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Legal Department

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FirstEnergy

76 South Main Street
Akron, Ohio 44308

FILE

Kathy J. Kolich
Senior Attorney

330-384-4580
Fax: 330-384-3875

*Via Federal Express
and Facsimile (614-466-0313)*

September 14, 2009

Ms. Renee J. Jenkins
Director, Administration Department
Secretary to the Commission
Docketing Division
The Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215-3793

PUCO

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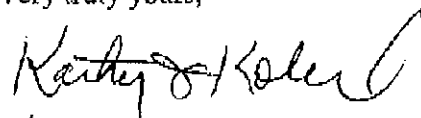
Dear Ms. Jenkins:

*Re: The Cleveland Electric Illuminating Company's Memorandum Contra the Ohio
Environmental Council's Motion to Intervene
Case No. 09-1100-EL-EEC*

Enclosed for filing, please find the original and twelve (12) copies of The Cleveland Electric Illuminating Company's Memorandum Contra the Ohio Environmental Council's Motion to Intervene. Please file the enclosed Motion in the above-referenced docket, time-stamping the two extras and returning them to the undersigned in the enclosed envelope.

Thank you for your assistance in this matter. Please contact me if you have any questions concerning this matter.

Very truly yours,



kag
Enclosures

cc: Parties of Record

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**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The) Lubrizol Corporation and The) Cleveland Electric Illuminating) Company For Approval of a Special) Arrangement Agreement With A) Mercantile Customer)	Case No. 09-1100-EL-EEC
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**MEMORANDUM CONTRA THE OHIO ENVIRONMENTAL COUNCIL'S
MOTION TO INTERVENE**

I. Introduction

Pursuant to §4901-1-12(B)(1), and for the reasons more fully discussed below, The Cleveland Electric Illuminating Company ("Company") hereby respectfully asks the Commission to deny the Motion to Intervene submitted by the Ohio Environmental Council ("OEC") on or about August 31, 2009.

II. Background

On or about July 29, 2009, Applicants, The Lubrizol Corporation ("Customer") and the Company jointly applied for approval of a special arrangement contract and authority to waive, consistent with R.C. 4928.66(A)(2)(c), recovery from Customer of certain rider charges that will be collected under the Company's Rider DSE2 ("Application"). This Application simply asks the Commission to approve the energy project(s) so as to justify Customer's exemption from paying the Rider DSE2 charges. The Company anticipates filing many more applications with other mercantile customers. The accumulation of these projects will be included as a single

program – the mercantile customer program – as part of a comprehensive portfolio of programs that will be the subject of a separate review process.

On August 31, 2009, the OEC electronically filed a motion to intervene¹, claiming that it meets the prerequisites for intervention set forth in R.C. 4903.221 and Ohio Administrative Code §4901-1-11.² OEC argues two interests: (1) “assuring that the Applicant’s proposal will result in sufficient energy savings to justify Customer’s opt-out of Rider DSE2” (OEC memorandum in support of Motion (hereinafter “MIS”), unnumbered p. 1); and (2) “ensuring that the energy efficiency and demand reduction benchmarks are met...” (Id. at unnumbered p. 2.) As is discussed below, the two interests are really one. Moreover, there is nothing in OEC’s pleading that supports its first alleged interest; and its second is already adequately protected by the Commission’s measurement and verification (“M&V”) expert. While OEC’s participation will do nothing to significantly contribute to the development of the factual issues surrounding the Application, its participation will unduly prolong or delay the application review process³ to the detriment of the Customer and will require the Customer to expend time, money and resources better utilized elsewhere in its business. Accordingly, the Company respectfully asks the Commission to deny OEC’s motion to intervene.

¹ According to the Commission’s website, documents in an EEC docket cannot be filed electronically. Accordingly, OEC’s motion was not properly filed.

² Section 4901-1-11, Ohio Administrative Code, mirrors the statutory requirements and, accordingly, all discussions regarding the criteria set forth in R.C. 4903.221(B) equally apply to the criteria set forth in the Code.

³ It should be kept in mind that OEC’s interest in assuring the accuracy of the Company’s reported energy and peak demand reduction levels is common to many potential intervenors. *See e.g.*, OCC MTI, filed August 13, 2009. Once intervention is granted to one party, it could very well open the floodgates for intervention, significantly increasing the potential for delay. This will be further exacerbated by the fact that the Company anticipates filing many applications similar to that at issue in this proceeding in the near future.

