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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider.

PUCO
Case No. 10-176-EL-ATA

MEMORANDUM OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY
CONTRA MOTION TO INTERVENE BY SUE STEIGERWALD, CITIZENS FOR KEEPING THE ALL-ELECTRIC PROMISE (CKAP), JOAN HEGINBOTHAM AND BOB SCHMITT HOMES, INC.

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I. INTRODUCTION

The Commission should deny the proposed intervention of Sue Steigerwald, Citizens For Keeping the All-Electric Promise ("CKAP"), Joan Heginbotham and Bob Schmitt Homes, Inc. ("Schmitt"). Ms. Steigerwald, Ms. Heginbotham and the members of CKAP are individual residential customers of the Companies who live in homes with only electric appliances. (*See* Mot. to Intervene, p. 2.) Schmitt, though not itself an all-electric customer, derives its interest in this case solely and indirectly from the residential customers who may purchase its all-electric homes in the future. (*See id.*) By proposing to intervene in this case, Movants thus offer the perspective and arguments of the typical all-electric residential customer and seek one objective: the continuation of all-electric discounts to as many residential customers as possible, for as long as possible, regardless of the impact on others.

But by doing so, Movants offer nothing new to this proceeding. The arguments and interests of all-electric residential customers are already represented by the Office of Consumers' Counsel ("OCC"). *See* Entry on Reh'g dated Apr. 6, 2010 (granting intervention to OCC). Since the outset of this case, OCC has argued not only for additional discounts for all-electric customers, but also for the extension of such discounts to customers who did not previously receive them as well as to customers with only electric water heaters. (*See infra.*, pp. 6-8.) Like Movants, OCC also has argued that the Companies should bear financial responsibility for such discounts. (*See id.*) The arguments and objectives of Movants and OCC are one in the same, and Movants cite no additional facts or expertise beyond those already offered by OCC. Moreover, because Ms. Heginbotham and Schmitt are not eligible for an all-electric discount in the first place, they have no interest in this proceeding at all. Because Movants' interest in this case is already represented by OCC, and because they can make no "significant contribution" to the development of the issues implicated in it, the Motion to Intervene should be denied. *See*

Rule 4901-1-11(A)(2) (intervention proper only where interests not already represented by an existing party), (B)(4) (intervention turns, in part, on whether entity will “significantly contribute” to development of issues in case).

Although it would add no new arguments or facts to this case, intervention by Movants would invite substantial (and unnecessary) procedural delay. Were the Commission to grant intervention here, it would have no principled reason to deny intervention to any of the tens of thousands of other individual all-electric customers served by the Companies. And once individual customers are permitted to intervene, it is not hard to imagine the results: dozens (or hundreds) of duplicative discovery requests, waves of motions and filings (each of which would require counter-waves of responses) and unmanageable scheduling conflicts among the parties. Wholesale intervention by individual customers would severely delay and prolong this proceeding, and because OCC already represents the interests of residential customers, there is no reason for it. *See* Rule 4901-1-11(B)(3) (intervention turns, in part, on whether it will “unduly prolong or delay the proceedings”). That is at least part of the basis for the Commission regularly denying such intervention requests. (*See* p. 5, *infra*.)

Simply because individual customers have concerns does not mean that those individual customers should be granted intervention as a party to a Commission proceeding. The instant Motion to Intervene should be denied.

II. ARGUMENT

To intervene in a Commission proceeding, a proposed intervenor must make “a showing” that:

The person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person’s interest is adequately represented by existing parties.

Rule 4901-1-11(A)(2), Ohio Administrative Code.

In evaluating whether to grant intervention, the Commission considers five factors:

- (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;
[and]
- (5) The extent to which the person's interest is represented by existing parties.

Rule 4901-1-11(B); *see* R.C. 4903.221(B).

