

FILE

11

BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING DIV  
2009 OCT 27 PM 4:34  
PUCO

In the Matter of the Energy Efficiency	)	
and Peak Demand Reduction Program	)	Case No. 09-580-EL-EEC
Portfolio of Ohio Edison Company, The	)	09-581-EL-EEC
Cleveland Electric Illuminating	)	09-582-EL-EEC
Company, and The Toledo Edison	)	
Company	)	
	)	
	)	

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA  
TO THE (1) MOTION TO INTERVENE ON BEHALF OF THE NEIGHBORHOOD  
ENVIRONMENTAL COALITION, THE EMPOWERMENT CENTER OF GREATER  
CLEVELAND, UNITED CLEVELANDERS AGAINST POVERTY, CLEVELAND  
HOUSING NETWORK, AND THE CONSUMERS FOR FAIR UTILITY RATES, AND  
(2) MOTION OF CITIZEN POWER, INC. TO INTERVENE

I. Introduction

Pursuant to Rule 4901-1-12(B)(1), and for the reasons more fully discussed below, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("Companies") hereby respectfully ask the Commission to deny both the Motion to Intervene filed by Citizen Power, Inc. on October 23, 2009, and the Motion to Intervene filed by the Neighborhood Environmental Coalition, the Empowerment Center of Greater Cleveland, United Clevelanders Against Poverty, Cleveland Housing Network, and the Consumers For Fair Utility Rates (collectively, "Citizens Coalition") on October 20, 2009 (collectively, the "Motions"). The Motions were not timely filed, and they fail to meet the standard for intervention provided by Ohio law.

II. Background

The Commission's September 23, 2009 Finding and Order (the "Order") approved the two energy savings and peak demand reduction programs proposed in this proceeding – the High

Efficiency Light Bulb Program (the “CFL program”) and the Online Home Energy Education Tool Program (the “Online Tool program”). In its Order, the Commission found that these programs and their associated costs were reasonable and should be approved. The Commission’s findings were supported, in part, by “the stakeholder’s agreement to the application as modified by the September 16, 2009 filing” – a reference to the letter from William R. Ridmann to Staff describing modifications to the CFL program and Online Tool program made to obtain the consent of interested stakeholders. That consent was the end result of an open collaborative process involving Commission Staff, OCC, and representatives of consumer and environmental groups.

Citizen Power and the Citizens Coalition were parties to the Electric Security Plan Stipulation that created and empowered the collaborative, and both participated in the collaborative process through their legal counsel.<sup>1</sup> Both were provided details of the CFL program, and both were advised of the Companies’ filing of this proceeding. Thus, while aware of the development of the CFL program, they elected not to intervene in this proceeding in a timely manner after it was commenced on July 9, 2009, and, in fact, did not seek to intervene in this proceeding until after the Commission’s September 23, 2009 Order.

On October 7, 2009, the Commission asked the Companies to postpone deployment of the CFL program and, on October 15, 2009, the Commission scheduled oral argument for the parties in order to allow the Commission the opportunity to ask questions concerning the CFL program. *See* October 15, 2009 Entry at ¶ 5. As part of this Entry, the Commission specified the parties who would be allowed to speak, their order of presentation, and the time limits for each

---

<sup>1</sup> Citizen Power and the Citizens Coalition were signatories to the Supplemental Stipulation filed on February 26, 2009, in Case No. 08-935-EL-SSO. As signatories, they agreed to all terms of the ESP Stipulation filed in that proceeding on February 19, 2009, with certain modifications not of relevance here.

presentation. Neither the Citizens Coalition nor Citizen Power sought leave to intervene prior to this Entry. Instead, they waited until October 20, 2009 and October 23, 2009, respectively, to file their motions. The Citizens Coalition waited until only eight days before oral argument. Citizen Power waited until five days before oral argument.

In support of the Motions, the Citizens Coalition and Citizen Power claim that they meet the prerequisites for intervention set forth in R.C. § 4903.221 and O.A.C. 4901-1-11. The Citizens Coalition claims that it seeks to intervene because: (1) it represents low income individuals who could potentially be impacted by increased utility costs; and (2) the Citizens Coalition has experience with issues relating to low income families. *See* Coalition Motion at 3-5. Similarly, Citizen Power claims a right to intervene because: (1) it advocates for affordable energy, particularly for low income customers; and (2) it has an interest as a participant in the Companies' collaborative. *See* Citizen Power Motion at 3-4. However, as discussed in detail below, there is nothing in these untimely Motions suggesting that the interests of consumers, or the interests of collaborative attendees, are not adequately represented by present parties. Moreover, the Citizens Coalition and Citizen Power have not demonstrated how their participation at this late date will contribute to the resolution of this proceeding.

