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September 24, 2009

Ms. Renee J. Jenkins
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PUCO

RE: Ohio Environmental Council's Reply to The Cleveland Electric Illuminating Company's Memorandum Contra the Ohio Environmental Council's Motion to Intervene
Case No. 09-1100-EL-EEC

Dear Ms. Jenkins:

Enclosed please find the original and nine (9) copies of Ohio Environmental Council's Reply to The Cleveland Electric Illuminating Company's Memorandum Contra the Ohio Environmental Council's Motion to Intervene. Please file the enclosed Reply in the above-referenced docket.

Thank you for your assistance, and please let me know if you have any questions concerning this filing.

Todd M. Williams

cc: Parties of Record

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Application of The
Lubrizol Corporation and The
Cleveland Electric Illuminating
Company For Approval of a Special
Arrangement Agreement With A
Mercantile Customer.**

Case No. 09-1100-EL-EEC

**REPLY TO MEMORANDUM CONTRA THE OHIO ENVIRONMENTAL
COUNCIL'S MOTION TO INTERVENE**

I. Introduction:

On August 31, 2009, the Ohio Environmental Council ("OEC") filed a Motion to Intervene in this proceeding. In this case, The Cleveland Illuminating Company ("Company") and The Lubrizol Corporation ("Lubrizol") (collectively with The Company, "Applicants") jointly seek approval of a special arrangement under Ohio Adm. Code 4901:1:39-08(B). Approval of this arrangement would permit Lubrizol to opt-out of paying the Company's Rider DSE2 that recovers from customers the costs associated with compliance with energy efficiency reduction requirements stated in R.C. 4928.66. Additionally, approval would allow the Company to attribute the energy reductions associated with the Customer's projects to the energy efficiency reduction achievements required for the Company to meet the benchmarks under R.C. 4928.66.¹

On or about September 14, 2009, the Company filed a Memorandum Contra the Ohio Environmental Council's Motion to Intervene ("Memo Contra") attacking OEC's entry on grounds that OEC failed to meet the criteria that the PUCO uses to judge motions to intervene. The Company alleges (i) OEC's interests are adequately protected by the independent program

¹ As enacted by Sub. S.B. 221 (S.B. 221)

evaluator; (ii) OEC has no resident expertise in evaluating engineering reports related to energy efficiency projects that would contribute to the development of the factual issues; (iii) there is another more efficient process through which OEC's concerns can be addressed; and (iv) OEC's participation will unduly prolong or delay this proceeding to the detriment of the Customer. Further, the Company claims OEC failed to show that they fit those "who may be adversely affected" as stated in R.C. 4903.221(A).

R.C. 4903.221(B) requires the Commission to consider the following criteria in ruling on motions 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 proceeding; and
- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

OEC meets the requirements stated in R.C. 4903.221, as discussed in OEC's Motion to Intervene and as further detailed in this Reply to Memorandum Contra the Ohio Environmental Council's Motion to Intervene.

II. Argument

- 1. OEC's interests have been erroneously characterized by the Company, and are not fully protected by other parties.**
 - a. Nature and extent of OEC's interest.**

The Company misconstrues OEC's interest in this case as a purely economic interest. Rather, OEC's interest in this case, while taking on an economic element due to the nature of the case, is in the protection of the environment. As new energy efficiency assets are deployed across, investments in new, costly, and ultimately environmentally destructive coal baseload power sources are deferred, which creates tangible environmental benefit for the state of Ohio.

As stated in the Motion to Intervene by the Ohio Environmental Council, the approval of special arrangements between Lubrizol and the Company, while allowed under R.C. §4928.66(A)(2)(c), should be undertaken only after a thorough review of the proposed energy efficiency projects undertaken by the mercantile customer. Should the Commission, The Company, or any consultant fail to properly apply rules, evaluate savings according to applicable protocols, introduce concepts contrary to statute in a calculation, or fail to properly characterize energy efficiency actions in the pursuit of bankable savings the OEC's environmental interest in maximum achievable new efficiency will be imperiled. Additionally, the rules governing these arrangements are not yet finalized. This makes it all the more likely, either intentionally or unintentionally, that the Commission or The Company could make a substantive determination that is contrary to the letter or intent of SB221.

This proceeding deals with a particularly important circumstance. Lubrizol is seeking this arrangement based upon pre-existing energy efficiency programs. These programs have already been undertaken and are in place at the time of this hearing. Lubrizol, which freely undertook these programs, now has an added benefit of being able to apply the programs to the Company and thereby avoiding the Rider DSE2.

