

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application)	
of Ohio Power Company to Update)	Case No. 17-1266-EL-RDR
the Energy Efficiency and Peak)	
Demand Reduction Rider)	

**OHIO POWER COMPANY’S MEMORANDUM CONTRA THE OFFICE OF THE
OHIO CONSUMERS’ COUNSEL’S MOTION TO INTERVENE**

I. INTRODUCTION

On January 18, 2017, the Commission issued an Opinion and Order approving Ohio Power Company’s (“AEP Ohio” or the “Company”) Energy Efficiency/Peak Demand Reduction (“EE/PDR”) Program Portfolio Plan for 2017 through 2020 (the “Plan”), as modified by the Stipulation in Case No. 16-0574-EL-POR (“*2017 Portfolio Plan Case*”). The Office of the Ohio Consumer’s Counsel (“OCC”) did not oppose the Stipulation approved and adopted in the *2017 Portfolio Plan Case*. See *2017 Portfolio Plan Case*, Opinion and Order at 3 (Jan. 18, 2017).

Consistent with the Commission’s Opinion and Order in the *2017 Portfolio Plan Case*, the Company filed its application to initiate this proceeding for the purpose of updating its EE/PDR rider rates consistent with the *2017 Portfolio Plan Case* Stipulation on May 15, 2017. OCC now seeks to intervene in this ministerial and administrative rider update proceeding. But as OCC’s comments filed in this docket on June 14, 2017 – and the hypothetical conjecture contained therein – make clear, OCC has no interest in any live or disputed issue in this docket. Instead, OCC is attempting to utilize this proceeding – which is merely a rider update proceeding involving a time period during which cost caps have already been established with finality – as a platform to advance OCC’s litigation position in cases involving other utilities’ energy efficiency programs. That is an inappropriate use of the intervention rules.

Apart from OCC's improper purpose for intervening in this proceeding, the memorandum in support of OCC's motion to intervene is simply a series of general and conclusory assertions restating the requirements for intervention tied together by *non sequiturs*, none of which add up to a clear or convincing justification for intervention. OCC's motion falls far short of the requirements for intervention set forth in R.C. 4903.221 and O.A.C. 4901-1-11. For these reasons, as explained below, the Commission should deny OCC's motion.

II. LAW AND ARGUMENT

The Commission should deny OCC's motion to intervene because OCC has not demonstrated that it satisfies the requirements for intervention set forth in the Revised Code or the Commission's Rules. In order to intervene in a Commission proceeding, an entity must demonstrate that it "may be adversely affected by" the proceeding. R.C. 4903.221. More specifically, unless a federal or Ohio statute confers a right to intervene (and OCC does not claim a statutory right to intervene), the entity must demonstrate that it "has a real and substantial interest in the proceeding and * * * is so situated that the disposition of the proceeding may, as a practical matter impair or impede [its] ability to protect that interest * * *." O.A.C. 4901-1-11(A)(2). OCC has not demonstrated any real interest in this proceeding.

The Commission must consider five additional factors in weighing a motion 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 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.

O.A.C. 4901-1-11(B); *see also* R.C. 4903.221(B) (instructing the Commission to consider the first four factors listed above when ruling upon applications to intervene). Each of these factors weighs against allowing OCC to intervene here.

A. OCC has not explained why Ohio's residential consumers might be adversely affected by this proceeding.

As a first step, an entity seeking to intervene in a Commission proceeding must demonstrate that it "may be adversely affected by" the proceeding. R.C. 4903.221. OCC simply asserts that "[t]he interests of Ohio's residential consumers may be 'adversely affected' by this case." (OCC Mem. Supp. at 1.) OCC does not explain how, or why, this proceeding would adversely affect Ohio's residential consumers. No reason is apparent, either. This is a rider update proceeding whose function is administrative and ministerial in nature, not substantive.

OCC adds that the real likelihood of an "adverse effect" on residential consumers would occur "if the consumers were unrepresented in a proceeding where the Utility will charge customers for energy efficiency through this rider." (*Id.*) But OCC's characterization vastly overstates, and misstates, the nature of this case. The amount that AEP Ohio may collect from customers through the EE/PDR rider is not at issue here. Moreover, OCC's own comments filed in this docket on June 14, 2017, which laud the results of the settlement in the 16-574-EL-POR case that is being implemented in rates through this proceeding, confirm that residential customers in fact *benefit* from the Company's Application in this case.