A. Movants Should Not Be Permitted To Intervene In This Proceeding.

The Commission should not allow Movants to intervene in this proceeding. Movants' interest here is in the continuation and maximization of all-electric discounts for residential customers. But this interest is adequately represented by OCC, and the Commission should deny intervention on that basis alone. Moreover, at least three of the five factors considered by the Commission weigh against intervention. The Motion to Intervene should be denied.

1. Movants' interests are adequately represented by OCC.

As demonstrated below, Movants' interests in this proceeding are adequately represented by OCC. Where a proposed intervenor's interests are adequately represented by an existing party, intervention *must* be denied. *See* Rule 4901-1-11(A)(2) (permitting intervention where a party has a "real and substantial interest in the proceeding . . . unless the person's interest is adequately represented by existing parties"). Thus, even without considering the five factors set forth in Rule 4901-1-11(B), the Commission should deny the Motion to Intervene.

In deciding whether an existing party adequately represents the interests of a proposed intervenor, the Supreme Court of Ohio and the Commission compare the objectives of the intervenor with those of the existing party. Where those interests and objectives are “essentially” the same, the proposed intervenor must make a “compelling showing” that the existing parties do not represent them. *See Toledo Coalition for Safe Energy v. Pub. Util. Comm.* (1982), 69 Ohio St. 2d 559, 562. Although a proposed intervenor may employ different legal strategies or tactics than existing parties, where the basic objectives are the same, intervention is denied. *See id.*

For example, in *Toledo Coalition*, a consumers’ group comprised of 200 residential customers sought intervention in a rate case, where OCC already was a party. The Commission denied intervention. On appeal, the consumers’ group argued that OCC did not adequately represent its interests because although both sought rates that reflected a generation plant’s lack of availability, the group sought the complete exclusion of the plant from rate base, while OCC merely sought corresponding reductions in rate base. *Id.* at 562. The Court rejected this argument, explaining that “as a practical matter, the interest and objective of [the group] and Consumers’ Counsel are essentially identical, not antithetical.” *Id.* (characterizing different positions as a mere “difference in strategy”). Because there were no “competing, limited, identifiable interests” that differentiated the group’s interests from those of the general public, OCC was an adequate representative, and the Commission properly denied the group’s intervention. *Id.* at 561.

Accordingly, the Commission has consistently denied intervention—and the Court has upheld such denials—to individual residential customers or groups of residential customers where OCC is already a party to the proceeding. *See, e.g., id.* at 563; *Senior Citizens Coalition v. Pub. Util. Comm.* (1982), 69 Ohio St. 2d 625, 628 (upholding denial of intervention regarding

rate base and operating expense issues where customer and customer-interest groups identified no interest differentiating them from ordinary residential customers already represented by OCC); *In re Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Reliability Rider*, No. 09-1946-EL-RDR, Entry dated Apr. 14, 2010 (denying intervention to two residential customers, where OCC already party to case); *In re Application of Ohio Edison Co., The Cleveland Elec. Illuminating Co., and the Toledo Edison Co. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code in the Form of an Elec. Sec. Plan*, No. 08-935-EL-SSO, Entry dated Oct. 2, 2008, ¶ 4 (denying intervention to three residential customers, where their interests were adequately represented by OCC); *In re Regulation of the Elec. Fuel Component Within the Rate Schedules of Ohio Power Co. and Related Matters*, No. 93-01-EL-EFC, Entry dated Mar. 11, 1993, ¶ 6 (denying intervention to residential customer who failed to show that OCC did not adequately represent her interests).

