

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT AND REQUEST FOR
LEAVE TO INTERVENE OUT OF TIME
BY CALPINE ENERGY SOLUTIONS LLC**

Robert Dove (0092019)
Kegler Brown Hill + Ritter Co., L.P.A.
65 E State St., Ste. 1800
Columbus, OH 43215-4295
Office: (614) 462-5443
rdove@keglerbrown.com

(Willing to accept service by email)
Attorney for Calpine Energy Solutions, LLC

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

MOTION TO INTERVENE

For the reasons set forth in the accompanying Memorandum in Support, Calpine Energy Solutions, LLC ("Calpine") respectfully moves the Public Utilities Commission of Ohio (the "Commission") for leave to intervene out of time in the above-captioned case pursuant to Ohio Revised Code 4903.221, Ohio Administrative Code 4901-1-11 and 4901-1-12, and to grant to the Calpine the full powers and rights specifically authorized by statute or by the provisions of the Ohio Administrative Code.

Calpine acknowledges that the procedural schedule originally set forth in this proceeding set the deadline for intervention as October 20, 2018.¹ However, Ohio Revised Code 4903.221 grants the Commission broad discretion when evaluating motions to intervene, including the ability to grant a motion to intervene filed after the specified deadline for intervention has passed for good cause shown. Further, Ohio Admin. Code 4901-1-11 authorizes the Commission to grant motions to intervene out of time under extraordinary circumstances.

As set forth in the attached Memorandum in Support, Calpine submits that it has a direct, real, and substantial interest in the issues and matters involved in this proceeding. Calpine is

¹ Entry, ¶18 (Sept. 20, 2018).

situated such that the disposition of this proceeding without Calpine's participation may, as a practical matter, impair or impede Calpine's ability to protect its interests. Additionally, Calpine's interests are not adequately represented by any other party to this matter, and its participation in this proceeding will contribute to a just and expeditious resolution of the issues and questions. Further, Calpine's participation will not unduly delay the proceedings or prejudice any other party.

Calpine respectfully requests that this Commission grant its Motion to Intervene and its Request for Leave to Intervene Out of Time for the reasons set forth in more detail in the attached Memorandum in Support.

/s/ Robert Dove
Robert Dove (0092019)
Kegler Brown Hill + Ritter Co., L.P.A.
65 E State St., Ste. 1800
Columbus, OH 43215-4295
Office: (614) 462-5443
rdove@keglerbrown.com

(Willing to accept service by email)
Attorney for Calpine

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM IN SUPPORT OF THE MOTION TO INTERVENE AND REQUEST
TO INTERVENE OUT OF TIME**

I. Introduction

Ohio Revised Code (“ORC”) § 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. Calpine seeks intervention in this proceeding in which the Commission has initiated a new corporate separation audit of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively “FirstEnergy” or the “Companies”).²

This proceeding began in 2017 and the original intervention deadline was October 20, 2018.³ The original audit was filed in this proceeding on May 18, 2020. On September 8, 2020 the Office of the Ohio Consumers’ Counsel (“OCC”) filed a motion to conduct an investigation and management audit of FirstEnergy, its corporate governance and its activities regarding Am. Sub. H.B. 6, to hire an independent auditor, to reopen the distribution modernization rider audit case, and to require FirstEnergy to show that it did not improperly use money collected from

² Entry, ¶17 (November 4, 2020). (“Audit Entry”)

³ Entry, ¶18 (Sept. 20, 2018).

consumers or violate any utility regulatory laws, rules or orders in its activities regarding Am. Sub. H.B. 6.⁴

New details about the Companies' operation emerged in the Companies' Form 8-K filing made on October 29, 2020 with the United States Securities and Exchange Commission.⁵ The Commission determined that this new information required additional action to ensure compliance by the Companies and its affiliates with R.C. 4928.17 and the Companies' Commission approved corporate separation plans.⁶ The Commission then ordered an RFP for audit of the Companies covering the period between November 1, 2016, and October 31, 2020.⁷ The Commission held that once an auditor was selected and the audit completed, any conclusions, results, or recommendations made by the auditor may be examined by any participant to this proceeding.⁸ On December 2, 2020 the Commission selected Marcum LLP as the auditor and reiterated that the final audit will be available for examination to any participant in this proceeding.⁹

