

**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)	Case No. 19-2121-EL-ATA
Edison Company for Approval to Establish a)	
Legacy Generation Resource Rider)	

**REPLY IN SUPPORT OF MOTION TO INTERVENE
BY THE CITIZENS' UTILITY BOARD OF OHIO**

I. INTRODUCTION

The Citizens' Utility Board of Ohio ("CUB Ohio") filed a Motion to Intervene in this case on October 1, 2020. CUB Ohio's Motion to Intervene was submitted in conjunction with a Motion to Amend the Legacy Generation Resource ("LGR") Rider tariffs filed in this docket by the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy EDUs" or "Companies") and authorized under R.C. 4928.148 to provide cost recovery for the Ohio investor-owned distribution utilities that own shares of the Ohio Valley Electric Corporation ("OVEC") coal plants. CUB Ohio seeks to make the tariffs refundable to ratepayers should R.C. 4928.148 be repealed or modified in light of the July 2020 eruption of a corruption scandal surrounding the provision's enactment in 2019 as part of House Bill 6.¹ Without Commission action on this matter, the Companies' customers may lose the more than \$1 million a month they are paying in the interim, since the Ohio Supreme Court has held that R.C. 4905.32 requires a tariff to contain an applicable refund

¹ U.S. Attorney's Office for the Southern District of Ohio, Press Release, Federal grand jury indicts Ohio House Speaker enterprise in federal public corruption racketeering conspiracy involving \$60 million (July 30, 2020), available at <https://www.justice.gov/usao-sdoh/pr/federal-grand-jury-indicts-ohio-house-speaker-enterprise-federal-public-corruption>.

mechanism in order for the tariff charges to be refunded.² The FirstEnergy EDUs' response to CUB Ohio's Motion to Amend did not oppose the requested relief, but only asserted that the Commission would have to take actions beyond those proposed by CUB Ohio to provide that relief.³

Nevertheless, the Companies have now filed a Memorandum Contra CUB Ohio's Motion to Intervene ("Memo Contra"), arguing that CUB Ohio's request for intervention represents an untimely attempt to seek rehearing since the Commission issued a Finding and Order in this docket on December 18, 2019. However, the Companies' opposition on this ground itself represents an untimely attempt to supplement its response to CUB Ohio's separate Motion to Amend, which was filed on an expedited basis under Ohio Adm. Code 4901-1-12(C). In any case, CUB Ohio did provide sufficient basis for the Public Utilities Commission of Ohio ("Commission") to grant its Motion to Intervene pursuant to R.C. 4903.221(A) and Ohio Adm. Code 4901-1-11, either as a routine motion in a case with no hearing date or other procedural deadlines set by the Commission, or as a request filed late based on a showing for good cause.

II. DISCUSSION

A. CUB Ohio's Motion to Intervene Satisfies the Timeliness Requirements of Ohio Administrative Code 4901-1-11.

The FirstEnergy EDUs do not contend that CUB Ohio has failed to satisfy any of the substantive criteria for intervention under R.C. 4903.221 and Ohio Adm. Code 4901-1-11. They

² *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, ¶ 19 (citing R.C. 4905.32's bar on the refund or remittance of "any rate, rental, toll, or charge" in its tariff schedules "except such as are specified in such schedule").

³ FirstEnergy EDUs' Memorandum Contra the Motion to Amend Legacy Generation Resource Rider Tariffs and for an Expedited Ruling (Oct. 8, 2020) at 1-3.

simply assert that it is untimely. However, the Companies fail to offer a valid basis to deny CUB Ohio's Motion to Intervene in light of the fact that CUB Ohio filed the motion expeditiously in response to rapidly developing events that occurred well after the Commission's December 18, 2019 Finding and Order.

Ohio Adm. Code 4901-1-11(E) provides that a motion to intervene will be considered untimely "if it is filed later than five days prior to the scheduled date of hearing or any specific deadline established by order of the commission for purposes of a particular proceeding." This echoes R.C. 4903.221(A), which states that a party must file a motion to intervene "no later than . . . [a]ny specific deadline established by order of the commission for purposes of a particular proceeding; or, if no such deadline is established; . . . [f]ive days prior to the scheduled date of hearing." CUB Ohio's motion is timely under these provisions. It is simple fact that the Commission has never set a hearing date or issued a scheduling order in this proceeding. The FirstEnergy EDUs never offer any explanation of how the Motion to Intervene could nonetheless be considered untimely, and that is sufficient basis to disregard their arguments.

By contrast, in the only case cited by the Companies in their Memo Contra as an example of denying a motion to intervene filed after a Commission opinion and order, a party sought intervention *after the scheduled hearing*.⁴ Even then, although the Commission denied the motion to intervene, it plainly stated that the movant could "request reconsideration of its motion" if any subsequent hearings were scheduled.⁵ In fact, the Commission did grant a later

⁴ *In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to its Compliance with Certain Provisions of the Minimum Telephone Service Standards Set Forth in Chapter 4901:1-5, Ohio Administrative Code ("Ameritech")*, Case No. 99-938-TP-COI, Opinion & Order (July 20, 2000) at 2-3 (describing procedural history).

