

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of PRO-TEC)
Coating Company, LLC for the Approval of a) Case No. 19-124-EL-AEC
Reasonable Arrangement for Its Leipsic, Ohio)
Plant)

**MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
MOTION TO INTERVENE
BY PRO-TEC COATING COMPANY, LLC**

I. INTRODUCTION

Through Ohio Adm. Code Chapter 4901:1-38, the Public Utilities Commission of Ohio (Commission) established rules for the timely and efficient consideration of applications for reasonable arrangements by mercantile customers as provided for under R.C. 4905.31. In filing its Application for a Reasonable Arrangement (Application) in this case, PRO-TEC Coating Company, LLC (PRO-TEC) complied with Ohio law under R.C. 4905.31 and the state policy enumerated in R.C. 4928.02, as well as the Commission's rules in Ohio Adm. Code Chapter 4901:1-38.¹ Notwithstanding the rules setting forth the appropriate procedures, the Office of the Ohio Consumers' Counsel (OCC) sought to intervene in this proceeding without complying with the rules, and without seeking leave from the Commission to intervene despite said lack of compliance.² As such, pursuant to Ohio Adm. Code 4901:1-38, 4901-1-11(F), 4901-1-12(B)(1), and 4901-1-13(A), PRO-TEC opposes OCC's attempt to

¹ See Application for a Reasonable Arrangement (January 11, 2019) (Application).

² See Motion to Intervene and Memorandum in Support (February 1, 2019) (OCC Motion to Intervene).

intervene in this proceeding out of time and respectfully requests that the Commission deny OCC's Motion to Intervene as untimely filed.

II. ARGUMENT

A. The Time for Intervention and the Filing of Comments and Objections in this Case Has Passed.

To implement R.C. 4905.31 and to recognize the importance of approving reasonable arrangements to promptly assist mercantile customers that are engaged in economic development activities or otherwise need incentives to expand, locate, or retain their operations and/or create or retain jobs in the state of Ohio, the Commission created rules that expeditiously consider applications for a reasonable arrangement requested by one or more mercantile customers.³ In its order adopting rules in Ohio Adm. Code 4901:1-38 to implement R.C. 4905.31, the Commission recognized that the primary focus of these types of arrangements is to create jobs and noted that the cost of electricity can be a major factor in the decision of business to cease, reduce or relocate operations.”⁴

The Commission considered all comments when drafting its rules and decided to establish a 20-day period within which interested parties may intervene and file comments and objections in cases such as this one where an applicant has sought approval for a reasonable arrangement from the Commission.⁵ More specifically, Ohio Adm. Code 4901:1-38-03(E) and 4901:1-38-05(F) provide that:

³ See Ohio Adm. Code Chapter 4901:1-38.

⁴ See *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as Amended by Substitute Senate Bill No. 221*, Case No. 08-777-EL-ORD, Finding and Order at 7 (September 17, 2008).

⁵ See Ohio Adm. Code 4901:1-38.

Affected parties may file a motion to intervene and file comments and objections to any application filed under this rule within twenty days of the date of the filing of the application.

PRO-TEC filed its Application for a reasonable arrangement pursuant to Ohio Adm. Code 4901:1-38.⁶ PRO-TEC's reasonable arrangement application constituted an economic development arrangement and unique arrangement under Ohio Adm. Code 4901:1-38-03 and 4901:1-38-05. Thus, the 20-day requirement of Ohio Adm. Code 4901:1-38 applies to all motions to intervene, including the one filed by OCC.⁷

PRO-TEC filed its application on January 11, 2019.⁸ As such, pursuant to Ohio Adm. Code 4901:1-38-03(E) and 4901:1-38-05(F), motions to intervene and any comments and objections to the Application by affected parties were required to be filed by January 31, 2019, 20 days after the Application was filed. OCC filed and served its Motion to Intervene after the deadline on February 1, 2019.⁹ Accordingly, by the plain language of Ohio Adm. Code 4901:1-38-03(E) and 4901:1-38-05(A), OCC's Motion to Intervene was not timely filed and should be rejected.

Further, OCC incorrectly states that it meets the criteria for intervention established in Ohio Adm. Code 4901-1-11.¹⁰ Ohio Adm. Code 4901-1-11(A) provides that “[u]pon *timely* motion, any person shall be permitted to intervene in a proceeding” provided that Ohio or federal law confers a right to intervene and the prospective intervenor has a real and substantial interest in the proceeding.¹¹ While OCC addresses its statutory right to intervene in Commission

⁶ Application at 1.

⁷ See Ohio Adm. Code 4901:1-38-03(E) and 4901:1-38-05(F).

⁸ See Application

⁹ OCC Motion to Intervene at 5 (Certificate of Service).

¹⁰ OCC Motion to Intervene at 3.

