

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY TO OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY’S
MEMORANDUM CONTRA TO THE MOTION TO INTERVENE
OF
THE OHIO MANUFACTURERS’ ASSOCIATION ENERGY GROUP**

I. INTRODUCTION

On September 15, 2020, the Public Utilities Commission of Ohio (Commission) opened the above-captioned case to review Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s (collectively, FirstEnergy Utilities) political and charitable spending in support of Am. Sub. H.B.6. (H.B. 6) and against the subsequent referendum effort. In doing so, FirstEnergy Utilities were ordered to show cause demonstrating that the costs of any political or charitable spending in support of H.B. 6 were not included, directly or indirectly, in any rates or charges paid by customers.¹ Significantly, the Commission’s review is concurrent with a federal prosecution and state civil lawsuit alleging that numerous illegal acts and schemes, to which FirstEnergy Utilities and/or their parent company or affiliates and shared employees were an integral part, were committed in direct relation to the enactment of H.B. 6.²

¹ See Entry at ¶ 5 (September 15, 2020).

² *United States of America v. Larry Householder, Jeffrey Longstreth, Neil Clark, Matthew Borges, Juan Cespedes, and Generation Now*, Case No. 1:20-MJ-00526 (S.D. Ohio) (July 17, 2020); see *State of Ohio v. FirstEnergy Corp.*, Complaint (September 23, 2020), <https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/State-ex-rel-Yost-v-FirstEnergy-et-al-Complaint-Al.aspx>.

Interested parties, including customers and customer groups, are entitled to participate in the investigation as to whether Ohio customers have “foot the bill” for FirstEnergy Utilities’ alleged misconduct relating to H.B. 6, satisfying the standard for intervention set forth in Ohio law and the Commission’s rules, which the Supreme Court of Ohio has said should be liberally granted.

On October 20, 2020, the Commission issued an Entry vacating the existing deadlines to submit comments on the FirstEnergy Utilities’ response to the Commission’s order to show cause.³ The Commission also established a deadline of November 2, 2020 for the filing of memoranda contra the FirstEnergy Utilities’ motion for a protective order to preclude the deposition of Santino L. Fanelli.⁴ Lastly, the Commission ordered a prehearing conference to be held, on the record, to address the motion for protective order.⁵ Accordingly, the scope of this proceeding is still developing and may very well extend beyond merely the filing of comments as the FirstEnergy Utilities have asserted.⁶

Moreover, as other interested parties have noted in recent filings in this proceeding, when asked by the Ohio House Select Committee on Energy Policy and Oversight about the scope and procedural posture of the investigation opened by the Commission, the Chairman confirmed that participation in the proceeding by interested parties would not be limited to merely providing comments as it is an investigation, a case, that will include interventions and discovery.⁷

³ Entry at ¶ 15 (October 20, 2020).

⁴ Id. at ¶ 13.

⁵ Id. at ¶ 14.

⁶ FirstEnergy Utilities’ Memoranda Contra at 1.

⁷ See <https://ohiochannel.org/video/ohio-house-select-committee-on-energy-policy-and-oversight-9-16-2020> (questions beginning at 1:11:00) (Emphasis added).

On September 30, 2020, relying on its right to participate in Commission proceedings that may adversely affect its members, who are customers of FirstEnergy Utilities, the Ohio Manufacturers' Association Energy Group (OMAEG) intervened in this proceeding. OMAEG intervened in the proceeding in order to participate fully in the investigation, including to conduct discovery, to ensure that its members' real and substantial interests are adequately represented.

Notwithstanding the foregoing, FirstEnergy Utilities seek to downplay the severity of the allegations relating to the enactment of H.B. 6. And to do so, FirstEnergy Utilities want to minimize participation⁸ and impede a full development of the record and equitable resolution of the issues in this proceeding. To accomplish this, FirstEnergy Utilities are expending ratepayer dollars to challenge numerous interested parties' interventions, and are also causing its customers (and others) to expend their time and resources defending their lawful interventions. FirstEnergy Utilities' imprudent actions and use of ratepayer funds to raise baseless objections must be rejected out of hand.

