

**BEFORE
THE OHIO POWER SITING BOARD**

In The Matter Of:)	
)	
Columbia Gas of Ohio, Inc.'s)	Case No. 19-2148 GA-BLN
Letter of Notification for the)	
Marysville Connector Pipeline Project)	

**COLUMBIA GAS OF OHIO, INC.'S
MEMORANDUM CONTRA PETITION FOR LEAVE TO INTERVENE
AND/OR
MOTION FOR WAIVER OF
SUBURBAN NATURAL GAS COMPANY**

1. Introduction

The rules of the Ohio Power Siting Board ("Board") concerning intervention in accelerated certificate application cases that use the Letter of Notification ("LON") format are clear. Any person wishing to intervene in a matter that has been filed with the Board under the LON accelerated application rules must do so within ten days of the date of the public notice required by Ohio Adm.Code 4906-6-08(A). Suburban Natural Gas Company failed to meet this deadline.

When a person fails to meet the deadline, the Board's rules provide a specific set of criteria for granting requests for intervention. Principal among these criteria, Ohio Adm.Code 4906-2-12(C) allows the Board or an Administrative Law Judge to grant an untimely petition to intervene only if extraordinary circumstances justify it. None of the convoluted arguments presented by Suburban in its Petition to Intervene and/or Motion for Waiver ("Petition") meet this standard, nor do they otherwise overcome its failure to timely request intervention. Suburban's request for intervention, therefore, is properly denied as untimely.

Even if Suburban's request for intervention were timely, however, there is nothing in its Petition that warrants its intervention in this case. Stripping away Suburban's superfluous argument about the format of Columbia Gas of Ohio's ("Columbia") application in this docket for the Marysville Connector Pipeline Project ("Project"), Suburban's basis for intervention appears to rest solely on its status as a customer of Columbia and its unsubstantiated speculation that the Project may somehow diminish Columbia's ability to serve its current customers. It is important to note that Ohio Adm.Code 4906-2-12(B)(1)(a) requires the Board, when considering intervention, to take into account not only the existence of an interest in the proceeding, but the extent and nature of that interest. Suburban articulates nothing other than a generalized interest in the proceeding that is common to every customer of Columbia. Moreover, it offers no special insight into its speculative claims other than a passing reference to the number of customers and counties it serves – customers and counties that are *not* even in the Project area. Suburban makes no other effort to even speculate on how this Project could affect any of Columbia's current customers. Rather Suburban appears to rely on the mere unsubstantiated suggestion that the Project could affect supplies in some undefined way. Even the most liberal interpretation of the Board's intervention rule requires a basis for intervention more substantial than generalized customer interest and vague speculation.

As discussed in more detail below, Suburban has failed to provide this Board with either an extraordinary circumstance that justifies allowing it to intervene out-of-time or adequate grounds for its intervention in this proceeding. Columbia, therefore, requests that the Board deny Suburban's request for intervention.

2. Argument

2.1. There are no extraordinary circumstances that justify granting Suburban's out of time request for intervention.

Suburban concedes that its request for intervention is untimely. Petition at 2. The Board's rules provide that the Board or Administrative Law Judge may grant an untimely petition for leave to intervene if: (1) extraordinary circumstances justify the granting of the petition; and (2) the intervenor agrees to be bound by agreements, arrangements, and other matters previously made in the proceeding. Ohio Adm.Code 4906-2-12(C)(1)-(2). Suburban makes almost no effort to demonstrate extraordinary circumstances that justify granting its untimely request.

Rather, it is telling that Suburban leads off its Petition with a confused argument that goes to the format of Columbia's application rather than the rules applicable to intervention. Suburban complains that Columbia has used the wrong application format in this case, claiming that Columbia's Marysville Connector Pipeline Project is part of a larger project, the Northern Loop Project, and that Columbia should have filed the Project as a standard certificate application. Petition at 1. Suburban makes no effort to link this argument, however, to the actual rule for granting untimely intervention, choosing instead to twist the argument to apply a different set of rules for intervention to this proceeding. Suburban insists that it should have been given thirty days to intervene, not ten, because Columbia filed the Project application in the wrong format.

