BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of FirstEnergy Solutions Corp. to Become a Certified Retail Electric Supplier in the State of Ohio	))))	Case No. 00-1742-EL-CRS

REPLY IN SUPPORT OF MOTION TO INTERVENE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

At the same time FirstEnergy Solutions Corp. ("FES") wants the federal and state governments to be concerned for its business and authorize assistance customer-funded subsidies for its uneconomic coal-fired and nuclear generation, FES sees no role for the government to protect FES's consumers from the bankruptcy it has publicized as likely at some point. The Office of the Ohio Consumers' Counsel's ("OCC") intervention is necessary to protect the interests of residential customers regarding FES that, by its own statements, is a failing enterprise. Following a second financial downgrading of FES's credit rating, FirstEnergy Corp.'s ("FirstEnergy") Chief Executive Officer has publically announced FES's plan to exit the merchant generation business and has publicized a potential bankruptcy. Clearly, any intent to exit the merchant generation business and any future bankruptcy could adversely affect residential consumers and their customer contracts. Yet, FES opposes OCC's intervention, stating it has no grounds to intervene and no basis to be concerned. The Public Utilities Commission of Ohio ("PUCO") should be concerned for consumers.

OCC, as the statutory representative of Ohio electric utility consumers, has a real and substantial interest in FES's certification proceeding that affords FES the authority to serve residential consumers and enter into new electric service contracts with consumers. These interests are not adequately protected by any existing parties, and therefore, OCC's intervention should be granted.

II. ARGUMENT

A. FES's failure to comply with the PUCO's rules, stated intent to exit the merchant generation business, and impending reorganization creates a case or controversy in which OCC should be allowed to intervene for Ohio consumers.

In hopes of excluding OCC from these proceedings, FES claims there is no real "case and controversy" and no active or pending proceeding in which to intervene.[1] However, this argument simply ignores FES's own ongoing certification before the PUCO. FES has a current certificate that was issued in the above-captioned proceeding that creates an ongoing duty to follow the PUCO rules, file annual reports, and notify the PUCO of material changes to the information contained in its most recent renewal application.[2] FES has failed to comply with the PUCO's rules. Further, as conceded by FES, it has been continuously renewing its CRES application over sixteen years and the deadline to renew its current certificate is October 3, 2018. Because FES continuously renews its application and because it has a duty to continually notify the PUCO of material changes, there is a case or controversy in which OCC is entitled to intervene under R.C. 4903.221.

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[1] FES Memorandum Contra at 5 (Nov. 20, 2017) ("Memorandum Contra").

[2] *See* Ohio Adm. Code 4901:1-24-11.

Specifically, FES is required to notify the PUCO if its "bond rating falls below BBB as reported by Standard & Poor's ["S&P"], or below Baa3 as reported by Moody's investors service."[3] As FES indicates, its bond rating as reported by Moody's Investment Services already dropped below investment grade to Caa1 in 2016.[4] FES properly notified the PUCO.[5] However, in August 2017, S&P also downgraded FES to below investment grade with a rating of CCC-.[6] FES's earlier second quarter Quarterly Highlights also indicates a S&P rating of CCC.[7] Because FES indicated a S&P rating of BB- in its most recent renewal application,[8] FES was required to notify the PUCO of this downgrade within 30 days.[9] FES has failed to do so. FES's failure to comply with the PUCO's rules, which are intended to ensure financial stability, creates a case or controversy in this proceeding in which OCC has a real and substantial interest.

Moreover, Chuck Jones, FirstEnergy CEO, has made public FES's intent to exit the merchant generation business and has initiated discussions with creditors.[10] Evidently, more information is required to determine what FES means by its intent to exit the merchant generation business. However, any intent to cease providing CRES services would assuredly affect residential customers in contract with FES and creates a "real and substantial interest" in this ongoing proceeding.[11]

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[3] Ohio Adm. Code 4901:1-24-11(B)(5).

[4] Memorandum Contra at 2.

[5] Notice of Material Change (November 28, 2016).

[6] *See* S&P Rating of FES attached as Attachment A.

[7] *See* FirstEnergy Quarterly Highlights 2Q 2017 Earnings Call at 33, attached as Attachment B.

[8] *See* Exhibit C-6 to FES's October 3, 2016 CRES renewal application.