More specifically, FirstEnergy Utilities filed a memorandum contra OMAEG's Motion to Intervene (Motion), claiming that OMAEG failed to meet the legal standard for intervention in Commission proceedings.⁹ FirstEnergy Utilities' proffered arguments misrepresent Supreme Court of Ohio and Commission precedent governing intervention and, as explained further below, OMAEG demonstrated that it meets the relevant standard for intervention. Therefore, OMAEG respectfully requests that the Commission reject FirstEnergy Utilities' arguments and grant

⁸ See e.g., FirstEnergy Utilities' Memoranda Contra the Motions to Intervene of ELPC (October 5, 2020), NRDC (October 14, 2020), OEC (October 14, 2020), OPAC (October 14, 2020), OMAEG (October 15, 2020), NOAC (October 20, 2020), and OHA (October 20, 2020).

⁹ See FirstEnergy Utilities' Memorandum Contra (October 15, 2020).

OMAEG intervention in this proceeding in order to protect its members' real and substantial interests that may be adversely affected by the outcome of this investigation.

II. ARGUMENT

R.C. 4903.221 and Ohio Adm. Code 4901-1-11 establish the standards for intervention in Commission proceedings. R.C. 4903.221 provides, in relevant part, that any person “who may be adversely affected” by a Commission proceeding is entitled to seek intervention in that proceeding. R.C. 4903.221(B) further requires the Commission to consider the nature and extent of the prospective intervenor’s interest, the legal position advanced by the prospective intervenor and its probable relation to the merits of the case, whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding, and the prospective intervenor’s potential contribution to a just and expeditious resolution of the issues involved. Ohio Adm. Code 4901-1-11 permits intervention to a party who demonstrates a real and substantial interest in the proceeding and who is so situated that the disposition of the proceeding may impair or impede its ability to protect that interest and whose interest is not adequately represented by an existing party. As discussed below, OMAEG’s Motion satisfied these standards and, accordingly, the Commission should grant OMAEG’s intervention in this proceeding.

A. In its Motion, OMAEG satisfied the requirements of Ohio Adm. Code 4901-1-11(A)(2) by demonstrating its real and substantial interests in this proceeding.

The Commission opened the above-captioned proceeding “to review the political and charitable spending by the FirstEnergy Utilities in support of Am. Sub. H.B.6 and the subsequent referendum effort.”¹⁰ In its Motion, OMAEG identified its real and substantial interests in this proceeding as ensuring: (1) “that any costs incurred by its members for utility services are just,

¹⁰ Entry at ¶ 5 (September 15, 2020).

reasonable, and consistent with Ohio law”; and (2) “that its members did not directly or indirectly fund any political or charitable spending efforts in support of H.B. 6 or the subsequent referendum effort through rates and charges paid to the FirstEnergy distribution utilities.”¹¹

FirstEnergy Utilities conceded that OMAEG’s first stated interest satisfies the standard set forth in the Ohio Adm. Code, but curiously asserted OMAEG’s second interest is not “real and substantial” and lies outside of the scope of the proceeding.¹² More specifically, FirstEnergy Utilities argued that this proceeding is about charges paid by customers and does not concern how FirstEnergy Utilities may have used funds from their revenues.¹³ FirstEnergy Utilities’ argument fails for multiple reasons.

1. Contrary to FirstEnergy Utilities’ assertions and misapplication of law, OMAEG’s real and substantial interest falls within the scope of this proceeding.

OMAEG’s interest in ensuring that rates and charges that its members have paid (or will pay) were not (or will not be) directly or indirectly used to support H.B. 6 is substantially related to the purpose of this proceeding, which is to review H.B. 6 spending by the FirstEnergy Utilities. FirstEnergy Utilities cite an Entry in Case No. 91-414-EL-AIR to support its claim that OMAEG’s second stated interest is unrelated to the purpose of this proceeding.¹⁴ That proceeding, however, is wholly inapplicable to the issues here. Specifically, in Case No. 91-414-EL-AIR, the Commission denied the city of Cincinnati’s intervention in the rate case because the city and its residents were *not customers* of the utility and neither the city nor its residents would pay any rates

¹¹ OMAEG’s Motion at 5.

¹² FirstEnergy Utilities’ Memorandum Contra at 2.

