

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the)	
Alternative Energy Rider Contained in the)	
Tariffs of Ohio Edison Company, The)	Case No.11-5201-EL-RDR
Cleveland Electric Illuminating Company,)	
and The Toledo Edison Company)	
)	

**REPLY TO FIRSTENERGY’S MEMORANDUM CONTRA THE MOTION TO
INTERVENE BY THE ENVIRONMENTAL LAW & POLICY CENTER AND REQUEST
FOR EXPEDITED RULING**

I. Introduction

The Environmental Law and Policy Center (“ELPC”) filed its motion to intervene in this proceeding December 14, 2012, and the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (“FirstEnergy”) filed a memorandum contra the motion on December 17. The Public Utilities Commission of Ohio (“Commission”) should grant ELPC’s motion to intervene because it meets the criteria set forth in both Ohio Revised Code (“ORC”) § 4903.221 and Ohio Administrative Code (“OAC”) § 4901-11-1.

FirstEnergy’s arguments opposing the motion lack merit. First, ELPC’s motion is timely because the Attorney Examiner, at FirstEnergy’s request, pushed back the procedural schedule by eleven weeks so that FirstEnergy’s initial testimony is not due until January 23, 2013, and intervenor testimony is not due until January 31, 2013. Second, the Commission should reject FirstEnergy’s baseless claim that ELPC lacks an interest in this proceeding. The implementation of SB 221’s renewable energy requirements, as well as FirstEnergy’s alleged overpayment for renewable energy credits, is directly related to ELPC’s mission as a non-profit organization focused on improving the Midwest’s environmental quality and economic development. Finally,

ELPC's interests as a regional organization with a focus on both environmental issues and economic development will not be adequately represented by any existing parties. The Commission should reject FirstEnergy's attempt to limit participation in this proceeding and grant ELPC's motion to intervene.

II. ARGUMENT

FirstEnergy argues that case law supports strict limits on intervention in Commission proceedings, but their argument distorts the actual intervention policy at the PUCO which encourages broad public participation. *See 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 (Jan. 14, 1986). The Ohio Supreme Court has made clear 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." *Ohio Consumers' Council v. Pub. Utils. Comm'n of Ohio*, 111 Ohio St. 3d 384, 387 (Ohio 2006). Moreover, "[t]he Commission's policy is to encourage the broadest possible participation in its proceedings." Case No. 85-675-EL-AIR, Entry (Jan. 14, 1986). The granting of ELPC's motion to intervene would further Commission policy and be consistent with the Ohio Supreme Court's directive for the liberal allowance of intervention.

A. ELPC's motion is timely because intervenor testimony is not due until January 31, 2013.

As FirstEnergy points out, the original procedural schedule in this case provided for motions to intervene and intervenor testimony to be filed by November 13, 2012. However, on October 31, two weeks prior to that deadline, the Attorney Examiner modified the procedural schedule to push the November 13 deadline back to January 31, 2013. *See* Case No. 11-5201, Entry (Oct. 31, 2012). While the original Entry specified that intervenor testimony and motions

to intervene were due on the same date, the new Entry is silent on interventions. ELPC assumed that the intervention deadline would be similarly extended along with the deadline for intervenor testimony, but if ELPC is incorrect about this then it requests a waiver of that deadline. There is nothing in the Attorney Examiner Entry to indicate that motions to intervene and intervenor testimony would not continue to be due on the same date, as is common practice in many Commission cases. For example, the Attorney Examiner set the same deadline for the filing of motions to intervene and intervenor testimony in both *In the Matter of the Application and Joint Stipulation and Recommendation of Vectren Energy Delivery of Ohio, Inc., for Approval of its Exemption Authority Granted in Case No. 07-1285-GA-EXM*, Case No. 12-483-GA-EXM, Entry (Feb. 24, 2012), and *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test*, Case No. 11-4571-EL-UNC, Entry (August 25, 2012).

The purpose of setting a deadline for interventions is to protect parties from late interventions that cause prejudice and undue inconvenience to the parties. ELPC has filed its motion to intervene over two months prior to the evidentiary hearing, which is scheduled for February of next year. The motion is also over a month ahead of the deadline for testimony from both FirstEnergy and the intervenors. FirstEnergy has not pointed to any prejudice it would experience due to ELPC's intervention. FirstEnergy fails to allege prejudice because it will not suffer any, as ELPC's intervention at this time will have no impact on FirstEnergy's or any other party's ability to conduct discovery and prepare for the evidentiary hearing. Also, as stated in its motion to intervene, ELPC is committed to working with the Commission, Staff, and other parties within the timeframe established by the Commission in this case.

