s/ William J. Michael
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Assistant Consumers' Counsel

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

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Summary: Memorandum Memorandum Contra Interlocutory Appeal of Direct Energy by Office of the Ohio Consumers' Counsel electronically filed by Ms. Alana M. Noward on behalf of Michael, William J.