

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Filing by Ohio Edison :
Company, The Cleveland Electric :
Illuminating Company, and The Toledo : Case No. 16-481-EL-UNC
Edison Company of a Grid Modernization :
Business Plan. :

In the Matter of the Filing by Ohio Edison :
Company, The Cleveland Electric :
Illuminating Company and The Toledo : Case No. 17-2436-EL-UNC
Edison Company Application for :
Approval of a Distribution Platform :
Modernization Plan. :

In the Matter of the Application of Ohio :
Edison Company, The Cleveland Electric :
Illuminating Company and The Toledo : Case No. 18-1604-EL-UNC
Edison Company to Implement Matters :
Relating to the Tax Cuts and Jobs Act of :
2017. :

In the Matter of the Application of Ohio :
Edison Company, The Cleveland Electric :
Illuminating Company, and The Toledo : Case No. 18-1656-EL-ATA
Edison Company for Approval of a Tariff :
Change. :

REPLY
OF
THE SMART THERMOSTAT COALITION
TO
MEMORANDUM CONTRA MOTION TO INTERVENE

On December 28, 2018, The Smart Thermostat Coalition (“STC”)¹ filed a motion to intervene in the above-captioned proceedings. Because the motion was filed after the

¹ STC is an *ad hoc* coalition comprised of Ecobee Inc. and Google, Inc. subsidiary, Nest Labs, which are industry leaders in smart thermostat technology.

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November 27, 2018 deadline for intervention established by the Attorney Examiner's November 15, 2018 entry in these dockets, STC included a request for leave to intervene out of time with its motion. On January 14, 2019 Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") filed a memorandum contra STC's motion to intervene.² STC hereby files its reply pursuant to Rule 4901-1-12(B)(2), Ohio Administrative Code ("OAC").

The Companies begin their memorandum contra with the proposition that STC has failed to make the showing "required by Ohio law" to support an untimely intervention, noting that STC asks the Commission to find that "good cause" exists for granting its late-filed motion to intervene, whereas the Commission's rule governing untimely intervention, Rule 4901-1-11(F), OAC, provides that a motion to intervene which is not timely will be granted "only under extraordinary circumstances."³ However, R.C. 4903.221(A) provides that "(t)he public utilities commission may, in its discretion, grant motions to intervene which are filed after the deadlines set forth in divisions (A)(1) and (2) of this section for *good cause shown*." (Emphasis supplied). Although the Commission unquestionably has broad authority to manage its proceedings,⁴ the Commission does not have the authority to impose a more rigorous standard for granting untimely motions to intervene than that established by the legislature. In so stating, STC is not attacking Rule 4901-1-11(F), OAC. Rather, STC's point is that this rule must be interpreted in a manner that does not conflict with the underlying statutory standard because, ultimately, the

² No other party has opposed STC's intervention.

³ See Companies' Memorandum Contra, 2.

⁴ See *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560 (1982); see also *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 (Opinion and Order dated March 31, 2016, at 10).

statutory standard controls. Thus, although the Commission, in evaluating late-filed motions to intervene, has applied the “extraordinary circumstances” test to determine if good cause exists for granting untimely motions to intervene, the Companies’ contention that a showing that of “good cause” and a showing of the existence of “extraordinary circumstances” are two different standards is simply wrong. Pursuant to R.C. 4903.221(A), granting a late-filed motion to intervene is always a matter within the Commission’s discretion, and it falls to the Commission to determine if good cause exists for granting such motions based on facts of each case.

The companies go on to note that “the Commission routinely denies untimely motions to dismiss in the absence of extraordinary circumstances.”⁵ Although this statement is true, it begs the question. The issue, of course, is what constitutes an extraordinary circumstance that represents good cause for granting an untimely motion to intervene, and the decisions cited by the Companies in support of this statement⁶ are distinguishable on their facts from the circumstances presented here.

As recounted by the attorney examiner in *Ohio Power*, Case No. 14-1693-EL-RDR, PJM’s untimely motion to intervene in that case was filed 129 days after the deadline for intervention and 17 days after the “well-publicized” hearing in the matter.⁷ PJM attempted to justify its untimely intervention motion by claiming that a stipulation filed after the conclusion of hearing presented, for the first time, the specific provisions of a PPA rider that the Commission had approved as a placeholder in an earlier proceeding. The attorney examiner denied intervention, finding that PJM had ample notice of the proceeding and that the Commission had

⁵ Companies’ Memorandum Contra, 3.

⁶ See Companies’ Memorandum Contra, 3, n. 7.

