

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the Non-Market-)
Based Services Rider Contained in the Tariffs of)
Ohio Edison Company, The Cleveland Electric) Case No. 18-1818-EL-RDR
Illuminating Company and The Toledo Edison)
Company.)

**REPLY OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL TO THE
MEMORANDUM CONTRA OF OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE
TOLEDO EDISON COMPANY**

I. INTRODUCTION

The Public Utilities Commission of Ohio (“PUCO”) has discretion to grant Motions to Intervene out of time for good cause shown.¹ The Office of the Ohio Consumers’ Counsel (“OCC”) respectfully requests that it be permitted to intervene in this proceeding to advocate for the interests of over 1.8 million residential customers served by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively the “Utilities”). This proceeding, which is on a short schedule under the PUCO’s rules,² will determine the Utilities’ Non-Market-Based services rider (“Rider NMB”), which allows the Utilities to charge customers non-market-based transmission costs imposed by the Federal Energy Regulatory Commission (“FERC”) or PJM. Good cause and extraordinary circumstances exist to permit OCC to

¹ R.C. 4903.221(A)(2).

² Ohio Admin. Code 4901:1-36-03(D) provides that “[e]ach annual application to update the transmission cost recovery rider should be made not less than seventy-five days prior to the proposed effective date of the updated rider.”

represent the Utilities’ residential customers in this proceeding, and OCC’s intervention will not prejudice the Utilities, who are the only parties in the proceeding.

II. ARGUMENT

A. OCC’s Motions Are Legally Sufficient, And Good Cause And Extraordinary Circumstances Warrant OCC’s Intervention In This Proceeding.

As OCC explains in its Motion for Leave to File Out of Time and Motion to Intervene (collectively “Motions”), Ohio law permits a party who may be adversely affected by the outcome of a PUCO proceeding to intervene, and permits the PUCO “in its discretion” to grant a late-filed motion to intervene “for good cause shown.”³ The PUCO’s Rules regarding intervention, which are established under the enabling statutes (including R.C. 4903.221) that grant authority to the PUCO, further provide that “[a] motion to intervene which is not timely will be granted only under extraordinary circumstances.” OCC satisfies each standard, and its intervention in this proceeding is warranted notwithstanding filing its Motions one week out of time.

The Utilities contend that the OCC’s Motions should be denied because they are “legally insufficient.” The Utilities are wrong. To begin, OCC demonstrated in the Motions that it has “good cause” to intervene in this proceeding because of its unique position of being the statutory representative of the Utilities’ over 1.8 million residential customers who unquestionably could be adversely affected by what the Utilities charge under Rider NMB. To date, no other parties have intervened in this proceeding and thus, OCC would be the only advocate to represent residential customers. OCC’s Motions also

³ R.C. 4903.221(A)(2).

fully explained how it satisfies the criteria for intervention set forth in R.C.

4903.221(B)(1)-(4) and Ohio Admin. Code 4901-1-11(B)(1)-(5). The Utilities do not – and cannot – dispute in their Memorandum Contra any of OCC’s substantive arguments in the Motions.

The Utilities instead rest their opposition to OCC’s Motions on the technical objection that OCC failed to provide an explanation of why the Motion to Intervene was late.⁴ That argument should be rejected. First, any failure by the OCC to provide a specific explanation for late filing should not be fatal, as it is well-settled Supreme Court of Ohio precedent that statutes and rules governing intervention should be “generally liberally construed in favor of intervention.”⁵ Second, the Utilities’ reliance on the April 14, 2010 Entry in Case No. 09-1946-EL-RDR to support their argument⁶ is misplaced. In that case, the PUCO denied untimely motions to intervene of two individual consumers primarily because neither demonstrated satisfaction of the five criteria set forth in Ohio Admin. Code 4901-1-11(B).⁷ Notably, the PUCO stated:

The attorney examiner notes that, in her filing, Ms. Hayes does not explain why her motion was filed out of time, she does not request leave to file the motion, and she does not address the factors to be considered when granting intervention contained in Rule 4901-1-11(B), O.A.C., or why her interests are not already adequately represented by other parties to this case. Therefore, the attorney examiner finds that Ms. Hayes’ motion for

⁴ Memorandum Contra, at 1, 3.

⁵ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 384, 856 N.E.2d 940, 945 (quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. Of Elections*, 74 Ohio St.3d 143, 144, 656 N.E.2d 1277 (1995))

⁶ Memorandum Contra, at 2, note 6.

⁷ *In the Matter of the Application of Duke Energy Ohio, Inc., to Establish and Adjust the Initial Level of Its Distribution Reliability Rider*, Case No. 09-1946-EL-RDR, Entry (April 14, 2010) at ¶¶11, 12.

intervention is both procedurally and substantively deficient and should be denied.⁸

By contrast, OCC properly filed a Motion for Leave to file its Motion to Intervene out of time and it thoroughly addressed in the Motion to Intervene how it satisfies the criteria set forth in R.C. 4903.221 and Ohio Admin. Code 4901-1-11(B).

OCC's review of the Utilities' proposed tariffs was delayed due to the press of business, and OCC determined its interest and need to participate in this proceeding later than usual.⁹ The short procedural timeframe in this proceeding, plus the holiday season, plus OCC's consumer advocacy in other major PUCO proceedings combined to create "extraordinary circumstances" resulting in OCC's late-filed Motion to Intervene. As further explained below, the PUCO has granted the Utilities and other parties leave to make late filings in similar circumstances, and OCC's Motions here are reasonable and should likewise be granted.

B. The PUCO Has Exercised Its Discretion To Grant Motions To Intervene Out Of Time Where There Would Be No Prejudice, And Granting OCC's Late-Filed Motion to Intervene Does Not Prejudice The Utilities.

