

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the Political	)	
and Charitable Spending by Ohio Edison	)	
Company, the Cleveland Electric	)	Case No. 20-1502-EL-UNC
Illuminating Company, and the Toledo	)	
Edison Company.	)	

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**REPLY MEMORANDUM IN SUPPORT OF THE ENVIRONMENTAL LAW &  
POLICY CENTER’S MOTION TO INTERVENE**

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The Environmental Law and Policy Center’s (“ELPC”) initial Motion to Intervene goes step by step demonstrating that it meets the statutory and regulatory requirements to intervene in this proceeding. Despite ELPC’s thorough analysis, FirstEnergy’s Memorandum Contra asserts that the Commission should deny ELPC’s Motion to Intervene, arguing that ELPC has not shown: a substantial interest in the proceeding, that the proceeding impacts its ability to protect its interest, and that it will contribute to the factual development of the issues in this proceeding. More confusingly, FirstEnergy argues that “no intervention is necessary given that the Commission’s review involves only the filing of initial and reply comments by interested parties.” FirstEnergy Memorandum Contra at 1. If the Commission agrees with this position, then that ruling moots the entire issue of ELPC’s intervention.

FirstEnergy’s contradictory arguments are perplexing, and ELPC was uncertain whether it needed to intervene in this proceeding because of its nature as an investigatory proceeding. However, as explained below, ELPC intervened out of an abundance of caution because of its request to expand the investigation. Assuming the Commission in fact determines that parties do need to intervene, ELPC addresses FirstEnergy’s motion. First, ELPC notes that it has intervened in dozens of proceedings at the PUCO. and, in all of these proceedings the Commission has approved ELPC’s intervention and followed its own longstanding policy of “encourag[ing] the

broadest possible participation in its proceedings.” Entry at 1, *In re Cleveland Elec. Illum. Co.*, No. 85-675-EL-AIR, 1986 WL 1262093 (Jan. 14, 1986). The Ohio Supreme Court has explained that “whether or not a hearing is held, intervention ought to be liberally allowed so that the positions of all persons with real and substantial interest in the proceedings can be considered by the PUCO.” *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 384, 388 (2006). If FirstEnergy’s arguments succeed, it would set a standard that would make it very difficult for any public interest group ever to qualify for intervention. The facts show, however, that ELPC does meet the statutory criteria: it has a real and substantial interest in this proceeding; its involvement will help develop the factual issues; its view is unrepresented by other parties; and its intervention will not delay the proceedings. R.C. 4903.211; O.A.C. 4901-1-11(B).<sup>1</sup> The review of spending related to House Bill 6 (“H.B. 6”) directly impacts the interests of ELPC and its members, and ELPC’s intervention is necessary for it to protect those interests and pursue a full investigation into the Companies’ alleged actions. ELPC’s experience and track record ensures that it will support the factual development of this case, and not create delay. Therefore, the Commission should reject FirstEnergy’s arguments and grant ELPC’s motion to intervene.

**I. ELPC Meets Each of the Criteria for Intervention Under Ohio Law and PUCO Rules, Including Having a Real and Substantial Interest in the Outcome of this Proceeding.**

FirstEnergy asserts that “ELPC has not met th[e] standard” for intervention, Memorandum Contra at 1, but its arguments unfairly narrow the scope of this case, ignoring the obvious connections between this investigation and ELPC and its members’ significant interest in

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<sup>1</sup> FirstEnergy emphasizes that ELPC “does not directly address the requirements of O.A.C. 4901-1-11(A) and, instead, discusses only the considerations in O.A.C. 4901-1-11(B),” seemingly suggesting that this is further support for its memorandum contra. FirstEnergy’s analysis appears based on an incomplete reading of that section of the Ohio Administrative Code. While O.A.C. 4901-1-11(A) does state that intervention is available to those with “real and substantial interest in the proceeding” and who will be impaired in protecting that interest should they be denied intervention, O.A.C. 4901-1-11(B) actually defines what the Commission must consider in determining whether an intervening party meets the standards of O.A.C. 4901-1-11(A). In other words, the section ELPC cites and discusses in its motion to intervene is the relevant section for understanding what a “real and substantial interest” is.