In effect, Suburban seeks to have its mere allegation transform the rule requirements applicable to this application, including the intervention rules, so that it can have more time to intervene. If Suburban wants to challenge Columbia's use of the accelerated application LON format, it must do so within the context of the accelerated application rules. And Suburban's claims regarding the

use of the accelerated application LON format could properly be raised only after it had timely intervened. Suburban's failure to timely intervene in this proceeding precludes it from now challenging the application format.

When Suburban does address the actual intervention rule, Suburban fails to demonstrate extraordinary circumstances to excuse its out-of-time request. Although it is generally understood that intervention is liberally granted, the Supreme Court of Ohio does not appear to have ever extended this liberal policy preference to procedurally defective or out-of-time requests. Suburban cites *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384 (2006), without mentioning that intervention was timely requested in that case. Petition at 7. There is a fundamental difference between allowing a party to intervene when there is some doubt as to that party's standing and allowing a party to intervene when it failed to meet the most basic of procedural requirements. Granting Suburban's out-of-time request to intervene in this case does not serve the public interest in allowing parties to participate in proceedings before the Board. Rather, it would unjustifiably excuse noncompliance with clear procedural rules. Even the most liberal policy favoring intervention does not require the Board to ignore its procedural rules.

It is also worth noting that one of the decisions cited by Suburban for its proposition that untimely motions to intervene have been granted in the past misrepresents the actual decision. Petition at 7. In the administrative law judge's decision in *In the Matter of the Application of American Municipal Power - Ohio, Inc. for a Certificate of Environmental Compatibility and Public Need for an Electric Generation Station and Related Facilities in Meigs County, Ohio*, Case No. 06-1358-EL-BGN (December 4, 2007), the issue was whether or not it was permissible to grant intervention to a party who complied with the intervention deadline set by the administrative law judge when that deadline was after the statutory deadline. In

granting the requested intervention, the administrative law judge concluded that the intervenor's reliance on the scheduling order constituted extraordinary circumstances warranting the granting of intervention even assuming, *arguendo*, that an administrative law judge lacks authority to extend the statutory thirty-day timeline for intervention. *Id.* at ¶4. In essence, the administrative law judge concluded that third parties could rely on procedural orders docketed in the case. That of course is not the case here, because Suburban has not complied with any deadline for intervention.

The only "extraordinary circumstance" that Suburban alleges is the timing of Columbia's LON. Suburban argues that Columbia's publication of the public notice on December 23, 2019, excuses its failure to follow the rules because the filing date was too close to Christmas. Petition at 7. Suburban claims that this date was so close to the holidays that it was unaware of the notice. Suburban goes so far as to imply that Columbia intentionally filed the application and published the notice during a period of time when interested parties "were potentially distracted with family and holiday commitments." *Id.* at 1.

Suburban is attempting to distract from its failure to timely intervene by casting unsubstantiated aspersions on Columbia. Columbia has been transparent about this case. Columbia filed its pre-application letter on December 13, 2019, noting publicly that it was filing the Marysville Connector Pipeline Project application on or around December 20, 2019. On December 20, Columbia filed its letter of notification in this case docket. Any sophisticated party, such as Suburban, would have seen these filings and this case on the Public Utilities Commission of Ohio's Docketing Division Daily Activity Report. Suburban's assertion also is inconsistent with its admission that it was following the docket in this case, and therefore knew in advance of January 7, 2020, that the application had been filed. *Id.* at 2. Suburban also ignores that six other potential intervenors were able to

file timely petitions to intervene, and none complained about the timing of the public notice. There is also nothing extraordinary or sinister about filing applications with the Board for certificates in December. In fact, multiple other LON format accelerated applications were filed in December.