While the Attorney Examiner failed to explicitly change the date for intervention, the original intervention date was set in the context of the rest of the schedule, which has now been changed. Given that scenario, the Entry should be “liberally construed in favor of intervention” just as the rules regarding intervention are to be liberally construed. *See Ohio Consumers’ Council*, 111 Ohio St. 3d at 387. In *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer*, ELPC and other groups were allowed to intervene in the proceeding even though their motions were indisputably filed after the deadline for intervention. Case No. 11-346-EL-SSO, Entry (July 8, 2011). The Attorney Examiner concluded that ELPC and the other groups would “significantly contribute to the resolution of the issues presented and that intervention [would] not unduly delay the proceedings, particularly due to their representations that they [were] each willing to accept the current posture of the proceedings.” *Id.*

In this proceeding, the Attorney Examiner modified the procedural schedule, at FirstEnergy’s request, extending the due date for intervenor testimony to January 31, 2012. ELPC’s motion is therefore timely and should be granted. ELPC’s intervention in this case will contribute to the resolution of the issues, and, as stated above, ELPC is willing to work within the schedule set by the Commission.

B. ELPC has a real and substantial interest in this proceeding.

As FirstEnergy explains, this case involves “the costs [sic] that the Companies paid for procuring renewable energy credits for the years 2009 to 2011” in their efforts to comply with the alternative energy requirements under SB 221. FirstEnergy’s Memorandum Contra the Environmental Law and Policy Center’s Motion to Intervene, p. 7 (Dec. 17, 2012). The independent auditor concluded that the purchase prices paid by FirstEnergy for certain renewable

energy credits “were excessive by any reasonable measure.” Redacted Final Report of Exeter Associates, p. iv (June 15, 2012).

Contrary to FirstEnergy’s unsupported claims, this case is entirely within ELPC’s “bailiwick.” ELPC, as a regional leader in energy and environmental issues, is interested in the successful implementation of the renewable energy requirements of SB 221. FirstEnergy’s allegedly “unreasonable” purchasing practices could frustrate the purposes of SB 221 and the realization of the renewable energy requirements. *See id.* at 14. ELPC is interested in ensuring that FirstEnergy’s procurement of renewable energy credits delivers the benefits of renewable energy in a cost-effective manner that does not shift excessive costs to ELPC members and other Ohio consumers. Such overpayment by FirstEnergy will have a long-term detrimental effect on the development of the renewable market in Ohio, as Ohio consumers, legislators and regulators will receive incorrect price signals regarding renewable energy. Moreover, ELPC has demonstrated its interest in the development of the renewable industry in Ohio by the production of the 2011 ELPC report *The Solar and Wind Energy Supply Chain in Ohio*.¹

In dozens of other similar cases, the Commission has determined that ELPC has a real and substantial interest in the proceedings and should be granted intervention. In fact, ELPC exercised a leading role (and was of course granted intervention by the Commission) in Case Nos. 09-1922-EL-ACP and 11-0411-EL-ACP involving FirstEnergy’s applications for force majeure determinations regarding the renewable energy benchmarks. *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of a Force Majeure Determination for a Portion of the 2009 Solar Energy Resources Benchmark Requirement*, Case No. 09-1922-EL-ACP; *In the*

¹ Report available at http://elpc.org/wp-content/uploads/2011/01/OhioWindSupplyFinal_HQ.pdf.

Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of a Force Majeure Determination for a Portion of the 2010 Solar Energy Resources Benchmark Requirement; Case No. 11-0411-EL-ACP; see also *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer*, Case No. 11-3549-EL-SSO, Entry (July 22, 2011) (allowing ELPC intervention in ESP case involving issues regarding residential renewable energy credit program). The issues in these cases significantly overlap with the current proceeding, and FirstEnergy's half-hearted assertions that ELPC does not have a substantial interest should be rejected out-of-hand.

C. ELPC's interests will not be adequately represented by existing parties.

FirstEnergy, after arguing that ELPC has no real or substantial interest in this proceeding, paradoxically argues that ELPC's interest is the exact same as groups like the Ohio Environmental Council ("OEC") and the Sierra Club ("SC"), groups that have already intervened without opposition from FirstEnergy. Just as the Commission has never found that ELPC lacks an interest in cases involving utility compliance with renewable energy and energy efficiency requirements, the Commission has also never concluded that ELPC's interests are adequately represented by parties like OEC and SC, although these groups have participated in many of the same proceedings in front of the Commission. For a very recent example, ELPC, OEC, and SC all participated in FirstEnergy's application for approval of its proposed 2013-2015 energy efficiency plan. The Commission granted the parties' motions to intervene and did not conclude that their interests significantly overlapped. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for*

2013 through 2015, Case Nos. 12-2190-EL-POR, 12-2191-EL-POR, 12-2192-EL-POR, Entry (Oct. 16, 2012). While ELPC's views in that proceeding sometimes overlapped with other environmental organizations, ELPC took different positions and made significantly different arguments than the other environmental groups. Certainly, ELPC cannot prejudge what positions it will take in the current proceeding before it sees FirstEnergy's testimony.

