

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Co- )  
lumbia Gas of Ohio, Inc. for Approval ) Case No. 16-1309-GA-UNC  
of Demand Side Management Program )  
for its Residential and Commercial )  
Customers. )

In the Matter of the Application of Co- )  
lumbia Gas of Ohio, Inc. for Approval ) Case No. 16-1310-GA-AAM  
to Change Accounting Methods. )

---

**MEMORANDUM CONTRA OF COLUMBIA GAS OF OHIO, INC.  
TO MOTIONS TO INTERVENE AND  
REQUESTS FOR LEAVE TO FILE MOTIONS OUT OF TIME OF  
EMPOWER GAS AND ELECTRIC, INC. AND  
ENVIRONMENTAL LAW & POLICY CENTER**

---

**1. INTRODUCTION**

Pursuant to Section 4903.221, Revised Code, and Rule 4901-1-11, Ohio Administrative Code ("O.A.C."), Columbia Gas of Ohio, Inc. ("Columbia") opposes and asks the Commission to deny the untimely and incomplete Motions to Intervene and Requests for Leave to File Motions Out of Time ("Motion") of Empower Gas and Electric, Inc. ("Empower") and Environmental Law & Policy Center ("ELPC"). The movants neither pleaded nor demonstrated the good cause and extraordinary circumstances required for the Commission to grant an untimely motion to intervene. They did not provide much of the information necessary to support a motion to intervene, such as the nature and extent of their interests in this proceeding or the extent to which their interests are already represented by existing parties. And the limited information they did provide – primarily, that they will "accept the record \*\*\* as it stands today" and not contribute to developing the factual issues in this proceeding – weighs against intervention, not in favor of it. For all of these reasons, as further explained below, Columbia respectfully requests that the Commission deny Empower's and ELPC's Motions to Intervene and Requests for Leave to File Motions Out of Time.

## 2. LAW AND ARGUMENT

### 2.1. The movants have not demonstrated extraordinary circumstances for failing to meet the Commission's deadline for intervention.

The primary reason to deny Empower and ELPC's Motions is that they did not explain or justify their failure to comply with the Commission's case schedule. The first requirement for a motion to intervene is that the motion must be "timely."<sup>1</sup> Under statute, a company seeking to intervene in a Commission proceeding must "file[a] a motion to intervene \*\*\* no later than \*\*\* [a]ny specific deadline established by order of the commission for purposes of a particular proceeding[.]"<sup>2</sup> The Commission may not grant an untimely motion to intervene absent a demonstration of "good cause."<sup>3</sup> And even then, the Commission will grant the motion "only under extraordinary circumstances."<sup>4</sup> "[T]he Commission has frequently denied untimely motions to intervene where no extraordinary circumstances were present."<sup>5</sup>

The Commission's procedural schedule for this proceeding imposed a July 27<sup>th</sup> deadline for filing motions to intervene.<sup>6</sup> The movants missed that deadline by over a month. Consequently, they were required to show they had good cause for missing the deadline and to describe the extraordinary circumstances that prevented them from complying the Commission's order.<sup>7</sup> But neither of them made any effort to fulfill those requirements. Instead, they dismissed the Commission's intervention deadline as a mere recommendation ("the procedural schedule \*\*\* provided that motions to intervene *should* be filed by July 27, 2016") and asserted the Commission had granted "similar requests to file motions to intervene out of time in other proceedings,"<sup>8</sup> none of which they identified or compared to this proceeding.

---

<sup>1</sup> Rule 4901-1-11(A), O.A.C.

<sup>2</sup> Section 4903.221(A)(1), Revised Code; *see also* Rule 4901-1-11(E), O.A.C.

<sup>3</sup> Section 4903.221(A)(2), Revised Code.

<sup>4</sup> Rule 4901-1-11(F), O.A.C.

<sup>5</sup> *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*, Case No. 14-1693-EL-RDR, Entry, ¶17 (Jan. 7, 2016), citing *In re AEP Ohio*, Case No. 10-2376-EL-UNC, Opinion and Order (Dec. 14, 2011) at 9; *In re FirstEnergy*, Case No. 11-5201-EL-RDR, Opinion and Order (Aug. 7, 2013) at 7-8; *In re Greenwich Windpark*, Case No. 13-990-EL-BGN, Opinion, Order, and Certificate (Aug. 25, 2014) at 3-4..

<sup>6</sup> Entry, ¶10 (July 14, 2016).

<sup>7</sup> Section 4903.221(A)(2), Revised Code.

