

**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)	Case No. 14-1297-EL-SSO
Edison Company for Authority to Provide for)	
a Standard Service Offer Pursuant to R.C.)	
4928.143 in the Form of An Electric Security)	
Plan)	

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY’S MEMORANDUM
CONTRA NOBLE AMERICAS ENERGY SOLUTIONS LLC’S MOTION TO
INTERVENE**

I. INTRODUCTION

Noble Americas Energy Solutions LLC’s (“Noble Solutions”) Motion to Intervene (the “Motion”) should be denied. The Motion is untimely, grossly prejudicial, and addresses concerns with respect to which the record in this proceeding has been closed. Noble Solutions has presented no valid reasons for its delay. Furthermore, its concerns are adequately represented by multiple parties and have been thoroughly litigated in the initial phase of this proceeding. Noble Solutions’ participation is unnecessary to this case, which, as of the time of this filing, is proceeding through an evidentiary hearing on the provisions of the Third Supplemental Stipulation and Recommendation (the “Third Supplemental Stipulation”). For these reasons, Noble Solutions has failed to satisfy the requirements for intervention under the plain language of Rule 4901-1-11, O.A.C., and well-settled Commission authority.

II. RELEVANT FACTS

Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the “Companies”) filed an application for approval of a fourth electric security

plan (“ESP IV”) on August 4, 2014. On August 29, 2014, the Commission set the original procedural schedule for this proceeding. Entry at 2 (Aug. 29, 2014). Among other things, the procedural schedule placed an October 1, 2014 deadline on intervention. *Id.* at 1.

Approximately fifty parties took advantage of the opportunity to intervene. Among these intervenors are the Retail Energy Supply Association (“RESA”), IGS Energy (“IGS”), Dynegy Inc. (“Dynegy”), Direct Energy Services, LLC (“Direct Energy”), and Constellation NewEnergy, Inc. (“Constellation”).

In the sixteen months following the Companies’ Application, the Companies and interested stakeholders have vigorously litigated this case. The parties have conducted extensive discovery and depositions, participated in 37 days of evidentiary hearings, and worked to reach several stipulations. The record with respect to three prior stipulations filed in this proceeding closed upon the conclusion of the evidentiary hearing on October 29, 2015.

The Companies filed a fourth stipulation, the Third Supplemental Stipulation, on December 1, 2015. On December 9, 2015, the Attorney Examiner reopened the record for the limited purposes of holding a hearing regarding the Third Supplemental Stipulation and to provide the parties with “an opportunity to present evidence related to the Third Supplemental Stipulation.” Entry at 4-5 (Dec. 9, 2015). In that Entry, the Attorney Examiner set a new procedural schedule establishing: (1) December 30, 2015 as the deadline for the filing of testimony in opposition to the Third Supplemental Stipulation, (2) December 28, 2015 as the cutoff for written discovery requests and (3) January 14, 2016 as the date on which the evidentiary hearing would commence. *Id.* at 4. Noble Solutions filed the Motion on January 14, 2016—the day the evidentiary hearing regarding the Third Supplemental Stipulation began, more

than two weeks after the cutoff dates for written testimony and discovery and 470 days after the deadline for intervention.

III. STANDARD OF REVIEW

Section 4903.221 of the Ohio Revised Code permits intervention only by persons who may be “adversely affected” by Commission proceedings. Rule 4901-1-11 of the Ohio Administrative Code sets the standard for intervention in Commission proceedings. Specifically, Rule 4901-1-11(B) provides:

In deciding whether to permit intervention under paragraph (A)(2) of this rule, the commission, the legal director, the deputy legal director, or an attorney examiner shall consider:

- (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.

Intervention is not permissible unless the party seeking to intervene can demonstrate that it has a “real and substantial interest” in the relevant proceeding and that its interests cannot be “adequately represented by existing parties.” Rule 4901-1-11(A)(2), O.A.C. Furthermore, Rule 4901-1-11(F) allows the Commission to grant an untimely motion to intervene “only under extraordinary circumstances.”