III. Arguments

As OEC correctly states, 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. (OEC MIS, unnumbered p. 1.) Subsection (B) of this same statute requires the Commission to consider the following criteria when 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;
- 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.

And, §4901-1-11, O.A.C. sets forth an additional Commission requirement: “the extent to which the [intervenor’s] interest is represented by existing parties.” §4901-1-11(A)(5), O.A.C. The OEC fails to meet any of these requirements.

A. OEC’s stated interest is unsupported by the pleading.

OEC indicates that its first interest lies “in assuring that there is sufficient energy savings to justify Customer’s opt-out of Rider DSE2.” (OEC MIS, unnumbered p. 1.) This interest is an economic interest. While not clear from OEC’s motion, it appears that OEC is arguing that if the Customer is erroneously granted a waiver from paying the rider charges, OEC’s members will pay more under the rider. According to OEC, it represents “over 100 affiliated group members” (id.), yet, it never identifies these members. Without knowing the identity of OEC’s members and whether any of them are

actually customers of the Company, OEC's pleading fails to support its assertion and makes it virtually impossible for the Company to respond to the same.

Notwithstanding the above, even if it is assumed for the sake of argument that any of OEC's members are customers of the Company, OEC's first interest is simply a variation of its second – to ensure that the levels of energy and peak demand reductions reported by the Company are accurate. As discussed below, this concern is adequately addressed by others.

B. OEC's interests are adequately protected through others and, therefore, OEC will not significantly contribute to the development of the factual issues surrounding the Application.

OEC argues that it "is interested in ensuring that the energy efficiency and demand reduction benchmarks are met...." (OEC MIS, unnumbered p. 2.) This interest is exactly what the *Commission* is charged with protecting (see R.C. 4928.66(B)). Indeed, in order to accomplish this task, the Commission is hiring an "independent program evaluator." In the rules originally adopted by the Commission in Docket No. 08-888-EL-ORD (hereinafter "Rules"),⁴ Rule 4901:1-39-01(L) defines this evaluator as "the person or firm hired by the electric utility at the direction of the commission staff to measure and verify the energy savings and/or electric utility peak-demand reduction resulting from *each* approved program and to conduct a program process evaluation of *each* approved program. Such person shall work at the sole direction of the commission

⁴ While these rules are no longer before JCAR for approval, the rules discussed in this pleading were generally not contested. Accordingly, it is anticipated that the rules ultimately approved by JCAR will have similar provisions. Inasmuch as the Commission is revising these rules, the Commission will know whether this assumption is valid. And, if indeed the assumption is valid, then so too is the argument.

staff.” (Emphasis added.) Clearly between the Staff’s data requests and review of supporting documentation submitted by the applicants, and the work of the independent program evaluator, OEC’s interest is adequately represented. To find otherwise, and allow parties to intervene so that any one of them could perform its own M&V analysis, would negate the need to hire the independent program evaluator. If the program evaluator is responsible for M&V, and this program evaluator is an independent third party trained in M&V, it is difficult to conceive exactly how OEC will make any contribution “to the full development and equitable resolution of the factual issues” beyond that which is already being done by the Commission’s M&V expert.⁵

C. OEC’s intervention will unduly prolong or delay the application review process and its concerns are better addressed in another proceeding.

Revised Code § 4928.66(B) requires the Commission, in accordance with the rules it shall adopt, “to produce and docket at the commission an annual report containing the results of its verification of the annual levels of energy efficiency and of peak demand reductions achieved by each electric distribution utility.” In order to develop this report, Rule 4901:1-39-05(C) of the Commission’s Rules requires all Ohio electric distribution utility’s to file by April 15th of each year, “a portfolio status report addressing the performance of all approved energy efficiency and peak-demand reduction programs in its program portfolio plan over the previous calendar year which includes, at a minimum,

⁵ OEC claims that “as an active participant in cases before the Commission, it has developed expertise that will contribute to the full development of the legal questions involved in this proceeding. (OEC MIS, unnumbered p. 3.) As a preliminary matter, this prong of the intervention test deals with the *factual*, rather than legal issues – issues that are adequately addressed by the Commission Staff and the Commission’s independent program evaluator. Second, OEC’s active participation in Commission cases is irrelevant when the issue before the Commission deals with the engineering results from an energy efficiency project.