<sup>8</sup> Empower Motion at 1 and ELPC Motion at 1 (emphasis added).

The movants assert that “[n]o party will be prejudiced” by their last-minute requests to join this proceeding.<sup>9</sup> But lack of prejudice is not the standard for untimely interventions in Commission proceedings. And regardless, the argument that the existing parties will not be prejudiced by the addition of two new parties cannot be squared with the procedural schedule the Commission just set.<sup>10</sup> Columbia and the other parties supporting the August 12<sup>th</sup> Stipulation and Recommendation have already completed and filed their testimony. The parties opposing the stipulation must file their testimony next week. Allowing two new parties with unknown legal positions to intervene at this point would make it impossible for the parties to anticipate or address their arguments.

The Commission chose an “extraordinary circumstances” standard for untimely motions to intervene, rather than a lesser “good cause” standard, because “failure to meet a deadline for intervention in a case has consequences for other parties in the case as well as for the Commission as it attempts to process its cases.”<sup>11</sup> The movants did not even try to meet the Commission’s high standard. For this reason alone, the Commission should deny the Motions to Intervene.

## **2.2. The movants did not fulfill most of the requirements for intervention in a Commission proceeding.**

The secondary reason to deny the Motions to Intervene is that they both fall short of meeting the statutory and regulatory requirements for motions to intervene in numerous ways. One or both of the movants failed to explain why they are seeking to intervene, what they plan to argue if the Commission grants intervention, how they plan to help the Commission resolve the issues in this case, or why the other parties cannot adequately represent their interests. Each of these reasons, as further discussed below, would warrant denying even a timely motion to intervene.

### **2.2.1. Empower did not describe a real or substantial interest in this proceeding.**

The fundamental requirement for intervening in a Commission proceeding is that the company must have “a real and substantial interest in the proceed-

---

<sup>9</sup> Empower Motion at 2; ELPC Motion at 1.

<sup>10</sup> Entry, ¶8 (Aug. 30, 2016).

<sup>11</sup> *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order, at 19, ¶ 30 (Dec. 6, 2006).

ing.”<sup>12</sup> Ohio statute and the Commission’s Rules both require the Commission to consider the “nature and extent” of the movant’s interest when weighing a motion to intervene.<sup>13</sup> Thus, at a minimum, a motion to intervene should explain why the person or company is seeking to intervene.

Empower’s Motion did not provide even this minimal explanation. Its Motion asserted Empower offers “private-sector energy efficiency services in Ohio,” sometimes “without the use of utility based energy efficiency subsidies.”<sup>14</sup> But Empower did not say it offers such services in the areas Columbia serves or even that it plans to do so. Nor did it explain why offering such services in Columbia’s area, if it does so, would give it a real and substantial interest in this proceeding. The Motion simply described Empower’s business and left it to the Commission to fill in the rest. Because Empower did not fulfill the basic requirement of explaining its interest in this proceeding, the Commission should deny Empower’s Motion to Intervene.

#### **2.2.2. Neither movant explained why its interests might be adversely affected by this proceeding.**

Next, Ohio permits intervention in a Commission proceeding *only* if the person seeking intervention “may be adversely affected by” the proceeding.<sup>15</sup> The Commission, accordingly, requires each movant to demonstrate that it is “so situated that the disposition of the proceeding may, as a practical matter, impair or impede [its] ability to protect that interest[.]”<sup>16</sup>

Empower’s Motion parroted this requirement.<sup>17</sup> But because Empower did not explain its interest in this proceeding, it could not, and did not, explain how this proceeding would adversely affect that interest. And ELPC’s Motion ignored

---

<sup>12</sup> Rule 4901-1-11(A)(2), O.A.C. The statute similarly directs the Commission to consider “[t]he legal position advanced by the prospective intervenor and its probable relation to the merits of the case \*\*\*.” Section 4903.221(B)(2), Revised Code. *See In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Waivers of Certain Provisions Contained in Chapter 4901:1-13, Ohio Administrative Code*, No. 06-1452-GA-WVR, Entry, 2007 Ohio PUC LEXIS 395, ¶8 (May 24, 2007) (explaining that “the ‘legal position’ of a movant is its showing of a real and substantial interest in the subject at hand”).

<sup>13</sup> Section 4903.221(B)(1), Revised Code; Rule 4901-1-11(B)(1), O.A.C.

<sup>14</sup> Empower Motion at 3.

<sup>15</sup> Section 4903.221, Revised Code.

<sup>16</sup> Rule 4901-1-11(A)(2), O.A.C.

