

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of The Ohio Edison)	
Company, The Cleveland Electric Illuminating)	
Company, and The Toledo Edison Company's)	Case No. 17-974-EL-UNC
Compliance with R.C. 4928.17 and Ohio Adm.)	
Code Chapter 4901:1-37.)	

**MOTION TO INTERVENE AND REQUEST FOR LEAVE TO FILE MOTION TO
INTERVENE OUT OF TIME OF THE ENVIRONMENTAL LAW & POLICY CENTER**

Environmental Law & Policy Center (“ELPC”), pursuant to Section 4903.221 of the Ohio Revised Code and Rule 4901-1-11 of the Ohio Administrative Code, moves for leave to intervene and requests leave to file its motion to intervene out of time in the above-captioned proceeding. As explained below, this case involves a highly unusual circumstance that warrants granting this motion.

ELPC recognizes that the procedural schedule set forth in the Entry issued in the above-captioned proceedings provided that motions to intervene should be filed by October 20, 2018. ELPC respectfully requests that the Commission grant it leave to file its motion to intervene out of time and entertain its motion to intervene, as granting the motion would be consistent with the Commission’s policy of encouraging the broadest possible participation in its proceedings, *Cleveland Elec. Illum. Co.*, No. 85-675-EL-AIR (January 14, 1986), and the Ohio Supreme Court’s instruction that motions to intervene are to be liberally construed, *Consumers’ Counsel v. Pub. Util.*, 111 Ohio St.3d 384, 387 (Nov. 29, 2006). While Commission rules permit untimely motions only under exceptional circumstances, Ohio Admin. Code 4901-1-11(F), ELPC believes the announcement of a new audit and the substantial factual developments since the 2018 deadline—including FirstEnergy Corporation’s termination of executives and allegations that FirstEnergy Corporation was involved with the House Bill 6 bribery scandal—support allowing

the delay between the start of the proceeding and ELPC's motion. Further, no party will be prejudiced by ELPC's request, and granting ELPC's leave to file its motion to intervene out of time would be consistent with the disposition of similar requests to file motions to intervene out of time in other proceedings before this Commission.

ELPC respectfully requests that the Public Utilities Commission of Ohio grant this motion to intervene and request for leave to file the motion out of time. A Memorandum in Support is attached hereto.

Respectfully submitted,

/s/ Caroline Cox

Caroline Cox

Environmental Law & Policy Center

21 West Broad St., Floor 8

Columbus, OH 43215

(312) 795-3742

ccox@elpc.org

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MEMORANDUM IN SUPPORT

The unprecedented events of the last several months—including allegations of bribery against the parent company of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “FirstEnergy Utilities”)—have made this docket newly active. The Commission’s procedural schedule for this case was set long before the Commission began its investigation into the FirstEnergy Utilities’ political and charitable spending in Case No. 20-1502 and long before the Environmental Law & Policy Center (“ELPC”) moved to expand that investigation to look at corporate separation issues. Because the Commission now seeks to use this docket for an entirely new audit related to corporate separation issues, ELPC moves to intervene in order to protect its interest in a thorough investigation into the FirstEnergy Utilities’ compliance with corporation separation rules.

Ohio Revised Code 4903.221 states that “[a]ny other person who may be adversely affected by a public utilities commission proceeding may intervene in such proceeding” provided the Public Utilities Commission of Ohio (“Commission”) makes certain determinations. ELPC clearly fits this definition. ELPC is a non-profit environmental advocacy organization whose mission is to improve the Midwest’s environmental quality and economic development. ELPC is an advocate for environmental health, sustainable economic development, and anti-corruption in

public utility regulation. As ELPC has intervened and moved for an expansion of the investigation in 20-1502, the audit proposed in this docket could interfere with ELPC's motion in the other proceeding. While the Commission did set an intervention deadline, we submit that it should use its discretion under R.C. 4903.221(A) to allow for ELPC's late intervention.

Ohio Revised Code 4903.221 requires the Commission to consider four factors when presented with a motion to intervene. The Commission must 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.

Ohio Rev. Code 4903.221(B). ELPC's motion to intervene meets all of the statutory factors.

