

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company of a Grid Modernization Business Plan	)	)	Case No. 16-481-EL-UNC
	)	)	
In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company Application for Approval of a Distribution Platform Modernization Plan	)	)	Case No. 17-2436-EL-UNC
	)	)	
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to Implement Matters Relating to the Tax Cuts and Jobs Act of 2017	)	)	Case No. 18-1604-EL-UNC
	)	)	
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Tariff Change	)	)	Case No. 18-1656-EL-ATA

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**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY’S MEMORANDUM CONTRA THE LATE-FILED MOTION TO INTERVENE OF THE SMART THERMOSTAT COALITION**

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**I. INTRODUCTION**

The Smart Thermostat Coalition (“STC”) filed a late motion to intervene in the above-captioned consolidated proceeding regarding a Stipulation and Recommendation (“Stipulation”) filed in this docket on November 9, 2018. The Stipulation resolves issues related to tax savings associated with the Tax Cuts and Jobs Act of 2017 (“TCJA”) and the implementation of the first

phase of electric distribution grid modernization plans in the service territories of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the “Companies”). STC’s motion to intervene (“Motion”) should be denied because 1) it was filed over one month late and failed to demonstrate “extraordinary circumstances” as required by Ohio law; and 2) STC does not have a real and substantial interest in this proceeding.<sup>1</sup>

## **II. ARGUMENT**

### **A. STC Filed Its Motion to Intervene Out-of-Time and Failed to Show Extraordinary Circumstances Necessary to Grant the Motion Under Ohio Law.**

The Companies filed their Grid Modernization Business Plan on February 29, 2016 and their Distribution Platform Modernization Plan on December 4, 2017. STC did not intervene in either proceeding. The Stipulation was filed on November 9, 2018. Pursuant to an Entry dated November 15, 2018, the Commission set a deadline of November 27, 2018 for interested parties to file motions to intervene.<sup>2</sup>

STC filed its Motion on December 28, 2018, over one month after the intervention deadline. At the end of its Memorandum in Support of the Motion, in a single paragraph, STC recognizes the deadline had “long since passed.”<sup>3</sup> STC asks the Commission to find that “good cause” exists for allowing late intervention.<sup>4</sup> However, “good cause” is not the appropriate legal standard for late intervention. Commission rules provide that “[a] motion to intervene which is

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<sup>1</sup> According to the Motion, STC is two smart thermostat companies that are calling themselves a coalition for purposes of this filing, i.e., “an *ad hoc* coalition.”

<sup>2</sup> Entry (Nov. 15, 2018), ¶ 11(a).

<sup>3</sup> Motion, p. 6.

<sup>4</sup> Motion, pp. 6-7.

not timely will be granted *only under extraordinary circumstances.*”<sup>5</sup> STC’s late intervention discussion never acknowledges this rule. Instead, STC argues that its late Motion satisfies the legal criteria for granting *timely* motions to intervene under R.C. 4903.221 and O.A.C. 4901-1-11(A) and (B).<sup>6</sup> Because STC makes no attempt to apply and satisfy the correct legal standard, the Commission must deny STC’s untimely Motion as a matter of law.

Under the appropriate standard, the Commission routinely denies untimely motions to intervene in the absence of extraordinary circumstances.<sup>7</sup> Even where a party alleges extraordinary circumstances, the Commission has examined whether the circumstances were in fact so “unforeseeable” as to excuse an untimely motion to intervene.<sup>8</sup> Here, STC does not provide any explanation or excuse (let alone an extraordinary or unforeseeable one) for missing the intervention deadline by more than a month. Rather, STC merely alleges that it “only recently learned that the Stipulation submitted in these proceedings addressed smart thermostat

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<sup>5</sup> O.A.C. 4901-1-11(F) (Emphasis added).

<sup>6</sup> See Motion, p. 2.

<sup>7</sup> 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 No. 14-1693-EL-RDR *et al.*, Entry (Jan. 7, 2016), ¶ 17 (“The attorney examiner notes that the Commission has frequently denied untimely motions to intervene where no extraordinary circumstances were present.”); *In re AEP Ohio*, Case No. 10-2376-EL-UNC, Opinion and Order (Dec. 14, 2011), at 9; *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-RDR, 2013 Ohio PUC LEXIS 159, Opinion and Order (Aug. 7, 2013), at \*15-16 (finding the absence of extraordinary circumstances warranted denial of an untimely motion to intervene); *In the Matter of the Petition of The Avon Lake Subscribers of The Century Telephone Company of Ohio*, Case No. 93-911-TP-PEX, 1995 Ohio PUC LEXIS 162, Entry (Feb. 17, 1995), at \*4-6 (denying the untimely motion to intervene in the absence of any “extraordinary circumstances”).

<sup>8</sup> See *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 et al.*, Case No. 08-917-EL-SSO *et al.*, 2011 Ohio PUC LEXIS 722, Entry (June 16, 2011), at \*12 (finding that a remand to the Ohio Supreme Court did not constitute an “unforeseeable occurrence” that would justify a finding of extraordinary circumstances under Rule 4901-1-11(F)).

deployment,” and that it retained counsel “as promptly as was reasonably possible.”<sup>9</sup> STC does not explain why it only recently learned of the Stipulation, which was filed over two months ago on November 9, 2018. Nor does STC explain why it never intervened in any of the individual proceedings that were eventually consolidated into this one (some of which have been pending for almost three years). In fact, STC concedes that it has *never* intervened in *any* Commission proceeding prior to this one.<sup>10</sup>

Granting intervention here, where there are no allegations of any extraordinary or unforeseeable circumstances, would defeat the very purpose of the November 15, 2018 Entry establishing a deadline in the first place. Similarly, granting intervention under these circumstances would establish a precedent that would, in effect, allow intervention at any point in a proceeding, regardless of the established deadline, thereby nullifying the explicit language of the November 15, 2018 Entry and Rule 4901-1-11(F). The Commission should enforce its rules and decline to depart from its well-established precedent.