¹¹ Ohio Adm. Code 4901-1-11(A)(1)-(2) (emphasis added).

proceedings generally and states that it has an interest in intervening in this proceeding, it fails to address the requirement of the rule that its Motion to Intervene be timely;¹² and a review of that Motion to Intervene demonstrates that OCC, in fact, unambiguously failed to file its motion in a timely manner. Pursuant to Ohio Adm. Code 4901-1-11(F), motions to intervene which are not timely filed will be granted “only under extraordinary circumstances,” which, as discussed further below, have not been demonstrated in this case. Therefore, OCC’s Motion to Intervene should be denied.

B. OCC Failed to Cure its Untimely Motion.

The Commission has rules in place specifically to address pleadings that are untimely filed. As noted above, Ohio Adm. Code 4901-1-11(F) states that untimely motions to intervene will only be granted under extraordinary circumstances. Meanwhile, Ohio Adm. Code 4901-1-13 establishes a procedure by which a party can obtain an extension of time to file a pleading, for good cause shown.¹³ Here, OCC did not request an extension of time to file its intervention and made no attempt to show good cause for its failure to file in a timely manner or otherwise demonstrate extraordinary circumstances to justify the acceptance of its untimely intervention. In fact, OCC did not even acknowledge that its pleading was filed out of time. Thus, it has not shown good cause for the Commission to grant an extension of the deadline to file motions to intervene in this case or to accept OCC’s untimely motion as is required by Ohio Adm. Code 4901-1-13.

The Commission has repeatedly rejected attempts by parties to intervene out of time when the parties have not asserted extraordinary circumstances to justify acceptance of their motions. Specifically, the Commission has stated that when a motion to intervene is untimely

¹² See OCC Motion to Intervene, Memorandum in Support at 1-3.

¹³ See Ohio Adm. Code 4901-1-13(A).

filed under Ohio Adm. Code 4901-1-11(F) and fails to allege extraordinary circumstances, “the motion must be denied.”¹⁴ Indeed, the Commission has a long history of denying untimely motions to intervene when the party seeking intervention has failed to demonstrate extraordinary circumstances.¹⁵

Not only is OCC aware of the requirements in Chapter 4901:1-38-03 to file interventions, comments, and objections within the 20-day period, OCC is aware of the Commission’s rules governing untimely intervention and the process to cure such untimely motions. OCC acknowledged the reasonable arrangement deadlines in a recent reasonable arrangement proceeding regarding Acero Junction, Inc. when OCC filed a Motion for Leave to File Motion to Intervene Out of Time.¹⁶ Similarly, in another reasonable arrangement proceeding regarding Vadata, Inc. (Amazon Case), OCC sought leave to refile its filing out of time in order to correct a technical error in its original filing.¹⁷

These past examples demonstrate that an avenue for untimely intervention is available when technical errors occur or portions of filings are inadvertently filed late and the movant demonstrates that extraordinary circumstances existed to accept its filing out of time. In the

¹⁴ See *In the Matter of the Application of the Cleveland Electric Illuminating Company for Authority to Amend Its Filed Schedules for Electric Service*, Case No. 83-1342-EL-ATA, Entry at ¶ 5 (February 17, 1984).

¹⁵ See, e.g., *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider, et al.*, Case Nos. 14-1693-EL-RDR, et al., Entry at ¶¶ 17-21 (January 7, 2016) (denying untimely motion to intervene of PJM Interconnection, LLC); *In the Matter of* , Case Nos. 11-346-EL-SSO, et al., Opinion and Order at 8-9 (December 14, 2011) (denying untimely motion to intervene of Interstate Gas Supply, Inc. when the Commission determined that extraordinary circumstances to justify acceptance of untimely motion did not exist).

¹⁶ See *In the Matter of the Joint Application for Approval of an Economic Development Arrangement Between Ohio Power Company and Acero Junction, Inc.*, Case No. 17-2132-EL-AEC (Acero Junction Case), Motion for Leave to File Motion to Intervene Out of Time by the Office of the Ohio Consumers’ Counsel (November 17, 2017).

¹⁷ See *In the Matter of the Joint Application of Vadata, Inc. and Ohio Power Company for Approval of a Unique Economic Development Arrangement for Ohio Data Center Campuses*, Case No. 17-1827-EL-AEC (Amazon Case), Motion for Leave to Refile Public Comments Out of Time by the Office of the Ohio Consumers’ Counsel (September 22, 2017).

Amazon Case, OCC timely filed its confidential comments, but a technical glitch caused some pages of the comments to appear upside-down.¹⁸ Accordingly, OCC sought leave to re-file the comments for good cause shown.¹⁹ When no party opposed that motion, it was granted by the Commission.²⁰ In the Acero Junction Case, OCC timely filed its comments on the application on the 20th day, but inadvertently failed to simultaneously intervene.²¹ As explained above, Ohio Adm. Code 4901:1-38-03(E) and 4901:1-38-05(F) require motions to intervene, comments, and objections on the applications for reasonable arrangements to all be filed within 20 days. In the Acero Case, the comments were filed within the prescribed 20-day period, while the motion to intervene was not. Accordingly, OCC had demonstrated partial adherence to the Commission's rules, even though its motion to intervene was untimely filed. When no party objected to OCC's request for leave in that case or its intervention, the Commission granted OCC's motion for leave to file its motion to intervene out of time.²²

The current PRO-TEC case is distinguishable from the cases discussed above where intervention was granted as the specific situation warranted. Instead, the PRO-TEC case is much more commensurate with the cases where the Commission denied untimely intervention due to a failure to demonstrate good cause or that extraordinary circumstances existed. Here, there has been no showing of a technical glitch, as in the Amazon case, or of partial compliance with the Commission-established deadline to file motions to intervene, comments and objections, as in the Acero Junction case. And, unlike both of the prior cases, OCC has not even acknowledged

¹⁸ Id. at 1.

