

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA OF OHIO EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY
TO THE MOTION TO INTERVENE BY THE NATURAL RESOURCES DEFENSE
COUNCIL**

I. INTRODUCTION

The Motion to Intervene (“Motion”) filed by Natural Resources Defense Council (“NRDC”) should be denied because NRDC fails to establish a real and substantial interest in this case. NRDC also has failed to show how the disposition of this proceeding will impair or impede its ability to protect its claimed interest, or how it will significantly contribute to the development of the factual issues in this case. Indeed, even if NRDC had a real and substantial interest in this proceeding, intervention would not be necessary for NRDC to represent such interest because the Commission’s review involves only the filing of initial and reply comments, for which intervention is unnecessary. Accordingly, NRDC’s Motion should be denied.

II. ARGUMENT

To be granted intervention, a person must show that it may be adversely affected by the proceeding in which it requests intervention. R.C. 4903.221. To satisfy this standard, the person seeking intervention must show it “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.” O.A.C. 4901-1-11(A)(2). The Commission must consider the criteria in R.C. 4903.221(B) and O.A.C. 4901-1-11(B) when ruling upon applications to intervene, but the overarching standard is that a person have a real and substantial interest that may be adversely affected by the proceeding. Because NRDC has not met this standard, the Motion should be denied.

A. NRDC has not shown it has a real and substantial interest in this case.

NRDC briefly states in its Motion that its interest in this proceeding is to “explore how FirstEnergy’s¹ political and charitable spending has impacted the clean energy resources and energy efficiency programs available to NRDC’s members within FirstEnergy’s service territory.” Mem. in Supp., p. 3. NRDC provides no explanation why this interest is relevant to this review proceeding or why this interest may be adversely affected by the outcome of this proceeding. NRDC’s stated interest is not germane to this case, which was initiated to confirm that the costs of any political or charitable spending in support of Am. Sub. H.B. 6 (“H.B. 6”) or the referendum effort are not in the rates and charges paid by retail customers of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the “Companies”).

While the Commission does exercise jurisdiction over energy efficiency programs available to the Companies’ customers (but not development of clean energy resources), the availability of those programs is governed by R.C. 4928.66 and the Commission’s order in Case No. 16-743-EL-POR. If NRDC is intent on changing the availability of those programs to its members, this proceeding is not the proper venue. And if NRDC’s goal is to “explore” whether expenditures by the Companies affected the General Assembly’s amendment of R.C. 4928.66 in H.B. 6, this proceeding also is not the proper venue. Curiosity is not a real and substantial interest.

¹ NRDC defines “FirstEnergy” to mean Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the “Companies”). Mem. in Supp., p. 1.

Regardless, because the scope of this proceeding is necessarily limited to questions over which the Commission has jurisdiction, NRDC lacks a real and substantial interest in this proceeding.

This proceeding is not a forum for NRDC to “explore” whether the Companies’ lobbying caused the General Assembly to amend R.C. 4928.66 or any other provision in H.B. 6. While NRDC may have an interest in finding information it can use to try to influence public opinion against FirstEnergy Corp., it has not shown that it has a real and substantial interest **in this case**. *See, e.g., 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 (Dec. 6, 1991) (denying City of Cincinnati’s motion to intervene because it did not have an interest in the rates at issue in proceeding); *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. 3 (June 14, 2005) (denying intervention because person’s interest was not related to the purposes of the proceeding in a manner that “assist the Commission’s primary interest of securing the best possible service for the public under a just and reasonable rate structure.”).

Moreover, NRDC’s claimed interest – to determine whether the Companies’ political and charitable spending may have impacted H.B. 6 – is not within the Commission’s jurisdiction. The Commission is not the venue for NRDC to question how the Companies spend their funds in the best interests of the utilities as determined by their management. *See Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 447-448, 110 N.E.2d 59 (1953). Nor can NRDC show that the Companies’ exercise of management discretion to make political and charitable spending is within the Commission’s jurisdiction. *See Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 258, 431 N.E.2d 683 (1982), syllabus; *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) (political contributions or donations are “a matter outside of our jurisdiction.”). Thus, as a matter of law, NRDC’s claimed interest cannot be a “real and substantial” interest in this proceeding.