The Commission, as it has already done in this proceeding, routinely denies intervention to parties who fail to satisfy the requirements of Rule 4901-1-11. *See, e.g., In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Entry (Jan. 13,

2016) at 5-9 (denying PJM Interconnection LLC’s untimely motion to intervene because, among other reasons, PJM set forth no extraordinary circumstances); *In the Matter of the Investigation of The East Ohio Gas Company d/b/a Dominion East Ohio Relative to Its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 12-380-GA-GPS, 2012 Ohio PUC LEXIS 392, *7 (April 20, 2012) (denying party’s motion to intervene in Commission-initiated GPS enforcement proceeding due to lack of statutory basis for intervention); *In the Matter of the Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934 as amended, to Establish an Interconnection Agreement with Cincinnati Bell Telephone Company*, Case No. 08-537-TP-ARB, 2008 Ohio PUC LEXIS 567 at *4 (Aug. 26, 2008) (denying motion to intervene because movant “failed to assert facts that would lead to a finding that it has a real and substantial interest”).

IV. ARGUMENT

A. Noble Solutions’ Motion Is Untimely and There Is No Good Cause For Its Delay.

Pursuant to its August 29, 2014 scheduling order, the Commission set a deadline of October 1, 2014 for timely motions to intervene. Entry at 2 (Aug. 29, 2014). No subsequent entry altered or modified that intervention deadline. Noble Solutions filed the Motion on January 14, 2016, 470 days after the deadline for intervention, more than two weeks after the cutoff for opposing testimony and discovery related to the Third Supplemental Stipulation and on the day the evidentiary hearing related to the Third Supplemental Stipulation commenced. *See* Entry at 4 (Dec. 9, 2015). Furthermore, as discussed below, Noble Solutions’ alleged interests concern matters wholly outside the scope of the Third Supplemental Stipulation, rendering its attempt at intervention even more untimely. Noble Solutions acknowledges that its motion is untimely, but then fails to make the showing of “extraordinary circumstances” required

by Rule 4901-1-11(F). For this reason alone, the Commission should deny Noble Solutions' Motion.

Noble Solutions' assertion of "extraordinary circumstances" is baseless. Noble Solutions is a member of RESA, who, according to the Motion, adequately represented Noble Solutions until a recent divergence of interests. Motion at 2, 4. Noble Solutions claims extraordinary circumstances exist because the alleged divergence of its interests from RESA's was unforeseeable. *Id.* Noble Solutions never explains why this is so, and its lack of an explanation is hardly surprising. Given the number of diverse parties within RESA, it should not be surprising that RESA, at some point in this complex matter, could take a position with which Noble Solutions did not agree. And even if Noble Solutions failed to recognize as much, its lack of foresight is not an error that the Commission should be tasked with remedying at this late stage. Simply stated, Noble Solutions should have moved to intervene to protect its interests long ago. In fact, several of RESA's other members – including IGS, Dynegy, Direct Energy and Constellation – did just that.¹ Noble Solutions' negligence does not constitute extraordinary circumstances that would permit untimely intervention.

Noble Solutions' interpretation of "extraordinary circumstances" also threatens to eviscerate the Commission's standard for permitting untimely intervention. If an alleged divergence of interests occurring only after extensive litigation and, in fact, during an evidentiary hearing is sufficient to permit untimely intervention, there are practically no limits on when parties can intervene in Commission proceedings. Noble Solutions' failure to cite any authority

¹ See <http://www.resausa.org/members?state%5B%5D=13> (last accessed January 14, 2016) (listing RESA's Ohio members).

supporting its reading of “extraordinary circumstances” is telling and belies its allegation that such circumstances exist here.

Noble Solutions’ Motion is untimely for the additional reason that it is wholly beyond the scope of the Third Supplemental Stipulation and the Attorney Examiner’s December 9, 2015 Entry that reopened the record in this proceeding. Noble Solutions raises no objections tailored to the specific provisions of the Third Supplemental Stipulation. Instead, its concerns relate generally to the proposed Retail Rate Stability Rider (“Rider RRS”) *per se*, Motion at 2-3, and to the mere existence of the Non-Market Based Services rider (“Rider NMB”). Motion at 4. In the December 9th Entry, the Attorney Examiner reopened the record for the limited purposes of holding a hearing “regarding the provisions of the Third Supplemental Stipulation” and to provide the parties with “an opportunity to present evidence related to the Third Supplemental Stipulation.” Entry at 4 (Dec. 9, 2015). By its unambiguous terms, the Entry only reopened the record to take evidence on the Third Supplemental Stipulation, which, with respect to Rider RRS, only changed the term of the rider from fifteen years to eight years and assured at least \$100 million in credits to the Companies’ customers. Third Supplemental Stipulation at 7-8. Rider NMB is in no way affected by the Third Supplemental Stipulation. In short, the issues with which Noble Solutions is concerned have been thoroughly vetted during litigation on the prior stipulations, and the record remains closed as to them.