¹³ *Id.*

¹⁴ *Id.* at 3-4.

established in the proceeding.¹⁵ The city's only colorable interest in the rate case was a stipulation; however, the stipulation's terms restricted its use in the rate case.¹⁶ In contrast, it is undisputed that OMAEG's members are in fact customers of FirstEnergy Utilities and have paid or will pay the rates and charges referenced by the Commission in opening this investigation. Specifically, the Commission stated that it is reviewing whether "the costs of any political or charitable spending in support of Am. Sub. H.B 6...were [] included, directly or indirectly, in any rates or charges paid by customers."¹⁷ OMAEG's members are the customers who paid the rates and charges being reviewed.

FirstEnergy Utilities' other attempt to allege that OMAEG's second stated interest is outside of the purpose of this proceeding is similarly inapplicable.¹⁸ In the case referenced by FirstEnergy Utilities, Case No. 05-5-HT-AIR, the Commission denied an intervention by a utility company because the case was concerning a competitor utility's application to increase its rates.¹⁹ Again, the would-be intervenor was *not* a customer of the utility and would not pay any rates established by the rate case; therefore, the Commission determined that the scope of the proceeding was to secure customers the best possible rates, and not to adjudicate a dispute between competitors.²⁰ In both of the rate cases that FirstEnergy Utilities cite, the potential intervenors were

¹⁵ *In the Matter of the Application of the Dayton Power & Light Co. for Auth. to Amend Its Filed Tariffs to Increase the Rates & Charges for Elec. Serv.*, 1991 WL 11811072, Case No. 91-414-EL-AIR, Entry at ¶ 6 (December 6, 1991).

¹⁶ *Id.*

¹⁷ See Entry at ¶ 5 (September 15, 2020).

¹⁸ FirstEnergy Utilities' Memorandum Contra at 3.

¹⁹ *In the Matter of the Application of Akron Thermal, Limited Partnership for an Increase in Rates for Steam and Hot Water Service*, Case No. 05-05-HT-AIR, Entry at p. 4 (June 14, 2005).

²⁰ *Id.* at ¶ 9.

not customers of and paid no rates to the respective utilities, and their asserted interests were wholly unrelated to the purpose of the proceedings to establish customers' rates.

Contrastingly, OMAEG has established that its members are customers of the FirstEnergy Utilities, pay rates and charges to the FirstEnergy Utilities (including those authorized under H.B. 6), and that OMAEG has directly participated in several Commission proceedings concerning the implementation of various H.B. 6 provisions.²¹ Thus, the cases relied upon by FirstEnergy Utilities have no relevance to OMAEG's stated interests in this proceeding. Furthermore, the Commission has historically recognized OMAEG's interest in FirstEnergy Utilities' proceedings.²² As such, the Commission should find that FirstEnergy Utilities' arguments are without merit and that OMAEG has established real and substantial interests in this proceeding in satisfaction of Ohio Adm. Code 4901-1-11(A)(2).

In addition, contrary to FirstEnergy Utilities' argument, the Commission has allowed customer participation in COI cases and recognized customers' real and substantial interests in recent proceedings.²³ While each intervenor must demonstrate his or her own real and substantial

²¹ See, e.g., *In the Matter of Establishing the Nonbypassable Recovery Mechanism for Net Legacy Generation Resource Costs Pursuant to R.C. 4928.148*, Case No. 19-1808-EL-UNC (OVEC Cost Recovery Proceedings); *In The Matter Of The Application Of Ohio Power Company For Approval Of Its Energy Efficiency And Peak Demand Reduction Program Portfolio Plan for 2017 Through 2020*, Case Nos. 17-1398-EL-POR, et al.; *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Decoupling Mechanism*, Case Nos. 19-2080-EL-ATA, et al.; *In the Matter of the Application of Ohio Power Company for Approval of a Decoupling Mechanism*, Case Nos. 20-1099-EL-ATA, et al.; *In the Matter of Establishing the Clean Air Fund Rider Pursuant to R.C. 3706.46*, Case No. 20-1143-EL-UNC.

²² See, e.g. *In the Matter of the Determination of the Existence of Significantly Excessive Earnings for 2019 Under the Electric Security Plan of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 20-1034-EL-UNC; , *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015*, Case No. 12-2190-EL-POR.

