

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Energy Efficiency and)
Peak Demand Reduction Program Portfolio of) Case Nos. 09-580-EL-EEC
Ohio Edison Company, The Cleveland Electric) 09-581-EL-EEC
Illuminating Company and The Toledo Edison) 09-582-EL-EEC
Company.)

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REPLY TO FIRSTENERGY'S MEMORANDUM CONTRA
MOTIONS TO INTERVENE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. HISTORY OF THE CASE

The Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy" or "Companies") filed a request on July 9, 2009 before the Public Utilities Commission of Ohio ("Commission" or "PUCO") for approval of the Companies' proposals regarding initial residential energy efficiency programs. The Companies proposed the programs as part of their plan to satisfy the Companies' requirements under R.C. 4928.66.¹ The PUCO issued an Order on September 23, 2009 that approved two programs proposed by the Companies.

FirstEnergy did not implement its proposed compact fluorescent light bulb ("CFL") program, apparently in response to a statement dated October 7, 2009 from the PUCO Chairman that noted the Governor's concerns.² On October 8, 2009, the Office of the Ohio Consumers' Counsel ("OCC") applied for rehearing, stating that the OCC and

¹ Application at 1 (July 9, 2009) ("Application").

² PUCO press release, *Statement from PUCO Chairman on FirstEnergy's compact fluorescent light bulb program*, (October 7, 2009). FirstEnergy incorrectly states that "the Commission asked the Companies to postpone deployment of the CFL program." Memo Contra at 2.

other interested persons should be permitted to participate in any Commission reconsideration of FirstEnergy's CFL program. In an Attorney Examiner Entry dated October 15, 2009, an oral argument was scheduled for the above-captioned case.³

On October 20, 2009 and October 23, 2009, the Citizens Coalition⁴ and Citizen Power ("Movants"), respectively, filed motions to intervene (collectively, the "Motions"). Each motion stated that the movant should be admitted to this proceeding where implementation issues have the potential to significantly impact small customers.⁵ Both movants are part of the residential and low-income collaborative that resulted from the Supplemental Stipulation reached in PUCO Case Nos. 08-935-EL-SSO, et al.,⁶ although neither is specifically mentioned in the Companies letter docketed on September 16, 2009.

The oral argument announced in the Attorney Examiner Entry was held on October 28, 2009. The oral argument featured inquiries by Commissioners regarding the manner in which the Commission should handle FirstEnergy's proposed programs after these programs were suspended by the Company. On November 4, 2009, the Commission issued an Entry on Rehearing that granted OCC's Application for Rehearing and directed FirstEnergy to "file a revised CFL Program by November 30, 2009," and suggested that the Companies "resume discussions with its energy efficiency

³ Entry at 2, ¶5 (October 15, 2009). According to Ohio Adm. Code 4901-1-32, the "attorney examiner may, . . . upon [his] own motion, hear oral arguments."

⁴ The Citizens Coalition is made up of the Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, United Clevelanders Against Poverty, Cleveland Housing Network, and The Consumers for Fair Utility Rates. Citizens Coalition's Motion at 1.

⁵ Citizens Coalition's Motion at 3; Citizen Power's Motion at 3.

⁶ *In re FirstEnergy's Initial Post-S.B. 221 SSO Proceedings*, Case Nos. 08-935-EL-SSO, et al., Supplemental Stipulation (February 26, 2008); also Memo Contra at 6.

collaborative.”⁷ According to the Entry on Rehearing, “[e]ach intervening party shall have seven days to file a response to FirstEnergy’s revised CFL Program.”⁸

Unfortunately, FirstEnergy has begun this next phase of the case, where stakeholders should be working toward solutions that are in the public interest, by opposing the Motions submitted by Citizens Coalition and Citizen Power.⁹ The instant pleading replies to FirstEnergy’s Memo Contra.

II. ARGUMENT IN FAVOR OF INTERVENTIONS

The Companies’ primary argument against party status for the Citizens Coalition and Citizen Power is the timing of the Motions. FirstEnergy cites Ohio Adm. Code 4901-1-11(E), which states: “A motion to intervene will not be considered timely if it is filed later than five days prior to the scheduled date of hearing or any specific deadline established by order of the commission for purposes of a particular proceeding.”¹⁰ FirstEnergy thereafter claims that the Commission did not order a hearing, “thereby foreclosing further intervention.”¹¹ FirstEnergy fails to state that either of the conditions stated in the rule the Companies cite -- “five days prior to the scheduled date of hearing” or “any specific deadline” -- were violated by the Motions.

FirstEnergy oddly treats this case as concluded despite all indications to the contrary. The cases cited by the Companies regarding untimely interventions after an

⁷ Entry on Rehearing at 3, ¶(9).

⁸ Id.

⁹ FirstEnergy’s Memorandum Contra Motions by Citizens Coalition and Citizen Power to Intervene (October 27, 2009) (“Memo Contra”).

¹⁰ Memo Contra at 4.