Here, Movants' sole objective is to maximize all-electric discounts for the Companies' customers, both in continuing all-electric discounts for customers who previously received them and extending them to new customers. (See Mot. to Intervene, pp. 2-3.) According to Movants, this relief is necessary to avoid the "negative financial impacts" that have affected all-electric households. (See *id.*) Movants also argue that the Companies should bear the financial burden of the new discounts for all-electric customers. (*Id.*)

This position and these arguments are familiar to the Commission. OCC has repeatedly made them—vigorously and repeatedly—since the outset of this proceeding. Like Movants, OCC seeks both the reestablishment of the original all-electric discount and the extension of discounts to new customers who succeeded original all-electric customers. (See, e.g., Memo. in Support of App. for Reh'g dated May 17, 2010 ("May 17 Memo."), pp. 10-12 (arguing for

extension of discounts to include water heating customers); Memo. in Support of Mot. for Order Directing FirstEnergy to File Replacement Tariffs That Comply With The Commission's Order dated Mar. 31, 2010 ("Mar. 31 Memo."), pp. 2-3 (same), p. 4 (arguing that discounts should be available to customers other than "grandfathered" customers); Memo. in Support of Request for Clarification And, In The Alternative, App. for Reh'g dated Mar. 8, 2010 ("Mar. 8 Memo."), pp. 3, 4 (arguing that "[t]he Commission should, for example, provide rate relief to any customer purchasing an electric home that was formerly subject to the non-standard rates" and advocating "non-discriminatory" rates); Memo. in Support of Mot. for Declaration of an Emergency, *et al.*, dated Feb. 25, 2010 ("Feb. 25 Memo."), p. 2 (arguing that reinstated all-electric discounts "should apply to every all-electric customer . . . without respect to when they first resided in an all-electric residence"), p. 3 (suggesting that reinstated discounts should be made retroactive).)

Like Movants, OCC argues that the Commission should investigate the Companies' alleged marketing practices with respect to all-electric discounts. (*See, e.g.*, Memo. Contra FirstEnergy's App. for Reh'g dated May 24, 2010 ("May 24 Memo."), pp. 7-9; May 17 Memo., pp. 5-6; Mar. 8 Memo., pp. 6-7 (arguing that investigation is "absolutely necessary"); Feb. 25 Memo., pp. 1, 12-13).)

And like Movants, OCC believes that the Companies should bear the financial burden of the new all-electric discounts. (*See, e.g.*, May 17 Memo., pp. 6-7 (arguing that "culpability" is relevant to "evaluating the range of options for recovering the revenue shortfall" resulting from reinstated discounts); Mar. 8 Memo., p. 7 (arguing that Staff should "appropriately consider[] the assignment of financial responsibility to FirstEnergy"); Feb. 25 Memo., p. 1.)

OCC's filings in this proceeding show that the objectives of OCC and Movants are the same: to maximize the scope and availability of the all-electric discounts and to maximize the

Companies' financial responsibility for the revenue loss associated with those discounts.

Because Movants' objectives are "essentially" the same as those of OCC, OCC is an adequate representative of their interests.

No doubt anticipating this challenge, Movants nonetheless argue that OCC is not an adequate representative because the interests of ordinary residential customers "may diverge" from Movants' interests and that, on such occasion, OCC would be bound by its "mission" to represent the ordinary customers. (Mot. to Intervene, pp. 2-3.) This is unsupported conjecture. Movants fail to explain what the allegedly divergent interests could be, or the circumstances under which they will arise. They point to no evidence or arguments that OCC may be reluctant to offer in light of this alleged conflict of interests. In fact, Movants cite nothing to suggest that non-all-electric residential customers (*i.e.*, "ordinary" customers) will be harmed by the continuation and increase of all-electric discounts. Moreover, Movants ignore the fact that by arguing for reinstatement of original all-electric discounts and extension of them to new customers, OCC *already* has forcefully (and so far successfully) represented their core objectives in this proceeding. Movants' alleged concern with a hypothetical divergence of interests does not entitle it to intervention.¹

2. Intervention by individual residential customers will unduly prolong and delay this proceeding.

Intervening parties possess several litigation tools to advance their arguments in Commission proceedings, including written, document and deposition discovery; participation in

