**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 |

**MEMORANDUM CONTRA FIRSTENERGY SOLUTIONS CORP.’S**

**MOTION TO STRIKE CORRESPONDENCE**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

Consumers have cause to be concerned about the financial stability of FirstEnergy Solutions Corp. (“FES”). As outlined in a November 6, 2017 letter (“Correspondence”) filed in this case by the Office of the Ohio Consumers’ Counsel (“OCC”), FES wants the federal and state governments to be concerned with the viability of its business and authorize assistance through customer-funded subsidies for its unregulated, uneconomical coal-fired and nuclear generation. But FES sees no role for the government, or its established agencies, to protect its customers from the bankruptcy it has publicized as likely at some point.

In a one page motion, FES has moved to strike OCC’s Correspondence.[[1]](#footnote-2) First, FES claims that because OCC is not yet a party to this proceeding, the Public Utilities Commission of Ohio (“PUCO”) should strike OCC’s Correspondence.[[2]](#footnote-3) And second, FES asserts OCC’s Correspondence is not authorized by the PUCO’s rules and is procedurally improper. FES’s arguments are without merit.

At the outset, FES’s Motion is void of any analysis or PUCO precedent supporting its legal conclusions. That’s because there is none. Anyone may file a letter in any PUCO proceeding, without the need to intervene. A motion to intervene is required only to attain party status in a case.[[3]](#footnote-4)

But in this case, OCC’s Correspondence was filed contemporaneously with a motion to intervene, something which FES fails to mention.[[4]](#footnote-5) OCC properly moved to intervene in this proceeding as it has in other similar proceedings.[[5]](#footnote-6) Notwithstanding, there is nothing in the PUCO’s rules that would preclude OCC (or anyone else, for that matter) from filing correspondence, motions, or other pleadings in a proceeding pending PUCO approval of a motion to intervene.

Indeed, it is routine for parties to file motions to intervene and participate in proceedings, including pleading practice and discovery, prior to being granted intervention. FES itself has even participated in previous cases while its motion to intervene was pending.[[6]](#footnote-7) In some cases, motions to intervene have been decided well into a proceeding at evidentiary hearings.[[7]](#footnote-8) Because OCC is not prohibited from filing correspondence, motions, or other pleadings prior to the PUCO granting OCC’s motion to intervene, FES’s Motion must be denied.

Second, FES asserts that “the Correspondence fails to comply with O.A.C. 4901-1-12.”[[8]](#footnote-9) Ohio Adm. Code 4901-1-12 relates to *motions* before the PUCO. A careful review of the rule shows that there is no procedural hurdle that a movant must overcome before being permitted to file correspondence with the PUCO.[[9]](#footnote-10) Further, OCC’s Correspondence was just that, “correspondence.” It was not a motion subject to Ohio Adm. Code 4901-1-12. OCC’s Correspondence was intended to bring to the PUCO’s attention certain matters of concern regarding FES’s probable bankruptcy that may affect consumers, and to develop those matters more fully in this proceeding moving forward.

In its Correspondence, OCC informed the PUCO that FES will likely file for bankruptcy and recommended ways the PUCO could protect FES’s customers from potential service interruption and financial harm. OCC seeks intervention to expound on those risks to FES’s customers and engage in discussions on how to effectively mitigate those risks.

Notably, FES’s Motion itself fails to comply with Ohio Adm. Code 4901-1-12. Under division (A) of the rule, FES’s Motion must be accompanied by a memorandum in support stating the grounds for the motion and citations of any authorities relied upon.[[10]](#footnote-11) FES failed to accompany its Motion with a memorandum in support. And it cited no legal authority for its Motion.

FES’s Motion fails to set forth sufficient basis to strike OCC’s properly filed Correspondence and is wholly void of any analysis or discussion. Bald legal conclusions are not a sufficient basis for granting a motion. Moreover, FES’s Motion itself lacks a memorandum in support and fails to comply with Ohio Adm. Code 4901-1-12. Accordingly, FES’s Motion is materially deficient and must be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission this 5th day of December 2017.

/s/ *Terry L. Etter*

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**SERVICE LIST**

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1. FES Motion to Strike (November 20, 2017) (“Motion”). [↑](#footnote-ref-2)
2. Motion at 1. [↑](#footnote-ref-3)
3. Ohio Adm. Code 4901-1-10(A)(4). [↑](#footnote-ref-4)
4. OCC Motion to Intervene (November 6, 2017). [↑](#footnote-ref-5)
5. *See 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) (granting OCC’s motion to intervene); *see also* *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) (granting OCC’s motion to intervene). [↑](#footnote-ref-6)
6. *See In the Matter of the Commission Review of the Capacity Charge of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC. In that proceeding, FES filed a motion to intervene on January 7, 2011 and subsequently participated in the proceeding by filing comments, reply comments, and memoranda before being granted intervention. [↑](#footnote-ref-7)
7. *See, e.g., In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Energy Efficiency and Peak Demand Reduction Portfolio of Programs*, Case No. 16-576-EL-POR, Tr. 11-12 (March 13, 2017) (granting motions to intervene at the evidentiary hearing). [↑](#footnote-ref-8)
8. Motion at 1. [↑](#footnote-ref-9)
9. Ohio Adm. Code 4901-1-12. [↑](#footnote-ref-10)
10. Ohio Adm. Code 4901-1-12(A). [↑](#footnote-ref-11)