²³ *In the Matter of the Commission's Investigation into PALMco Power OH, LLC dba Indra Energy and PALMco Energy OH, LLC dba Indra Energy's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-2153-GE-COI, Entry at ¶ 19 (April 6, 2020); *In the Matter of the Commission's Investigation into SFE Energy Ohio, Inc. and Statewise Energy Ohio, LLC's Compliance with the Ohio Revised Code and Ohio Administrative Code and Potential Remedial Action*, Case No. 20-1216-GE-COI, Entry at ¶ 13 (September 28, 2020).

interest in the proceeding that cannot be adequately represented by an existing party, FirstEnergy Utilities have implicitly admitted that customers and customer groups have real and substantial interests related to this proceeding. On September 23, 2020, Ohio Energy Group (OEG) filed its Motion to Intervene.²⁴ OEG's stated interest in this proceeding is that "[its member] companies purchase electric distribution services from First Energy."²⁵ FirstEnergy Utilities failed to challenge OEG's intervention within the deadline established in the Ohio Adm. Code.²⁶ Also, on September 21, 2020, the Office of the Ohio Consumers' Counsel (OCC), filed its intervention which FirstEnergy Utilities have also not opposed.

Consequently, the Commission should not permit FirstEnergy Utilities to challenge the adequacy of OMAEG's stated interests when it has implicitly recognized the adequacy of other customers. Although those customer groups cannot adequately represent the specific interests of OMAEG, FirstEnergy Utilities' claim that customers themselves do not have standing in this case must fail. Such an interpretation would result in unfair and inequitable treatment of interested parties.

2. Contrary to the plain language of the Entry, FirstEnergy Utilities attempt to arbitrarily limit the scope of the Commission's review.

As previously mentioned, FirstEnergy Utilities claim that this proceeding is only about the inclusion of H.B. 6 costs in customers' charges and rates and does not involve whether rates and charges paid by customers were used to support H.B. 6.²⁷ This argument contradicts the plain language of the Commission's Entry. The Entry states, "this proceeding should be opened to

²⁴ OEG's Motion to Intervene (September 23, 2020).

²⁵ Id.

²⁶ See Ohio Adm. Code 4901-1-12(B)(1).

²⁷ FirstEnergy Utilities' Memorandum Contra at 2.

review political and charitable spending by the FirstEnergy Utilities in support of Am. Sub. H.B.6 and the subsequent referendum.”²⁸ OMAEG’s second stated interest of ensuring that its members did not fund H.B. 6 support efforts through rates or charges paid to the FirstEnergy Utilities falls squarely within this purpose. Next, the Commission directed FirstEnergy to show cause “that the costs of *any* political or charitable spending in support of Am. Sub. H.B. 6, or the subsequent referendum effort, were not included, *directly or indirectly*, in *any* rates or charges paid by ratepayers in this state.”²⁹ The Commission’s expansive language in this directive also directly conflicts with FirstEnergy Utilities’ self-serving interpretation that the Commission intended to limit the scope of its review so narrowly as to exclude a review of whether FirstEnergy Utilities’ customers’ money was used to fund political and charitable spending in support of H.B. 6.

Nonetheless, even if FirstEnergy Utilities’ claim is correct (which it is not) and that this proceeding is only about the inclusion of H.B. 6 costs in customers’ charges and rates, OMAEG still has standing to intervene as OMAEG has an interest in whether FirstEnergy Utilities inappropriately included H.B. 6 costs in customers’ charges and rates paid for by customers, like OMAEG’s members.

Lastly, FirstEnergy Utilities’ argument that this proceeding only involves charges paid by customers and not how FirstEnergy Utilities used its revenue is a distinction without a difference. H.B. 6 is a statute that authorized new charges to be assessed to customers and provided revenue to Ohio’s electric distribution utilities (EDUs) as a result of those new charges to customers.³⁰ Thus, any customer’s money unlawfully used to support H.B. 6 necessarily also affects rates and

²⁸ Entry at ¶ 5 (September 15, 2020).

²⁹ Id. (emphasis added).

³⁰ See, e.g., OMAEG’s Motion at 3 (citing R.C. 3706.46(A)(1)’s requirement that for bills rendered on or after January 1, 2021, utilities must assess retail electric customers a monthly charge sufficient to produce an annual revenue requirement of \$170 million.).

charges paid by customers. FirstEnergy Utilities' arguments are without merit and should be rejected and OMAEGs intervention in this proceeding should be granted.