¹¹ Id.

order was issued do not fit the factual circumstances of this case.¹² FirstEnergy has not proceeded to implement its CFL program according to the Commission's September 23, 2009 Order, oral arguments were scheduled and heard, the Companies have requested that the residential collaborative (including Citizens Coalition and Citizen Power) take up the matter of revising the CFL program,¹³ and the Commission has granted rehearing and ordered a revised plan that will be filed before responses are received from "intervening parties."¹⁴ Citizens Coalition and Citizen Power are such intervening parties that have been provided an opportunity to comment on a revised plan in this docket. FirstEnergy's Memo Contra disingenuously argues against the involvement of parties that even the Companies recognize are needed to reach a conclusion to this case.

The Companies' secondary argument is that Citizens Coalition and Citizen Power have failed to meet the criteria for admission as parties. FirstEnergy states that these parties need be "[u]nique" in their concern for residential customers.¹⁵ FirstEnergy's position is contrary to Ohio law. Movants stated the "nature and extent" of their interests, in satisfaction of the intervention criterion stated in R.C. 4903.221(B)(1). R.C. 4903.221(B) sets forth a list of the criteria that the Commission "shall consider" with regard to intervention. The General Assembly did not include FirstEnergy's claimed standard on the list of criteria for the PUCO to consider. FirstEnergy never expressed any concern over the involvement of either Citizens Coalition or Citizen Power in Case

¹² Id. at 5.

¹³ Representatives of Citizens Coalition and Citizen Power were among the collaborative members who were contacted by FirstEnergy on November 2, 2009 regarding revisiting the design of a CFL program.

¹⁴ Entry on Rehearing at 3, ¶(9).

¹⁵ Memo Contra at 5.

Nos. 08-935-EL-SSO, et al. -- the case underlying the involvement of these parties in the collaborative process that FirstEnergy vociferously (and inaccurately¹⁶) mentions in its Memo Contra.¹⁷ FirstEnergy also creates, and then criticizes, strawman positions that Citizens Coalition and Citizen Power have not actually stated in their statements regarding the criterion stated in R.C. 4903.221(B)(2).¹⁸ It is essential, in this controversial case with its particular history, to hear arguments from the parties themselves.

FirstEnergy argues that the Motions might have the effect of delaying the oral argument, a matter that was never raised by the Movants and is now moot since the oral argument took place as scheduled. The Companies' argue that undue delay is the only possible intent for the interventions,¹⁹ which assumes (again, contrary to all indications) that all matters are resolved in this case. And Movants' sincerity that they seek to contribute to an equitable resolution of this case, responding to R.C. 4903.221(B)(4), should be accepted by the Commission. A critical component of the present controversy is community acceptance of FirstEnergy's proposed program. At least outwardly, FirstEnergy has sought the advice of Citizens Coalition and Citizen Power as part of the

¹⁶ The manner in which the residential collaborative has been conducted is not fundamental to the Commission's consideration of the Motions. FirstEnergy's accounts of that process are, however, misleading. Memo Contra at 6. The Companies filed their Application on July 9, 2009, without relating to collaborative members the details of FirstEnergy's plans. As a result, the OCC commented that FirstEnergy's CFL program should have been sent back to the collaborative. OCC Motion to Intervene and Recommendations for Modifications at 5 (August 10, 2009). The Companies filed their letter on September 16, 2009 after further contact on the CFL program was initiated by the PUCO Staff, but Citizens Coalition and Citizen Power were not contacted regarding alternative proposals. See FirstEnergy Letter to Daniel R. Johnson (September 16, 2009) (no specific mention of Movants).

¹⁷ Memo Contra at 6.

¹⁸ Id. at 7-8.

¹⁹ FirstEnergy apparently addresses the criterion stated in R.C. 4903.221(B)(3).

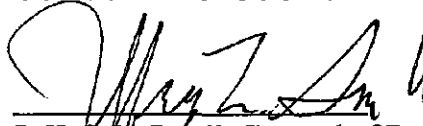
residential and low-income collaborative. The Commission should likewise grant the Motions and hear from these intervening parties.

III. CONCLUSION

The Commission should grant the Motions submitted by Citizens Coalition and Citizen Power. The Commission continues to consider the design of FirstEnergy's CFL program, and FirstEnergy proposed to involve Movants in a collaborative process even before the Commission suggested this action in the Entry on Rehearing. Citizens Coalition and Citizen Power should be granted party status in these cases to directly advocate their positions for consideration by the Commission and should not be relegated by a lack of party status, as FirstEnergy would have it, to an indirect role that is dependent upon communicating their views to the Commission through other parties. This result seems to have already been ordered in the Entry on Rehearing.

Respectfully submitted,

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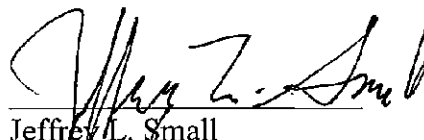
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Reply* by the Office of the Ohio Consumers' Counsel was provided, via first class U.S. Mail, to the persons listed below this 6th day of November 2009.



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