In sum, STC has ignored the applicable legal standard for filing untimely motions to intervene, and failed to assert, much less show, extraordinary circumstances. Therefore, the Commission must deny the Motion consistent with Ohio law and long-standing Commission practice.

**B. STC Does Not Have A Real and Substantial Interest in This Proceeding.**

In addition to failing to recognize or address the standard for late intervention under Rule 4901-1-11(F), STC has failed to show it satisfies the criteria for granting motions to intervene

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<sup>9</sup> Motion, pp. 4-6.

<sup>10</sup> *Id.*

under R.C. 4903.221 and O.A.C. 4901-1-11(A) and (B).<sup>11</sup> R.C. 4903.221 permits intervention only by persons who may be “adversely affected” by proceedings. Likewise, O.A.C. 4901-1-11(A) authorizes intervention only when:

[t]he person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person’s interest is adequately represented by existing parties.<sup>12</sup>

In considering a motion to intervene, the Commission must consider: (1) the nature and extent of the intervenor’s interest; (2) the legal position advanced by the intervenor and its probable relation to the merits of the case; (3) whether intervention will unduly prolong or delay the proceedings; (4) whether the intervenor will significantly contribute to full development and equitable resolution of the factual issues; and (5) the extent to which the intervenor’s interest is represented by existing parties.<sup>13</sup>

STC fails to satisfy the criterion that it has a real and substantial interest in this proceeding. STC argues that it has a real and substantial interest insofar as this proceeding “will shape the thermostat program in the Companies’ respective service territories” and that “STC’s members have an obvious interest in assuring the smart thermostats deployed in connection with any program approved have the capabilities necessary to provide the maximum benefit to the Companies’ customers.”<sup>14</sup> Contrary to STC’s assertions, the Stipulation has no “thermostat

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<sup>11</sup> The intervention criteria under R.C. 4903.221 and O.A.C. 4901-1-11(A) and (B) presupposes that a party has filed a timely motion to intervene.

<sup>12</sup> O.A.C. 4901-1-11(A).

<sup>13</sup> See O.A.C. 4901-1-11(B)(1)-(5); *see also* R.C. 4903.221(B)(1)-(4).

<sup>14</sup> Motion, p. 5.

program.” The Stipulation only authorizes the first phase of the Companies’ grid modernization plan (“Grid Mod I”), over a three-year budget period, without smart thermostat installations.<sup>15</sup>

With respect to smart thermostats, the Stipulation provides only that the AMI deployment will utilize the necessary and generally accepted standards to implement a Home Area Network, so that customers can connect qualified devices (e.g. in-home displays, smart programmable thermostats, etc.).<sup>16</sup> Additionally, the Stipulation includes a commitment by the Companies to facilitate a “Grid Mod collaborative group to update stakeholders on the status of the project throughout implementation of the Grid Mod plans and to provide for customer input and advice.”<sup>17</sup> The Stipulation provides that technical eligibility requirements for qualification purposes will be developed through the Grid Mod collaborative group.<sup>18</sup> The Stipulation further provides that, within six months after a Commission Order in this case, the Companies will consult with the Grid Mod collaborative group to propose a time-varying rate offering for non-shopping customers that “should leverage enabling devices, e.g., smart thermostats.”<sup>19</sup> Thus, even without its intervention, STC will be able to offer its “substantial experience and expertise”<sup>20</sup> on smart thermostats by actively participating in the Grid Mod collaborative group.

Even STC acknowledges as much when it “recognizes that the Stipulation contemplates that smart thermostat deployment is a matter that will be taken up by the Grid Mod collaborative

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<sup>15</sup> Stipulation, pp. 3, 11.

<sup>16</sup> Stipulation, p. 14.

<sup>17</sup> Stipulation, p. 14.

<sup>18</sup> Stipulation, pp. 14-15.

<sup>19</sup> Stipulation, p. 17.

<sup>20</sup> Motion, p. 6.

group.”<sup>21</sup> Yet STC does not explain how its intervention now would enable it to address its concerns with the outcome of future collaborative proceedings. To the contrary, STC need not intervene in this case to achieve its stated objectives. The Stipulation already ensures that STC will be afforded meaningful opportunities to share its concerns and protect its interests.

Without any real and substantial interest in the proceeding, STC has not satisfied the intervention criteria under Ohio law. Consequently, the Commission must deny STC’s Motion.

### **III. CONCLUSION**

For the foregoing reasons, the Companies respectfully request that the Commission deny STC’s Motion.

Respectfully Submitted,

/s/ James F. Lang

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<sup>21</sup> *Id.* at 3.

**CERTIFICATE OF SERVICE**

I certify that the foregoing Memorandum Contra the Motion to Intervene of the Smart Thermostat Coalition was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 14<sup>th</sup> day of January, 2019. The PUCO's e-filing system will electronically serve notice of the filing of this docket on counsel for all parties.

*/s/ Mark T. Keaney*  
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Summary: Memorandum Contra the Late-Filed Motion to Intervene of The Smart Thermostat Coalition electronically filed by Mr. Mark T Keaney on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company