3. FirstEnergy Utilities erroneously argue that the Commission lacks jurisdiction to review EDUs' spending of customers' money collected pursuant to Commission authorized rates and charges.

FirstEnergy Utilities incorrectly argue that OMAEG's second stated interest in this proceeding is not "real and substantial" because the Commission lacks authority to review FirstEnergy Utilities' political and charitable spending.³¹ In *Elyria Tel. Co.*, the Supreme Court of Ohio held that public utilities have the right to manage their own internal affairs, "*unless in doing so a situation develops which is inimical to the public interest.*"³² FirstEnergy Utilities cited *Elyria Tel. Co.* for the proposition that this proceeding is an improper forum for OMAEG to question the prudence of FirstEnergy's management decisions.³³ In light of the allegations that the FirstEnergy Utilities, FirstEnergy Corp., and its affiliates face,³⁴ it is safe to say that a situation has developed which is inimical to the public interest and the prudence of FirstEnergy Utilities' management decisions related to H.B. 6 are no longer shielded from Commission review.

FirstEnergy Utilities then rely on a rule review proceeding where the Commission declined to adopt a rule that would prohibit EDUs from using political contributions/donations to gain a competitive advantage over aggregation services.³⁵ In rejecting the proposed rule, the Commission

³¹ See FirstEnergy Utilities' Memorandum Contra at 3.

³² *Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 447, 110 N.E.2d 59 (1953) (emphasis added) (referencing *City of Cleveland v. Pub. Util. Comm.*, 102 Ohio St. 341, 131 N.E. 714).

³³ See FirstEnergy Utilities' Memorandum Contra at 3.

³⁴ See, e.g., *State of Ohio v. FirstEnergy Corp.*, Complaint at 8 (September 23, 2020) <https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/State-ex-rel-Yost-v-FirstEnergy-et-al-Complaint-AI.aspx> (alleging that FirstEnergy Corp. and its affiliates in an effort to enact H.B. 6 and prevent its repeal via referendum, engaged in a pattern of corrupt activity, laundered money, committed bribery, and tampered with evidence.).

³⁵ See FirstEnergy Utilities' Memorandum Contra at 3 (citing *In re Chapter 4901:1-20, Ohio Adm. Code*, 2004 WL 1950732, Case No. 04-48-EL-ORD, Finding and Order at p. 14 (July 28, 2004)).

stated that *prohibiting or restricting* political contributions is outside of its jurisdiction and was unrelated to the corporate separation rules at issue in the proceeding.³⁶ Nothing in the order that FirstEnergy Utilities cited suggests that the Commission lacks authority to review EDUs' political and charitable spending of money collected pursuant to Commission-authorized rates and charges. Indeed, the Ohio General Assembly has vested the Commission with plenary authority to supervise all regulated utilities within its jurisdiction and authorized the Commission to examine public utility services to ensure compliance with all laws.³⁷ Therefore, the Commission has supervisory authority to ensure that the revenue created from rates and charges assessed on customers was not used for any unlawful purposes. Furthermore, the Commission has historically disallowed political spending to be included as operating expenses in rates borne by customers.³⁸

In sum, OMAEG's Motion demonstrated substantial and real interests that satisfy Ohio Adm. Code 4901-1-11(A)(2). FirstEnergy Utilities incorrectly argued that OMAEG's interest is outside of the scope of this proceeding and that the Commission lacks authority to review FirstEnergy's political and charitable spending of revenue collected pursuant to Commission authorized rates and charges. For the above-mentioned reasons, the Commission should find that OMAEG has a real and substantial interest in this proceeding as a matter of law and grant OMAEG's intervention.

³⁶ *In re Chapter 4901:1-20, Ohio Adm. Code*, 2004 WL 1950732, Case No. 04-48-EL-ORD, Finding and Order at p. 14 (July 28, 2004) (emphasis added).

³⁷ See R.C. 4905.06.

³⁸ *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 258, 431 N.E.2d 683 (1982) (affirming the Commission's order).