<sup>17</sup> *See* Empower Motion at 3 (reciting, “the disposition of this proceeding without its participating may, as a practical matter, impair or impede its ability to protect its interest.”).

this requirement entirely. ELPC did not assert that this proceeding would adversely affect its interest in “advocating for better efficiency programs.”<sup>18</sup> For this reason too, the Commission should deny both Motions to Intervene.

**2.2.3. Neither movant showed its interest in this proceeding is not represented by existing parties.**

Under the Commission’s rules, the Commission also will not grant a motion to intervene if the moving company’s “interest is adequately represented by existing parties.”<sup>19</sup> The Commission will consider “[t]he extent to which the person’s interest is represented by existing parties” when weighing a motion to intervene.<sup>20</sup>

Again, the Motions failed to address this basic requirement for intervention. Neither movant explained whether its interests are adequately represented by Ohio Partners for Affordable Energy, the Ohio Consumers’ Counsel, or any of the several other parties in this proceeding. Indeed, ELPC’s interest – wanting “Columbia Gas to provide the best efficiency programs possible”<sup>21</sup> – appears to be shared by every party to this proceeding. The movants’ failure to address this basic requirement for intervention also requires the denial of their Motions.

**2.2.4. Neither movant will help develop or resolve any factual issues in this case.**

The last factor the Commission must weigh is whether the movants “will significantly contribute to the full development and equitable resolution of the factual issues in this proceeding.”<sup>22</sup> Again, this factor weighs against granting the Motions to Intervene.

By the time the Commission rules on the Motions, Empower and ELPC will have missed the deadlines for submitting testimony. And each movant has said it will “take the record as it finds it.”<sup>23</sup> If Empower and ELPC do not intend to add to the factual record, then their interventions could not contribute to developing and equitably resolving the factual issues presented by Columbia’s ap-

---

<sup>18</sup> ELPC Mem. Supp. at 1.

<sup>19</sup> Rule 4901-1-11(A)(2), O.A.C.

<sup>20</sup> Rule 4901-1-11(B)(5), O.A.C.

<sup>21</sup> ELPC Mem. Supp. at 2.

<sup>22</sup> Section 4903.221(B)(4), Revised Code; Rule 4901-1-11(B)(4), O.A.C.

<sup>23</sup> Motion at 3.

plication. For this reason as well, the Commission should deny the Motions to Intervene.

### 3. CONCLUSION

While Columbia and the other parties are busy preparing and filing their pre-hearing testimony, Empower Gas and Electric and the Environmental Law & Policy Center have belatedly decided they would like to take part in these proceedings. But the deadline for filing motions to intervene was July 27<sup>th</sup> – more than a month ago. Absent extraordinary circumstances and a showing of good cause for missing the Commission’s deadlines, an untimely motion to intervene “will [not] be granted.”<sup>24</sup> And the movants have not even explained why they missed the deadline, much less described the kinds of “extraordinary circumstances” that would allow the Commission to overlook their untimeliness.<sup>25</sup> For this reason alone, the Commission should deny the Motions.

Yet even if the movants had filed their Motions a month ago, or had shown extraordinary circumstances and good cause for missing the Commission’s deadline for filing motions to intervene, they still would not have met the Commission’s requirements for permissive intervention in a Commission proceeding. The movants note that the Commission’s ruling in *Cleveland Electric Illuminating*<sup>26</sup> and the Supreme Court of Ohio’s 2006 opinion in *Ohio Consumers’ Counsel v. Public Utilities Commission of Ohio*<sup>27</sup> both encourage broad participation and liberal intervention in Commission proceedings. But as the Commission emphasized in *Cleveland Electric Illuminating*, “the Commission must also consider whether a potential party’s participation” will meet the requirements of Rule 4901-1-11.<sup>28</sup>

In OCC, the party seeking intervention (the OCC) had filed “motions and accompanying memoranda [that] properly addressed the relevant criteria of R.C. 4903.221.”<sup>29</sup> In particular, “[t]he Consumers’ Counsel explained her interest in the cases in her motions to intervene and also explained that her views would not be

---

<sup>24</sup> Rule 4901-1-11(F), O.A.C.

<sup>25</sup> *Id.*

<sup>26</sup> See Empower Motion at 1, citing *Cleveland Elec. Illum. Co.*, Case No. 85-675-EL-AIR, Entry (Jan. 14, 1986); ELPC Motion at 1 (same).

<sup>27</sup> See Empower Motion at 1, n.2, citing *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 387, 2006-Ohio-5853, ¶20; ELPC Motion at 1 (same).