No party will be prejudiced by OCC's intervention in this case, and the Utilities' Memorandum Contra does not dispute this. There have been no docketed activities, aside from OCC's instant Motions and the Utilities' response. Further, no other parties have even intervened in the proceeding. In other proceedings, the PUCO has exercised its

⁸ *Id.* at ¶12.

⁹ Among other matters, OCC's analytical and legal staff actively participated in: *In the Matter of the 2018 Long-Term Forecast Report of Ohio Power Company and Related Matters, et al.*, Case No. 18-501-EL-FOR *et al.*; *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval of an Increase in Gas Rates, et al.* Case No. 18-0298 *et al.*; and *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, et al.* Case No. 16-0481 *et al.*

discretion to accept late-filed Motions to Intervene and other filings as timely where there would be no prejudice to the parties.¹⁰ And the Utilities themselves have sought – and have been granted – leave from the PUCO to submit late filings.¹¹

The Utilities cite several cases where the PUCO has denied late-filed motions to intervene.¹² But these cases are plainly distinguishable on the facts, as the motions to intervene at issue were filed months – or even years – after the intervention deadlines, and during or after the evidentiary hearings. For example, the Utilities cite the January 7, 2016 Entry in Case No. 14-1693-EL-RDR, where the PUCO denied PJM’s untimely Motion to Intervene. But in that case, PJM filed its Motion to Intervene *129 days* following the deadline, and “after 17 days of a widely publicized hearing.”¹³ The PUCO further determined that PJM did not have a unique interest in the proceedings that was not already represented by existing parties.¹⁴ Further, even though the PUCO denied PJM’s intervention, it still permitted PJM to file an amicus brief as a non-party.¹⁵

¹⁰ See e.g. *In the Matter of the Filing by Ohio Edison Company, et al. of a Grid Modernization Business Plan*, Case No. 16-481-EL-UNC, *et al.*, Opinion and Order (Jan. 29, 2019) at ¶ 12 (Granting Motion to Intervene of Smart Thermostat Coalition filed one month after the deadline and finding no undue prejudice to the parties.) *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO *et al.*, Opinion and Order (July 22, 2011) at ¶ 10 (Granting Motion to Intervene of Cincinnati Bell filed 9 days after the deadline and finding no undue prejudice to the parties); and *In the Matter of the Applications of the Ohio Edison Company, et al. for Retail Transition Cost Recovery of Nonbypassable Generation Transition Charges and Regulatory Transition Charges*, Case No. 03-1445-EL-ATA *et al.*, Opinion and Order (Aug. 2, 2005) ¶ 13 (Granting Ohio Edison’s Motion for Leave to File Out of Time, finding that other parties were not prejudiced by Ohio Edison’s failure to timely file its pre-filed testimony).

¹¹ *Application of Ohio Edison Co. et al.*, Case No. 03-1445-EL-ATA *et al.*, Opinion and Order (Aug. 2, 2005) at ¶13.

¹² Memorandum Contra, at 2-3, notes 4, 8.

¹³ *In the Matter of 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.

¹⁴ *Id.* at ¶18.

¹⁵ *Id.* at ¶21.

The Utilities also cite the December 14, 2011 Opinion and Order in Case No. 10-2376-EL-UNC, where the PUCO denied Interstate Gas Supply's ("IGS") untimely Motion to Intervene. In that case, IGS's Motion was filed *seven months* after the deadline for intervention.¹⁶ In addition, the PUCO found that IGS's Motion was filed after the hearing had already been in progress for a week, and noted that "[w]hile IGS cites to two cases in which intervention was granted after the deadline . . . *both were granted well before the hearing began.*"¹⁷ Similarly, in the August 7, 2013 Opinion and Order in Case No. 11-5201-EL-RDR cited by the Utilities, AEP Ohio's motion to intervene at issue was filed *220 days* after the intervention deadline.¹⁸ In addition, that case involved not only AEP Ohio's late-filed motion to intervene, but also a motion to reopen the proceedings.¹⁹ The Utilities' reliance on the June 29, 2011 Entry in Case Nos. 08-917-EL-SSO, *et al.*²⁰ also misses the mark. In that case, the motions to intervene were filed nearly *three years* after the intervention deadline.²¹ In this case, OCC filed its Motions seven days after the intervention deadline, and there have been no hearings scheduled.

¹⁶ *In re AEP Ohio*, Case No. 10-2376-EL-UNC, Opinion and Order (Dec. 14, 2011), at 9.

¹⁷ *Id.* (emphasis added).

¹⁸ *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 (Aug. 7, 2013), at 7.

¹⁹ *Id.* at 7-8.

²⁰ Memorandum Contra, at 3, note 8.

²¹ *In the Matter of Application of Columbus Southern Power Company for Approval of an Electric Security Plan, et al.*, Case Nos. 08-917-EL-SSO *et al.*, Entry (June 19, 2011), ¶5.

III. CONCLUSION

OCC's intervention in this proceeding is reasonable and necessary in order to advocate for the interests of the Utilities' 1.8 million residential customers who could be adversely affected by the PUCO's determination of the Utilities' Rider NMB. OCC's participation in the proceeding would not prejudice the Utilities or any other parties (because there are none), and the Utilities do not dispute OCC's satisfaction of the criteria for intervention set forth in R.C. 4903.221(B)(1)-(4) and Ohio Admin. Code 4901-1-11(B)(1)-(5). Accordingly, for the reasons explained above and in its Motions, OCC respectfully requests that the PUCO grant its Motion for Leave to File Out of Time and Motion to Intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply has been served electronically upon those persons listed below this 21st day of February 2019.

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Summary: Reply Reply of the Office of the Ohio Consumers' Counsel to the Memorandum Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company electronically filed by Ms. Deb J. Bingham on behalf of O'Brien, Angela D.