B. OMAEG demonstrated that the disposition of this proceeding may, as a practical matter, impair or impede its ability to protect the interests asserted in its Motion in satisfaction of Ohio Adm. Code 4901-1-11(A)(2) and R.C. 4903.221.

FirstEnergy Utilities next assert that OMAEG's Motion fails to meet the standard of intervention established in Ohio Adm. Code 4901-1-11(A)(2), which requires a potential intervenor to demonstrate that "the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest."³⁹ As explained above, OMAEG articulated its real and substantial interests in this proceeding as ensuring: (1) its members are only assessed just, reasonable, and lawful rates; and (2) that its members did not directly or indirectly fund political or charitable spending in support of H.B. 6 through rates and charges paid to the FirstEnergy Utilities.⁴⁰

Interestingly, FirstEnergy Utilities argue, "the ultimate disposition of this case will not affect OMAEG's claimed interests in any way, let alone impair or impede OMAEG's ability to protect its interests."⁴¹ OMAEG's Motion established that its members are significant consumers of electricity in FirstEnergy Utilities' service territory.⁴² It is unlawful for political or charitable contributions to be included as operating expenses in any rates that customers pay.⁴³ Should the Commission determine that H.B. 6 costs were included directly or indirectly in any rates or charges that FirstEnergy Utilities assessed its customers and revenue collected from customers was used to fund illegal activities, then the disposition of this case would clearly affect OMAEG's interest

³⁹ FirstEnergy Utilities' Memorandum Contra at 3-4.

⁴⁰ OMAEG's Motion at 5.

⁴¹ FirstEnergy Utilities' Memorandum Contra at 4.

⁴² OMAEG's Motion at 5.

⁴³ See *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 258, 431 N.E.2d 683 (1982).

in ensuring that its members are not directly or indirectly funding illegal activities and that customers are only assessed just, reasonable, and lawful rates.

Similarly, the Commission's disposition in this proceeding directly affects OMAEG's second stated interest. Should the Commission determine that customers' money paid to the FirstEnergy Utilities through rates and charges was used unlawfully to support charitable or political spending in support of H.B. 6, this also necessarily impacts OMAEG's members. H.B. 6 had numerous effects in Ohio, including the creation of new charges for customers and the provision of revenue to Ohio's EDUs.⁴⁴ In its Motion, OMAEG also demonstrated that it has participated in numerous proceedings involving the Commission's implementation of various H.B. 6 provisions.⁴⁵ Undoubtedly, a Commission determination that customers' money paid to FirstEnergy Utilities was used unlawfully to fund H.B. 6 political and charitable spending would affect OMAEG members' economic and legal interests.

FirstEnergy Utilities then argue that because the Commission has established a schedule for comments and reply comments in this proceeding, OMAEG's ability to protect its interests would be unaffected should the Commission deny OMAEG's Motion.⁴⁶ However, the scope of this proceeding is still being determined. Multiple parties have asked the Commission to expand the scope of the proceeding.⁴⁷ Specifically, the Environmental Advocates have filed a motion requesting that the Commission expand the scope of its review to investigate: (1) to what extent the FirstEnergy Utilities and their affiliates were involved with HB 6; (2) how FirstEnergy

⁴⁴ See, e.g., R.C. 3706.46(A)(1).

⁴⁵ OMAEG's Motion at 5, n. 7.

⁴⁶ FirstEnergy Utilities' Memorandum Contra at 4.

⁴⁷ See Motion of the Environmental Advocates to Expand the Scope of the Commission's Review (September 29, 2020); Entry at ¶¶ 13, 14 (October 20, 2020) (directing parties to file memoranda contra FirstEnergy Utilities' Motion for a Protective Order and stating that a subsequent Entry will establish the date of a prehearing conference); also see OCC's Interlocutory Appeal (September 21, 2020).