With respect to the first factor, ELPC has moved to intervene in the investigation into the FirstEnergy Utilities' political and charitable spending related to HB6 and the subsequent referendum effort. *See* Motion to Intervene by the Environmental Law & Policy Center, *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Co., the Cleveland Elec. Illuminating Co, and the Toledo Edison Co.*, No. 20-1502-EL-UNC (Sept. 18, 2020). In that docket, ELPC has moved with the Ohio Environmental Council to expand the investigation into, among other issues, whether the FirstEnergy Utilities violated any corporate separation requirements with regard to their advocacy in relation to Amended Substitute House Bill 6 ("HB6"). *See* Motion of the Environmental Advocates to Expand the Scope of the Commission's Review into FirstEnergy's Political and Charitable Spending, No. 20-1502-EL-UNC (Sept. 29, 2020). Because the issue of corporate separation is addressed in this new audit,

ELPC has an interest in intervening in this docket to ensure that the audit is a thorough review of the FirstEnergy Utilities' practices and addresses the allegations related to HB6.

In addition to our specific interest based on the related investigation, ELPC also has a substantial interest in the audit into the FirstEnergy Utilities' compliance with corporate separation laws, regulations, and policies. FirstEnergy Utilities' compliance is essential for a robust deregulated energy market in Ohio. Anticompetitive behavior that violates these requirements would impact ELPC's interests in economic and clean energy development, which rely on functioning and fair markets. Additionally, the Commission's November 4, 2020 Entry ordering a new audit acknowledges that the corruption allegations tied to HB6, press reports of FirstEnergy Corporation's involvement, and the October 8-K SEC filing prompted this new audit. ELPC participated in hearings on HB6 and led legislative education efforts. If the FirstEnergy Utilities or their leadership violated corporate separation requirements in its HB6 or legislative work, then they likely undermined ELPC's work to educate legislators. ELPC has also often acted as watchdog for corruption and malfeasance in the Midwest's energy sector, including the current Exelon bribery scandal in Illinois and litigating against energy groups that fail to meet environmental standards.

As to the second factor, because of the potential impacts on ELPC and its Ohio members, ELPC seeks to ensure the audit fairly and fully addresses how the FirstEnergy Utilities' actions could have impacted the deregulated energy market in Ohio. As a clean energy advocate, ELPC has experience working with public utility commissions to create functioning markets in which clean energy can effectively compete and thrive. Violations of corporate separation requirements may have undermined that deregulation goal, and ELPC's perspective from across the Midwest—including other deregulated states—will help create a comprehensive audit.

Under the third factor, ELPC's inclusion will not unduly delay or prolong the proceeding. Although the Commission has set a procedural schedule for the case, which included a deadline to intervene of October 20, 2018, recent developments and the new audit process have substantially changed this proceeding. The Commission announced this new audit less than a month ago and has yet to select a new auditing firm. ELPC is committed to working within any further schedule that is imposed by this Commission to achieve the efficient and orderly disposition of the new questions presented in this proceeding.

Finally, ELPC will significantly contribute to the full development and resolution of the proceeding by bringing its unique perspective to bear. ELPC has expertise and experience throughout the Midwest regarding energy policy that will contribute to resolving the pending issues.

The Commission's procedural rules at Ohio Administrative Code 4901-11-1 similarly provide that the Commission shall consider five factors when weighing a motion to intervene. ELPC meets the requirements set forth in that section:

- (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; [and]
- (5) The extent to which the person's interest is represented by existing parties.

O.A.C. 4901-11-1. The first four factors mirror those in R.C. 4903.221, and for the reasons stated above, ELPC meets those factors. As to the fifth, ELPC maintains that no other party can adequately represent its interests in protecting its rights in Case No. 20-1502 and as a Midwestern environmental advocacy organization with experience as a watchdog for corruption.

Through this motion, ELPC seeks leave to file its motion to intervene out of time because the original intervention deadline of October 20, 2018 has passed. Ohio Administrative Code 4901-1-11(F) allows untimely intervention in “extraordinary circumstances” that the intervenor could not have foreseen. *See, e.g., In re Columbus Southern Power Co.*, No. 008-917-EL-SSO Entry (June 16, 2011). Already in this proceeding, the Commission has granted an untimely intervention in circumstances far less extraordinary than those prompting ELPC’s intervention. In April 2020, the Commission granted untimely intervention to the Retail Energy Supply Association because the Association could not have reasonably foreseen that the Commission would stay its complaint in a case raising related corporate separation issues. Entry ¶¶ 11, 12 No. 17-974-EL-UNC (Apr. 29, 2020). In ELPC’s case, the chain of events leading to the new audit has also prompted this late intervention. In July 2020, the U.S. Attorney for the Southern District of Ohio released a criminal complaint detailing a legislative bribery scandal tied to HB6.¹ Press reports have continued to tie this scandal to the FirstEnergy Utilities’ parent company.² As the Commission’s most recent Entry notes, the FirstEnergy Utilities’ parent company admitted in an October 2020 SEC filing “reporting the termination of certain officers and appointment of a new interim chief executive officer” as part of its internal investigations related to government investigations. Entry ¶ 16, 17-974-EL-UNC (Nov. 4, 2020). These are unprecedented developments that must qualify under Ohio Administrative Code 4901-1-11(F).