To the extent NRDC wants to promote energy efficiency, it has other venues available to it. But it has not shown that it has a real and substantial interest in this case that justifies intervention as required by O.A.C. 4901-1-11(A)(2).

B. NRDC has not shown that the disposition of this proceeding may, as a practical matter, impair or impede its ability to protect its claimed interest.

NRDC does not say how the disposition of this proceeding “may, as a practical matter, impair or impede” its ability to protect its claimed real and substantial interest. Instead, it erroneously confuses the four factors in R.C. 4903.221(B) with the “adversely affected” test in R.C. 4903.221(A). Mem. in Supp., pp. 2, 3-4. While the factors in R.C. 4903.221(B) are to be considered by the Commission, the Commission must also determine under R.C. 4903.221(A) and O.A.C. 4901-1-11(A)(2) whether NRDC has a real and substantial interest that could be adversely affected by the outcome of this proceeding. Yet NRDC makes no effort to show how the disposition of this proceeding may impair or impede its claimed interest in the proceeding.

The stated purpose of this case is to confirm that the costs of any political or charitable spending in support of H.B. 6 – either supporting enactment of the bill or opposing the H.B. 6 referendum – are not in the rates and charges paid by the Companies’ retail customers. In contrast, NRDC’s interest appears to be in the energy efficiency provisions of R.C. 4928.66. The purpose of this case and NRDC’s claimed interest do not overlap. Regardless of the outcome of this proceeding, NRDC will retain the ability to promote the benefits of energy efficiency.

Because NRDC has not shown that the disposition of this case may, as a practical matter, impair or impede its ability to protect its claimed interest, it is not entitled to intervene as a party.

C. NRDC's Motion does not satisfy the factors in O.A.C. 4901-1-11(B).

Given that NRDC has not satisfied the requirements of O.A.C. 4901-1-11(A)(2), its discussion of the factors in O.A.C. 4901-1-11(B)(2)-(5) is inconsequential. However, NRDC also struggles to satisfy these factors.

Most importantly, NRDC makes no effort to show the probable relation of its legal position to the merits of this proceeding. *See* O.A.C. 4901-1-11(B)(2). In reference to this factor, NRDC simply states that it wants to “participate in a robust investigation in FirstEnergy’s political and charitable spending and its impact on Ohio’s energy policy and NRDC’s members.” Mem. in Supp., p. 3. This is not a legal position, and it has no relation to the merits of this proceeding.

NRDC also fails to show how it “will significantly contribute to full development and equitable resolution of the factual issues” in this proceeding. O.A.C. 4901-1-11(B)(4). NRDC claims expertise in the areas of energy efficiency and renewable energy, among others (Mem. in Supp., pp. 3-4), but the Commission will not be approving energy efficiency or renewable energy programs for the Companies in this proceeding. NRDC also claims expertise in nuclear energy and coal generation (*id.*), but the Commission will not be approving nuclear or coal generation in this proceeding. NRDC mentions no factual issues in this case that it will significantly contribute to developing. And because there is no evidentiary hearing scheduled or necessary in this proceeding, NRDC will have no need to develop or resolve factual issues. NRDC has not shown how its participation in this proceeding will have any impact on the Commission’s consideration of the Companies’ September 30 response to the show cause entry.

NRDC has not justified its intervention in this review proceeding.

III. CONCLUSION

The Companies respectfully request that the Commission deny NRDC’s Motion to Intervene.

Respectfully Submitted,

/s/ James F. Lang

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CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 14th day of October 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ James F. Lang
One of the Attorneys for Ohio Edison
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Summary: Memorandum Contra Motion to Intervene of NRDC electronically filed by Mr. James F Lang on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company