

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)		
Ohio Edison Company, The Cleveland)		
Electric Illuminating Company, and the	)	Case Nos.	09-1947-EL-POR
Toledo Edison Company for Approval of	)		09-1948-EL-POR
Their Energy Efficiency and Peak	)		09-1949-EL-POR
Demand Reduction Program Portfolio)		
Plans for 2010 through 2012 and)		
Associated Cost Recovery Mechanisms)		
)		
In the Matter of the Application of)		
Ohio Edison Company, The Cleveland	)	Case Nos.	09-1942-EL-EEC
Electric Illuminating Company, and the	)		09-1943-EL-EEC
Toledo Edison Company for Approval	)		09-1944-EL-EEC
of Their Initial Benchmark Reports)		
)		
In the Matter of the Energy Efficiency)		
and Peak Demand Reduction Program	)	Case Nos.	09-580-EL-EEC
Portfolio of Ohio Edison Company, The	)		09-581-EL-EEC
Cleveland Electric Illuminating Company,	)		09-582-EL-EEC
and the Toledo Edison Company)		

**COMMENTS REGARDING FIRSTENERGY’S MEMORANDUM CONTRA THE
ENVIRONMENTAL LAW AND POLICY CENTER’S MOTION TO INTERVENE**

Introduction

On December 15, 2009, the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison company (collectively “FirstEnergy” or “Companies”), filed an Application and Report for their Three Year Energy Efficiency and Peak Demand Reduction Plans and Initial Benchmark Reports. The Application concerns the implementation of the energy efficiency and peak demand reduction (“PDR”) requirements of Senate Bill 221 (“S.B. 221”). The Application represents the first application for an energy efficiency and PDR portfolio plan, and the associated “opt-out” and mercantile cost-recovery mechanisms, filed by FirstEnergy pursuant to the provisions of S.B. 221.

After several parties intervened in the consolidated series of cases, and within the time period allowed for intervention requests, the Environmental Law and Policy Center (“ELPC”) filed a Motion to Intervene. On January 7, 2010, FirstEnergy filed a Memorandum Contra to ELPC’s motion (“Memo Contra ELPC”), claiming that ELPC does not meet the statutory tests for intervention as outlined in R.C. 4903.221(B) and Ohio Adm. Code 4901-11-1(B) for various reasons. Each of the Companies’ arguments is without merit, and the sum total of FirstEnergy’s claims necessitates a response from the Ohio Environmental Council (“OEC”), an environmental advocacy organization, fellow intervenor in this proceeding, and frequent participant in energy matters before the Commission. These Comments are not filed to defend the motion by the Environmental Law and Policy Center; ELPC and its legal staff are capable of making their own legal arguments before the Commission. However, FirstEnergy’s Memorandum Contra ELPC contains arguments and expresses a narrow view of standing that must be rebutted by the OEC.

FirstEnergy’s Memorandum Contra ELPC, when compounded with similar filings in other cases before the Commission, betrays the Companies’ strategy regarding energy standard compliance: (1) keep environmental advocates out of cases; (2) attempt to push through compliance applications with minimal review; and (3) in the process, establish a new standing precedent that severely limits interested party intervention. The Commission should not only reject the Companies’ arguments in this proceeding, but should take this opportunity to respond to FirstEnergy’s attempts to limit interested party standing. The Commission should put forth a clear statement on the rights of environmental intervenors to participate in proceedings to implement the mandates codified by S.B. 221.

Argument

FirstEnergy’s memoranda contra consistently argue that environmental intervenors are unable to satisfy several of the four factors that shall be considered when ruling on a motion to

intervene: notably R.C. §§ 4903.221(B)(1), (B)(3), and (B)(4). Accordingly, the following Comments address whether environmental intervenors such as ELPC have a valid interest in these proceedings; whether environmental intervenors will cause undue delay; and whether such intervenors can significantly contribute to the development of the issues.

I. FirstEnergy Does Not Recognize the Environmental Impact of This Proceeding

FirstEnergy's Memorandum Contra ELPC, and similar memoranda filed contra other environmental organizations, show that the Companies do not understand how non-compliance with energy efficiency benchmarks could affect the environment. For example, FirstEnergy suggests that because ELPC's interest is in "environmental health," it does not follow that ELPC could be "adversely affected by a Commission order."¹ That is, the Companies imply that non-economic environmental harm is not an adverse effect. FirstEnergy has used a similar line of argument in other energy efficiency cases before the Commission, including in 09-1102-EL-EEC. In that case, FirstEnergy filed a Memorandum Contra the OEC's Motion to Intervene, the main argument of which was that OEC should be denied intervention because it did not demonstrate that its members could "pay more" as a result of the disposition of the case.² FirstEnergy suggests that the only reason why one could be affected by a Commission decision is if he or she would "pay more" as a result of the decision. This is an extremely narrow view of the consequences of energy efficiency and PDR projects.

There are certainly many potential consequences beyond economic ones. The consideration and resolution of FirstEnergy's application for its energy efficiency and PDR portfolio plan, which includes efficiency "opt-out" requests, will have a significant impact on the environment. There can be no doubt that the resolution of this case and others like it will

¹ Memorandum Contra ELPC at 3.

impact—positively or negatively—the air quality in Ohio. To give one simple example, if FirstEnergy is awarded credit for an ineligible efficiency project, that project would displace other, actual, efficiency projects. Energy efficiency and PDR results in reduced energy consumption, reduced demand for electricity, and consequently less fossil fuel combustion for electricity generation and a reduction in air pollutant emissions. Not only would non-compliance result in avoidance of the statutory mandates, but it would result in a hardship on the environment. That potential hardship represents the environmental intervenors' interest.

