

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio       )  
Edison Company, The Cleveland Electric       )  
Illuminating Company and The Toledo       ) Case No. 10-176-EL-ATA  
Edison Company for Approval of a New       )  
Rider and Revision of an Existing Rider.     )

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**REPLY TO FIRSTENERGY’S MEMORANDUM CONTRA  
MOTION TO INTERVENE OF SUE STEIGERWALD, CITIZENS KEEPING  
THE ALL-ELECTRIC PROMISE, JOAN HEGINBOTHAM, AND BOB  
SCHMITT HOMES  
BY  
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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**I. INTRODUCTION**

On May 27, 2010, a Motion to Intervene was filed by Sue Steigerwald, Citizens for Keeping the All-Electric Promise (CKAP), Joan Heginbotham and Bob Schmitt Homes, Inc. (collectively, “Movants”) with the Public Utilities Commission of Ohio (“PUCO” or “Commission”). Counsel for Movants served copies of their motion on parties by mail, as stated on Movants’ Certificate of Service. On June 17, 2010, twenty-one days later, FirstEnergy filed a Memorandum Contra Movants’ Motion to Intervene (“Memo Contra”).

The Office of the Ohio Consumers’ Counsel (“OCC”), on behalf of approximately 1.9 million residential electric customers of FirstEnergy<sup>1</sup>, replies to FirstEnergy’s Memo

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<sup>1</sup>“FirstEnergy” is defined as Ohio Edison, Toledo Edison, and Cleveland Electric Illuminating Company. OCC in this pleading may also refer to FirstEnergy as “Companies.”

Contra. This Reply is filed pursuant to Ohio Adm. Code 4901-1-12(B)(2) and 4901-1-07(C).<sup>2</sup> The Movants' Motion to Intervene should be granted, as explained in this Reply.

## **II. ARGUMENT**

### **A. FirstEnergy's Memo Contra Was Untimely Under Ohio Adm. Code 4901-1-12(B)(1) And Should Be Disregarded.**

FirstEnergy's Memo Contra which was not timely filed under the Commission's rules should be disregarded. Under Ohio Adm. Code 4901-1-12(B)(1), any party may file a memorandum contra within fifteen days after the service of a motion. The Movants filed their motion to intervene on May 27, 2010, and served it by mail. Adding three days to the time period as the result of mail service, as provided by Ohio Adm. Code 4901-1-07(B),<sup>3</sup> the Companies' memorandum contra was due on or before June 14, 2010. The Companies filed their Memo Contra three days late, on June 17, 2010. The Companies did not seek an extension of time to file their pleading, as they may do under Ohio Adm. Code 4901-1-13(A). Such extensions of time may be granted upon a timely motion<sup>4</sup> and a showing of good cause. FirstEnergy did not provide any explanation as to why it could not meet the time requirements stated in the PUCO's rules and file its pleading in a timely manner.

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<sup>2</sup> FirstEnergy electronically served its Memo Contra at 5:44 p.m. on June 17, 2010. A reply to a memorandum contra is permitted under Ohio Adm. Code 4901-1-12(B)(2) within seven days of service. In computing the time in which to file this Reply, one day is added, as provided by Ohio Adm. Code 4901-1-7(C), since the electronic message was conveyed after 5:30 pm.

<sup>3</sup> According to Ohio Adm. Code 4901-1-07(B), whenever a party is required to take action within a prescribed time after a pleading is served, if service is through mail, three days are added onto the time.

<sup>4</sup> A motion for extension of time to file a document "must be timely filed so as to permit the commission, legal director, deputy legal director, or attorney examiner sufficient time to consider the request and to make a ruling prior to the established filing date." Ohio Adm. Code 4901-13(B).

The Commission has in the past determined that where a memorandum in opposition to motions was untimely filed, it will not consider the arguments made in the pleading.<sup>5</sup> The Commission, consistent with such rulings, should not consider the arguments made by the Companies in their Memo Contra.

In instances where the Commission has considered untimely pleadings, it has generally done so only upon a finding that there will be no undue delay or prejudice to the affected parties.<sup>6</sup> Here, in contrast, Movants are likely to be prejudiced by the PUCO considering the Memo Contra because FirstEnergy seeks to eliminate Movant's right to participate in the PUCO proceeding.

FirstEnergy's Memo Contra was untimely, without explanation or excuse, and should be disregarded. The remainder of this Reply addresses FirstEnergy's arguments in the event that they are not disregarded.

**B. Intervention in PUCO Cases Is To Be Liberally Allowed Under R.C. 4903.221 Which Sets Forth The Standard For Intervention And Prevails In Any Conflict With Ohio Adm. Code 4901-1-11(B)(5).**

Movants have properly addressed the factors that must be considered regarding their Motion to Intervene. *Intervention in PUCO matters is governed by R.C. 4903.221.*<sup>7</sup> That statute provides that any person "who may be adversely affected" by a PUCO

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<sup>5</sup> See, e.g., *In the Matter of the Joint Application of Cincinnati Bell Telephone Company and Cincinnati Bell Long Distance for a Waiver of certain of the Commission's Local Service Guidelines*, Case No. 99-1496-TP-UNC, Entry on Rehearing at ¶5 (April 27, 2000); *In the Matter of the Petition of Morrow Chamber of Commerce v. United Telephone Company of Ohio et al. Relative to a Request for Two-Way, Flat-Rate Extended Area Service Between the Morrow Exchange of United Telephone Company of Ohio and Cincinnati and Little Miami Exchanges of Cincinnati Bell Telephone Company*, Case No. 90-1760-TP-PEX, Entry on Rehearing at ¶4 (October 1, 1992).

