

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio )  
Edison Company, The Cleveland Electric )  
Illuminating Company, and The Toledo )  
Edison Company For Approval of Their ) Case No. 16-0743-EL-POR  
Energy Efficiency and Peak Demand )  
Reduction Program Portfolio Plans for 2017 )  
through 2019 )

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY AND THE TOLEDO EDISON COMPANY’S MEMORANDUM  
CONTRA ENERGY MANAGEMENT SOLUTION, INC.’S MOTION TO  
INTERVENE**

**I. INTRODUCTION**

On June 3, 2016, Energy Management Solutions, Inc. (“EMS”) filed a motion to intervene in this proceeding. In its memorandum in support of its motion (hereinafter “EMS Memo”), EMS muddles its role, first claiming to be intervening on its own behalf;<sup>1</sup> then, as an advocate of industrial customers;<sup>2</sup> and finally, as an expert witness.<sup>3</sup> However, as more fully discussed below, the rule governing intervention allows a *person* to intervene, provided that it meets certain prerequisites. In this instance, the person seeking intervention is EMS. It cannot bootstrap the interests of unidentified clients and make those interests its own. The granting of EMS’s request for intervention must be based on whether EMS, *as an individual entity*, meets such prerequisites. And, as discussed below, EMS fails to demonstrate these prerequisites. Accordingly, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison

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<sup>1</sup> EMS Memo, p. 2.

<sup>2</sup> Id.

<sup>3</sup> Id. at 5.

Company (collectively, “Companies”) urge the Commission to deny EMS’s motion to intervene.

## II. THE STANDARD FOR INTERVENTION

Revised Code Section 4903.221 permits intervention by someone who may be “adversely affected” by a proceeding. Similarly, Ohio Administrative Code Section 4901:1-11 governs interventions in Commission proceedings and provides:

- (A) Upon timely motion, any *person* shall be permitted to intervene in a proceeding upon a showing that:

\* \* \*

- (2) The *person* has a real and substantial interest in the proceeding, and 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, unless the *person's* interest is adequately represented by existing parties. [Emphasis added.]

In light of the above, intervention must be judged based on the circumstances surrounding the person seeking intervention. And, while the Ohio Supreme Court indicated that intervention should be liberally allowed,<sup>4</sup> it never negated the requirement that the person seeking such intervention must demonstrate that it has a *legitimate* interest that it must protect because others cannot adequately do so.

As EMS explains, its business is “to provide energy conservation and management services for [third party] businesses to help strengthen their bottom lines and to help organizations make real and lasting conservation improvements that optimize energy usage and reduce power consumption.”<sup>5</sup> In essence, EMS provides energy consulting/management services. It states that it has performed a number of audits.<sup>6</sup>

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<sup>4</sup> *Ohio Consumers’ Counsel v. Pub. Util Com’n* (2006), 111 Ohio St. 3d 384, 388, 2006 Ohio 5853, 856 N.E. 2d 940.

<sup>5</sup> EMS Memo at 4.

<sup>6</sup> *Id.*

EMS is not an association of businesses, such as The Industrial Energy Users of Ohio (“IEU”), the Ohio Manufacturers’ Association Energy Group (“OMAEG”) or the Ohio Hospital Association (“OHA”) – all of which are the actual entities, or “persons,” that sought intervention in this proceeding and represent their respective memberships. EMS is simply a potential vendor that may be able to assist businesses through the energy efficiency and peak demand reduction (“EE and PDR”) programs that will ultimately be offered by the Companies in the future. It is not an association and its “clients” are not members or otherwise affiliated with EMS. As such, it is inappropriate for EMS to seek intervention on behalf of purported industrial clients -- none of whom have been identified as customers of the Companies, and all of whose interests as industrial customers are adequately represented by one or more of the aforementioned organizations who are already parties to this proceeding. If EMS’s request for intervention is to be granted, EMS must meet the prerequisites *on its own* – something that it cannot do.

### **III. EMS DOES NOT MEET THE PREREQUISITES FOR INTERVENTION.**

When deciding whether to grant intervention, Rule 4901:1-11(B) sets forth the criteria to be considered, stating:

In deciding whether to permit intervention under paragraph (A)(2) of this rule, the commission, the legal director, the deputy legal director, or an attorney examiner shall consider:

- (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.
  - (5) The extent to which the person's interest is represented by existing parties.
- A. EMS has not demonstrated a legitimate interest that may be adversely affected by the outcome of this proceeding.