[9] *See* Ohio Adm. Code 4901:1-24-11(B)(5).

[10] http://www.cleveland.com/business/index.ssf/2017/08/firstenergy_solutions_downgrad.html.

[11] *See* Ohio Adm. Code 4901-1-11(A)(2).

Further, the act of FES initiating discussions with creditors regarding structured settlement is a clear indication that FES intends to file for reorganization. The possibility of FES filing for reorganization is more than a "hypothetical future event," contrary to FES's framing of the issue.[12] FirstEnergy, in its October 26, 2017 quarterly report to the Securities and Exchange Commission ("SEC"), stated: "the risks and uncertainties associated with the lack of viable alternative strategies regarding the Competitive Energy Services (CES) segment, thereby causing FirstEnergy Solutions Corp. (FES), and likely FirstEnergy Nuclear Operating Company (FENOC), to restructure its substantial debt and other financial obligations with its creditors or seek protection under United States bankruptcy laws and the losses, liabilities and claims arising from such bankruptcy proceeding, including any obligations at FirstEnergy Corp."[13]

Not only is FES required to notify the PUCO if it intends to file for reorganization, but this reorganization necessarily is an event in which its Ohio residential customers have a real and substantial interest.[14] Therefore, FES's failure to comply with the PUCO's rules – failing to report its S&P downgrade and intent to file for reorganization – creates a case or controversy and proceeding in which the OCC may intervene.

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[12] Memorandum Contra at 5.

[13] Attachment B at 2. FES asserts that the SEC filings FirstEnergy is required to make prejudice FES compared to other private CRES providers. The truth of FES's financial instability does not prejudice FES – it promotes transparency and is in the public interest.

[14] Ohio Adm. Code 4901:1-24-11(B)(6).

B. Because OCC has a real and substantial interest for Ohio consumers in these proceedings, intervention should be granted.

The Supreme Court of Ohio has 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."[15] However, in an effort to exclude OCC from these proceedings, FES cites several cases where the PUCO has denied intervention.[16] Those cases are inapposite. Only two of the cited cases involved proceedings for a certificate to provide competitive retail natural gas service ("CRNGS") and none of them involved certification for retail generation providers and power marketers.

Although FES cites to a 2003 case where OCC was denied intervention, this case is inapplicable and has no bearing on the PUCO's decision here.[17] In Case No. 02-2583-GA-CRS, OCC was denied intervention because the PUCO had already suspended the applicant's CRES application, conducted a review, and concluded that no hearing was necessary.[18] Because the PUCO granted the applicant's application without a hearing, OCC's intervention was no longer necessary. Therefore, there was no occasion for the PUCO to reach the question of whether OCC had a "real and substantial interest" or whether OCC was "adequately represented by existing parties" in that case.[19]

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[15] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 20; *see In the Matter of the Application of The Dayton Power and Light Company To Establish a Fuel Rider*, Case No. 09-1012-EL-FAC, Entry at 2-3 (Sept. 26, 2011) (granting FES intervention).

[16] Memorandum Contra at 4, n. 4.

[17] *Id.*

[18] *In the Matter of the Application of My Choice Energy for a Certificate to Provide Competitive Retail Natural Gas Service in Ohio*, Case No. 02-2583-GA-CRS, Entry (Feb. 20, 2003).

[19] *See* Ohio Adm. Code 4901-1-11(A)(2).

Rather, where a party has a "real and substantial interest" in the proceedings and where that interest is not "adequately represented by existing parties," the PUCO routinely grants intervention. In a proceeding like the one at hand, the PUCO granted OCC intervention in Duke Energy Retail Sales, LLC's renewal application to provide competitive retail electric service ("CRES") in Ohio.[20] In its entry, the PUCO found "that OCC has a real and substantial interest in this proceeding and that it is so situated that disposition of this proceeding may impair its ability to protect that interest."[21] Likewise, OCC was also granted intervention in Commerce Energy, Inc.'s renewal application for its certificate to provide CRNGS.[22]

Here, OCC's intervention is necessary to protect Ohio's residential consumers. There is ample evidence showing concern that FES intends to exit the merchant generation business and/or file for reorganization "to restructure its substantial debt and other financial obligations with its creditors or seek protection under United States bankruptcy laws and the losses, liabilities and claims arising from such bankruptcy proceeding, including any obligations at FirstEnergy Corp."[23] The point is that the PUCO does not have any filed information on what FES will seek and how that will affect its obligations, including the servicing of its customer contracts. Further, there is no documentation regarding how FES will interpret its broadly written contract terms and

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[20] *In the Matter of the Application of Duke Energy Retail Sales, LLC, for Certification as a Competitive Retail Electric Service Provider in Ohio*, Case No. 04-1323-EL-CRS, Entry at 5 (Dec. 3, 2008).

