

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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. |) | |

**REPLY IN SUPPORT OF INTERSTATE GAS SUPPLY, INC.’S MOTION TO
INTERVENE**

I. INTRODUCTION

Although Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, “FirstEnergy”) seek to deny Interstate Gas Supply, Inc. (“IGS” or “IGS Energy”) – and seemingly every other prospective intervenor – of its right to participate in this proceeding, IGS has satisfied the standard for intervention set forth in Ohio Adm. Code 4901-1-11.

IGS, as a retail market participant, has a real and substantial interest in the review of whether FirstEnergy improperly used ratepayer funds to support the passage of Am. Sub. H.B.6., and by extension, the specific provisions of the bill that: (1) allow FirstEnergy and other EDUs to construct behind the meter generation and compete with IGS directly; and (2) extend financial benefits to FirstEnergy’s former unregulated competitive affiliate, FirstEnergy Solutions. If the Public Utilities Commission of Ohio (“PUCO” or “Commission”) does find that FirstEnergy subsidized its lobbying efforts with ratepayer funds, then FirstEnergy will have undoubtedly violated Ohio’s corporate separation requirements, which are designed to protect IGS and other market participants.

FirstEnergy claims that IGS cannot satisfy the intervention standard because it not only failed to establish that it has a real and substantial interest in this case, but also failed to show how the disposition of this proceeding will impair or impede IGS' ability to protect that interest.¹ FirstEnergy also argues that IGS' Motion violates Ohio Adm. Code 4901-1-11(B)(4) in that it failed to show how IGS will significantly contribute to the development of the factual issues in this case.² In an absurd twist, FirstEnergy raises a third and final argument that IGS' motion to intervene is simply unnecessary because the PUCO's review in this case "involves only the filing of initial and reply comments[.]"³

While the necessity of IGS' Motion could be subject to debate, there is no disputing that FirstEnergy ignores the Commission's liberal intervention standard and past precedent and, by doing so, unreasonably seeks to deprive IGS of its right to participate in this case.

During what may be reflected upon as a dark time in Ohio history, the need for a transparent and open process is critical to restoring faith in our public processes. While FirstEnergy is entitled to its day in court to defend against the various state, federal, and administrative allegations that have arisen from its conduct during the passage of Am. Sub. H.B. 6, the Commission should not indulge FirstEnergy's request to deprive IGS of its opportunity to participate in the process of determining whether FirstEnergy misused

¹ Memorandum Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company to the Motion to Intervene by Interstate Gas Supply, Inc., Case No. 20-1502-EL-UNC at 1 (October 14, 2020) (hereinafter "FirstEnergy Memo Contra").

² *Id.*

³ *Id.*

customer dollars—in violation of Ohio laws designed to protect IGS from the conduct of monopoly utilities—to pass legislation to the detriment of IGS.

Therefore, for the reasons set forth below, the Commission should reject FirstEnergy’s arguments and grant IGS’ Motion to Intervene in this case so that it may participate and contribute to the process of determining whether FirstEnergy engaged in conduct that violated Ohio law and policy to the detriment of IGS and its customers.

II. ARGUMENT

A. IGS’ Motion Satisfies the Intervention Standard Under Ohio Adm. Code 4901-1-11(A)(2).

i. IGS Established a Real and Substantial Interest Necessary to Justify Intervention.

FirstEnergy opposes IGS’s Motion to Intervene arguing that IGS failed to satisfy the standard for intervention set forth in Ohio Adm. Code 4901-1-11(A)(2).

As an initial matter, FirstEnergy argues that IGS’ status as both a CRES provider and competitor of FirstEnergy’s former affiliate, FirstEnergy Solutions, is insufficient to allow it to participate in the Commission’s review of whether FirstEnergy improperly included the costs of its political and charitable spending in support of Am. Sub. H.B.6 in distribution rates.⁴ FirstEnergy claims that IGS does not have a real and substantial interest in the core issue in this case (i.e. FirstEnergy’s retail rates and charges), and in doing so, attempts to marginalize the relationship that IGS maintains with its customers and the Ohio competitive market.⁵ But FirstEnergy should not be permitted to frame IGS’s interest in this case so narrowly.

⁴ *Id.* at 2-3.

⁵ *Id.* at 2.