In sum, Suburban is arguing that its failure to heed public notices is an extraordinary circumstance that justifies granting an untimely petition to intervene. Accepting this argument would diminish the Board's rule and give parties an excuse not to pay attention to public notices. Because Suburban has not established an extraordinary circumstance, its request for untimely intervention is not justified under the Board's rules and the request should be denied.

2.2. Suburban's contention that the Project is part of the Northern Loop Project neither supports intervention nor overcomes an untimely request to intervene.

Suburban dedicates a substantial portion of its Petition to arguments concerning the relationship of this Project to the Northern Loop Project. Perhaps realizing that its Petition was untimely and its arguments for intervention weak, Suburban leads its request with a discussion of the relationship of the Project to the Northern Loop Project – a future project that has not been filed with the Board – in an effort to create the impression that its Petition has merit. Suburban's fundamental argument appears to be that since the Marysville Connector Pipeline will eventually connect to Columbia's gas distribution system, including the Northern Loop Project, it must now be considered part of the yet-to-be-filed Northern Loop Project, and therefore Columbia is not entitled to consideration under the accelerated application LON format.

Before addressing the lack of merit in this argument, it is important to reiterate that Suburban's Petition is not the correct legal vehicle to raise this issue. The issues presented for consideration by the Board in Suburban's Petition are

limited to two: first, whether or not Suburban has shown an extraordinary circumstance that justifies out-of-time intervention; and second, whether or not Suburban meets the general requirements for intervention. Suburban fails on both counts. Whether the Project is part of the Northern Loop Project is not an issue that is properly considered as part of a petition to intervene.

Because Suburban has attempted to distract from its untimely request to intervene with this argument, Columbia must respond. There is nothing in the Board's rules that require applicants for Certificates of Environmental Compatibility and Public Need to include all related projects in a single application. In fact, the Board's rules specifically reject Suburban's argument. The Board's rules allow for the combination of projects into a standard certificate application, but do not require it:

If a project that qualifies for accelerated review is an associated facility of a major utility facility that is subject to filing a standard certificate application with the board, the projects *may* be combined into one standard certificate application.

Ohio Adm.Code 4906-3-04(A) (emphasis added). Even assuming *arguendo* that the Marysville Connector Pipeline Project will become an associated facility of the Northern Loop Project, the decision to combine the projects into a single standard certificate application is within Columbia's discretion. Suburban's effort to use this argument to distract from its untimely submittal is refuted by the plain language of the Board's rules.

2.3. The Project is appropriately filed under the LON format as an accelerated application.

Suburban also contends that Columbia's decision to file the Project as an accelerated application using the LON format does not meet the requirements of R.C. 4906.03(F)(3). The statute provides:

(F) Notwithstanding sections 4906.06 to 4906.14 of the Revised Code, the board shall adopt rules to provide for an accelerated review of an application for a construction certificate for any of the following: ***

(3) A gas pipeline that is not more than five miles in length *or* is primarily needed to meet the requirements of a specific customer or specific customers.

R.C. 4906.03(F)(3)(emphasis added). Suburban argues that Columbia does not meet either condition in (F)(3). Petition at 5.

Suburban is incorrect. A project qualifies under the statute for accelerated review if it is either less than five miles in length or needed for a specific customer or customers, not both. The only criteria that Columbia must meet to use the accelerated application LON format for this Project, therefore, is that the pipeline is less than 5 miles in length. As discussed above, because Columbia is not required to combine the Project with any other project, the overall length of the Project is less than five miles, and the Project is properly before the Board as an LON format accelerated application.