⁷ See, *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, *et al.*, (Entry dated January 7, 2016, ¶17).

previously held that “the filing of a stipulation that may resolve issues differently than initially proposed or that expands the issues, does not, alone, constitute extraordinary circumstances warranting untimely intervention.”⁸

Similarly, in *AEP Ohio*, Case No. 10-2376-EL-UNC, IGS filed a motion to intervene seven months after the established deadline for intervention and a week after the hearing on the stipulation had commenced. In affirming the attorney examiner’s ruling denying intervention, the Commission noted that, in the two cases cited by IGS where late-filed motions to intervene had been granted, the motions to intervene, although filed after the intervention deadline, were filed well before the commencement of the hearing.⁹ And, in *CEI, et al.*, Case No. 11-5201-EL-RDR, the Commission denied AEP Ohio’s late-filed motion to intervene, noting that the motion had been filed 220 days after the established deadline for intervention and 46 days after the conclusion of the briefing schedule.¹⁰ Finally, in *Columbus Southern Power Company*, Case No. 08-917-EL-SSO, *et al.*, the attorney examiner denied intervention to three movants who sought to intervene in the case after it was remanded to the Commission by the Ohio Supreme Court. After noting that the petitions for leave were filed three years after the deadline for intervention, the attorney examiner found that a remand of a Commission order was a foreseeable possibility and did not constitute an extraordinary circumstance that would justify granting an untimely motion to intervene under Rule 4901-1-11(F), OAC.¹¹

⁸ *Id.*

⁹ *See In re AEP Ohio*, Case No. 10-2376-EL-UNC (Opinion and Order dated December 14, 2011, at 9).

¹⁰ *See 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 (Opinion and Order dated August 7, 2013, at 7-8).

¹¹ *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*, Case No. 08-917-EL-SSO *et al.*, (Entry dated June 16, 2011, at 5-6).

The first point that emerges from the foregoing decisions is that the Commission considers untimely motions to intervene on a case-by-case basis. Thus, contrary to the Companies' claim, granting STC's motion to intervene would not establish "a precedent that would, in effect, allow intervention at any point in a proceeding, regardless of the established deadline,"¹² nor would granting STC's motion undo any existing precedent. Second, these decisions teach that there are several key factors that the Commission takes into account in ruling upon late-filed motions to intervene: whether the movant knew or should have known of the pendency of the proceeding in question, the timing of the filing of the motion, and whether it was foreseeable before the deadline for intervention that the movant could be adversely impacted by new issues that could arise by virtue of a subsequent stipulation or a remand of a final order by the Ohio Supreme Court.

The members of STC are headquartered outside Ohio, did not previously have local counsel versed in Commission matters, were not on any service lists relating to any Commission proceeding, and were not subscribed to the Commission's DIS case notification alerts. Thus, although the Companies fault STC for failing "to explain why it never intervened in any of the individual proceedings that were eventually consolidated into this [proceeding],"¹³ the answer is obvious. As stated in its motion to intervene, the STC members were unaware of these proceedings until after the deadline for intervention had passed. Indeed, although the Companies make much of the fact that "STC concedes that is [*sic*] has *never* intervened in *any* Commission proceeding prior to this one,"¹⁴ this makes STC's point. Unlike the movants that were denied

¹² Companies' Memorandum Contra, 4.

¹³ *Id.*

¹⁴ *Id.*

untimely invention in the decisions cited by the Companies, most of whom were Commission-regulated entities and/or frequent participants in Commission proceedings, STC's members do not, as a matter course, keep abreast of developments at the Commission, and, thus, had no notice, actual or constructive,¹⁵ that the Commission was about to consider a stipulation that could adversely affect its interests.¹⁶

This brings us to the timing factor the Commission considers in ruling upon late-filed motions to intervene. Unlike the situations in the cases cited by the Companies, where the motions to intervene were filed many months or even years after the established deadline, STC's motion was filed 43 days after November 15, 2018 deadline for intervention had passed. Further, and even more significantly, unlike the movants in the *Ohio Power, CEL, et al.*, and *Columbus Southern Power Company* cases, whose motions to intervene were not filed until well after the hearings in those cases had concluded or were already underway, STC's motion to intervene, although untimely, was filed over a month in advance of the scheduled February 4, 2019 start date of the hearing in these proceedings. As discussed above, in *AEP Ohio*, the Commission, in distinguishing earlier decisions wherein it had granted motions to intervene filed after the deadline for intervention attached significance to the fact that the motions to intervene in those cases were filed well before the commencement of the hearing.