¹ Movants also argue that OCC cannot adequately represent them because, by virtue of their all-electric homes, they are at a "higher financial risk of electric rate increases." (Mot. to Intervene, p. 3.) This argument also fails. First, they fail to explain why OCC cannot represent entities with "higher financial risk." Second, Movants' "higher financial risk" is not itself the relevant "interest." Rather, some of Movants' greater sensitivity to possible increases in electric rates gives rise to their interest in maximizing all-electric discounts. And that interest is, as discussed above, adequately represented by OCC.

motion practice; presentation of witnesses at hearing; and cross-examination of other parties' witnesses. *See* Rules 4901-1-16, 4901-1-19 through 4901-1-25, 4901-1-27, 4901-1-29.

Here, Movants ostensibly seek those litigation rights for only themselves, claiming intervention solely on the fact that they live in all-electric homes. But this makes them no different than any other all-electric customer. If the Commission allows Movants to intervene, it would have no principled basis to deny individual intervention to any of the other tens of thousands of all-electric customers living in the Companies' service territory. Intervention by the handful of all-electric customers, like some of Movants here, is a license for intervention by all such customers.

In that scenario, it is not hard to imagine the resulting procedural delays. Intervention by dozens—or hundreds—of all-electric customers, all of whom could independently exercise their rights as parties, easily will lead to duplicative discovery requests, waves of filings and counter-filings (much of which likely will be irrelevant or fruitless) and profound difficulties in scheduling depositions, conferences and settlement discussions. Wholesale intervention by individual customers also will profoundly complicate the presentation of evidence at hearing, with each customer having an independent, equal claim to present and cross-examine witnesses. If individual all-electric customers are allowed to intervene, every stage of this proceeding will be unduly delayed and prolonged. This factor weighs against intervention. *See* Rule 4901-1-11(B)(3).

There is a better way to accommodate the concerns of individual all-electric customers. The Commission already has indicated that it will allow for the "filing of comments by interested persons," and it has ordered Staff to develop a process that affords such persons a "meaningful opportunity to participate in the resolution of the issues raised in this proceeding." *See* Second

Entry on Reh'g dated Apr. 15, 2010, ¶ 7; Finding and Order dated Mar. 3, 2010, ¶ 13.

“Meaningful participation” does not require full litigation rights as an intervening party. For example, OCC has suggested that all-electric customers be permitted to express their concerns at additional public hearings and in written comments. (See Mar. 8 Memo, pp. 8-9.) Many customers already have filed written correspondence reflecting their views in this docket. Given these alternative avenues, it is not necessary that individual customers be allowed to take formal discovery, file motions, and participate individually at hearing, especially given that OCC is an adequate representative of those customers’ interests. In fact, OCC already is engaged in written and document discovery regarding, among other things, the bill impacts associated with all-electric discounts, the current scope and availability of the discounts, and the history of the relevant tariffs. There are other ways for customers to voice their opinions regarding all-electric discounts. But the Commission should not grant formal intervention to individual customers.

3. Movants will not significantly contribute to the development of factual issues in this proceeding.

Movants claim that they will significantly contribute to this proceeding for two reasons: (i) because of their “demonstrated history” of arguing for the extension of all-electric discounts; and (ii) because they are “extremely concerned” about the impact of nondiscounted rates on all-electric customers. (Mot. to Intervene, p. 3.)

Neither of these reasons warrants intervention. In fact, those reasons apply with greater force to OCC. OCC too has a “demonstrated history” of arguing for all-electric discounts, both in this proceeding and in the Companies’ SSO case, as well as before the General Assembly. (See, e.g., OCC Mot. to Intervene dated Feb. 23, 2010, p. 3; *In re FirstEnergy’s 2009 MRO Proposal*, No. 09-906-EL-SSO, OCC Initial Post-Hearing Br. dated Jan. 8, 2010, p. 5.;

“Testimony Before The House Of Representatives Consumer Affairs And Economic Protection

Committee,” submitted by Janine L. Migden-Ostrander, dated Feb. 17, 2010.²) As described above, OCC already has filed several motions and other pleadings in this case in which it has advocated the extension of all-electric discounts, and OCC has been pursuing written and document discovery to support its claims for several weeks. And like Movants, OCC also described itself as “extremely concerned” about the impact of nondiscounted rates, in a sentence taken verbatim by Movants to use in their own subsequent Motion to Intervene. (*Compare* OCC Mot. to Intervene dated Feb. 23, 2010; *with* CKAP Mot. to Intervene, p. 3.) Movants’ argument that they will significantly contribute to this proceeding fails.