2.4. Suburban fails to meet the requirements for intervention.

To the extent the Board is willing to consider Suburban's request for untimely intervention, Columbia further contends that Suburban has not met even the most liberally construed standard for intervention in this case. Columbia agrees with Suburban that the Board, following the decisions of the Supreme Court of Ohio, has liberally construed the requirements for intervention to encourage parties to participate in matters properly before the Board. *See, e.g., Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940 (2006). However, the Board still has threshold requirements for intervention, which Suburban does not meet in this case. Ohio Adm.Code 4906-2-12(B) provides:

- (B) The board or the administrative law judge shall grant petitions for leave to intervene only upon a showing of good cause.
- (1) In deciding whether to permit intervention under this paragraph, the board or the administrative law judge may consider:
 - (a) The nature and extent of the person's interest.
 - (b) The extent to which the person's interest is represented by existing parties.
 - (c) The person's potential contribution to a just and expeditious resolution of the issues involved in the proceeding.
 - (d) Whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice an existing party.

Ohio Adm.Code 4906-2-12(B).

Suburban's argument in favor of intervention is so general that it is difficult to fathom how it can establish good cause to intervene. Suburban essentially argues that because it is a customer of Columbia, and because it serves some 17,000 residential and commercial customers in Delaware, Henry, Wood, and Marion Counties, it has an adequate interest in this case to support intervention. Petition at 2. But this case relates to the installation of a pipeline in *Union County*. Suburban, therefore, has no interest in the case other than a vague generalized interest common to every Columbia customer. This is not enough to warrant intervention in this case.

Other than its mere existence as a customer of Columbia, albeit one that does not conduct business in the Project area, the only other interest Suburban raises is the speculation that, somehow, the Project may impact Columbia's ability to serve its current customers. Petition at 3. This concern, however, is entangled with Suburban's flawed contention that the Project in this case should be

considered as part of a larger planned pipeline project. *Id.* Nowhere in the Petition does Suburban claim that the Marysville Connector Pipeline Project, standing on its own, will have any impact on Suburban. Since Suburban's own articulation of its interest in this case depends on the association of the Project with another, unfiled project, Suburban's request must fail because it has not described any meaningful interest in this proceeding that merits its intervention.

Finally, although Suburban claims that its participation in this case will not unduly delay the proceedings, the lead argument in Suburban's Petition highlights its intent to delay. Suburban's primary argument is that this Project is part of a larger project and should not be considered as an accelerated application. This argument is premised on a flawed legal analysis of the rules and there is little doubt Suburban will raise the issue over and over again in the proceedings. This will delay the proceedings even if the Board rules on the merits of this case, as Suburban will likely avail itself of every procedural avenue available to contest this Project on that ground. Allowing Suburban to intervene when it has no meaningful interest in the case, and with the expectation that it will seek to delay the proceedings, is not consistent with the Board's rules or fair to Columbia.

2.5. The Board should not waive the requirements for out-of-time intervention just because Suburban cannot meet them.

Suburban makes one last ditch desperate effort to overcome its failure to file a timely request for intervention by requesting, if all else fails, that the Board waive the deadline for intervention. The Board has the ability to waive the procedural requirements in its rules for good cause. Ohio Adm.Code 4906-6-01(B). But good cause does not exist in this case. To the contrary, granting a waiver request would effectively render the Board's standards for out-of-time intervention meaningless. Suburban is essentially arguing that even if it cannot meet the ex-

traordinary circumstances standard for out-of-time intervention in Ohio Adm.Code 4906-2-12, the Board should just waive the rule for Suburban, for no other reason other than that Suburban cannot meet the standard. The Board has rules related to intervention, and specific criteria for granting untimely intervention requests, for a reason. Suburban has failed to advance any compelling reason why the Board should ignore its own rules to correct Suburban's failure.

3. Conclusion

Suburban's request to intervene in this proceeding is untimely and no argument advanced by Suburban overcomes it. Further, even if Suburban had filed a timely request, it has no meaningful interest in this proceeding that would warrant granting intervention generally. Suburban apparently has many issues with a future Columbia project, but those issues are properly considered by the Board in that proceeding, not the present matter. Suburban's request should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Summary: Memorandum Contra Petition for Leave to Intervene and/or Motion for Waiver of Suburban Natural Gas Company electronically filed by Cheryl A MacDonald on behalf of Columbia Gas of Ohio, Inc.