<sup>6</sup> See e.g. *In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-COI, Entry at ¶¶11-14 (June 1, 2001).

<sup>7</sup> See *Ohio Consumers' Counsel v. Public Util. Comm.* (2006), 111 Ohio St.3d 384, ¶15.

proceeding is entitled to seek intervention in that proceeding. In ruling on a motion to intervene, the PUCO *shall* consider “(1) the nature and extent of the prospective intervenor’s interest, (2) the legal position advanced by the prospective intervenor and its probable relation to the merits of the case, (3) whether the intervention will unduly prolong or delay the proceeding, and (4) whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.”

The Ohio Supreme Court, in upholding OCC’s right to intervene in a utility’s accounting deferral application, held that whether or not a hearing is held, intervention “ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO.”<sup>8</sup> That holding should be applied to Movants, and Movants should be granted intervention because they have demonstrated a real and substantial interest in the proceeding.<sup>9</sup>

Despite Movants’ clear showing that they meet the statutory requirements of R.C. 4903.221, FirstEnergy focuses instead on a factor within the Ohio Adm. Code that originated before R.C. 4903.221 was effective. FirstEnergy’s argument seems to rely upon the contents of Ohio Adm. Code 4901-1-11(B)(5) -- that the Commission consider the “extent to which the person’s interest is represented by existing parties.” FirstEnergy argues that because the interests of all-electric customers are already represented by OCC, intervention should be denied.<sup>10</sup> These arguments are flawed.

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<sup>8</sup> Id. at ¶20.

<sup>9</sup> Movants’ Motion to Intervene at 2-3 (May 27, 2010).

<sup>10</sup> Memo Contra at 3-7 (June 17, 2010). FirstEnergy cites two Ohio Supreme Court cases, *Senior Citizens Coalition v. Public Util. Comm.* (1982), 69 Ohio St. 2d 625 and *Toledo Coalition for Safe Energy v. Public Util. Comm.* (1982), 69 Ohio St. 2d 559, to support its arguments. These cases cannot be relied upon because the decisions were made prior to the 1983 enactment of the controlling intervention statute, R.C. 4903.221, and indeed the result in these cases may have become the impetus for enacting the 1983 law to protect customers. Additionally, the factors considered for intervention were those the Court attributed to appellate holdings, whose relevance is questionable given the statutory enactment of R.C. 4903.221.

It is the statute, R.C. 4903.221, which controls. R.C. 4903.221 was enacted in 1983, which was subsequent to when the PUCO's procedural rules were first codified. It is well-established that "[a]n administrative rule that conflicts with a valid, existing statute is invalid."<sup>11</sup> This legal conclusion stems from the fact that administrative agencies, such as the PUCO, possess rule making powers pursuant to a statutory delegation of powers. And, since administrative rules are made under such a delegation, a rule that conflicts with a statute is invalid.<sup>12</sup>

The Ohio Supreme Court has held that "administrative rules, in general, may not add to or subtract from \* \* \* the legislative enactment."<sup>13</sup> Under the Supreme Court's standard, a regulation that impermissibly adds to or subtracts from a statute automatically creates a clear conflict, invalidating the rule. Thus, R.C. 4903.221 controls and precludes consideration of other intervention elements. Having met the requirements of R.C. 4903.221, the Commission may not apply additional provisions of the procedural rules (Ohio Adm. Code 4901-1-11(B)(5)) in this instance, and preclude Movants from intervening on the basis that their interests are already represented by OCC.

### **III. CONCLUSION**

FirstEnergy's Memo Contra was not timely, and FirstEnergy failed to request an extension to its deadline and provide good cause for its delay. FirstEnergy's inaction is fatal to its pleading, which should be disregarded by the Commission.

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<sup>11</sup> *State ex rel. Navistar International Transp. Corp. v. Industrial Comm.*, Franklin App. No. 04AP-638, 2005-Ohio-3284 at ¶13, citing *Kelly v. Accounting Board of Ohio* (C.A. 1993), 88 Ohio App.3d 453, 458.

<sup>12</sup> See, e.g., *Athens Home Telephone Co. v. Peck* (1953), 158 Ohio St. 557; *Hoover Universal, Inc. v. Limbach* (1991), 61 Ohio St.3d 563.

<sup>13</sup> *Central Ohio Joint Vocational School Dist. Bd. of Educ. v. Admr., Ohio Bureau of Employment Services* (1986), 21 Ohio St.3d 5, 10 (citation omitted).

In the event that the Commission considers FirstEnergy's argument (which it should not), the Memo Contra incorrectly relies upon a factor that is not contained in the controlling statute for the consideration of motions to intervene. FirstEnergy's arguments should be rejected, and Movants' Motion to Intervene should be granted.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's Reply to FirstEnergy's Memo Contra Motion to Intervene was served upon the persons listed below by electronic transmission and by first class U.S. Mail, postage prepaid, this 24<sup>th</sup> day of June, 2010.

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

**Commission of Ohio Docketing Information System on**

**6/24/2010 11:03:30 AM**

**in**

**Case No(s). 10-0176-EL-ATA**

Summary: Reply Reply to FirstEnergy's Memorandum Contra Motion to Intervene of Sue Steigerwald, Citizens Keeping the All-Electric Promise, Joan Heginbotham and Bob Schmitt Homes by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Ms. Maureen R. Grady