The participation of the Citizens Coalition and Citizen Power will not significantly contribute to the development of the factual issues confronting the Commission. Their participation could only prolong or delay the resolution of this application. Accordingly, the Companies respectfully request that the Commission deny the Motions.

### **III. Discussion**

When determining whether to grant a *timely-filed* motion to intervene, O.A.C. § 4901-1-11 provides five criteria for the Commission's consideration:

- (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 proceedings.
- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.
- (5) The extent to which the person's interest is represented by existing parties.

The Citizens Coalition and Citizen Power fail to satisfy these requirements because: (1) the Motions were not timely filed; (2) the interests of the residents that the Citizens Coalition and Citizen Power purport to represent are adequately represented by existing parties; (3) they have not established that they have legal or factual arguments helpful to the Commission; and (4) the participation of the Citizens Coalition and Citizen Power could unduly prolong or delay the proceedings. Accordingly, the Motions should be denied.

**A. The Motions to Intervene Were Not Timely Filed.**

O.A.C. 4901-1-11(E) states that "A motion to intervene will not be considered timely if it is filed later than five days prior to the scheduled date of hearing or any specific deadline established by order of the commission for purposes of a particular proceeding." The instant case has been pending since July 9, 2009, and several interested parties moved to intervene after the case was filed. Neither the Citizens Coalition nor Citizen Power sought leave to participate at that time. On September 16, 2009, the Companies notified the Commission that they had reached consensus with all interested parties, and, on September 23, 2009, the Commission granted the Companies' application. In that Order, the Commission found that it was unnecessary to hold a hearing, thereby foreclosing further intervention. On October 15, 2009,

the Attorney Examiner issued an Entry finding that the Commission has a “full and complete record” upon which to make a decision. *See* October 15, 2009, Entry at ¶5.

On October 20, 2009, almost a month after the Commission issued its Order and only eight days before the oral argument on a record which has already been established, the Citizens Coalition filed its Motion seeking leave to intervene. Citizen Power filed its Motion three days later on October 23, 2009. However, Ohio law is clear. The Citizens Coalition and Citizen Power were required to intervene, if at all, no less than five days before the hearing. O.A.C. 4901-1-11(E). They failed to seek leave to intervene until after the Commission had issued its decision. They have offered no explanation or justification for their delay. Motions to intervene filed after the Commission issues its rulings are untimely. *See* Case No. 03-1966-EL-ATA, Entry dated March 25, 2004 at ¶ 11 (denying as untimely motion to intervene filed by Sempra Energy Solutions after the Commission’s opinion and order had been issued); Case No. 05-704-EL-ATA, Opinion and Order dated January 4, 2006 at p. 15 (denying as untimely motion to intervene filed by the City of Cleveland Heights filed two weeks after the relevant hearing). As the Commission has already issued its Order, the Motions are untimely and should be denied.

**B. The Citizens Coalition and Citizen Power Do Not Have A Unique Interest In These Proceedings Not Already Represented By Others.**

The Citizens Coalition’s stated interest in the proceeding is that low income residents would be adversely affected by even minor increases in utility costs. *See* Coalition Motion at 4. Similarly, Citizen Power claims an interest in keeping the cost of electricity affordable for low-income customers. Citizen Power Motion at 3. Even if one accepts these claims as true, they are irrelevant to the question of whether or not Citizens Coalition and Citizen Power should be allowed to intervene at this late juncture.

The Citizens Coalition and Citizen Power cannot claim ignorance as an excuse. They have known since February of this year that the Companies would be proposing energy efficiency programs to a collaborative and then would seek Commission approval of those programs. The details of this collaborative process, which was open to the Citizens Coalition and Citizen Power, are set forth in the ESP Stipulation to which both were parties. Those stakeholders with an interest in these programs, including the Citizens Coalition, Citizen Power, and other stakeholders representing the interests of low-income residential consumers, convened in a series of sessions with the Companies throughout the spring and summer of this year. Both the Citizens Coalition and Citizen Power participated in the collaborative subcommittee – the residential and low income subcommittee – in which the CFL program was reviewed. In fact, both had representatives telephonically attend the June 24, 2009 subcommittee meeting during which the CFL program’s business plan and costs were presented and discussed in detail. Because subcommittee attendees expressed support for the program, the Companies filed an application on July 9, 2009, requesting Commission approval. On September 14, 2009, the Companies updated collaborative subcommittee attendees, including representatives of the Citizens Coalition and Citizen Power,<sup>2</sup> on the status of the July 9, 2009 filing.