Under the Commission's liberal intervention standard and past precedent, IGS' Motion to Intervene should be granted. Precedent holds that retail suppliers have been granted intervention in Commission proceedings that may impact retail choice programs, customers, and the competitive market. For example, the Commission granted IGS' Motion to Intervene in a GCR proceeding over Duke Energy Ohio's ("Duke") objection and held:

The thrust of [Duke's] argument is that IGS does not have a real and substantial interest in this GCR proceeding. The examiner finds that issues related to the competitive market, competitive suppliers, and their customers may arise in this proceeding. Such issues have been a part of the utility's prior GCR cases before the Commission.⁶

The issues IGS raised in its Motion to Intervene directly impact the competitive market, competitive suppliers, and their customers. IGS' Motion clearly states that IGS' customers may have unknowingly financed FirstEnergy's lobbying efforts and thereby contributed to the passage of legislation (i.e. Am. Sub. H.B.6) that provides preferential treatment to utilities.⁷ IGS' Motion expresses concern that Am. Sub. H.B. 6 now authorizes FirstEnergy and other utilities to compete directly⁸ with IGS in Ohio's competitive retail market,⁹ and warns that if FirstEnergy used ratepayer funds to further its lobbying efforts, then those funds also served to indirectly subsidize competitive

⁶ *In the Matter of the Regulation of the Purchased Gas Adjustment Clauses Contained Within the Rate Schedules of Cincinnati Gas & Electric Company and Related Matters*, Case No. 05-218-GA-GCR, Entry at 2 (Nov. 15, 2005).

⁷ Motion to Intervene of Interstate Gas Supply, Inc. at 5 (Sept. 29, 2020) (hereinafter "IGS' Motion to Intervene").

⁸ See R.C. 4928.27, which authorizes an electric distribution utility to enter into an agreement with mercantile customers to construct on-site renewable generation resources pursuant to Am. Sub. H.B. 6.

⁹ IGS' Motion to Intervene at 5.

services (e.g. the on-site generation provision in AM. Sub. H.B. 6) in violation of Ohio's corporate separation requirements and state policy.¹⁰ Moreover, it is alleged that FirstEnergy may have utilized distribution dollars to bankroll a criminal enterprise explicitly designed to pass legislation to directly benefit its former affiliate, FirstEnergy Solutions. Such conduct would establish a text book corporate separation violation by utilizing a non-competitive service to extend an "undue preference or advantage to any affiliate . . . engaged in the business of supplying the competitive retail electric service . . . " R.C. 4928.17(A)(3)

Nevertheless, it is well established that the standard for intervention in Commission proceedings is broad. As IGS referenced in its original motion, the Ohio Supreme Court, in *Ohio Consumers' Counsl v. Public Utilities Commission*, stated unequivocally that "intervention ought to *liberally allowed* so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO."¹¹ (emphasis added). Given that the corporate separation rules themselves and state policy are clearly designed to protect the competitive market and its participants (e.g. IGS and its customers) from electric distribution utility abuses, IGS' Motion clearly establishes that it has a real and substantial interest in this proceeding.

ii. IGS Established That the Disposition of This Proceeding will Impair or Impede Its Ability to Protect Its Interest.

Next, FirstEnergy claims that IGS cannot satisfy the Commission's intervention standard under Ohio Adm Code 4901-1-11(A)(2), because "IGS does not explain how the

¹⁰ See R.C. 4928.17 and R.C. 4928.02

¹¹ *Ohio Consumers' Counsel v. Pub. Util Com'n of Ohio* (2006), 111 Ohio St. 3d 384, 38, 2006 Ohio 5853, 856 N.E.2d 940 (emphasis added).

disposition of the Commission's review of [FirstEnergy's] rates and charges specific to H.B. 6 costs could adversely affect IGS's claimed interests."¹²

IGS' Motion, however, accomplishes just that. Here again, IGS' Motion clearly provides that it seeks intervention in this proceeding to explore whether FirstEnergy improperly used ratepayer funds to subsidize its lobbying efforts in support of Am. Sub. H.B.6.¹³ Any use of those funds – either directly or indirectly – to promote the interests of FirstEnergy and/or its former affiliate is an abuse of utility monopoly status that runs afoul of Ohio law and policy and adversely impacts the competitive market that IGS and other CRES suppliers participate in.