<sup>28</sup> *Cleveland Elec. Illum.*, Entry, ¶6.

<sup>29</sup> *Id.*

adequately represented by the existing parties.”<sup>30</sup> Those motions further explained the OCC’s position that “the accounting changes sought by the two electric companies [in that proceeding] would adversely affect the companies’ residential customers and would violate Ohio law.”<sup>31</sup>

Here, Empower and ELPC failed to address almost any of the relevant requirements of Section 4903.221, Revised Code, or Rule 4901-1-11, O.A.C. Empower provided no explanation of its interest in this case, beyond asserting that it, too, offers energy efficiency services. Neither movant explained how this proceeding would affect their interests. They did not describe the legal arguments they intended to offer, explain why those arguments would be helpful for the Commission, or differentiate those arguments from the positions already offered by the current parties. They did not even explain whether they oppose or support the Stipulation and Recommendation. And they both told the Commission that they will not contribute to developing the factual record in this case. Thus, even under the liberal standard for intervention described by the Supreme Court in *Ohio Consumers’ Counsel*, Empower and ELPC have not justified their intervention here.

If parties filing untimely motions for intervention do not “show that extraordinary circumstances existing for granting their untimely motions to intervene, as required by Rule 4901-1-11(F), O.A.C.,” their motions must be denied.<sup>32</sup> And if a party “does not satisfy the criteria necessary to intervene[,]” its “motion to intervene is substantively deficient and should be denied.”<sup>33</sup> Because Empower and ELPC’s Motions are untimely, because they did not justify their late filings, and because their Motions fail to demonstrate that they meet the requirements for intervention in a Commission proceeding, Columbia Gas of Ohio respectfully requests that the Commission deny Empower’s and ELPC’s Motions to Intervene and Requests for Leave to File Motions Out of Time.

---

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at ¶18.

<sup>32</sup> *In the Matter of Muskingum River Plant for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 10-911-EL-REN, ¶4 (Aug. 26, 2010).

<sup>33</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of Proposed Reliability Standards*, Case No. 09-757-EL-ESS, Entry, ¶7 (May 19, 2010).

Respectfully submitted by,

**COLUMBIA GAS OF OHIO, INC.**

/s/ Joseph M. Clark

Joseph M. Clark, Counsel of Record

Stephen B. Seiple, Asst. General Counsel  
(0003809)

Joseph M. Clark, Senior Counsel  
(0080711)

P.O. Box 117

290 W. Nationwide Blvd.

Columbus, Ohio 43216-0117

Telephone: (614) 460-6988

E-mail: sseiple@nisource.com  
josephclark@nisource.com

(Willing to accept service by e-mail)

Attorneys for  
**COLUMBIA GAS OF OHIO, INC.**



## CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document is also being served via electronic mail on the 6th day of September, 2016, upon the parties and movant listed below:

**Ohio Attorney General's Office**      thomas.lindgren@ohioattorneygeneral.gov  
john.jones@ohioattorneygeneral.gov

**Ohio Partners for Affordable Energy**      cmooney@ohiopartners.org

**Ohio Consumers' Counsel**      christopher.healey@occ.ohio.gov  
bojko@carpenterlipps.com

**Ohio Farm Bureau Federation**      amilam@ofbf.org  
cendsley@ofbf.org  
lcurtis@ofbf.org

**Mid-Ohio Regional Planning Commission**      callwein@keglerbrown.com

**Ohio Hospital Association**      dborchers@bricker.com  
mwarnock@bricker.com  
rick.sites@ohiohospitals.org

**Retail Energy Supply Association**      glpetrucci@vorys.com  
ibatikov@vorys.com  
mjsettineri@vorys.com

**Interstate Gas Supply, Inc.**      joliker@igsenergy.com

**Northwest Ohio Aggregation Coalition**      trhayslaw@gmail.com  
lesliekovacik@toledo.oh.gov

**Empower Gas and Electric, LLC**      gpiacentino@wp-lawgroup.com

**Environmental Law & Policy** mfleisher@elpc.org  
**Center**

/s/ Joseph M. Clark

Joseph M. Clark

Attorney for  
**COLUMBIA GAS OF OHIO, INC.**

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**9/6/2016 3:37:45 PM**

**in**

**Case No(s). 16-1309-GA-UNC, 16-1310-GA-AAM**

Summary: Memorandum Contra to Motions to Intervene and Requests For Leave to File Motions Out of Time of Empower Gas and Electric, Inc. and Environmental Law & Policy Center electronically filed by Cheryl A MacDonald on behalf of Columbia Gas of Ohio, Inc.