Noble Solutions has failed to show why it could not timely intervene to address its concerns. Rider RRS has been a key issue in this proceeding since the filing of the Companies’ Application in August 2014. And RESA’s position on Rider NMB – the issue with respect to which Noble Solutions claims its interests and RESA’s have “recently” diverged – was well articulated by RESA witness Stephen Bennett in August 2015. *See* Bennett Third Supp.

Testimony at 3-9. The Motion comes too late and is unjustified by any extraordinary circumstances. Noble Solutions' Motion should therefore be denied. *See In the Matter of Muskingum River Plant for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 10-911-EL-REN, 2010 Ohio PUC LEXIS 883 (Aug. 26, 2010) (denying parties' motions to intervene out of time because no "extraordinary circumstances exist for granting their untimely motions to intervene, as required by Rule 4901-1-11(F)"); *In the Matter of the Petition of The Avon Lake Subscribers of The Century Telephone Company of Ohio*, Case No. 93-911-TP-PEX, 1995 Ohio PUC LEXIS 162 at *4-6 (Feb. 17, 1995) (denying untimely motion to intervene in the absence of any "extraordinary circumstances").

B. Noble Solutions Has No Real and Substantial Interest In This Proceeding.

Noble Solutions asserts that its intervention will "significantly contribute to the development, and ultimate resolution, of the factual issues in this case." Motion at 4. But, with all deadlines on discovery and written testimony having now passed and with the evidentiary hearing on the Third Supplemental Stipulation underway, this claim rings hollow. As demonstrated above, the record remains closed with respect to Noble Solutions' stated concerns. Noble Solutions' late attempt to participate in this matter cannot conceivably add anything to the development of factual issues. Indeed, Noble Solutions expressly promises not to, stating that it "accepts the record in this proceeding as it exists on the date of this filing and does not intend to introduce any testimony." Motion at 5. By its own admission, Noble Solutions' interests at this point in the case are academic, not real and substantial.

C. Any Interest In This Case by Noble Solutions Is Already Adequately Represented By Existing Parties To This Proceeding.

Noble Solutions' Motion should also be denied because its particular concerns are already adequately represented by several intervenors. *See, e.g., In the Matter of Application of*

Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20, Case No. 11-3549-EL-SSO, 2011 Ohio PUC LEXIS 1090, *5 (Oct. 4, 2011) (denying untimely motion to intervene because “the attorney examiner does not believe that the [movant] has a unique interest in these proceedings that is not adequately represented by other parties already granted intervention”). Indeed, Noble Solutions states that it accepts the record in this proceeding as it exists as of the filing of the Motion. Motion at 5. Noble Solutions’ asserted interests are already addressed at length by the existing record, rendering Noble Solutions’ presence in this proceeding unnecessary.

Numerous parties have addressed Noble Solutions’ concerns on the record it purports to accept. Several witnesses raised arguments in opposition to the Commission’s approval of Rider RRS, including the Independent Market Monitor (“IMM”), Sierra Club, the Office of the Ohio Consumers’ Counsel (“OCC”) and the Northeast Ohio Public Energy Council (“NOPEC”). *See* Bowring (IMM) Direct Testimony at 4; Comings (Sierra Club) Direct Testimony at 4; Wilson (OCC/NOPEC) Direct Testimony at 15-16. Similarly, several parties have directly addressed the Companies’ proposals with respect to Rider NMB. *See, e.g.*, Campbell (Exelon) Direct Testimony at 23-29; Rubin (OCC) Direct Testimony at 8-16; Hill (OMAEG) Supp. Testimony at 6.

Noble Solutions brings nothing new to this proceeding. The record adequately addresses its concerns. The Motion should be denied.

V. CONCLUSION

For the foregoing reasons, the Commission should deny Noble Solutions' Motion to Intervention.

Date: January 19, 2016

Respectfully Submitted,

/s/ David A. Kutik

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served upon the following parties via electronic mail on January 19, 2016.

/s/ David A. Kutik
David A. Kutik

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Summary: Memorandum Contra Noble Americas Energy Solutions LLC's Motion to Intervene electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company