FirstEnergy cites Case No. 11-3549-EL-SSO, which does not support its claim that ELPC is somehow adequately represented by OEC and SC. In Case No. 11-3549, the Attorney Examiner denied SC's motion to intervene because it was untimely and filed "late into the procedural schedule." Case No. 11-3549-EL-SSO, Entry (Oct. 4, 2011). Although the Attorney Examiner modified the procedural schedule in Case No. 11-3549, those modifications were adopted *after* the deadline to intervene had passed. Sierra Club filed its motion to intervene 76 days after the intervention deadline. In this case, as explained above, the Attorney Examiner modified the procedural schedule prior to the deadline for filing motions to intervene and thus extended the original deadline to January 31, 2013. ELPC has filed its motion almost seven weeks prior to this deadline.

FirstEnergy's position that ELPC is adequately represented by existing parties is flawed. FirstEnergy quotes the websites of OEC, SC, and ELPC, apparently in an effort to conflate the three organizations, but ELPC's regional presence, as well as its focus on sustainable and "green" economic development, distinguishes it from OEC and SC. While many environmental organizations have similar and sometimes overlapping missions, this does not translate to those organizations being able to adequately represent ELPC's interest. ELPC has significant experience in Ohio and other Midwestern states with regard to utility compliance with renewable energy benchmarks and other renewable energy issues. *See In the matter, on the Commission's*

own motion, regarding the regulatory reviews, revisions, determinations, and/or approvals necessary for Consumers Energy Company to fully comply with Public Acts 286 and 295 of 2008, Case No. U-15805 (Michigan case involving Consumers Energy’s renewable energy plan); In the matter, on the Commission’s own motion, regarding the regulatory reviews, revisions, determinations, and/or approvals necessary for the Detroit Edison Company to fully comply with Public Acts 286 and 295 of 2008, Case No. U-16582 (Michigan case involving Detroit Edison’s renewable energy plan); In the Matter of Illinois Power Agency’s Petition for Approval of the 220 ILCS 5/16-111.5(d) Procurement Plan, Case No. 11-0660 (Illinois case involving Illinois Power Agency’s renewable energy credit procurement). ELPC was also prominently involved in the development of the Illinois renewable portfolio standard, as well as various rulemakings in Illinois, Indiana, Iowa and other states regarding renewable energy standards. This experience will allow ELPC to meaningfully contribute to the evaluation of FirstEnergy’s renewable energy credit purchases apart from the contributions of OEC and SC.

In its memorandum contra ELPC’s motion to intervene, FirstEnergy makes the ridiculous assertion that ELPC “has ridden OEC’s coattails” because ELPC and OEC have filed joint motions and comments in the past.² See FirstEnergy Memorandum at 9-10. Groups like OEC, ELPC, SC, and the Ohio Consumers’ Council have sometimes taken the pragmatic approach of filing joint motions or comments when their interests align. This reasonable approach, which FirstEnergy criticizes, furthers the interests of judicial economy and the preservation of organization resources. When intervening parties share certain views or interests in any given

² It is unclear why FirstEnergy jumps to the conclusion that ELPC has ridden OEC’s coattails when the groups have filed a handful of joint motions and comments. While OEC is a well-respected organization, FirstEnergy fails to consider that perhaps OEC is riding on ELPC’s coattails in those joint filings rather than the other way around. Obviously, FirstEnergy has no way of knowing, as ELPC and OEC do not consult with FirstEnergy on any such issues.

case, the Commission should not have to waste its time and resources reviewing and addressing multiple filings. The majority of the time, of course, the interests of OEC, ELPC, and other intervening parties do not perfectly overlap, and the groups have no way of knowing this before FirstEnergy files its testimony.³

III. CONCLUSION AND REQUEST FOR AN EXPEDITED RULING

ELPC has demonstrated real and substantial interests in this proceeding, which will not be adequately represented by existing parties. Consistent with Commission policy to encourage broad participation and Ohio law requiring the liberal allowance of intervention, ELPC requests that the Commission grant its motion to intervene.

In addition to granting this motion, ELPC respectfully requests that the Commission consider it on an expedited basis. OAC § 4901-1-12(C) allows for a party to include in its motion “a specific request for an expedited ruling.” FirstEnergy has refused to cooperate with ELPC in the signing of a protective agreement until its motion to intervene has been addressed, and ELPC does not have access to information the other parties can now receive. Therefore, even though the deadline for testimony is still over a month away, ELPC respectfully requests an expedited ruling on its motion.