[21] *Id.*

[22] *In the Matter of the Application of Commerce Energy, Inc. d/b/a Just Energy for Certification as a Competitive Retail Natural Gas Provider*, Case No. 02-1828-GA-CRS, Entry at 2 (Sept. 30, 2010).

[23] Attachment B at 2.

whether the bankruptcy will allow FES to terminate residential customer contracts.[24] Ohio's residential customers could be adversely affected if they were unrepresented in a situation where FES files for bankruptcy. Therefore, OCC has a real and substantial interest in protecting residential customers from potential adverse effects of any bankruptcy and/or reorganization, including interruptions in service and financial harm.

Further, disposition of this proceeding without granting OCC's intervention will impair OCC's ability to protect the interests of Ohio residential consumers. Although FES claims that it "is particularly sensitive to ensuring the provision of excellent service to its retail customers,"[25] there is currently no party representing the interests of Ohio residential customers in these proceedings to hold FES accountable for those claims. Moreover, those interests are not adequately represented by a marketer whose loyalty and advocacy includes the financial interest of stockholders. Indeed, FES's arguments in opposition to protections proposed by OCC illustrate that FES cannot adequately represent the interests of its residential customers. Consequently, OCC's motion to intervene should be granted.

Lastly, any argument in opposition of OCC's recommendation for customer notice[26] is not germane to whether OCC meets the criteria set forth in R.C. 4903.221 and Ohio Adm. Code 4901-1-11 for intervention.

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[24] *See* FES's Variable Price Residential Contract for CEI customers (*e.g., see* Force Majeure Termination provision: "FES will make commercially reasonable efforts to provide your electric service, *but does not guarantee a continuous supply of electricity*. Certain causes and events are out of FES's reasonable control ('Force Majeure Event(s)') and may result in interruptions in service. FES will not be liable for any such interruptions caused by a Force Majeure Event, including but not limited to, acts of God, war, civil disturbance, insurrection, terrorism, fire, flood, earthquake, acts of default of common carriers, strikes, boycotts, unforeseen maintenance, unforeseen shutdowns or deficiencies of sources of supply, inability to access the local distribution utility system, nonperformance by the EDU *or other similar circumstances beyond FES's reasonable control*." (emphasis added)).

[25] Memorandum Contra at 10.

[26] *Id*. at 9-10.

III. CONCLUSION

As the advocate for residential utility consumers, OCC has a very real and substantial interest in this proceeding. That interest is not adequately represented by the existing parties. As OCC meets the criteria set forth in R.C. 4903.221 and Ohio Adm. Code 4901-1-11, and in light of Court and PUCO precedent for intervention, OCC's motion to intervene should be granted.

Respectfully submitted,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ *Terry L. Etter*
Terry L. Etter (0067445)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: 614-466-7964 (Etter Direct)
Terry.etter@occ.ohio.gov
(willing to accept service by e-mail)

Kimberly W. Bojko (0069402)
Counsel of Record
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
bojko@carpenterlipps.com
(willing to accept service by e-mail)

Outside Counsel for the
Office of the Ohio Consumers' Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply was served on the person stated below via electronic transmission this 27th day of November 2017.

/s/ Terry L. Etter
Terry L. Etter
Assistant Consumers' Counsel

SERVICE LIST

William Wright
Public Utilities Commission of Ohio
30 E. Broad St., 16th Fl.
Columbus, OH 43215
William.wright@ohioattorneygeneral.gov

James F. Lang
N. Trevor Alexander
Mark T. Keaney
Calfee, Halter & Griswold LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
jlang@calfee.com
talexander@calfee.com
mkeaney@calfee.com

Attorneys for FirstEnergy Solutions Corp.

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