**Before**

**The Public Utilities Commission of Ohio**

In the Matter of the Application for )

Establishment of a Reasonable ) Case No. 12-1494-EL-AEC

Arrangement Between ASHTA )

Chemicals Inc. and The Cleveland )

Electric Illuminating Company )

**ashta chemicals inc.’s**

**Memorandum in Opposition to the Motion to Intervene by Ohio Energy Group**

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Two weeks before this matter is set to proceed with an evidentiary hearing and well after the second deadline for intervention, the Ohio Energy Group (“OEG”) has moved to intervene in this matter. Because OEG has failed to demonstrate a basis for intervention, the Motion should be denied.

# Background

ASHTA Chemicals Inc. (“ASHTA”), a mercantile customer, filed an Application for a reasonable arrangement on May 7, 2012. On May 25, 2012, the Commission Staff (“Staff”) filed a request for an extension of the 20-day deadline for comments. The request was granted and the Attorney Examiner extended the date to file comments and motions to intervene until June 28, 2012. Entry at 2 (May 29, 2012).

On June 28, 2012, the Cleveland Electric Illuminating Company (“CEI”) and Staff filed comments raising concerns about the recommended price per kilowatt hour (‘kWh”), the discount, and the estimated level of delta revenues that would be recovered from other customers. Comments of the Cleveland Electric Illuminating Company (June 28, 2012) (“CEI Comments”); Comments Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (June 28, 2012) (“Staff Comments”). Based on those comments, the Commission directed ASHTA to file information regarding the recommended price per kWh, the recommended discount per kWh, and the estimated delta revenue. Entry at 2 (Aug. 1, 2012). ASHTA filed the requested information as part of its testimony on August 20, 2012 in both an unredacted version filed under seal with a motion requesting a protective order of trade secret information and a public redacted version.

On September 21, 2012, the Attorney Examiner noted that the information that the Commission directed to be filed was included in the testimony ASHTA filed on August 20, 2012, but also stated that the testimony appeared to be modifying the application in some respects. Because the Attorney Examiner concluded that the Application had been modified, the deadline for intervention was extended to October 22, 2012*.* Entry at 2 (Sept. 21, 2012). Further, the Attorney examiner set the matter for an evidentiary hearing to commence on November 15, 2012. *Id*.

On October 19, 2012, CEI filed a timely Motion to Intervene. In support of its Motion to Intervene, CEI noted that it would be a signatory to the reasonable arrangement and that it was knowledgeable about the arrangement because it had met with both ASHTA and Staff to discuss it. Memorandum in Support of the Motion to Intervene of the Cleveland Electric Illuminating Company at 2 (Oct. 19, 2012). Further, CEI stated that it is “uniquely positioned to protect and balance the interests of [its] customers and shareholders through supporting efforts that will help mitigate costs that may be imposed upon customers and then providing for a reasonable recovery mechanism for those costs.” *Id*. at 3.

On October 29, 2012, OEG filed its Motion to Intervene Out of Time. In support of its motion, it asserts that it should be permitted to intervene because it has members that are customers of CEI that may be required to pay rates affected by the Application and that the Application does not contain sufficient detail. Memorandum in Support of the Ohio Energy Group’s Motion to Intervene Out of Time at 2-3 (Oct. 29, 2012) (“OEG Memorandum in Support”). However, OEG does not offer any explanation for its failure to file a timely application other than to suggest that OEG failed to identify this Application from the “many that are routinely filed.” *Id*. at 3. Further, other than quoting the applicable rule regarding the factors that the Commission must consider in reviewing a motion to intervene, OEG does not offer any support for its motion to intervene. *Id*.

# ARGUMENT

OEG has not provided any basis on which the Commission should find that OEG has demonstrated extraordinary circumstances on which to grant its Motion to Intervene Out of Time, as required by Commission rule. Further, OEG has failed to demonstrate the basic grounds that would support a motion to intervene even if the motion were timely. Because OEG has failed to demonstrate grounds for intervention, the Commission should deny its motion.

## OEG has failed to demonstrate extraordinary circumstances to justify intervention out of time

As OEG admits, its motion to intervene is late. The original date for a timely intervention was June 28, 2012. The Attorney Examiner then extended the intervention deadline to October 22, 2012. OEG filed its Motion to Intervene Out of Time on October 29, 2012. Thus, the motion is not timely and “will be granted only under extraordinary circumstances.” Rule 4901-1-11(F), Ohio Administrative Code (“OAC”).

According to OEG, the absence of detail in the public documents is the extraordinary circumstance that “obliges OEG to intervene.” OEG Memorandum in Support at 3. This assertion that it is obliged to intervene because of the public record concerning the proposed arrangement fails to demonstrate any logical connection to an extraordinary circumstance that would justify OEG’s intervention. Whatever that connection is, OEG has left the Commission to guess.