promoting and protecting clean energy policies. The Entry Order states, “The Commission has determined that this proceeding should be opened to review the political and charitable spending by the FirstEnergy Utilities in support of Am. Sub. H.B.6 and the subsequent referendum effort.” Entry Order at 2, No. 20-1502-EL-UNC (Sept. 15, 2020). This proceeding is meant to investigate whether and how the FirstEnergy companies used ratepayer funds to support the passage of H.B.6. *See id.* As this Commission knows, House Bill 6 had enormous impacts on clean energy policy in the state. The law eliminated renewable energy credit requirements for public utilities; got rid of the utility energy efficiency goals; introduced a decoupling charge; and created a new fund to bail out nuclear power plants in the state from a charge on customers’ monthly bills. ELPC actively participated in hearings and discussions on House Bill 6 because these amendments to Ohio law directly relate to its work to promote a smart clean energy transition, encourage energy efficiency, and protect its members from policies that undermine a clean energy future. ELPC is not, as FirstEnergy asserts, trying to “espouse its environmental policy positions.” Memorandum Contra at 2. Instead, it seeks to participate in an investigation on whether and how FirstEnergy used ratepayer funds to influence the hearings and discussions on H.B. 6. Moreover, ELPC has members in Ohio, and has an office in Ohio that focuses on Ohio energy and environmental issues. Many of ELPC’s members are located throughout FirstEnergy’s service territory, and ELPC’s intervention will help protect their interest in ensuring that their utility payments are not used to promote policies that undermine clean energy policy in the state.

ELPC’s interests are at risk if it is not permitted to participate in this docket, and its participation will only help the development of this case. ELPC differs from other organizations because of its interest in both environmental and consumer protection, as well as its legal and policy expertise from its work around the Midwest. Different non-profits often have different

perspectives and take different positions. ELPC's members will lack sufficient representation if the Commission excludes ELPC. Moreover, the Ohio Supreme Court has made clear that the primary reason to refuse intervention if an intervenor shows that it has a real interest in the proceedings is if there is a legitimate concern over delay. *See Ohio Consumers' Counsel*, 111 Ohio St. 3d at 387. FirstEnergy has failed to identify any risk of delay from ELPC's participation in this docket, while in contrast ELPC risks losing the only opportunity to protect its interests in relation to the alleged H.B. 6 scandal at the PUCO if it is not permitted to fully participate in this proceeding.

## **II. Intervention in this Proceeding Is Necessary to Protect ELPC's Real and Substantial Interests.**

ELPC intervened in this proceeding out of an abundance of caution and careful attention to the laws and regulations governing PUCO proceedings. Specifically, when it intervened ELPC knew that it intended to file a motion to expand the scope of this proceeding. Ohio Administrative Code 4901-1-12 appears to limit motion practice to "parties" to proceedings. Only a "party may file a memorandum contra," and filing reply memoranda is similarly limited to parties. O.A.C. 4901-1-12(B)(1), (2). Hence, to become a party and safeguard its interest in moving to expand the investigation, ELPC believed it needed to intervene.

Furthermore, ELPC based its decision to intervene on the public descriptions of this proceeding. On September 16, 2020, Chairman Randazzo discussed the scope of this proceeding with members of the Ohio House Select Committee on Energy Policy and Oversight.<sup>2</sup> He explained to the Committee that the Commission would "have other parties intervening in this case" and that "[s]ome may choose to do discovery."<sup>3</sup> Chairman Randazzo's comments not only

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<sup>2</sup> See Ohio House Select Committee on Energy Policy & Oversight Hearing (Sept. 16, 2020), <https://ohiochannel.org/video/ohio-house-select-committee-on-energy-policy-and-oversight-9-16-2020>.

<sup>3</sup> *Id.* at 1:12:16–1:12:21.

signaled that there would be “other parties”—that would presumably need to intervene—but also made clear that full participation in the proceeding *requires* intervention. Because the Ohio Administrative Code limits discovery in Commission cases to “any party,” ELPC and any other group interested in discovery must first intervene. *See* O.A.C. 4901-1-16(B).

ELPC also determined that intervening would protect its interests against any Commission decision that prospective parties did need to intervene. In other cases, the Commission has denied late intervention to parties on the grounds that changes to the case’s scope—including an expansion of the issues considered in the proceeding—are insufficient grounds for untimely intervention. *See* Opinion and Order at 9–10, *In re Ohio Power Co. and Columbus Southern Power Co. for Authority to Merge and Related Approvals*, No. 10-2376-EL-UNC (Dec. 14, 2011). The Commission has explained that parties may resolve issues in a case beyond the precise issue for which the Commission or utility opened the case. Therefore, it is incumbent on parties to intervene to protect those interests. Opinion and Order, *In re Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement*, No. 14-1693-EL-RDR (May 31, 2016). Given the importance of the alleged House Bill 6 scandal to ELPC’s clean energy work in Ohio, ELPC’s intervention protects it from any unanticipated results of this investigation.