⁵ *Ameritech*, Entry (Oct. 5, 2000), ¶ 12.

motion to intervene filed by the Ohio Consumers' Counsel seeking to participate in subsequent proceedings, with no apparent concern about timeliness.⁶

CUB Ohio's Motion to Intervene is timely under the plain language of Ohio Adm. Code 4901-1-11(E), and should be granted. But even if the Commission were to consider the motion to be late-filed, CUB Ohio has good cause for having filed after the Commission's December 18, 2019 Finding and Order. The Commission has generally granted untimely motions to intervene consistent with R.C. 4903.221(A), which provides that the Commission may do so "for good cause shown," judging that a showing of good cause also establishes "extraordinary circumstances" warranting later intervention under Ohio Adm. Code 4901-1-11(F).⁷ In this case, the good cause for CUB Ohio filing its Motion to Intervene after December 2019 is that the events and facts forming the basis for its interest in the case and request for relief – the exposure of alleged political corruption underlying the enactment of R.C. 4928.148 and subsequent consideration of multiple bills that would repeal R.C. 4928.148 by the Ohio General Assembly – *did not occur* until the latter half of 2020. Accordingly, CUB Ohio would have had no grounds for intervention or its Motion to Amend in 2019.⁸

⁶ *Ameritech*, Entry (Dec. 27, 2000), ¶ 3.

⁷ See, e.g., *In re Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Management Programs*, Case No. 16-1309-GA-UNC, Entry (Sept. 27, 2016) at 5 (granting intervention out-of-time to Environmental Law & Policy Center); *In re Application of Duke Energy Ohio, Inc. for Tariff Approval*, Case No. 14-2209-EL-ATA, Entry (Dec. 16, 2015) at 2-3 (granting intervention out-of-time to multiple parties); *In re Ohio Edison Co., Cleveland Elec. Illum. Co., and Toledo Edison Co. for Authority to Provide a Standard Service Offer*, Case No. 12-1230-EL-SSO, Entry (May 15, 2012) at 2 (granting intervention out-of-time to Cleveland Municipal Schools District).

⁸ Additionally, CUB Ohio was not incorporated in Ohio until June 2020. See State of Ohio Certificate and Initial Articles of Incorporation for CUB Ohio (June 23, 2020), available at <https://bizimage.ohiosos.gov/api/image/pdf/202017600794>. Its lack of corporate existence in 2019 would also represent good cause for a late motion to intervene.

B. The FirstEnergy EDUs Cannot Supplement Their Memorandum Contra CUB Ohio's Motion to Amend Through This Separate Filing.

With no direct argument to establish that CUB Ohio's Motion to Intervene is untimely on its own, the Companies suggest that it should be denied as part of an attempt to file an untimely application for rehearing regarding the Commission's December 18, 2019 Finding and Order through the accompanying Motion to Amend. Whether or not that argument has any substantive merit, it is untimely.

The FirstEnergy EDUs are effectively arguing that the Motion to Amend is invalid – not the Motion to Intervene. The Companies' response to the Motion to Amend was due seven days after its filing, on October 8, 2020, due to CUB Ohio's request for an expedited ruling on the motion under Ohio Adm. Code 4901-1-12(C). The FirstEnergy EDUs did in fact file a Memorandum Contra the Motion to Amend consistent with that deadline, but never characterized the Motion to Amend as an untimely application for rehearing. They cannot supplement those arguments out-of-time through the Memorandum Contra the Motion to Intervene, at least not without demonstrating good cause for the Commission to waive the requirements of Ohio Adm. Code 4901-1-12(C), which they have not even attempted to do.

C. CUB Ohio's Motion to Amend Does Not Constitute an Untimely Application for Rehearing.

CUB Ohio's Motion to Amend also does not constitute an application for rehearing that needed to be filed within 30 days of the Commission's December 18, 2019 Finding and Order under R.C. 4903.10. That statute relates to applications request "a rehearing in respect to any matters determined in the proceeding." Since the corruption scandal surrounding House Bill 6 had not come to light by December 2019, and the Ohio legislature was not considering repeal or

modification of R.C. 4928.148 at that time, the Commission’s Finding and Order did not “determine” anything with respect to refund language in the LGR tariffs to address such a repeal or modification. That is a wholly new issue first raised in CUB Ohio’s Motion to Amend, and can be ruled upon by the Commission without in any way altering its December 18, 2019 Finding and Order. Therefore, the FirstEnergy EDUs lack any valid basis for this argument.

III. CONCLUSION

CUB Ohio’s Motion to Intervene was timely filed, or at worst filed at this point in the proceeding for good cause. CUB Ohio does not seek any modification or reversal of the Commission’s December 18, 2019 Finding and Order, but rather requests relief for customers from the tariffs filed and authorized through this docket based on events that have occurred in 2020. The Commission should grant CUB Ohio’s Motion to Intervene and consider that request on its merits, rather than allowing the FirstEnergy EDUs to wield baseless procedural and technical arguments that could needlessly cost its customers millions of dollars.

October 23, 2020

Respectfully submitted,

/s/ Madeline Fleisher
Madeline Fleisher (0091862)
(Counsel of Record)
Dickinson Wright PLLC
150 East Gay Street, Suite 2400
Columbus, Ohio 43215
(614) 591-5474
mfleisher@dickinsonwright.com

Counsel for Citizens’ Utility Board of Ohio

CERTIFICATE OF SERVICE

The e-filing system of the Public Utilities Commission of Ohio will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons listed below via electronic mail on October 23, 2020.

/s/ Madeline Fleisher
Madeline Fleisher

bknipe@firstenergycorp.com
jlang@calfee.com
khehmeyer@calfee.com
John.Jones@OhioAttorneyGeneral.gov
Christopher.healey@occ.ohio.gov
Angela.obrien@occ.ohio.gov

Michael.williams@puco.ohio.gov

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Summary: Reply Reply in Support of Citizens' Utility Board of Ohio Motion to Intervene electronically filed by Ms. Madeline Fleisher on behalf of Citizens' Utility Board of Ohio