

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**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.**

Case No. 10-176-EL-ATA

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**SURREPLY IN SUPPORT OF 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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COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND
THE TOLEDO EDISON COMPANY

I. INTRODUCTION

Where, as here, a motion is not filed for six days after the date of service stated in the certificate of service, it is improper to consider such service date as the start of the time period in which a responsive pleading should be filed.¹ The Commission should accept and consider the arguments made in the Memorandum Contra Movants' Motion to Intervene filed by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company ("Companies"). The Commission should reject any claim that the Companies' Memorandum Contra was untimely. Indeed, even assuming that the Companies' Memorandum Contra was filed three days after the deadline established in Rule 4901-1-12(B)(1), as calculated from the date on Movants' certificate of service, the Commission should find good cause to waive that deadline and consider the Memorandum Contra timely filed. Neither Movants nor OCC have shown any prejudice by the timing of the Companies' filing. In fact, the only "prejudice" they allege is that the Companies oppose Movants' intervention, and under Commission precedent, that is insufficient. (*See* p. 3, *infra*.) Moreover, the Companies' filing has caused no delay in these proceedings. Because the Companies' Memorandum Contra raises important procedural concerns, the Commission should consider it.

II. ARGUMENT

In contrast to provisions governing rehearing, no statute sets response times for motions, and procedural matters are statutorily entrusted to the discretion of the Commission. *See, e.g.*, R.C. 4901.13 ("The public utilities commission may adopt . . . rules to govern its proceedings . . ."); *Weiss v. Pub. Util. Comm.* (2000), 90 Ohio St. 3d 15, 19 ("Under R.C. 4901.13 the

¹ In its Reply, OCC incorrectly stated that the Movants' Motion to Intervene had been filed on May 27, 2010. In fact, the Motion to Intervene was not filed with the Commission until June 2, 2010, and it was this extraordinary delay that caused the confusion in this instance.

commission has broad discretion in the conduct of its hearings.”). Among other things, the rules adopted by the Commission provide that it may set (and waive) response times for motions.

Relevant here, Rule 4901-1-12(B)(1) provides, “Any party may file a memorandum contra within fifteen days after service of a motion, *or such other period as the commission . . . requires.*” *Id.* (emphasis added). Further, Rule 4901-1-38(B) provides, “The commission may, upon its own motion or for good cause shown, waive any requirement, standard, or rule set forth in this chapter or prescribe different practices or procedures to be followed in a case.”

OCC, which filed a reply on behalf of Movants,² contends that the Companies’ Memorandum Contra is untimely. The essence of OCC’s argument is that, because the motion to intervene indicates that it was served on May 27, 2010, the time for filing memoranda contra started on that date. Using that date, OCC argues, the Companies’ Memorandum Contra is late by three days. OCC’s argument is wrong.

To begin, OCC neglects to note that no one—not the Companies or the Commission—received the instant motion until June 2, 2010, a full six days after the stated service date in the motion. The Commission’s rules do not contemplate allowing a party to benefit by an extraordinary delay between the date on the certificate of service and when the opposint party actually receives that document. To do otherwise would invite untoward gamesmanship and mischief. Thus, in circumstances such as the present case (*i.e.*, a six-day delay between the stated service date and receipt), the date when the motion was served cannot be reasonably considered to be the date on which a reply period begins.

Moreover, even giving the rules a literal interpretation here, good cause exists to waive the time period set forth in Rule 4901-1-12(B)(1). Good cause to do so exists for three reasons.

² The fact that OCC filed a reply on Movants’ behalf proves the thrust of the Companies’ Memorandum Contra, *i.e.*, that intervention is unnecessary because OCC can adequately represent Movants’ interests.

First, neither Movants nor OCC have shown any prejudice by the timing of the Companies' filing. Neither point to any legal argument they could not develop, any facts they could not investigate, or any research they could not perform because the Companies filed their Memorandum Contra on June 17 instead of June 14. Both Movants and OCC were able to file substantive responses to the Companies' arguments, and neither indicated any weakness in their responses as a result of the timing of the Companies' filing.

Instead, the sole alleged "prejudice" they identify is that the Companies oppose Movants' intervention.³ (See Reply to FirstEnergy's Memo. Contra Mot. to Intervene of Sue Steigerwald, *et al.*, dated June 25, 2010, p. 2; Reply to FirstEnergy's Memo. Contra Mot. to Intervene of Sue Steigerwald, *et al.* by the Office of the Ohio Consumers' Counsel ("OCC Reply"), dated June 24, 2010, p. 3.) But that is not "prejudice" in the sense contemplated by the Commission's precedent. Prejudice, for purposes of evaluating whether to accept late-filed documents, is that which results from the timing of the filing itself, not from the substantive arguments therein. If such prejudice arose merely because a party opposed a motion, then the Commission *never* would have good cause to accept and consider late-filed documents. And in fact, the Commission routinely does so. See, e.g., *In re Application of DEO for Authority to Increase Rates*, Case Nos. 07-829-GA-AIR, *et al.*, Entry on Reh'g dated Sept. 23, 2009 (denying rehearing and affirming consideration of untimely opposition to motion to reopen proceedings); *In re Application of Duke Energy Retail Sales for Certification as CRES Provider*, Case No. 04-1323-EL-CRS, Entry dated Dec. 3, 2008 (denying motion to strike and permitting filing of untimely reply brief); *Cook v. GTE North, Inc.*, 92-1652-TP-PEX, Entry dated Nov. 23, 1994 (permitting untimely submission of call data). By contrast, the two cases cited by OCC involved

³ OCC fails to explain why it is prejudiced by the Companies' opposition to Movants' intervention.

memoranda contra applications for rehearing, where the arguments involved already had been litigated. (*See* OCC Reply, p. 3 n.2.) No party has been prejudiced by the Companies' filing.

Second, the Companies' filing has not resulted in any delay in these proceedings. Specifically, the Commission has indicated that the new all-electric discounts will remain in effect at least "through the next winter heating season." Second Entry on Reh'g dated Apr. 15, 2010, ¶ 7. The Commission also has lifted its previous requirement that Staff file an investigation report by June 2010, and it recently granted rehearing to further consider the parties' arguments regarding the fundamental scope and extent of the all-electric discounts. *Id.*; Fourth Entry on Reh'g dated June 9, 2010, ¶ 9. Given the posture of this case, the Companies' filing has not caused any delay in these proceedings or in the administration of this case.

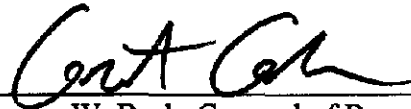
Third, the Companies' filing raises important procedural concerns that should be considered. As set forth in the Companies' Memorandum Contra, individual intervention by customers like Movants would cause serious problems in conducting discovery, presenting and rebutting evidence at hearing and crafting a possible long-term settlement of issues related to all-electric discounts. (*See* Memo. of Ohio Edison Co., *et al.* Contra Mot. to Intervene of Sue Steigerwald, *et al.*, dated June 17, 2010, pp. 7-9.) Therefore, there is good cause for the Commission to consider the Companies' Memorandum Contra timely filed and to consider the arguments made therein.

III. CONCLUSION

For the above reasons, the Companies respectfully request that the Commission accept and consider the Companies' Memorandum Contra Movants' Motion to Intervene and, as set forth in that Memorandum Contra, deny the Motion to Intervene.

DATED: June 30, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Surreply in Support of 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 30th day of June, 2010:


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