³ FirstEnergy also absurdly argues that ELPC and OEC used “almost verbatim” language in their motions because a handful of words were used in both filings. *See* FirstEnergy Memorandum at 10. FirstEnergy should not be surprised that interested parties’ motions to intervene in a case involving scrutiny of FirstEnergy’s REC purchases and compliance with SB 221 would include generic words such as “interested parties,” “properly scrutinize,” and “comply with SB 221.”

Respectfully submitted,

/s/ Nicholas McDaniel

Nicholas McDaniel

Environmental Law & Policy Center

1207 Grandview Avenue, Suite 201

Columbus, OH 43212

P: 614-488-3301

F: 614-487-7510

NMcDaniel@elpc.org

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Reply to FirstEnergy's Memorandum Contra the Motion to Intervene by the Environmental Law & Policy Center and Request for Expedited Ruling* submitted on behalf of the Environmental Law & Policy Center was served by electronic mail, upon the following Parties of Record, this 20th day of December, 2012.

/s/ Nicholas McDaniel

Nicholas McDaniel

Terrence O'Donnell, Attorney
Brickler & Eckler LLP
100 South Third Street
Columbus, OH 43215
Phone: (614) 227-2345
Fax: (614) 227-2390
todonnell@bricker.com

M. Howard Petricoff
Michael J. Settineri
Lija Caleps-Clark
Vorys, Sater, Seymour, and Pease LLP
52 East Gay Street
Columbus, OH 43215
Telephone: (614) 464-5414
mhpetricoff@vorys.com
mjsettineri@vorys.com
lkalepsclark@vorys.com

Theodore Robinson
Citizen Power
2121 Murray Avenue
Pittsburgh OH 15217
Phone: 412-421-7029
Fax: 412-421-6162
robinson@citizenpower.com

William Wright
Chief, Public Utilities Section
Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, OH 43215
William.wright@puc.state.oh.us

Melissa Yost
The Ohio Consumers' Counsel
10 West Broad Street, 18th floor
Columbus, OH 43215
Phone: 614-466-1291
yost@occ.state.oh.us

Christopher Allwein
Williams, Allwein & Moser LLC
1373 Grandview Ave Suite 212
Columbus OH 43212
Phone: (614)429-3092
Fax: (614)670-8896
callwein@wamenergylaw.com

Trent A Dougherty
Cathy Loucas
Ohio Environmental Council
1207 Grandview Ave. Suite 201
Columbus OH 43212
Phone: 614-487-7506
Fax: 614-487-7510
trent@theoec.org
cloucas@theoec.org

Patti Mallarnee
The Office of the Ohio Consumers Counsel
10 W. Broad St. Suite 1800
Columbus OH 43215
Phone: 614-466-8574
mallarnee@occ.state.oh.us

Frank Merrill
Matthew Warnock
Brickler & Eckler LLP
100 South third Street
Columbus, OH 43215
Phone: 614-227-2300
Fax: 614-227-2390
fmerrill@bricker.com
mwarnock@bricker.com

Jennifer Duffer
Armstrong & Okey, Inc.
222 East Town Street 2nd Floor
Columbus OH 43215
Phone: 614-224-9481
Fax: 614-224-5724
JDuffer@AandO.com

Sandra Coffey
Public Utilities Commission of Ohio
180 E. Broad St.
Columbus OH 43215
Phone: (614) 728-2516
Fax: (614) 728-8373
Sandra.Coffey@puc.state.oh.us

Thomas Siwo
Brickler & Eckler LLP
100 South Third Street
Columbus, OH 43215
Phone: (614) 227-2345
Fax: (614) 227-2390
tsiwo@bricker.com

Leila Vespoli
Carrie Dunn
FirstEnergy Corp.
76th S Main Street
Akron, OH 44308
cdunn@firstenergycorp.com

Teresa Orahood
Bricker & Eckler LLP
100 South Third Street
Columbus OH 43215-4291
Phone: (614) 227-4821
Fax: (614) 227-2390
torahood@bricker.com

David Kutik
Lydia Floyd
Jones Day
901 Lakeside Avenue
Cleveland, OH
Phone: 216-586-7186
Fax: 216-579-0212
dakutik@jonesday.com
lfloyd@jonesday.com

Michael Lavanga
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street N.W.
8th Floor, West Tower
Washington D.C. 20007
Phone: 202-342-0800
Fax: 202-342-0800
mkl@bbrslaw.com

David Boehm
Michael L Kurtz
Jody M. Kyler
Ohio Energy Group Inc.
36th E. Seventh Street, Suite 1510
Cincinnati, OH 45202
Phone: 513-421-2255
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
jkylwer@bkllawfirm.com

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

12/20/2012 2:48:31 PM

in

Case No(s). 11-5201-EL-RDR

Summary: Reply to FirstEnergy's Memorandum Contra the Motion to Intervene by ELPC and Request for Expedited Ruling electronically filed by Mr. Nicholas A. McDaniel on behalf of Environmental Law and Policy Center