Several stakeholders intervened in this proceeding in a timely manner to ensure their concerns would be considered by the Commission. The Citizens Coalition and Citizen Power took a different approach. Although they participated in the collaborative and were advised of the CFL program and this proceeding, they failed to intervene at a time when they could assist in

---

<sup>2</sup> Both the June 24, 2009 meeting and the September 14, 2009 meeting were attended by Joseph Meissner, Citizens Coalition’s representative, and Theodore S. Robinson, Citizen Power’s representative. Joseph Meissner also attended a May 26, 2009 meeting of the collaborative subcommittee during which the CFL program was discussed.

the development of the record.<sup>3</sup> They took no action until news media decided that the CFL program was a story. In light of the fact that they did not seek leave to participate in this process until *after* the Commission already issued its Order, it is unclear what unique interest they could possibly represent at this point.

The consumers purportedly represented by the Citizens Coalition and Citizen Power are already represented by the existing parties. The Ohio Partners for Affordable Energy (“OPAE”) represents low and moderate-income consumers, and, by statute, the OCC acts on behalf of all residential consumers, including those the Citizens Coalition and Citizen Power purport to represent.<sup>4</sup> In fact, the OPAE counts among its many members two of the participants in the Citizens Coalition – Cleveland Housing Network and Consumers For Fair Utility Rates.<sup>5</sup> Thus, not only have the interests of low-income consumers been fully represented<sup>6</sup> in this proceeding, but the Citizens Coalition itself has been represented.

It must be noted that the Citizens Coalition and Citizen Power have failed to explain how their representation of low-income customers would benefit the Commission at this stage of the proceedings. If they mean to challenge the right of a public utility to recover its costs incurred in designing and implementing energy efficiency programs, that issue was resolved by the General Assembly when it enacted S.B. 221. If they mean to challenge the Companies’ recovery of lost distribution revenue caused by energy efficiency programs, they need only be reminded that they

---

<sup>3</sup> Ironically, Citizen Power uses its participation in the collaborative as justification for its untimely request to intervene. *See* Citizen Power Motion at 3. Citizen Power does not explain why it decided to participate in the collaborative, lodged no objection to the CFL program, and then decided not to intervene in this proceeding in a timely manner.

<sup>4</sup> *See* Motion to Intervene and Memorandum in Support for Ohio Partners for Affordable Energy, filed August 17, 2009; R.C. § 4911.02.

<sup>5</sup> *See* OPAE membership list available at <http://www.ohiopartners.org/membership.htm>.

<sup>6</sup> In fact, those interests have been represented by multiple intervenors. While Citizen Power generally claims an interest in the potential environmental impact of energy efficiency programs, that interest also is represented by existing parties, including NRDC.

consented to that recovery when they agreed to the ESP Stipulation. If they simply object to rates increasing to pay for energy efficiency programs mandated by the General Assembly, such a complaint is too generalized to entitle a party to intervene and is more properly directed to the General Assembly. Regardless, the Commission is more than capable of recognizing the impact that rate increases could have on low income customers.

Because the interests of low-income residential consumers currently are represented in these proceedings by experienced counsel, intervention by the Citizens Coalition and Citizen Power is unnecessary. To find otherwise, and allow any neighborhood group or association to intervene well after the Commission has issued its Order, would negate the intent of O.A.C. 4901-1-11.

**C. The Citizens Coalition and Citizen Power Have Not Offered Any Factual Or Legal Arguments Not Already Considered By The Commission.**

The Citizens Coalition and Citizen Power have not offered a legal position justifying their inclusion in this proceeding, or explained how their legal position relates to the merits of the case. They also have not explained how they will contribute to the development and resolution of the factual issues before the Commission. This is a particular concern, because the Commission has already issued its Order, and it had a “full and complete record” upon which to make a decision. *See* October 15, 2009 Entry.

The Citizens Coalition merely has argued that its “knowledge of the effects of changing energy costs on low-income families will assist the PUCO in fully developing and equitably resolving this case.” Coalition Motion at 5. Similarly, Citizen Power’s “legal position” is that “electric rates should be reasonable.” Citizen Power Motion at 3. However, the Commission already has considered each of these factual and legal issues, and has issued its Order. Now, almost a month after that Order was filed, the Citizens Coalition and Citizen Power seek to



introduce their unspecified “knowledge” about issues already considered by the Commission and the interested parties who participated in the process leading up to this point. This is an insufficient reason to allow intervention at this stage of the litigation.