While ELPC submits that it easily meets the tests for intervention, it also comes full circle back to FirstEnergy’s argument that intervention is not even necessary because the Attorney Examiner’s Entry allows for comments. This argument raises the question of why FirstEnergy would take the time to oppose ELPC’s intervention if it believes that intervention is an unnecessary step. Nine other parties have also intervened in this docket, showing that other groups think they need to intervene in order to ensure they can participate in the proceeding. FirstEnergy’s assertion also ignores that the Commission has granted motions to intervene in other investigations. For

example, in the recent investigation into electric vehicle charging, Case No. 20-434-EL-COI, the Commission granted Ohio Consumers' Counsel's motion to intervene. *See Finding and Order, In re Commission's Investigation into Electric Vehicle Charging Service in the State*, No. 20-434-EL-COI (July 1, 2020). The Commission's order noted the numerous organizations that filed comments in the case without intervening, but it did not deny OCC's motion simply because filing comments was not predicated on having first intervened. *Id.* ELPC's intervention, therefore, fits with this larger precedent and allows ELPC to pursue its interests in the proceeding.

### **III. Conclusion**

ELPC meets the requirements necessary to intervene in this proceeding. ELPC's experience in Ohio and around the Midwest on clean energy work and the H.B. 6 legislation that relates to the campaign and charitable contributions gives ELPC a clear and significant interest in this proceeding. ELPC's legal position will not unduly delay the proceedings, and other parties do not represent ELPC's interests. The Commission has a mandate to allow for broad participation in its proceedings, a mandate that is even more vital when the proceeding relates to one of the greatest alleged public utility scandals in Ohio's history. Therefore, ELPC respectfully asks this Commission to grant the Motion to Intervene.

Respectfully submitted,

/s/ Robert Kelter

Robert Kelter  
Robert Kelter (PHV-2685-2019)  
Senior Attorney  
Environmental Law & Policy Center  
35 E. Wacker Drive, Suite 1600  
Chicago, IL 60601  
(312) 795-3734  
[rkelter@elpc.org](mailto:rkelter@elpc.org)

Caroline Cox (0098175)  
Associate Attorney  
21 W. Broad Street, Floor 8

Columbus, OH 43206  
(865) 803-1778  
[ccox@elpc.org](mailto:ccox@elpc.org)

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Reply Memorandum in Support of the Environmental Law & Policy Center's Motion to Intervene* was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on October 12, 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Robert Kelter  
Robert Kelter

Robert Kelter (PHV-2685-2019)  
Senior Attorney  
Environmental Law & Policy Center  
35 E. Wacker Drive, Suite 1600  
Chicago, IL 60601  
(312) 795-3734  
[rkelter@elpc.org](mailto:rkelter@elpc.org)

Caroline Cox (0098175)  
Associate Attorney  
21 W. Broad Street, Floor 8  
Columbus, OH 43206  
(865) 803-1778  
[ccox@elpc.org](mailto:ccox@elpc.org)

### Service List:

[John.jones@ohioattorneygeneral.gov](mailto:John.jones@ohioattorneygeneral.gov)  
[trhayslaw@gmail.com](mailto:trhayslaw@gmail.com)  
[leslie.kovacik@toledo.oh.gov](mailto:leslie.kovacik@toledo.oh.gov)  
[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)  
[bethany.allen@igs.com](mailto:bethany.allen@igs.com)  
[joe.oliker@igs.com](mailto:joe.oliker@igs.com)  
[michael.nugent@igs.com](mailto:michael.nugent@igs.com)  
[mkurtz@BKLawfirm.com](mailto:mkurtz@BKLawfirm.com)  
[kboehm@BKLawfirm.com](mailto:kboehm@BKLawfirm.com)  
[kylarcohn@BKLawfirm.com](mailto:kylarcohn@BKLawfirm.com)  
[bknipe@firstenergycorp.com](mailto:bknipe@firstenergycorp.com)  
[jang@calfee.com](mailto:jang@calfee.com)

[khehmeyer@calfee.com](mailto:khehmeyer@calfee.com)  
[dborchers@bricker.com](mailto:dborchers@bricker.com)  
[dparram@bricker.com](mailto:dparram@bricker.com)  
[jspottswood@bricker.com](mailto:jspottswood@bricker.com)  
[mleppla@theOEC.org](mailto:mleppla@theOEC.org)  
[tdougherty@theOEC.org](mailto:tdougherty@theOEC.org)  
[ctavenor@theOEC.org](mailto:ctavenor@theOEC.org)  
[rdove@keglerbrown.com](mailto:rdove@keglerbrown.com)  
[Maureen.willis@occ.ohio.gov](mailto:Maureen.willis@occ.ohio.gov)  
[Angela.obrien@occ.ohio.gov](mailto:Angela.obrien@occ.ohio.gov)  
[mleppla@theOEC.org](mailto:mleppla@theOEC.org)



Attorney Examiner:

[Gregory.price@puco.ohio.gov](mailto:Gregory.price@puco.ohio.gov)

[Megan.addison@puco.ohio.gov](mailto:Megan.addison@puco.ohio.gov)

[Jacky.stjohn@puco.ohio.gov](mailto:Jacky.stjohn@puco.ohio.gov)

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