Utilities' actions may have violated Ohio's corporate separation requirements; and (3) to what extent the FirstEnergy Utilities or their parent corporation's supported FirstEnergy Solutions, currently known as Energy Harbor.⁴⁸ Similarly, OCC has filed an interlocutory appeal asserting that the Commission erred by failing to expand its investigation by appointing an independent auditor, establishing a procedural schedule allowing for ample discovery, and reopening the Distribution Modernization Rider Case.⁴⁹

The Commission's recent entry recognized these requests and has allowed the issue to be fully briefed prior to comments being filed. The Commission, through its October 20, 2020 Entry, vacated the upcoming deadlines to file comments on the FirstEnergy Utilities' response to the Commission's order to show cause.⁵⁰ In addition, the Commission set a deadline of November 2, 2020 for the filing of memoranda contra the FirstEnergy Utilities' motion for a protective order to preclude the deposition of Santino L. Fanelli.⁵¹ Finally, the Commission directed that a prehearing conference will be held, on the record, to address the motion for protective order.⁵² Based on the actions of the Commission and stakeholders, the scope of this proceeding is still not determined and may allow for more participation than merely the filing of comments as the FirstEnergy Utilities argued.⁵³ Consequently, there is a very real possibility that denying OMAEG's intervention would impair and impede its ability to protect the real and substantial interests that its members have in this proceeding.

⁴⁸ Motion of the Environmental Advocates to Expand the Scope of the Commission's Review at 2 (September 29, 2020).

⁴⁹ OCC's Interlocutory Appeal at 3-5.

⁵⁰ Entry at ¶ 15 (October 20, 2020).

⁵¹ Id. at ¶ 13.

⁵² Id. at ¶ 14.

⁵³ FirstEnergy Utilities' Memoranda Contra at 1.

Moreover, typically, even in proceedings where comments are solicited, parties have discovery rights.⁵⁴ To be able to conduct discovery, a party must have intervened in the case. As mentioned above, rights to discovery in investigation proceedings have been allowed previously.⁵⁵

Nonetheless, even if the Commission intends to limit this proceeding to that of only comments and reply comments, the FirstEnergy Utilities' argument is still moot. The Commission's Entry directed "*interested parties* [to] file comments regarding the Companies' response to this Entry by October 29, 2020 and reply comments by November 13, 2020."⁵⁶ Ohio Adm. Code 4901-1-10-(A)(4) defines a "party" as "[any] person granted leave to intervene under rule 4901-1-11 of the Administrative Code." Per the Commission's rules and directive in its Entry, intervention is required for OMAEG to submit comments and reply comments in this proceeding. Furthermore, only a party may appeal a Commission decision.⁵⁷

Consequently, contrary to FirstEnergy Utilities' claims, denying OMAEG intervention would directly impair and impede OMAEG's ability to protect its real and substantial interests.

⁵⁴ See Ohio Adm. Code 4901-1-16(H).

⁵⁵ *In the Matter of the Commission's Investigation into PALMco Power OH, LLC dba Indra Energy and PALMco Energy OH, LLC dba Indra Energy's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-2153-GE-COI, Entry at ¶ 20 (April 6, 2020); *In the Matter of the Application of Verde Energy USA Ohio, LLC for Certification as a Competitive Retail Electric Supplier*, Case Nos. 11-5886-EL-CRS, et al., Entry at ¶ 10 (March 24, 2020); *In the Matter of the Commission's Investigation into SFE Energy Ohio, Inc. and Statewise Energy Ohio, LLC's Compliance with the Ohio Revised Code and Ohio Administrative Code and Potential Remedial Action*, Case No. 20-1216-GE-COI, Entry at ¶ 15 (September 28, 2020); also see the Chairman's statement regarding discovery in this proceeding: <https://ohiochannel.org/video/ohio-house-select-committee-on-energy-policy-and-oversight-9-16-2020>, questions beginning at 1:11:00.

⁵⁶ Entry at ¶ 5 (September 15, 2020) (emphasis added).

⁵⁷ R.C. 4905.13.

C. OMAEG's Motion satisfies the five factors established in Ohio Adm. Code 4901-1-11(B).

Ohio Adm. Code 4901-1-11(B) directs the Commission to consider the following five factors when determining whether to grant a person's intervention:

- (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 by the prospective intervenor will unduly prolong or delay the proceedings;
- (4) whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues; and
- (5) the extent to which the person's interest is represented by existing parties.