As a threshold step, a party must demonstrate that it would be "adversely affected" by a Commission proceeding before it may intervene in that proceeding. OCC has not explained, and cannot explain, why residential consumers would be adversely affected by this proceeding –

because it concedes they will not be. For this reason alone, the Commission should deny OCC's Motion.

B. OCC has no real or substantial interest in this proceeding.

An entity moving to intervene in a Commission proceeding must also demonstrate that it "has a real and substantial interest in the proceeding" and is "so situated that the disposition of the proceeding may, as a practical matter, impair or impede [its] ability to protect that interest[.]" O.A.C. 4901-1-11(A)(2). For this requirement, OCC asserts that it "has a real and substantial interest in this case involving the Utility's energy efficiency programs, which affect the rates residential customers pay for electric service." (OCC Mem. Supp. at 3.) Similarly, the Commission is required to consider the "nature and extent" of OCC's interest. R.C. 4903.221(B)(1); O.A.C. 4901-1-11(B)(1). OCC states only that "the nature and extent of OCC's interest is representing the residential customers of AEP Ohio in this case where AEP Ohio will charge customers for energy efficiency costs." (OCC Mem. Supp. at 2.) OCC misses the mark as to both requirements.

It is clear from OCC's June 14, 2017 comments that OCC's interest in this case is to improperly utilize this proceeding as a platform for OCC to present its litigation position about cost caps generally in an attempt to create leverage in other utilities' energy efficiency plan proceedings. That is not a proper purpose or interest worthy of intervention in this case. Nor is it appropriate for OCC to utilize this proceeding to speculate about what the costs of AEP Ohio's EE/PDR program would be absent the Plan caps agreed upon in the *2017 Portfolio Plan Case*. Again, the subject of this proceeding is not whether or how much AEP Ohio may collect through the EE/PDR rider for 2017 through 2020 or the application of cost caps to AEP Ohio's Plan. The subject of this proceeding is simply to update mathematically the Company's EE/PDR rider rates consistent with the Commission's Opinion and Order in that case. OCC has no real or

substantial interest in this proceeding because this proceeding involves no real or substantial issue. OCC's generic and vague assertions are not sufficient grounds for intervention.

C. OCC's vaguely described legal position has no apparent relation to the merits of this proceeding.

Next, the Commission must consider "the legal position [OCC intends to advance in this proceeding] and its probable relation to the merits of this case." R.C. 4903.221(B)(2); O.A.C. 4901-1-11(B)(2). OCC states that it will "advanc[e] the position that the rates consumers pay for electric service (including charges for energy efficiency) should be no more than what is reasonable and lawful under Ohio law." (OCC Mem. Supp. at 2.) This position, OCC asserts, is "directly related to the merits of this case[.]" (*Id.*) But the reasonableness and lawfulness of AEP Ohio's SSO rates is simply not at issue here. Nor is the reasonableness and lawfulness of the EE/PDR rider. The Commission already determined that the EE/PDR rider is reasonable and lawful in *ESP I*, Case Nos. 08-917-EL-SSO, *et al.*, and confirmed that determination in *ESP II*, Case Nos. 11-346-EL-SSO, *et al.*, *ESP III*, Case Nos. 13-2385-EL-SSO, *et al.*, and the *2017 Portfolio Plan Case*. It is long past the time for OCC to challenge those determinations, and in any event, based upon OCC's comments, OCC does not plan to do so.

D. OCC's intervention will unduly prolong and delay this proceeding and will not help develop or resolve any factual issues.

The Commission is also required to consider whether OCC's intervention would "unduly prolong or delay the proceedings." R.C. 4903.221(B)(3); O.A.C. 4901-1-11(B)(3). OCC asserts that "OCC's intervention will not unduly prolong or delay the proceedings" because OCC "will duly allow for the efficient processing of the case with consideration of the public interest." (OCC Mem. Supp. at 2.) Again, with all due respect to OCC, this is meaningless. A promise to "allow for the efficient processing of the case" means nothing, and is not in any regard tempered by OCC's ambiguous caveat, "with consideration of the public interest." In reality, OCC

appears only to promise not to prolong or delay this case no longer than its conception of the public interest requires.