...[a section in its portfolio status report] detailing its achieved energy savings and demand reductions relative to its corresponding baselines.” Similarly, Rule 4901:1-39-06(A) of these rules indicates that “[a]ny person may file comments regarding an electric utility’s initial benchmark report or annual portfolio status report filed pursuant to this chapter within thirty days of the filing of such report. And, finally, Rule 4901:1-39-05(C) provides that “[t]he commission may schedule a hearing on the electric utility’s portfolio benchmark report or status report.” As explained below, OEC will have another more appropriate process through which to address the concerns set forth in its motion to intervene.

The Application filed in this proceeding deals with a single customer’s energy efficiency project(s). This application is one of many contemplated to be filed with the Commission, with the results of all projects for all applications being accumulated and included as a single program within the Company’s portfolio of programs. This entire portfolio of programs will be the subject of both the Company’s 3 year plan (that is required under Rule 4901:1-39-04(A)) and the annual status report required under Rule 4901:1-39-05(C). OEC’s concerns are better addressed in either of these dockets simply because both will include the entire portfolio of projects, thus allowing all parties to perform a single review of the *entire* plan, rather than a piecemeal review of, not only a single program, but also the individual components that comprise the program. To allow intervention so that OEC can perform its own M&V analysis will unduly prolong or delay the application review process and postpone the date on which the Customer would otherwise be exempt from paying Rider DSE2 charges. Further, if OEC is granted

intervention, the Customer will not only have to expend time, money and resources accommodating the Commission's independent program evaluator, but it will have to duplicate these efforts for OEC's M&V expert. Such redundancy is inefficient and costly and should not be permitted.⁶

D. Summary

In sum, OEC claims that its interest lies in ensuring the accuracy of the levels of energy and peak demand reductions reported by the Company. In order to obtain such assurance, OEC would have to perform a M&V analysis of the Customer's projects. Such expertise does not reside within OEC, which would require the hiring by OEC of an M&V expert. The Commission is hiring an independent M&V expert to perform the same analysis as that which would be required by OEC. Accordingly, OEC's interests in this proceeding are adequately protected by others. To find otherwise would render the work of the Commission's expert redundant and could create a "battle of the experts." Such redundancy and potential for battle would unduly prolong or delay the application review process, especially when there is another more appropriate proceeding -- a proceeding that will include all of the Company's programs, rather than simply a single project -- in which OEC's concerns can be addressed.

Given that (i) OEC's interests are adequately protected by the independent program evaluator; (ii) OEC has no resident expertise in evaluating engineering reports

⁶ Even if the date could be coordinated on which both OEC's and the Commission's experts are available, the process could be unduly delayed when trying to find a date that accommodates both schedules. This delay would be exacerbated if intervention is granted to multiple parties, all of whom will more than likely desire to perform an independent M&V analysis as well.

related to energy efficiency projects that would contribute to the development of the factual issues; (iii) there is another more efficient process through which OEC's concerns can be addressed; and (iv) OEC's participation will unduly prolong or delay this proceeding to the detriment of the Customer or require the customer to utilize unnecessary resources and incur unnecessary costs to accommodate both the Commission's and OEC's M&V experts, OEC's Motion to intervene must be denied.

Respectfully submitted,

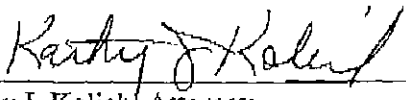


Kathy J. Kolich
Senior Attorney
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
Telephone: 330-384-4580
Fax: 330-384-4875
Email: Kjkolich@firstenergycorp.com

Attorney for The Cleveland Electric
Illuminating Company

CERTIFICATE OF SERVICE

This is to certify that a copy of The Cleveland Electric Illuminating Company's Memorandum Contra OEC's Motion to Intervene was served on this 14th day of September, 2009, on the persons stated below by regular U.S. Mail, postage prepaid, except for service on Mr. Todd M. Williams, who was served electronically at the email address set forth below.


Kathy J. Kolich, Attorney

Duane Luckey
Assistant Attorney General
Public Utilities Commission of Ohio
180 East Broad Street, 9th Floor
Columbus, OH 43215

Todd M. Williams
Williams & Moser, L.L. C.
P.O. Box 6885
Toledo, OH 43612
toddm@williamsandmoser.com

Ann M. Hotz
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485

John Leonard
The Lubrizol Corporation
29400 Lakeland Blvd.
Wickliff, OH 44092