

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY IN SUPPORT OF OHIO PARTNERS FOR AFFORDABLE ENERGY’S
MOTION TO INTERVENE**

I. INTRODUCTION

Ohio Partners for Affordable Energy (“OPAE”) filed a Motion to Intervene (“Motion”) in this proceeding on September 29, 2020. OPAE’s Motion addressed, in a step by step manner, why it is entitled to intervene in this proceeding under law and Commission precedent. On October 14, 2020, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, “FirstEnergy”) filed a Memorandum Contra OPAE’s Motion (“Memo Contra”). The Memo Contra makes two primary claims, first, that OPAE failed to satisfy the criteria for intervention, and second, that intervention is not necessary as the Commission has only issued a call for comments.¹ For the reasons discussed below, FirstEnergy’s Memo Contra is without merit and should be denied.

II. LAW AND ARGUMENT

When taken together, the primary claims in FirstEnergy’s Memo Contra do not make much sense. FirstEnergy seeks to bar OPAE intervention, which would allow them to participate in this proceeding, but then states OPAE can participate anyway without intervention. OPAE will address these claims in reverse order.

¹ FirstEnergy Memo Contra at p. 1.

A. Intervention is Required to Participate in this Proceeding.

The Public Utilities Commission of Ohio (“Commission”) initiated this proceeding on September 15, 2020. In the September 15 Entry the Attorney Examiner directed “interested parties” to file comments by October 29, 2020.² “Parties” is defined, in relevant part, under Ohio Admin. Code 4901-1-10(A)(4) as “[a]ny person granted leave to intervene under rule 4901-1-11 of the Administrative Code.” Therefore, under Commission rules, intervention is required to participate in this proceeding. FirstEnergy’s argument that intervention is not required is meritless. Had the Attorney Examiner directed “interested persons”³ to file comments, then interested persons could file comments without intervening. That is not the word the Attorney Examiner chose in this proceeding and therefore intervention is required. Furthermore, when questioned, before the General Assembly, about the process in this proceeding, the Chairman testified that he expects other parties to intervene in this case.⁴

FirstEnergy’s claim intervention is not necessary is meritless and should be denied and OPAE’s Motion to Intervene should be granted.

B. OPAE has Satisfied the Requirements for Intervention.

The Commission has a longstanding policy of “encourag[ing] the broadest possible participation in its proceedings.”⁵ The Ohio Supreme Court has explained that “whether or not a hearing is held, intervention ought to be liberally allowed so that the positions of all persons with real and substantial interest in the proceedings can be considered by the PUCO.”⁶

² Pub. Util. Comm. Case No. 20-1502-EL-UNC, Entry at ¶6 (Sep. 15, 2020).

³ Pub. Util. Comm. Case No. 03-1461-EL-UNC, Entry at ¶4 (July 30, 2003).

⁴ <https://ohiochannel.org/video/ohio-house-select-committee-on-energy-policy-and-oversight-9-16-2020> Chairman’s comments starting at 1:11:15.

⁵ Pub. Util. Comm. Case No. 85-675-EL-AIR, Entry at 1, (Jan. 14, 1986).

⁶ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, 388 (2006).

i. OPAE has a real and substantial interest in this proceeding.

OPAE, as identified in its Motion, is an Ohio non-profit corporation with a stated purpose of advocating for affordable energy policies for low-and moderate-income Ohioans. OPAE includes, as members, non-profit organizations located FirstEnergy's service territory. Moreover, many of OPAE's members are Community Action Agencies. Under the federal legislation authorizing the creation and funding of these agencies, originally known as the Economic Opportunity Act of 1964, Community Action Agencies are charged with advocating for low-income residents of their communities. OPAE has been granted intervention in over one hundred cases before the Commission over twenty-five years. Yet, FirstEnergy claims OPAE failed to establish it has a real and substantial interest or that this proceeding may impede or impair its ability to protect its members and their communities.⁷

OPAE properly identified it has a real and substantial interest in exploring the impacts of FirstEnergy's political and charitable spending has had on its members within FirstEnergy's service territory.⁸ This is directly in line with the purpose of this proceeding as stated by the Commission: "The Commission has determined that this proceeding should be opened to review the political and charitable spending by the FirstEnergy Utilities in support of Am. Sub. H.B.6 and the subsequent referendum effort."⁹

Despite OPAE identifying its real and substantial interest which is directly in line with the Commission's purpose for the proceeding, FirstEnergy attempts to use Commission precedent from rate cases to bar OPAE's intervention.¹⁰ The cases FirstEnergy cites reject the interventions of parties because those parties either do not have an interest in the rates at issue or

⁷ Memo Contra at pp. 2-3.