II. The Participation by Environmental Organizations in PUCO Cases Contributes to Fuller Discussions of the Issues and Better Decisions

Environmental organizations have a unique interest in the implementation of S.B. 221. Unlike organizations representing consumers and business interests, environmental organizations are interested in the realization of S.B. 221's mandates solely because of their impact on the environment. For example, a particular method of calculation or award of efficiency or PDR credit could result in a benefit to a consumer or business interest, but a detriment to the air quality within Ohio. Therefore, environmental organizations have unique interests in the outcome of these proceedings. Without the participation of these groups, environmental consequences may not be fully developed or considered.

There have been several recent situations in which the participation of environmental intervenors has contributed to a fuller development of the issues. As an example, FirstEnergy recently applied to receive efficiency credit for existing efficiency projects and for projects undertaken by other companies in a manner not allowed under the code.³ The Application's deficiencies were identified by the OEC and other environmental and consumer advocates, which resulted in the PUCO's dismissal of FirstEnergy's Application. Additionally,

² 09-1102-EL-EEC, Memorandum Contra OEC at 3. This "pay more" argument is identical to FirstEnergy's Memorandum Contra OEC in 09-1100.

environmental and consumer intervenors have identified similar errors in other applications filed by the Companies.⁴ It is not clear whether the errors in the Companies' Applications would have been caught without intervenor scrutiny. In particular, the OEC has developed a history of substantive participation over the past decade.⁵ The review and scrutiny by environmental intervenors such as ELPC and the OEC has resulted in better compliance applications by FirstEnergy and other utilities without delaying the proceedings. The participation of environmental organizations in Commission proceedings will continue to improve utility compliance with Ohio law. Finally, we note FirstEnergy's poor performance implementing the standards codified by S.B. 221, as described above. This poor performance only emphasizes the importance of participation by environmental organizations.

III. FirstEnergy is Attempting to Severely Limit Participation in Cases Before the Commission, in Contravention of the Commission's Stated Policy

FirstEnergy's repeated attempts to prevent participation in Commission proceedings show that its goal and strategy is to push through its applications quickly, and without the review of interest parties. This strategy is both disappointing and puzzling. However, never before has the Commission applied its intervention criteria in the manner sought by FirstEnergy. The Commission has granted hundreds of interventions by numerous environmental organizations in cases such as this one. By allowing each intervention by an environmental organization, the Commission has recognized what FirstEnergy does not: Environmental intervenors have an

³ Case No. 09-384-EL-EEC

⁴ See, e.g., Case No. 09-535-EL-EEC. FirstEnergy sought to at once avoid its 2009 PDR requirements due to economic factors and to satisfy its benchmark obligations based on demand response measures undertaken before 2009, which is not permissible by the clear language of R.C. 4928.66(A)(1)(b).

⁵ See Case No. 99-1613-EL-ORD, and the OEC's May 5th 2000 application for rehearing, which include numerous well-sourced recommendations for the implementation of Ohio's environmental disclosure law from other jurisdictions; see Case No. 02-565-EL-ORD and the OEC's May 24th 2002 reply comments which encompassed efforts to create compromise in a Percentage Income Payment Plan Proceeding; and see Case No. 08-935-EL-SS0 and the OEC's submission of the direct testimony of Randy Gunn, on September 29th, 2008, which provided extensive and illuminating analysis on First Energy's initially inadequate energy efficiency program portfolio filing.

interest in the outcome of S.B. 221 compliance cases and provide value to the resolution of those cases.

A similar challenge to interested party intervention by the Ohio Consumers' Counsel ("OCC") reached the Supreme Court of Ohio. In that case, FirstEnergy challenged OCC's Motion to Intervene, arguing that OCC had not demonstrated a sufficient interest in the proceeding.⁶ The Supreme Court of Ohio, applying an abuse of discretion standard, said that OCC should be allowed to intervene. The court wrote that "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."⁷ The court also analogized the PUCO intervention statute with Ohio Civ. Rule 24, which shall be "liberally construed in favor of intervention."⁸

Finally, we point out that it is the Commission's stated policy "to encourage the broadest possible participation in its proceedings."⁹ The Commission should not—and indeed it does not—apply its intervention criteria in a manner that would favor one environmental or consumer advocate to the exclusion of others.¹⁰ FirstEnergy has proven that it does not recognize the Commission's stated policy.

Conclusion

FirstEnergy has repeatedly filed memoranda objecting to environmental intervenors, indicating that such parties do not have an interest in PUCO proceedings and that they will not add value to the proceedings. As we have explained above, these claims are without merit. But even if these memoranda, which mischaracterize and misapply the Commission's rules, do not

⁶ *Ohio Consumers' Counsel v. PUC*, 111 Ohio St. 3d. 384 (2006).

⁷ *Id.* at 387.

⁸ *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144 (1995).

⁹ *Cleveland Elec. Illum. Co.*, Case No. 85-675-EL-AIR, Entry dated January 14, 1986, at 2.

¹⁰ Curiously, FirstEnergy has not objected to the intervention of other intervenors expressing consumer and environmental interests similar to ELPC's in this case. The OEC, OCC, the Natural Resources Defense Council, and the Neighborhood Environmental Coalition have filed motions to intervene which have not received memoranda contra from FirstEnergy.

succeed in keeping parties out of cases, they are damaging nonetheless. FirstEnergy and its stable of lawyers may have the time and inclination to file motion after motion objecting to interested party intervention, but these filings place a significant burden on organizations like the OEC—who must devote precious attorney time to respond even to baseless arguments. The OEC urges the Commission to use this opportunity to make a clear statement on the rights of environmental intervenors to participate in PUCO proceedings to implement Ohio’s new energy laws.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion to Intervene has been served upon the following parties, by electronic or regular U.S. Mail, this 14th day of January, 2010.

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