As set forth above, IGS does have a real and substantial interest in FirstEnergy's retail rates and charges given that those charges may have been used to fund lobbying practices that allegedly violated federal and state law and led to outcomes (i.e. Am. Sub. H.B. 6) that ultimately tilted competitive market conditions in FirstEnergy's favor. While other prospective intervenors may have expressed similar concerns regarding the impact of FirstEnergy's alleged misconduct on competitive market conditions, none of those parties represent IGS's interests. IGS cannot, and does not, rely on any other entity that seeks intervention in this case to represent its interest. As of this filing, IGS is the only CRES provider to seek intervention in this case, and IGS wishes to do so to examine whether FirstEnergy used ratepayer funds to promote and pass legislation that may adversely impact IGS, its customers, and IGS' standing as a market participant.

¹² FirstEnergy Memo Contra at 3.

¹³ IGS' Motion to Intervene at 5.

Therefore, because IGS has demonstrated that it has a real and substantial interest in this proceeding that cannot be adequately represented by other parties, the Commission should dismiss FirstEnergy's arguments and grant IGS' Motion to Intervene.

B. IGS Satisfies the Intervention Criteria Under Ohio Adm. Code 4901-1-11(B).

FirstEnergy also argues that IGS' Motion to Intervene should be denied because it made no attempt to satisfy the factors that the Commission uses to evaluate whether IGS established a real and substantial interest necessary for intervention. Specifically, FirstEnergy claims that IGS' Motion should be denied because it made no attempt to satisfy the criteria set forth in Ohio Adm. Code 4901-1-11(B)(2)-(5).¹⁴ A closer inspection of IGS' Motion to Intervene, however, reveals that each criterion was sufficiently addressed.

IGS' legal position is clear: FirstEnergy may have utilized distribution funds to subsidize a competitive service, which violates Ohio law and policy and adversely impacts IGS' standing as a competitive market participant.¹⁵ IGS' Motion also expressly provides that it will not unduly delay the proceeding, nor can any other party adequately protect its interests in this case.¹⁶ Given IGS' experience and track record in participating in cases before the Commission, the Commission should find that IGS will contribute to the full development and resolution of the factual issues in this case.¹⁷ Therefore, because IGS' Motion satisfies the factors set forth in Ohio Adm. Code 4901-1-11(B)(2)-(5), the

¹⁴ FirstEnergy Memo Contra at 4.

¹⁵ IGS' Memo Contra at 5.

¹⁶ *Id.* at 6.

¹⁷ See Ohio Adm. Code 4901-1-11(B)(4).

Commission should find that IGS has a real and substantial interest in this case and grant its Motion to Intervene.

C. IGS' Intervention is Necessary to Fully Participate in This Case.

Although FirstEnergy moves to deny IGS' Motion to Intervene, it also contends that IGS' intervention in this case is unnecessary "because the Commission's review involves only the filing of initial and reply comments. . . ." ¹⁸

First, IGS would like to note that the Commission has previously granted intervention in proceedings where the scope of the Commission's review was limited to filing initial and reply comments.¹⁹ More importantly, a recent Commission Entry²⁰ in this proceeding strongly suggests that the scope of this case could extend beyond the filing of initial and reply comments. Despite FirstEnergy's argument to the contrary, IGS elected to file a Motion to Intervene out of an abundance of caution, and its motion is necessary for it to enjoy the full rights and privileges as a party to this case.

III. CONCLUSION

Contrary to FirstEnergy' Memorandum Contra, IGS has satisfied the Commission's liberal standard for intervention. IGS' motion indicated that the Commission's review in this case raises questions as to whether FirstEnergy improperly used ratepayer funds to subsidize its lobbying efforts in support of Am. Sub. H.B. 6 and thereby adversely impact IGS' standing as competitive market participant. IGS's intervention is necessary to

¹⁸ FirstEnergy Memo Contra at 1.

¹⁹ See *In the Matter of the Commission's Investigation Into Electric Vehicle Charging Service In This State*, Case No. 20-434-EL-COI, Entry at 18 (Jul. 1, 2020). The Commission granted the Motion to Intervene of the Ohio Consumers' Counsel in a proceeding that was limited in scope to the filing of initial and reply comments.

²⁰ Entry at 3-4 (Oct. 20, 2020).

ensure that its interests are adequately represented. Based on the foregoing, IGS' respectfully requests that the Commission grant its Motion to Intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this *Reply in Support of Motion to Intervene and Memorandum in Support of Interstate Gas Supply Inc.* was filed electronically with the Docketing Division of the Public Utilities Commission of Ohio on this 21st day of October 2020.

/s/ Michael Nugent
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Summary: Reply in Support of Interstate Gas Supply, Inc.'s Motion to Intervene electronically filed by Mr. Michael A Nugent on behalf of Interstate Gas Supply, Inc.