OEC is not opposed to the inclusion of those pre-existing mercantile projects which were implemented after January 2006. However, S.B. 221 encourages new investment in Ohio in

order to achieve the system benefit goals of the legislation. Pre-existing projects do not represent a new investment in either energy efficiency or demand response reduction. The benefits from increased energy efficiency or demand reduction are already set to incur to Lubrizol, the Company, and to the other electrical users of Ohio. Approval of this arrangement will essentially lessen the obligation to invest in energy efficiency and demand reduction faced by the Company without requiring any additional reduction in energy usage or investment by Lubrizol. Approval is statutorily permissible, but it is in the OEC's interest, and the OEC's interest alone, to ensure that this approval is as narrowly tailored to statutory letter and intent as possible.

The Company alleges that as OEC has not specifically identified any of its 100 affiliated group members, or that any are "actually customers of the Company,"² and that the pleading fails to support the finding that OEC is a party who may be adversely impacted by the PUCO proceeding. OEC, first of all, is not required and is protected from being compelled to identify individual members under the First Amendment to the U.S. Constitution's guarantee of Freedom of Assembly.³ Nevertheless, the Company's argument takes a limited view of the impact which this proceeding will have on the State of Ohio, the environment of Ohio, and the all the residents of Ohio. This hearing will have a direct impact on the amount of investment made by the Company to meet the benchmarks set by S.B. 221, and if the statute is improperly applied to this project, could dramatically affect the quantity of new energy efficiency investments The Company will make in the state of Ohio as a result of SB221 compliance pressures. Failure to maximize the deployment of economically achievable energy efficiency will result in a

² Company's Memo Contra at 3-4.

³ See National Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson, 357 U.S. 449, 462 (1958) (Privacy in one's associations is crucial to the First Amendment Freedom of Assembly. In order for the state to compel an organization to disclose its membership, it must have a compelling interest); See also Buckley v. Valeo, 424 US 1 (1976) (If the government is going to impede upon the Freedom of Assembly, it will be subject to strict scrutiny. This ensures the protection of the privacy of members who may be subjected to negative effects on their lives as a result of the publicity of their membership in an organization. It also ensures the organization's ability to advocate its constitutionally protected beliefs.)

deleterious effect on the environment of Ohio, on the interest of the 100 affiliated members groups of OEC, and on OEC's several thousand individual members. The Company's narrow interpretation of energy efficiency and DSM programs as merely having an economic and not an environmental impact, clearly necessitates OEC's involvement in this application and "the many contemplated to be filed with the Commission."⁴

b. OEC's interest is not represented by any other party to the proceeding.

The Company contends that the sole interest of OEC is to ensure that the energy efficiency and demand reductions benchmarks are met, which is the interest of the Commission and presumably the Commission's Staff and/or appointed expert. This is a simplistic interpretation of OEC's interest. By no means does OEC seek to imply that its expertise should supplant that of the Commission in the area of measurement and verification. The Company argues that the Commission will be hiring an "independent program evaluator" as defined under the rules originally adopted by the Commission in Docket No. 08-0888-EL-ORD (hereinafter "Rules"). The Company states that the Independent Evaluator, so hired, will meet all the concerns of OEC, by ensuring that programs are functioning as designed. It should be noted that the Company relies on the fact that while these rules have not been adopted, this portion has drawn little ire and should be included in future adopted versions of the rules. This further demonstrates the need for intervenor participation. Currently, an independent program evaluator will be a part of the assessment process. But as The Company is well aware, some parties feel this requirement should be removed.⁵ As rules are reconsidered, any provision, including the independent program evaluation requirement may be amended. If it is, the OEC's participation in this proceeding would be even more essential than it already is. Because the Rules have yet to be

⁴ *Id.* at 6.

⁵ AEP objected to Rule 4901:1-39-01(L), which requires an independent program evaluator hired by the utility at the direction of Commission staff. (AEP application for Rehearing, p.9)

adopted, it is hard to fathom that a currently non-existent entity can serve to protect OEC's current interest. Even so, unless the rules are changed dramatically in regard to the independent evaluator's assessment, such an expert, appointed by the Commission, will not be evaluating with an eye on the impact on the environment of the state. Additionally, this individual will not in any meaningful manner act to resolve any *current* issues. Much like the proceedings to review the portfolio reports in April, the entity will function as a post action review mechanism.

Throughout its 40-year history, OEC has been a leading advocate for fresh air, clean water, and sustainable land and energy use. OEC was an active participant in the effort that led to the inclusion of demand reduction and energy efficiency requirements in S.B. 221. Its members, both those within the Company's territory, and those without, share an interest in the success of energy efficiency and demand response programs. These programs will reshape the use of energy throughout the state, curtailing demand and leading to a lessening of the impact upon the environment. No other party to this proceeding has the mission of protecting the environment for all Ohioans, and no other party has been a continuous participant in cases before the Commission for the purpose of furthering this mission. It should be stressed that both the Commission and the Supreme Court of Ohio favor an inclusive intervention policy.⁶

2. Contribution to development

The Company notes that OEC's past "active participation in Commission cases is irrelevant when the issue before the Commission deals with the engineering results from an energy efficiency project."⁷ OEC mentions its past participation solely to demonstrate a history of effective advocacy before the Commission, both in the development of legal and factual

⁶ See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, 2006-Ohio-5853. "In our view, whether or not a hearing is held, intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO."