⁸ OPAE's Memorandum in Support of its Motion at p. 3.

⁹ Entry at ¶5.

¹⁰ Memo Contra at pp. 2-3.

will be unable to assist in securing the best possible service under a just and reasonable rate structure.¹¹ These cases are inapplicable and FirstEnergy's attempt to use them is disingenuous. There are no pending rates at issue in this proceeding. Instead, this proceeding was opened to review FirstEnergy's political and charitable spending in support of Am. Sub. H.B. 6 and the subsequent referendum effort. As demonstrated in its Motion, OPAE has a real and substantial interest in determining how the identified spending impacted OPAE's members. FirstEnergy's claim this interest equates to OPAE merely being an interested bystander is patently wrong.

FirstEnergy claims this is not a forum to explore the Companies involvement in House Bill 6 despite that being exactly what the Commission Entry stated it was.¹² Further, in response to questions¹³ from Rep. Leland regarding the scope and process of this proceeding the Chairman testified,

[The Commission] required FirstEnergy to provide information demonstrating that money associated with the referendum and political charitable activities surrounding House Bill 6 is not included in rates. Once they provide that other parties have the opportunity to provide comments. [The Commission] will have other parties intervening in this case. Some may choose to do discovery some may not choose to do discovery; it's a case. It's an investigation. So what happens after that as I hope you would expect of [the Commission] will be a function of what the evidence shows and what [the Commission's] legal authority is and that's as much as I can say about.¹⁴

It is clear from the Chairman's testimony that this is a case and a case where full due process is to be provided. Further, it must be provided so there can be evidence presented on which the Commission can issue its decision. Therefore, contrary to FirstEnergy apparent

¹¹ Id.

¹² Entry at ¶5. ("The Commission has determined that this proceeding should be opened to review the political and charitable spending by the FirstEnergy Utilities in support of Am. Sub. H.B.6 and the subsequent referendum effort.")

¹³ <https://ohiochannel.org/video/ohio-house-select-committee-on-energy-policy-and-oversight-9-16-2020> at 1:11:00.

¹⁴ Id. at 1:11:55.

position that this is merely a proceeding where the companies Respond to the Commission and interested parties are only allowed to comment, the Commission will be requiring full due process including the exploration of FirstEnergy's charitable and political spending.

- a. The Commission has authority to review FirstEnergy's charitable and political spending regarding H.B. 6 and the subsequent repeal effort.

FirstEnergy claims OPAE cannot, as a matter of law, have an interest in this case related to FirstEnergy's charitable and political giving as both are outside the jurisdiction of the Commission.¹⁵ It is true that the political and charitable contributions are not allowed to be directly built into base rates. It is also true that the Commission has no authority to prohibit or restrict charitable and political donations. However, it is not true that the Commission therefore has no authority to review such expenditures.

The Commission opened this proceeding citing to its jurisdiction under R.C. 4905.05 and R.C. 4905.06.¹⁶ Revised Code 4905.05 gives the Commission jurisdiction over FirstEnergy, including FirstEnergy's holding company, "insofar as such records and accounts may in any way affect or relate to the costs associated with the provision of electric utility service by any public utility operating in this state and part of such holding company system."¹⁷ Revised Code 4905.06 similarly provides that the Commission has general supervision over all public utilities in its jurisdiction and states the Commission may:

[E]xamine such companies and keep informed as to their * * * compliance with all laws and orders of the commission, insofar as any of such matters may relate to the costs associated with the provision of electric utility service by public utilities in this state which are affiliated or associated with such companies.¹⁸

¹⁵ Memo Contra at p. 3.

¹⁶ Entry at ¶¶2-3.

¹⁷ R.C. 4905.05 (emphasis added.)

¹⁸ R.C. 4905.06 (emphasis added.)

The Commission, by law, has the authority to review any spending of FirstEnergy's that may relate to the costs of the provision of electric service in Ohio. Amended Substitute House Bill 6 impacts the costs of several provisions of electric service in Ohio including by codifying several charges and eliminating others. If FirstEnergy spent money in support of passing Am. Sub. H.B. 6 or the subsequent repeal effort, those funds would be subject to Commission oversight pursuant to R.C. 4905.05 and R.C. 4905.06. Because the use of funds, as just described, is within the Commission's jurisdiction, OPAE has a real and substantial interest in this proceeding for the previously explained reasons.