According to the EMS website,<sup>7</sup> EMS is headquartered in Excelsior, Minnesota, with an office located in New Albany, Ohio, the latter of which is located outside of the Companies' respective service territories. As such, EMS has no personal interest in the nature or cost of the EE and PDR programs being proposed in this proceeding. It is not a customer of any of the Companies and, thus, it cannot personally take advantage of any of the EE and PDR programs being proposed in this proceeding; nor can it be required to bear any of the costs of such programs.

Although not a customer of any of the Companies, EMS claims that it has a real and substantial interest because "the issues involved are directly related to EMS's business."<sup>8</sup> As already discussed, EMS's business model is designed to focus on third parties' abilities to take advantage of the various EE and PDR programs being offered by utilities. Inasmuch as the Companies intend to offer a wide variety of EE and PDR programs through the proposed portfolio to all customer classes, EMS's business interests will not be harmed. It will still be able to assist potential clients in qualifying for the energy efficiency programs ultimately approved in this proceeding. Further, the design of those industrial programs that will ultimately be approved by the Commission will be

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<sup>7</sup> See, [emsenergy.com](http://emsenergy.com).

<sup>8</sup> EMS Memo, p. 4.

addressed by no less than three organizations (IEU, OMAEG and OHA) who are already parties to this proceeding, and of which none have a profit motive like that of EMS.<sup>9</sup>

EMS also identifies an “expertise” interest, claiming that it cannot be fully represented by other parties because “none of the other parties can adequately represent [its] interest as an efficiency expert with significant and specific expertise in the development, deployment and installation of [EE] and [PDR] retrofits, facilities and programs.”<sup>10</sup> EMS’s stated interest appears to be that of an expert witness in search of a client. The fact that none of the other parties representing industrial customers decided to hire EMS as an expert to testify in the development, deployment and installation of EE and PDR retrofits, facilities and programs does not mean that these issues will not be addressed. They simply will not be addressed by EMS. Nor does this fact elevate EMS’s interest to a level of real and substantial, especially when its opinions on program design will have no direct bearing on EMS, since it is not a customer of any of the Companies.

Finally, EMS states that its interests in this proceeding lie with industrial programs, generally, and more specifically, EE and PDR retrofits<sup>11</sup> involving combined heat and power (“CHP”) and waste energy recovery (“WER”) facilities.<sup>12</sup> It claims that these issues “may directly impact EMS and its clients’ interests in the development of energy efficiency projects, actual savings generated by FirstEnergy customers and the ability of EMS and its clientele to contribute to the State’s competitiveness in the global economy.”<sup>13</sup> As has already been discussed, it is improper to consider the interests of EMS’s alleged unknown clients for purposes of EMS’s request for intervention.

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<sup>9</sup> As an energy consultant, profits are generally tied to the amount of savings that can be generated.

<sup>10</sup> EMS Memo at p. 5.

<sup>11</sup> Id. at p. 2

<sup>12</sup> Id. at p. 4.

<sup>13</sup> Id. at 2.

Therefore, its unnamed clients' alleged interests in EE project development, amounts of savings generated and their ability to contribute to the State's global competitiveness is irrelevant for purposes of resolving EMS's request for intervention. Moreover, nowhere in its description of its business model does EMS indicate that it is a developer of CHP or WER projects,<sup>14</sup> (and, even if it did, it does not change the fact that EMS did not meet the requirements of intervention); and since it is not the Companies' customer, the amount of savings generated by the Companies' customers has no bearing on EMS's interests. Further, as a company headquartered in Minnesota, as an entity that is not a customer of any of the Companies and as an entity that simply provides consulting services, it is unclear as to exactly how EMS would contribute to Ohio's global competitiveness through any of the EE or PDR programs being offered by the Companies through this proceeding.

In sum, and based on the foregoing, EMS has failed to demonstrate a legitimate interest that could be adversely affected by the outcome of this proceeding and, accordingly, its request for intervention should be denied.

B. EMS does not satisfy the other criteria for intervention.

As has already been demonstrated, the nature and extent of EMS's interest is pecuniary. It is a consultant that tries to help third party customers reduce their energy costs. While a lofty goal that the Companies applaud, EMS should achieve this goal through programs that are designed and approved by the Commission based on a *balancing* of costs and benefits. In this instance, there is no balance, because EMS has no cost burden. But it stands to increase its profits if bigger savings could be achieved

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<sup>14</sup> In the EMS Memo, it only discusses the number of energy audits that it has performed. See EMS Memo, p. 4.

through larger program incentives. In light of this, EMS is motivated to advocate for the highest possible program incentives. Such a position of self-dealing will contribute to neither the full development nor equitable resolution of factual issues, especially since EMS, as a non-customer of the Companies, has no financial obligation to bear any of the program costs. Such a position, on the other hand, could prolong these proceedings because driving program costs upward is contrary to the positions taken by those parties who represent customer groups who will be responsible for paying those program costs.