Similarly, OCC asserts that it “will obtain and develop information that the PUCO should consider for equitably and lawfully deciding the case in the public interest,” purportedly in satisfaction of the requirement that the Commission weigh whether OCC “will significantly contribute to the full development and equitable resolution of the factual issues” under R.C. 4903.221(B)(4) and O.A.C. 4901-1-11(B)(4). (*Id.* at 2-3.) But again, OCC does not explain what information it intends to “obtain and develop” here. Nor does it explain why additional information is needed in this docket.

OCC’s assurances aside, OCC does threaten to prolong and delay these proceedings merely by intervening and can add nothing to develop or resolve any factual issues. As set forth above, legal issues related to the EE/PDR rider have already been addressed in *ESP I*, *ESP II*, *ESP III*, and the *2017 Portfolio Plan Case* (among others), and are not at issue here. Requiring AEP Ohio to respond to filings and discovery by OCC address repetitive legal and factual issues in this case will unavoidably prolong and delay this proceeding, result in administrative inefficiency, and cause the Company and Commission to incur unnecessary cost due to OCC’s improper use of this case to advance its position in other pending proceedings. OCC’s attempt to argue EE/PDR policy issues not at issue here may also compel other interested parties to attempt to intervene and respond to OCC’s comments. Even if no additional interventions occurred in this docket, furthermore, it could compel other parties to intervene as a “protective” matter in future rider update dockets in which OCC intervenes to make sure they have a chance to respond if OCC attempts to expand the proceeding into a general policy discussion. For this reason too, the Commission should deny OCC’s motion, not only for the undue delay it could cause this

proceeding, but also for the precedent it sets in future rider update proceedings and similar ministerial and administrative proceedings.

E. OCC does not have any interest in this proceeding that is or is not represented by existing parties.

Finally, the Commission must consider “[t]he extent to which [OCC’s] interest is represented by existing parties.” O.A.C. 4901-1-11(B)(5). OCC asserts, on this point, that it “uniquely has been designated as the state representative of the interests of Ohio’s residential utility customers.” (OCC Mem. Supp. at 3.) While this is true, OCC has not explained why the interests of Ohio’s residential utility customers are implicated in this proceeding, as discussed above. In any case, because OCC has no real interest in this proceeding, its interests cannot be said to be represented or unrepresented by existing parties.

OCC asserts that the Ohio Supreme Court “has confirmed that [OCC’s] intervention ought to be liberally allowed.” (*Id.*, citing *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶ 13-20.) To the contrary, the Court in *Ohio Consumers’ Counsel* merely confirmed OCC’s right to intervene in Commission proceedings where OCC’s “interests were not represented by any other party to the proceedings, * * * there [was] no suggestion in the record that intervention would have unduly delayed the proceedings or caused prejudice to any party[,]” and OCC explained how the subjects of the dispute “would adversely affect * * * residential customers[.]” *Ohio Consumers’ Counsel*, 2006-Ohio-5853, at ¶ 18. In other words, OCC is permitted to intervene only when it demonstrates that it meets the requirements of R.C. 4903.221 and O.A.C. 4901-1-11. The Court indicated that where there is “some evidence in the record” calling into doubt OCC’s purported interest in a case or OCC’s claim that its “views would not be adequately represented by the existing parties,” “or showing

that intervention would unduly prolong or delay the proceedings,” intervention need not be granted. *Id.* at ¶20.

As shown above, OCC’s intervention at this late stage, coupled with its asserted desire to “significantly contribute to the full development * * * of the factual issues” (*i.e.*, make unnecessary filings and serve lengthy discovery requests), will unduly prolong and delay these proceedings. OCC has provided no clear explanation of its interest in this case, beyond an empty reference to its role representing the interests of residential consumers. And OCC has not explained what unique facts or legal arguments it intends to offer or why those facts or legal arguments are useful in this rider update docket. Thus, even under the liberal standard for intervention described by the Supreme Court in *Ohio Consumers’ Counsel*, intervention is not warranted here.

III. CONCLUSION

For the reasons set forth above, Ohio Power Company respectfully requests that the Commission deny OCC’s motion to intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties.

In addition, I hereby certify that a service copy of the foregoing *Ohio Power Company's Memorandum Contra the Office of the Ohio Consumers' Counsel's Motion to Intervene* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 19th day of June, 2017, via electronic transmission.

/s/ Steven T. Nourse

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Summary: Memorandum - Ohio Power Company's Memorandum Contra The Office of the Ohio Consumers' Counsel's Motion to Intervene electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company