OEG’s assertion that the Application was extraordinary because it did not contain certain information, likewise, does not amount to an extraordinary circumstance justifying an untimely intervention. If OEG had concerns about what was contained in the redacted portions of the testimony, it could have sought timely intervention and a protective agreement so that it could have access to the unredacted testimony. Yet, OEG did not intervene despite two extensions of the intervention deadline and did not contact ASHTA’s counsel regarding the filing to discuss the merits of the filing or to seek a protective agreement so that OEG might have access to the redacted information.

Further, the implication that ASHTA’s filings lack the necessary information to properly proceed is unsupported by the record. The Commission requested additional information from ASHTA in support of the Application after CEI and Staff noted concerns. ASHTA complied with the Commission’s request, and the Attorney Examiner found that the requested information was included in ASHTA’s testimony. Thus, OEG’s implication that the Commission is without important information affecting the Application is simply false.

Additionally, OEG does not provide any basis for the Commission to believe that OEG has a legitimate reason for filing late. It has offered no explanation as to why it was not aware of ASHTA’s application despite it claims that a review of the Application filed on May 7, 2012 would have revealed how “extraordinary” the Application was. Instead, OEG implies that this was just one of the many applications “routinely filed,” but OEG became concerned about the Application based on “rumors.” *Id*.

OEG’s failure to identify the so-called extraordinary Application because it was “routinely filed” (which of course it must be if the Commission is to consider it) and then to seek intervention out of time based on rumors is nothing more than a poor excuse for filing late. This excuse cannot serve as the extraordinary circumstances OEG must demonstrate to support a motion to intervene that is “exceedingly untimely.” *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al*., Entry at 9 (June 29, 2011) (“*AEP-Ohio ESP I Case*”).

OEG also has alleged is that it has an interest in the outcome of the case because there are OEG members that are customers of CEI. OEG Memorandum in Support at 2. The Commission, however, has previously held that a party seeking to intervene out of time must demonstrate more than an interest in the outcome of the case. For example, the Attorney Examiner in the remand of AEP-Ohio’s first electric security plan (“ESP 1”) refused to grant a motion to intervene out of time by several competitive retail electric service (“CRES”) providers because the remand was not unforeseeable and because their primary interest in the remand case was alleged to be the effect of the ESP I remand on AEP-Ohio’s second ESP case. *AEP-Ohio ESP I Case,* Entry at 5-6 (June 16, 2011). The Commission subsequently affirmed the Attorney Examiner’s decision when the Commission denied the CRES providers’ interlocutory appeal. *Id*., Entry at 10 (June 29, 2011).

Similarly, OEG’s claim that OEG members that are CEI customers may be affected by the outcome of this case is far from extraordinary; it is true of all CEI customers and an interest recognized by the Staff in its Comments and CEI in its Motion to Intervene. Thus, OEG has failed to demonstrate any extraordinary circumstance that will support its Motion to Intervene Out of Time.

## OEG fails to demonstrate grounds for intervention

Apart from OEG’s failure to demonstrate that extraordinary circumstances justify its late intervention, OEG also fails to demonstrate that it has an interest in the proceeding that justifies its intervention. Given that OEG is seeking a Commission order allowing it to intervene two weeks before the hearing is to commence, the Commission should be assured that the intervention satisfies the factors the Commission is to consider under Section 4903.221 and Rule 4901-1-11(B), OAC. Although OEG claims that OEG members will bear the consequences of this Application, it does not offer anything in its memorandum in support of its motion to demonstrate the legal position it intends to take, how its intervention will not unduly prolong or delay the proceeding, how OEG will significantly contribute to the development and resolution of the factual issues, or the extent to which its interests are not represented by other parties. Rule 4901-1-11(B), OAC.

In particular, the Commission files demonstrate that OEG’s sole asserted interest in this matter, the “rate consequences,” are also a matter which the Staff and CEI have similar interest and concern. For example, Staff comments sought additional information to address delta revenue concerns. Staff Comments at 3. Similarly, CEI has noted its concern in assuring that the interest of its other customers and shareholders be addressed in its timely motion to intervene. Under these circumstances, OEG did not and cannot demonstrate that its interest in the rate consequences are not adequately represented by other parties in the proceeding.

# Conclusion

For the reasons discussed herein, OEG’s Motion to Intervene Out of Time should be denied. OEG has not demonstrated that extraordinary circumstances exist to justify its Motion. More fundamentally, it has failed to allege even a minimal basis for intervention even if it had timely filed.

Respectfully submitted:

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**Certificate of Service**

I hereby certify that a copy of the foregoing *ASHTA Chemicals Inc.’s Memorandum in Opposition to the Motion to Intervene by Ohio Energy Group* was served upon the following parties of record this 31st day of October 2012, *via* hand-delivery, electronic transmission, or first class mail, U.S. postage prepaid.

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