Granting EMS party status could also provide it with an unfair competitive advantage by allowing it access through the discovery process to the Companies' sensitive business information, such as cost structures, anticipated participation rates, and overall market potential – information that other potential energy consulting/energy management companies will not have. Moreover, given that EMS performs energy audits and the Companies contract for such services usually through a bidding process, EMS may be privy to underlying information that may provide it with an advantage should it decide to participate in any request for proposal process undertaken by the Companies. Perhaps if EMS had a legitimate interest in need of protection, the Commission could develop controls to alleviate these anti-competitive concerns. However, since EMS has failed to demonstrate any such interest, there is no need to unduly delay this proceeding with such issues.

And, finally, if the Commission grants EMS's motion to intervene, there is nothing to prevent other potential energy consultants and other potential vendors from also intervening in order to advance their business agendas. The focus in this case is on the justness and reasonableness of the Companies' proposed portfolio of EE and PDR

programs. It should not be converted into a case on how best to maximize the profits of potential vendors.

#### IV. CONCLUSION

In sum, EMS is an energy consultant. Its request for intervention must be evaluated based on its role as such and not on the alleged interests of unknown industrial customers. As has been demonstrated, the issues raised by EMS do not give rise to legitimate interests that will be adversely affected by the outcome of this case. But, even if we assume for the sake of argument that this was not the case, then those interests identified by EMS are being adequately protected by no less than three parties who are already parties to this proceeding. Accordingly, EMS fails to meet the prerequisites for intervention and its request for the same must be denied.

Respectfully submitted,

/s/ Kathy J. Kolich

Carrie M. Dunn (0076952)

Counsel of Record

FIRSTENERGY SERVICE COMPANY

76 South Main Street

Akron, OH 44308

(330) 761-2352 (tel)

(330) 384-3875 (fax)

[cdunn@firstenergycorp.com](mailto:cdunn@firstenergycorp.com)

Kathy J. Kolich (0038555)

Kolich & Associates, LLC

1521 Hightower Drive

Uniontown, OH 44685

(330) 316-2378 (tel)

Email: [Kjklaw@yahoo.com](mailto:Kjklaw@yahoo.com)

ATTORNEYS FOR APPLICANTS OHIO  
EDISON COMPANY, THE CLEVELAND  
ELECTRIC ILLUMINATING COMPANY,  
AND THE TOLEDO EDISON COMPANY



## **CERTIFICATE OF SERVICE**

I hereby certify that the Companies' Memorandum Contra Energy Management Solutions, Inc.'s Motion to Intervene was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 8th day of June, 2016. The Commission's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. Further, on this same date a courtesy copy has been served upon the parties via electronic mail at the email addresses set forth below.

/s/ Kathy J. Kolich

Kathy J. Kolich, Esq.

One of the attorneys for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

**Ohio Environmental Council:**

Trent Dougherty – Tdougherty@theOEC.org

**Environmental Defense Fund:**

John Finnigan – Jfinnigan@edf.org

**Ohio Partners for Affordable Energy**

Colleen L. Mooney – Cmooney@ohiopartners.org

**Industrial Energy Users – Ohio**

Matthew R. Pritchard – Mpritchard@mwncmh.com

**Ohio Manufacturers Association Energy Group**

Kimberly W. Bojko – Bojko@carpenterlipps.com

Danielle M. Ghiloni – Ghiloni@carpenterlipps.com

**The Kroger Company**

Ryan P. O'Rourke – O'Rourke@carpenterlipps.com

**Energy Management Solutions, Inc.**

Christopher J. Allwein – Callwein@keglerbrown.com

**Ohio Consumers' Counsel**

Christopher Healey – Christopher.healey@occ.ohio.gov

Kyle Kern – kyle.kern@occ.ohio.gov

Dane Stinson – Dstinson@bricker.com

**Natural Resources Defense Council**

Robert Dove – rdove@attorneydove.com

**Environmental Law and Policy Center**

Madeline Fleisher – mfleisher@elpc.org

**Ohio Hospital Association**

Richard L. Sites – ricks@ohanet.org

Matthew W. Warnock – mwarnock@bricker.com

Dylan F. Borchers – dborchers@bricker.com

**Ohio Attorney General**

William Wright – William.wright@ohioattorneygeneral.gov

Natalia Messenger – Natalia.Messenger@ohioattorneygeneral.gov

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**6/8/2016 1:01:15 PM**

**in**

**Case No(s). 16-0743-EL-POR**

Summary: Memorandum Contra Motion to Intervene of Energy Management Solutions Inc. electronically filed by Ms. Kathy J Kolich on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company