In satisfaction of the first factor, OMAEG's Motion established that its members are significant consumers of electricity in FirstEnergy Utilities' service territory and that OMAEG has participated in numerous proceedings before the Commission involving the FirstEnergy Utilities and implementation of various H.B. 6 provisions.⁵⁸

Next, FirstEnergy Utilities claimed that OMAEG failed to satisfy the second factor and did not identify its legal position and its relation to the case.⁵⁹ However, OMAEG identified its legal positions as ensuring its members were not unlawfully assessed rates or charges that included H.B. 6 costs and that its members did not directly or indirectly fund political or charitable spending in support of H.B. 6, which has been alleged to include illegal activities.⁶⁰ These positions are squarely within the purpose of the proceeding which is "to review the political and charitable spending by the FirstEnergy utilities in support of Am. Sub. H.B.6 and the subsequent referendum

⁵⁸ OMAEG's Motion at 5.

⁵⁹ FirstEnergy Utilities' Memorandum Contra at 4.

⁶⁰ See OMAEG's Motion at 5.

effort.”⁶¹ Neither the Ohio Revised Code nor the Ohio Adm. Code require OMAEG to develop a full-fledged legal argument on the merits of the proceeding in its Motion to Intervene as FirstEnergy suggests is required. It would be impractical to require OMAEG to do so as the issues in this proceeding are still being developed and FirstEnergy Utilities hold the vast majority of the relevant information.

In satisfaction of the third factor, OMAEG asserted that its participation in the proceeding will not unduly prolong or delay the proceeding.⁶² OMAEG is regularly involved in proceedings before the Commission and filed its Motion before FirstEnergy Utilities responded to the Commission’s order to show cause.⁶³ At that early stage of the proceeding, there is no reason to believe that OMAEG’s participation would delay the proceeding and FirstEnergy Utilities have offered no arguments to the contrary.

In its Motion, OMAEG satisfied the fourth factor by explaining how its unique knowledge and perspective would contribute to the full development and equitable resolution of the facts in this case.⁶⁴ Specifically, OMAEG explained that it regularly appears before the Commission and has been extensively involved in numerous proceedings involving H.B. 6’s various provisions. FirstEnergy argued that because the Commission has not scheduled a hearing in this case, OMAEG will have no need to develop factual issues.⁶⁵ Even if this were true, the Supreme Court of Ohio

⁶¹ Entry at ¶ 5 (September 15, 2020).

⁶² See OMAEG’s Motion at 6.

⁶³ Id.

⁶⁴ Id. at 5-6.

⁶⁵ FirstEnergy Utilities’ Memorandum Contra at 5.

has held that intervention in Commission proceedings should be granted to stakeholders liberally regardless of whether the Commission holds a hearing or not.⁶⁶

Lastly, OMAEG satisfied the fifth factor by demonstrating the unique economic and legal interests of its members in this proceeding and asserting that no other party adequately represents those interests.⁶⁷ The Commission should grant OMAEG intervention as its Motion meets the legal standard for intervention in Commission proceedings.

D. FirstEnergy Utilities' opposition to OMAEG's Intervention is contrary to the Commission's stated policy of encouraging broad participation in its proceedings.

The Commission's long-standing policy has been "to encourage the broadest possible participation in its proceedings."⁶⁸ Regardless of whether the Commission holds a hearing, intervention is to be granted liberally to all stakeholders with substantial interests.⁶⁹ OMAEG regularly participates in proceedings before the Commission, including those proceedings directly related to the FirstEnergy Utilities, their rates and charges, and H.B. 6, and has demonstrated its real and substantial interests in this proceeding. Denying OMAEG intervention would be inconsistent with both Supreme Court of Ohio and Commission precedent.

⁶⁶ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2006-Ohio-5853, ¶ 20, 111 Ohio St. 3d 384, 388, 856 N.E.2d 940, 946.

⁶⁷ See OMAEG's Motion at 5- 6.

⁶⁸ *In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service* , Case No. 85-675-EL-AIR, Entry at ¶ 6 (January, 14, 1986).

⁶⁹ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2006-Ohio-5853, ¶ 20, 111 Ohio St. 3d 384, 388, 856 N.E.2d 940, 946.

III. CONCLUSION

For the aforementioned reasons, OMAEG respectfully requests that the Commission reject FirstEnergy Utilities' arguments and grant OMAEG's Motion to Intervene.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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Summary: Reply to The Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company's Memorandum Contra to the Motion to Intervene of The Ohio Manufacturers' Association Energy Group electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group