Moreover, Movants fail to explain how they will contribute to the development of “factual issues” here. Nor could they. Movants possess no greater knowledge of relevant facts than any other all-electric customers. Nor do Movants offer any special expertise in all-electric discounts or rate design. By contrast, OCC already is gathering facts related to those discounts, both in discovery from the Companies and in discussions with customers, and OCC has extensive experience presenting expert testimony on rate matters. With OCC already a full participant, Movants cannot make any significant contribution to this case. This factor also weighs against intervention. *See* Rule 4901-1-11(B)(4).

B. Intervention By Ms. Heginbotham And Schmitt Additionally Fails Because They Have No “Real And Substantial Interest In This Proceeding.”

As demonstrated above, no Movant can meet the showing required by R.C. 4903.221 and Rule 4901-1-11, and they should be denied intervention on that basis. Additionally, Ms. Heginbotham and Schmitt should be denied intervention because they have no “real and substantial interest in this proceeding.” *See* Rule 4901-1-11(A)(2); *see also* Rule 4901-1-

² The testimony is available at:
http://media.cleveland.com/business_impact/other/Testimony%20from%20Consumers%20Counsel.pdf.

11(B)(2) (requiring consideration of the proposed intervenor's legal position "and its probable relation to the merits of the case").

This case began when the Companies proposed to increase all-electric discounts for those customers who received them prior to the Commission-approved modification of the discounts in 2009. (*See* App. dated Feb. 12, 2010.) The Commission modified this proposal and ordered that the discounts be offered to both so-called "grandfathered" customers and to customers who succeeded to grandfathered accounts. *See* Second Entry on Reh'g dated Apr. 15, 2010, ¶ 7. But Ms. Heginbotham and Schmitt fall into neither of those categories. Ms. Heginbotham purchased her home after the January 1, 2007 cut-off for eligibility for the original discount, and she apparently did not succeed a grandfathered account. (*See* Mot. to Intervene, p. 2.) Schmitt's interest in this case arises because it owns several residential lots on which it intends to build all-electric homes.³ (*See id.*) But because those homes do not yet exist, their eventual residents cannot qualify as grandfathered or successor customers. Thus, neither Ms. Heginbotham nor Schmitt (nor purchasers of its homes) are entitled to the all-electric discounts ordered by the Commission in this proceeding, which are available to only grandfathered and successor customers. Because Ms. Heginbotham and Schmitt fall into neither of those categories, they simply do not have an interest in this case. Therefore, Ms. Heginbotham and Bob Schmitt Homes should be denied intervention on that additional basis.

III. CONCLUSION

For the above reasons, the Companies respectfully request that the Commission deny the instant Motion to Intervene.

³ Schmitt has known since January 2006 that the all-electric rates were being grandfathered and that they would not be available to homes built after January 1, 2007.

DATED: June 17, 2010

Respectfully submitted,



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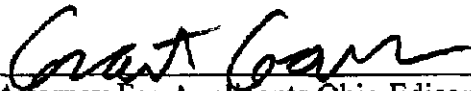
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Motion to Intervene by Sue Steigerwald, Citizens for Keeping the All-Electric Promise (CKAP), Joan Heginbotham and Bob Schmitt Homes, Inc. was delivered to the following persons by first class mail, postage prepaid, and e-mail this 17th day of June, 2010:


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