

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)	
Cleveland Electric Illuminating)	Case No. 09-1102-EL-EEC
Company and PolyChem Corporation)	
for Approval of a Special Arrangement)	
Agreement with a Mercantile Customer)	

**MEMORANDUM CONTRA THE OHIO ENVIRONMENTAL COUNCIL'S
MOTION TO INTERVENE**

I. Introduction

Pursuant to OAC 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 filed on December 11, 2009 by the Ohio Environmental Council ("OEC").

II. Background

On November 4, 2009, PolyChem 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 the DSE2 charge that otherwise would be collected under the Company's Rider DSE ("Application"). The Application asks the Commission to approve the Customer's energy efficiency project – a lighting upgrade project – for inclusion in the Company's mercantile customer program and to exempt Customer from payment of the DSE2 charge contingent upon compliance with certain annual reporting requirements. Since filing the Application, the Company has filed more applications with other mercantile customers and anticipates filing several more in the future. These mercantile projects in the aggregate will be included as a single program – the mercantile customer program – in the

Company's comprehensive program portfolio for which the Company recently requested Commission approval in Case No. 09-1947-EL-POR.

On December 11, 2009, OEC electronically filed a motion to intervene and memorandum in support (the "Motion"), claiming it meets the prerequisites for intervention set forth in R.C. 4903.221 and O.A.C. 4901-1-11. OEC argues two interests: (1) "assuring that the applicants' proposal will result in sufficient energy savings to justify PolyChem's opt-out of Rider DSE2" and, (2) "ensuring that the energy efficiency and demand reduction benchmarks are met." Motion at pgs. 1-2. As discussed below, the two interests are really one. Moreover, there is nothing in OEC's Motion that supports its first alleged interest; and its second is already adequately protected by the Company's and the Commission's evaluation, measurement and verification ("EM&V") processes.

Instead of contributing to the development of the factual issues surrounding the Application, OEC's participation will simply unduly prolong or delay the application review process to the detriment of the Customer. Further, allowing OEC to intervene will require the Customer to expend time, money and resources better utilized elsewhere in its business. Accordingly, the Company respectfully requests that the Commission deny OEC's Motion.

III. Arguments

As OEC correctly states, R.C. 4903.221 provides in part that any person "who may be adversely affected" by a Commission proceeding is entitled to seek intervention in that proceeding. Motion at pg. 3. Subsection (B) of this same statute requires that the Commission 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.

R.C. 4903.221(B). And, O.A.C. 4901-1-11 sets forth an additional Commission requirement: “the extent to which the [intervenor’s] interest is represented by existing parties.” 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.” Motion at pg 3. While not clear from the Motion, it appears that OEC is arguing that if the Customer is erroneously granted a waiver from paying the DSE2 charge, OEC’s members will pay more. OEC asserts that it represents more than 100 group members, 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 the Commission were to assume for the sake of argument that some of OEC’s members are customers of the Company, this is not the forum for re-litigating the process for exemption from the Company’s DSE2 charge in Rider DSE. OEC’s claimed interest of “assuring that there is sufficient energy savings to justify Customer’s opt-out of Rider DSE2” may mean that OEC wants a higher burden placed on customers to obtain an exemption than that which currently appears in Rider DSE. If so, that issue was decided by the Commission when it approved the Company’s Rider DSE in Case No. 08-935-EL-SSO. The Commission also has defined in Rule 4901:1-39-05(G) the showing a mercantile customer must

make when filing an application to commit its energy efficiency programs to the Company under R.C. 4928.66(A)(2)(d). Those issues cannot be litigated again in this proceeding.

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.” Motion at pg. 4. This interest is exactly what the Commission and its Staff are charged with protecting through the portfolio plan review process. *See* R.C. 4928.66(B); OAC 4901:1-39-05. Indeed, monitoring, verification and evaluation of the Company’s mercantile customer program, in which the Customer’s energy efficiency project is proposed to be included, will be conducted by the Staff’s independent program evaluator. OAC 4901:1-39-05(D). Notably, Section 1.d. of the Mercantile Customer Project Commitment Agreement (the “Agreement”) executed by Customer and the Company, which is attached as Exhibit 1 to the Application, specifically provides access to both Company and Commission representatives to the Customer’s energy efficiency project for purposes of measuring and verifying energy savings. Section 3.b. of the Agreement also obligates the Customer to submit to the Company, on or before January 31 of each year, a report demonstrating energy savings achieved.¹ That report will comply with the Commission’s newly-adopted Rule 4901:1-39-08. Thus, while the Commission can be assured in this proceeding that a compliance review will take place, this proceeding is not the appropriate forum for conducting that review.