¹⁹ Id.

²⁰ Amazon Case, Entry at ¶ 4 (October 5, 2017).

²¹ See Acero Junction Case, Comments by the OCC (November 16, 2017); Motion for Leave to File Motion to Intervene Out of Time by the Office of the Ohio Consumers' Counsel (November 17, 2017).

²² Acero Junction Case, Entry at ¶ 6 (March 1, 2018).

its error or sought leave to file its motion out of time. Absent any showing of extraordinary circumstances or good cause, as required by Ohio Adm. Code 4901-1-13(A), OCC's motion to intervene should be denied in accordance with the Commission's rules and past precedent.

C. PRO-TEC will be Prejudiced by Granting OCC's Untimely Motion to Intervene.

The Commission explicitly established a 20-day deadline for the filing of interventions, comments, and objections in cases filed under Ohio Adm. Code 4901:1-38-03 and 4901:1-38-05. This allows for an expeditious consideration of these types of applications. As explained above, Ohio Adm. Code Chapter 4901:1-38 was adopted "to facilitate the state's effectiveness in the global economy, to promote job growth and retention in the state, to ensure the availability of reasonably priced electric service, to promote energy efficiency and to provide a means of giving appropriate incentives to technologies that can adapt successfully to environmental mandates in furtherance of the policy of the state of Ohio embodied in section 4928.02 of the Revised Code."²³ By considering applications for reasonable arrangements in a prompt fashion and by creating an expedited stakeholder review process and an expedited period to file interventions, comments, and objections, the Commission created a process by which financial devices could be created and utilized to assist mercantile customers in economic development and job retention programs in a manner which would allow businesses to make opportune decisions regarding investing in the state of Ohio. An accelerated process also facilitates the states' effectiveness in the global economy. Allowing OCC to ignore the rules and file an untimely motion to intervene (or untimely comments and objections) will cause unnecessary delay in the consideration of PRO-TECs Application, causing undue prejudice to

²³ See Ohio Adm. Code 4901:1-38-02(A) (citing R.C. 4928.02).

PRO-TEC and potential harm by stalling its application and the related economic development benefits.

The delay caused by accepting OCC's untimely motion to intervene is made even more prejudicial in light of OCC's decision not to file comments and objections. As noted above, comments on PRO-TEC's Application, like motions to intervene, were due on January 31, 2019 pursuant to Ohio Adm. Code 4901:1-38-03 and 4901:1-38-05. No comments and objections to the Application were filed by the prescribed deadline by any affected parties, and AEP-Ohio's non-opposition to the Application has been noted. Thus, delaying the proceedings to allow for OCC's intervention, without comments and objections, would further delay the proceeding, require the expenditure of additional time and resources by the parties involved, and unfairly prejudice PRO-TEC.

D. PRO-TEC's Proposed Reasonable Arrangement Should be Approved as No Comments or Objections Have Been Filed.

As explained above, no affected parties have timely filed comments and objections on the reasonable arrangement application as required by Ohio Adm. Code 4901:1-38-03(E) and 4901:1-38-05(F). Even if OCC's untimely motion to intervene is granted, OCC failed to timely file any specific comments and objections. Given that neither OCC nor any other party filed comments and objections on the Application, that AEP-Ohio has stated its non-opposition to the Application, and that PRO-TEC has worked with Staff to create the proposed reasonable arrangement, PRO-TEC respectfully asks this Commission to approve PRO-TEC's Application as filed as soon as possible so that PRO-TEC's approximate \$400 million investment in the state of Ohio to expand and create a state-of-the-art facility that will be the first of its kind in the world may timely receive the requested economic development incentives. Given that the

Application is just and reasonable, and no party has alleged otherwise, PRO-TEC's Application should be approved without a hearing.²⁴

III. CONCLUSION

OCC failed to file a timely intervention in this proceeding, failed to timely file comments and objections, and has further failed to seek leave for acceptance of its out of time intervention, as provided for in the Commission's rules. As such, the pleading should be rejected, OCC's Motion to Intervene should be denied, and PRO-TEC's Application should be approved as just and reasonable without delay.

Respectfully submitted,

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²⁴ Ohio Adm. Code 4901:1-38-03(C) and 4901:1-38-05(A)(2).

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all parties of record via electronic mail on February 12, 2019.

/s/ Brian W. Dressel
Brian W. Dressel

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Summary: Memorandum Contra the Office of the Ohio Consumers' Counsel's Motion to Intervene electronically filed by Mr. Brian W Dressel on behalf of PRO-TEC Coating Company, LLC