¹ Criminal Complaint, *United States v. Matthew Borges et al.*, No. 1:20-MJ-00526 (S.D. Ohio July 21, 2020).

² *See, e.g.,* Mark Williams, *Akron-Based Utility Fires CEO, Two Others, In Wake of HB6 Scandal*, COLUMBUS DISPATCH (Oct. 29, 2020), <https://www.dispatch.com/story/business/2020/10/29/firstenergy-fires-ceo-2-others-wake-hb-6-scandal/6078932002/>; *see also* FirstEnergy Corp. Statement on HB 6 Investigation, FIRSTENERGY CORP. (July 21, 2020), https://www.firstenergycorp.com/newsroom/news_articles/firstenergy-corp--statement-on-hb-6-investigation.html (“This afternoon, FirstEnergy Corp. (NYSE: FE) received subpoenas in connection with the investigation surrounding Ohio House Bill 6. We are reviewing the details of the investigation and we intend to fully cooperate.”)

It is also clear that ELPC could not have foreseen at the time of the intervention deadline the extraordinary circumstances leading to its late intervention. In 2018, ELPC could not have foreseen the bribery scandal, FirstEnergy Corporation’s internal investigation and its results, or the Commission’s decision to open an entirely new audit in this docket. *See id.* ¶¶ 16, 17. Therefore, the Commission should conclude that these extraordinary circumstances are sufficient to grant ELPC’s request for leave to file to intervene out of time.

The Commission’s rules favor intervention, see *Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 384, 388 (2006), and this Commission’s policy is to “encourage the broadest possible participation in its proceedings,” Entry at 2, *Cleveland Elec. Illum. Co.*, Case No. 85-675-EL-AIR (January 14, 1986). ELPC respectfully requests that the Commission embrace this preference for intervention—especially given the unprecedented situation that has led to the new audit in this docket—and grant both ELPC’s request for leave to seek intervention out of time and its motion for intervention in this proceeding.

Respectfully submitted,

/s/ Caroline Cox
Caroline Cox
Environmental Law & Policy Center
21 West Broad St., Floor 8
Columbus, OH 43215
(312) 795-3742
ccox@elpc.org

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Intervene and Request for Leave to File Motion to Intervene Out of Time submitted on behalf of the Environmental Law & Policy Center was served by electronic mail, upon the following Parties of Record on November 20, 2020.

/s/ Caroline Cox
Caroline Cox

Email Service List:

Devin.Mackey@puco.ohio.gov;
Debra.bingham@occ.ohio.gov;
mlandes@isaacwiles.com;
Bethany.allen@igs.com;
rglover@mcneeslaw.com;
torahood@bricker.com;
Tonnetta.Scott@puc.state.oh.us;
Jamie.williams@occ.ohio.gov;
rdoringo@jonesday.com;
kspencer@aando.com;
mary.fischer@puco.ohio.gov;
heather.chilcote@puco.ohio.gov;
joliker@igsenergy.com;
dstinson@bricker.com;
jlang@calfee.com;
edanford@firstenergycorp.com;
mnugent@igsenergy.com;
talexander@calfee.com;
Maureen.willis@occ.ohio.gov;
mrgladman@jonesday.com;
angela.obrien@occ.ohio.gov;
Steve.beeler@ohioattorneygeneral.gov;
joliker@igsenergy.com;
Mnugent@igsenergy.com;
bethany.allen@igs.com;
gkrassen@bricker.com;
dstinson@bricker.com;
edanford@firstenergycorp.com;
cwatchorn@firstenergycorp.com;

bknipe@firstenergycorp.com;
cahill@whitt-sturtevant.com;
whitt@whitt-sturtevant.com;
fykes@whitt-sturtevant.com;
mwager@taftlaw.com;
iavalon@taftlaw.com;
Megan.addison@puc.state.oh.us;
Gregory.price@puc.state.oh.us;

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Summary: Motion to Intervene, Request for Leave to File Motion to Intervene Out of Time, and Memorandum in Support electronically filed by Ms. Caroline Cox on behalf of Environmental Law and Policy Center