- ii. OPAE demonstrated that the disposition of this proceeding may impair or impede its ability to protect its interests.

FirstEnergy claims that OPAE failed to establish that this proceeding "may, as a practical matter, impair or impede" its ability to protect its real and substantial interest.¹⁹ This claim is meritless. OPAE clearly established that it has a real and substantial interest in the proceeding, how FirstEnergy's political and charitable spending may have impacted OPAE's members, which is directly related to the merits of the case.²⁰ Further, OPAE established that no other party can adequately represent the interests of OPAE's members.²¹ It is therefore obvious, as was stated by OPAE, that the disposition of this matter, which is an investigation into FirstEnergy political and charitable spending, may impair or impede the ability of OPAE to protect its interests, namely how FirstEnergy's political and charitable spending impacted OPAE's members. OPAE must be allowed to intervene into this investigation to determine if and how FirstEnergy's charitable and political contributions surrounding House Bill 6 and the subsequent repeal effort have impacted OPAE's members.

¹⁹ Memo Contra at p. 3.

²⁰ Motion at p. 3.

²¹ Id.

iii. OPAE Has satisfied the factors in Ohio Admin. Code 4901-1-11(B).

FirstEnergy claims OPAE failed to satisfy the factors listed in Ohio Admin. Code 4901-1-11-(B).²² Specifically, FirstEnergy alleges OPAE cannot demonstrate it will significantly contribute to the full development and equitable resolution of the factual issues in this proceeding or the probable relation to its legal position to the merits of this proceeding.²³ These claims are disingenuous.

This proceeding is an investigation. FirstEnergy currently controls the vast majority of the factual information. The Commission opened this case, as explained by the Chairman in the above quoted testimony, to investigate the use of FirstEnergy's political and charitable contributions and provide parties the opportunity to do discovery. Until all the factual issues are revealed it would be irresponsible to allege a position based on unknown facts. FirstEnergy's legal arguments are obfuscation and obstructionist and are merely attempts to frustrate the process. OPAE's Motion thoroughly discussed each factor in both R.C. 4903.221 and Ohio Admin. Code 4901-1-11(A)-(B) and therefore is entitled to intervention. FirstEnergy's Memo Contra should be denied and OPAE's Motion to Intervene should be granted.

III. CONCLUSION

OPAE clearly and thoroughly explained how and why it satisfied each criteria for intervention in its original Motion. FirstEnergy's arguments to the contrary are meritless and should be denied.

Further, OPAE, as a consumer advocate, is highly alarmed by the obstructionist tact taken by FirstEnergy in this proceeding. This proceeding is borne out of a request by the Ohio

²² Memo Contra at p. 4.

²³ Id. at pp. 4-5.

Consumers' Counsel in two separate dockets.²⁴ That request was based on an eighty-two page Criminal Complaint filed by the United States Attorney for the Southern District of Ohio, David Devillers, who characterized the actions identified in the Criminal Complaint as “what is likely the largest bribery, money laundering scheme ever perpetrated against the people of Ohio.”²⁵ FirstEnergy claims they have done nothing wrong and yet they have sought to block the intervention of every party²⁶ to this proceeding thus far with the exception of the Ohio Consumers' Counsel and the Ohio Energy Group. This is highly distressing to OPAE and its members.

FirstEnergy's actions, thus far in this proceeding, and some of the arguments it has set forth, are not indicative of a company with nothing to hide but rather of a company who does not feel accountable to its customers or its regulator. OPAE hopes the Commission considers the Companies' actions in this proceeding as it considers the appropriateness of expanding the scope of this proceeding. OPAE respectfully requests that the Commission deny FirstEnergy's Memo Contra and grant OPAE's Motion to Intervene.

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²⁴ Entry at ¶4.

²⁵ https://www.youtube.com/watch?v=dYmkBvTNW20&feature=emb_title starting at 12:05.

²⁶ Industrial Energy Users of Ohio filed their intervention on Oct. 16, 2020 and the deadline for any Memorandum Contra to that Motion has yet to pass.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served on all parties of record via the DIS system on October 21, 2020.

/s/ Robert Dove
Robert Dove

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Summary: Reply in Support of Ohio Partners for Affordable Energy's Motion to Intervene electronically filed by Mr. Robert Dove on behalf of Ohio Partners for Affordable Energy