**D. Intervention Of The Citizens Coalition and Citizen Power Could Cause Undue Delay.**

Although the Commission has a full and complete record before it, it has scheduled oral argument to allow the Commission to ask questions of the parties who have intervened thus far in order to provide the Commission with a better understanding of the issues. *See* October 15, 2009 Entry. It is unclear what effect, if any, intervention of the Citizens Coalition and Citizen Power could have besides, potentially, delaying the oral argument currently scheduled for October 28, 2009. The Commission’s expeditious scheduling of argument implicitly recognizes the limited period left in 2009 for the Companies to take steps to comply with the energy savings mandates of S.B. 221. Additional delay or postponement that might be occasioned by the untimely Motions only exacerbates the issues surrounding compliance with the statutory mandates. Certainly, the mere filing of the Motions *after both* the Commission’s Order of September 23, 2009 *and* the Entry of October 15, 2009 setting the matter for oral argument should not provide a mechanism for the Citizens Coalition and Citizen Power to bootstrap themselves into this previously scheduled argument. If, however, they do not intend to interfere with the oral argument and do not intend to attempt to re-open the record,<sup>7</sup> then the Motions appear to have been filed for no reason. The Citizens Coalition and Citizen Power have not proven that they are entitled to intervene in this proceeding.

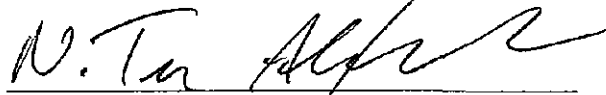
---

<sup>7</sup> The Citizens Coalition filed a motion on October 26, 2009, asking the Commission to schedule public hearings around the state and also to accept public comments on the CFL program. This would, of course, unduly delay the proceedings. It also would not alter the fact that the Commission, having a full and complete record before it, was correct in finding that the CFL program and its costs are reasonable.

#### IV. Conclusion

The Citizens Coalition and Citizen Power did not seek leave to intervene before the Commission's September 23, 2009 Order was filed. Therefore, the Motions are untimely and should be denied for this reason alone. However, leaving aside the tardiness of the Motions, the Citizens Coalition and Citizen Power have failed to establish that they represent a unique interest, will offer additional factual or legal arguments not already considered by the Commission, and would not cause undue delay. Therefore, the Companies respectfully request that the Motions be denied.

Respectfully submitted,



Arthur E. Korkosz (Counsel of Record)  
FIRSTENERGY SERVICE COMPANY  
76 South Main Street  
Akron, OH 44308  
Telephone: (330)384-5849  
Facsimile: (330) 384-3875  
kjkolich@firstenergycorp.com  
korkosza@firstenergycorp.com

James F. Lang  
N. Trevor Alexander  
CALFEE, HALTER & GRISWOLD LLP  
1400 KeyBank Center  
800 Superior Ave.  
Cleveland, OH 44114  
Telephone: (216) 622-8200  
Facsimile: (216) 241-0816  
jlang@calfee.com  
talexander@calfee.com

ATTORNEYS FOR APPLICANTS, OHIO  
EDISON COMPANY, THE CLEVELAND  
ELECTRIC ILLUMINATING COMPANY AND  
THE TOLEDO EDISON COMPANY

## CERTIFICATE OF SERVICE

Copies of the foregoing were served by first class United States Mail, postage prepaid, to the persons upon the parties of record identified below on this 27th day of October, 2009.

David C. Rinebolt  
Ohio Partners for Affordable Energy  
231 West Lima Street  
P.O. Box 1793  
Findlay, OH 45839

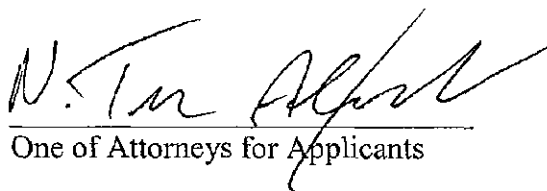
Duane W. Luckey  
Attorney General's Office  
Public Utilities Commission Section  
180 E. Broad Street, 9th Floor  
Columbus, OH 43215-3793

Samuel Randazzo  
McNees, Wallace & Nurick  
21 East State Street, 17th Floor  
Columbus, OH 43215-4228

Jeffrey L. Small  
Richard C. Reese  
Gregory J. Poulos  
Office of the Consumers' Counsel  
10 W. Broad Street, 18th Floor  
Columbus, OH 43215-3485

Henry W. Eckhart  
50 West Broad Street, #2117  
Columbus, OH 43215  
Joseph P. Meissner  
Matthew D. Vincel  
The Legal Aid Society of Cleveland  
1223 West 6th St.  
Cleveland, OH 44113

Theodore S. Robinson  
Citizen Power  
2121 Murray Avenue  
Pittsburgh, PA 15217

  
One of Attorneys for Applicants