The application filed in this proceeding deals with a single customer’s energy efficiency project. To approve the application, the Commission must find that the Customer’s energy

¹ This obligation commences after Commission approval of the Application. Thus, should the Commission not approve the Application until after January 31, 2010, the Customer’s first submission will occur on or before January 31, 2011.

efficiency project qualifies as a mercantile customer-sited energy efficiency program. The Commission can and should make that finding without the need for any “assistance” from OEC. OEC’s focus, as described in its Motion, is on verification and the potential problems created if the Customer fails to contribute to the Company’s mercantile customer program in future years. While the Company appreciates OEC’s concern, the process for verification is clearly set forth in the Agreement and in the Commission’s Rules. In approving this application, the Commission agrees that the Customer’s project may be included in the Company’s mercantile program and authorizes the Company and Customer to utilize that verification process. If the Customer fails to follow that process, its exemption automatically terminates and the Company has the right to recover any exempted rider charges. *See* Agreement at 3.c.iv. The application should be approved as filed.

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

OEC’s Motion is misdirected and premature, as its stated interest is one that can be addressed only in the context of the Company’s portfolio status report. R.C. 4928.66(B) requires the Commission, in accordance with its rules, “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, O.A.C. 4901:1-39-05(C) requires all Ohio electric distribution utilities to file by March 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, ... [a section] detailing its achieved energy savings and demand reductions relative to its corresponding baselines.” Similarly, Rule 4901:1-39-06(A) indicates that “[a]ny person may file comments regarding an electric utility’s ... annual

portfolio status report filed pursuant to this chapter within thirty days of the filing of such report.” Finally, Rule 4901:1-39-06(C) provides that “[t]he commission may schedule a hearing on the electric utility’s portfolio benchmark report or status report.” Thus, OEC will have an opportunity through the portfolio status report review process to address the concerns set forth in its Motion.

This application is one of many that have been or will be filed with the Commission, with the results of all projects for all applications being aggregated and included as a single mercantile program within the Company’s portfolio of programs. This portfolio of programs is the subject of the Company’s three-year portfolio plan, which was filed with the Commission on December 15, 2009 in Case No. 09-1947-EL-POR. Once approved, this portfolio of programs will also be the subject of the Company’s annual status reports to be filed under Rule 4901:1-39-05(C). OEC’s concerns are better addressed in the latter proceeding because it will focus upon verification of 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. OEC already has moved to intervene in the Company’s three-year portfolio plan proceeding. *See* Motion to Intervene by the Ohio Environmental Council, Case No. 09-1947-EL-POR (filed Dec. 22, 2009).

The EM&V review apparently contemplated by OEC is not appropriate in the instant proceeding. To find otherwise, and allow parties to intervene so that any one of them could perform its own EM&V review of an individual mercantile customer’s energy efficiency project would unduly complicate the application process. The application process should be an efficient, stream-lined process that allows for expeditious review and approval of self-directed mercantile customer programs, contingent on future EM&V review. To incorporate that review into the

application process would unduly prolong or delay the application process and postpone the date on which the Customer would otherwise be exempt from paying the DSE2 charge. Further, if OEC is granted intervention, the Customer could be compelled to duplicate efforts in responding to the Company's EM&V requests, the Staff's EM&V requests, and also potentially to OEC's EM&V requests. Such redundancy is inefficient and costly and should not be permitted.

D. Summary

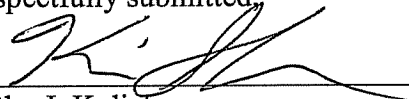
OEC claims that its interest lies in ensuring the accuracy of the levels of energy efficiency and peak demand reductions reported by the Company. Yet, now that the Commission's Rules finally are in effect, the verification process is clear and the Customer is contractually bound to follow it. Thus, no further review is necessary or appropriate in this docket. OEC's professed interest in EM&V, presumably through the hiring of an EM&V expert, will be satisfied in future proceedings by the Company's annual status reports and the Commission's independent program evaluator. Allowing OEC to clog the application pipeline with premature EM&V reviews not only would unduly delay pending applications but also would render redundant the work of the Commission's independent program evaluator.

OEC's Motion to Intervene must be denied because: (i) OEC's interests are adequately protected in this proceeding; (ii) there is another more appropriate process through which OEC's concerns can be addressed; and, (iii) 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 EM&V reviews.

IV. Conclusion

As discussed above, OEC has failed to satisfy the requirements to intervene in this proceeding. Accordingly, the Company respectfully requests that the Commission deny OEC's Motion.

Respectfully submitted,



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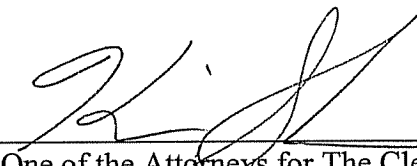
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Memorandum Contra the Ohio Environmental Council's Motion to Intervene* was served on the persons stated below by electronic mail and regular U.S. Mail, postage prepaid, on this 28th day of December, 2009.

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Summary: Memorandum Contra the Ohio Environmental Council's Motion to Intervene electronically filed by Mr. Kevin P. Shannon on behalf of The Cleveland Electric Illuminating Company