⁷ Company's Memo Contra, at page 5, footnote 5.

issues. OEC's past effective advocacy will continue in this case. As demonstrated by our participation in settlements with various parties at the commission, including DP&L and First Energy, the OEC has proven itself a constructive partner in the development of reasonable, consensus based settlement arrangements.⁸ The OEC is also capable of bringing mainstream, valuable expertise to bear. For instance, during case 08-0935-EL-SSO the Ohio Environmental Council worked with Summit Blue consulting, to review operation of residential and commercial energy efficiency programs in various state programs, comparing them to the programs proposed by First Energy. Undoubtedly, this testimony provided more substance to the case, and helped move parties towards a stakeholder driven negotiated settlement. Currently, Summit Blue is working with AEP in the development of AEP's energy efficiency program portfolio.

3. OEC's intervention will not unduly prolong or delay the proceedings as required under R.C. 4903.221(B)(3). Company's argument that OEC has a more appropriate proceeding to address its interest is without merit.

The Company correctly states that Rule 4901:1-39-05(C) of the Commission's Rules require all Ohio electric distribution utility's to file a portfolio status report addressing the performance of all approved energy efficiency and peak demand programs over the previous calendar year, detailing the achieved energy savings and demand reductions.⁹ Further, they correctly identify the rule, Rule 4901:1-39-06(A) by which any person may file comments upon either the initial benchmark report or the annual portfolio status report, and the fact that Rule 4901:1-39-05(C) allows the Commission to schedule a hearing upon these reports.

The Company alleges that this presents a superior opportunity for OEC to seek redress for its concerns. The Company stresses that these proceedings will provide OEC the opportunity

⁸ Cases 08-1094-EL-SSO and 08-0935-EL-SSO, respectively.

⁹ Company's Memo Contra at 5.

to analyze the entire portfolio of projects, "thus allowing parties to perform a single review of the entire plan, rather than a piecemeal review or, not only a single program, but also the individual components of that program."¹⁰

OEC does look forward to April and to participating fully in any and all hearings regarding the portfolio status reports. However, the Company's argument has two rather glaring holes. First, the aforementioned opportunities are remote in time to the current interests of OEC. Second, they are designed to allow the Commission and all interested parties the opportunities to review the Company's past actions. The current proceeding has the exact opposite nature; it will shape the future actions of the Company as it seeks to meet the required benchmarks. Again, it must be stated that OEC looks forward to working with the Company and the Commission in the April proceedings to review the Company's portfolio of programs to ensure the continued integrity of the environment. But this participation cannot preclude OEC's participation in the current proceeding.

The Company goes on to imply that by allowing the intervention, OEC will seek to participate in a manner as to cause delay and excessive expense to the mercantile customer. These assertions are without any merit or reasoning within the Company's Memo. OEC is supportive of energy efficiency programs, and more generally, all programs which will advance the goal of a cleaner environment. The OEC is an enthusiastic supporter of new energy efficiency, and plans on intervention in support of projects that follow statutory and rule requirements and create new energy efficiency. OEC is cognizant of the fact that both the Company and Lubrizol function as for profit companies, and as such, must carefully allocate the limited time, money, and resources they have in a manner considered most profitable. OEC is

¹⁰ Company's Memo Contra at 6.

interested in the development of logical and efficient programs, which will neither be detrimental to the electric utility nor to the environment.

Further OEC's involvement in the proceeding will more likely prevent undue hardship and unnecessary expense. If OEC is not permitted to provide input into the applications at the beginning, OEC may be required to contest a special arrangement after the arrangement has been implemented and relied upon by a customer for an opt-out, or during benchmark report or the annual portfolio status report. A later contest by OEC would lead to added expenses not expected by the customer on top of requiring the customer to pay Rider DSE2 when the customer had expected that its own energy efficiency efforts would provide an opt-out on the basis of the special arrangement with the Company.

III. Conclusion

OEC has demonstrated that it has an appropriate interest, that its interest is not protected by any other party, and that it will not cause undue delay to the proceeding. The environmental interests OEC should be represented and protected. If either the Company or Lubrizol fails to properly characterize energy savings, a reduction in the amount of new energy efficiency savings to be create company-wide will result in a negative impact on the environment. OEC has been a leading environmental advocate in the State of Ohio for forty years, and as such is uniquely qualified to represent the environmental interest. The Commission should grant OEC's Motion to Intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the Ohio Environmental Council's reply to the Memorandum Contra the Ohio Environmental Council's Motion to Intervene was served on this 24th day of September, 2009, on the persons stated below by regular U.S. Mail, postage prepaid.

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