Finally, the "foreseeability" factor the Commission has considered in determining if circumstances exist that warrant granting an untimely motion to intervene is not in play here. STC has moved to intervene prior to the commencement of the hearing on the Stipulation now

¹⁵ There was no newspaper publication of a notice of this proceeding.

¹⁶ To be clear, STC does not assert that it has any interest any of these proceedings except Case No. 16-481-EL-UNC. STC included the other three proceedings in the caption of its motion only because the cases were consolidated for purposes of the hearing on the Stipulation that covers all four cases. See Attorney Examiner's Entry dated November 15, 2018, at ¶11.

before the Commission and makes no claim that its tardiness in filing for intervention was attributable to something that arose after the deadline for intervention had passed that could not have been foreseen prior to the deadline. STC's motion to intervene was not timely filed because STC was unaware of this proceeding until after the deadline for intervention had passed, and STC moved to intervene within a matter of days after learning that its interests could be adversely affected by the proceeding.

As previously noted, STC recognizes that granting an untimely motion to intervene, is, by statute, a matter within the sound discretion of the Commission. However, STC respectfully submits that it has shown good cause for granting its motion to intervene in view of the factors the Commission has considered in determining whether circumstances exist that support granting a late-filed motion to intervene.

As the second prong of their memorandum contra STC's intervention, the Companies assert that STC does not meet the criteria for intervention set out in R.C. 4903.221 and Rule 4901-1-11(A) and (B), OAC.¹⁷ STC disagrees.

The Companies begin by reciting STC's position that it has a real and substantial interest in this proceeding because this proceeding "will shape the smart 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."¹⁸ The Companies then state that, contrary to STC's assertion, the Stipulation has no "thermostat

¹⁷ See Companies' Memorandum Contra, 4-5.

¹⁸ Companies' Memorandum Contra, 5.

program” because it addresses only the first phase of the Companies’ grid modernization plan, which does not include the installation of smart thermostats.¹⁹ That is precisely STC’s point. As explained in the memorandum accompanying STC’s motion to intervene, if the goal of rolling out smart meters is to permit the Companies and their customers to better understand individual contributions to peak load, the installation of smart meters should be accompanied by the deployment of smart thermostats to enable customers to act on this enhanced information to their benefit.²⁰ If granted intervention, STC will advocate that the Stipulation should be modified to address the provisioning of smart thermostats as a part of the first phase of the plan and will present information demonstrating that, consistent with the Commission objectives set forth in the PowerForward Roadmap,²¹ smart thermostats will maximize the benefits to the Companies, their customers, and the grid. As STC noted in the memorandum in support of its motion to intervene, the Stipulation contains only vague references to smart thermostats.²² Thus, even if the Commission ultimately determines that smart thermostat deployment should be addressed in a subsequent phase of the plan, STC’s participation in this proceeding will permit the Commission to provide guidance to the Companies as a part of its order in this case based on an informed expectation as to how a properly conceived smart thermostat program should operate.

The Companies also point out that the Stipulation contains a commitment by the Companies to facilitate a Grid Mod collaborative group with which it will consult to propose a time-varying rate offering for non-shopping customers “that should leverage enabling devices,

¹⁹ See Companies’ Memorandum Contra, 5-6.

²⁰ See STC Memorandum in Support, 4.

²¹ See STC Memorandum in Support, 2-3.

²² See STC Memorandum in Support, 3.

e.g., smart thermostats,” and suggest that this means that there is no need to grant STC intervention in this case because STC will be able to protect its interests by actively participating in the collaborative.²³ STC would welcome the opportunity to participate in the Grid Mod collaborative group, but this does not address STC’s concern regarding the shortcomings of the Stipulation with respect to the need to link the roll out of smart meters with the deployment of smart thermostats. Moreover, it is far from clear how, if STC is not made a party to this case, it will receive notice of meetings of the Grid Mod collaborative.

STC has a real and substantial interest in this proceeding and is so situated that the disposition of the proceeding may, as practical matter, impair or impede its ability to protect that interest. The Companies do not dispute that STC’s interest is not represented by any existing party, nor do they dispute that the specific considerations that the Commission must take into account in applying the Rule 4901-1-11(A)(2), OAC, all support granting STC’s motion to intervene. Thus, STC meets the standard for intervention set forth in Rule 4901-1-11(A)(2), OAC. Accordingly, STC respectfully requests that the Commission find that good cause exists for entertaining STC’s request to intervene out of time and that STC’s motion to intervene should be granted.

Respectfully submitted,



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²³ See Companies’ Memorandum Contra, 6.

Certificate of Service

I hereby certify that a copy of the foregoing was served upon the following persons by electronic mail this 16th day of January 2019.


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