Calpine is an independent, national provider of competitive retail electric service ("CRES") across twenty states. It operates as a licensed CRES provider in Ohio and is actively serving and soliciting customers throughout Ohio, including in the FirstEnergy service territory. Calpine currently offers a wide variety of efficiency and energy-related products and services beyond simple energy procurement designed to meet the individualized needs and demands of Calpine's customers and capture the benefits of the existing competitive wholesale energy environment to bring those benefits forward into Ohio's competitive retail electric market.

⁴ Entry ¶11 (December 2, 2020).

⁵ Audit Entry ¶16.

⁶ Id. ¶17.

⁷ Id.

⁸ Id. ¶21.

⁹ Entry ¶17 & ¶23 (December 2, 2020).

FirstEnergy's compliance, or potential lack thereof, with Ohio's corporate separation laws and rules could have great impact to the competitive market in Ohio and specifically Calpine's customers. Calpine's interests are not adequately represented by any other parties in this proceeding. As such, Calpine is entitled to intervene in the above captioned proceeding.

Because this audit is essentially a new proceeding and was not contemplated under the original Entry establishing the procedural schedule good cause exists to allow Calpine's intervention out of time. Finally, the facts detailed in the Companies' Form 8-K filing constitute extraordinary circumstances as evidenced by the Commission decision to initiate this new audit. Therefore, extraordinary circumstances exist which justifies untimely intervention.

II. Legal Standard

Ohio law states that a party may intervene in a Commission proceeding if that party "may be adversely affected by a public utilities commission proceeding."¹⁰ In the determination of whether a party may be adversely affected for purposes of intervention, the Commission is required to evaluate:

- (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.¹¹

Revised Code 4903.221 (A) authorizes the Commission to establish a deadline for intervention or to allow intervention up to five days before a hearing if no deadline was set. The statute also

¹⁰ R.C. 4903.221.

¹¹ R.C. 4903.221(B).

authorizes the Commission to grant motions to intervene filed after either of the aforementioned deadlines upon a showing of good cause.¹² Finally, Ohio Admin. Code Chapter 4901-1-11 states the Commission should only grant an untimely intervention under extraordinary circumstances.

The Commission's rules also provide that any person may intervene where "[t]he person has a real and substantial interest in the proceeding."¹³ The PUCO regulations set forth the same four standards that are established in Ohio Revised Code 4903.221(B) for determining whether a party may be "adversely affected," and also purport to add a fifth factor regarding "the extent to which the person's interest is represented by existing parties."¹⁴

As the Ohio Supreme Court recently held, intervention in Commission proceedings "ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the [Commission]."¹⁵ The Commission has consistently maintained a policy to "encourage the broadest possible participation" in its proceedings, even under extenuating circumstances.¹⁶ Calpine satisfies these liberal intervention standards and respectfully requests that its intervention be granted in these cases. Further, Calpine can demonstrate both good cause and extraordinary circumstances which justify intervention out of time.

¹² R.C. 4903.221(A)(2).

¹³ Ohio Adm. Code 4901-1-11(A)(2).

¹⁴ Ohio Adm. Code 4901-1-11(B).

¹⁵ *Ohio Consumers' Counsel v. Pub. Util Comm'n of Ohio* (2006), 111 Ohio St. 3d 384, 388, 2006 Ohio 5853, 856 N.E.2d 940.

¹⁶ See e.g. *In the Matter of the Application of The Dayton Power and Light Company*, 2009 WL 322883 at 1, Ohio PUC February 5, 2009 (Commission granted motion to intervene in light of policy to encourage participation, despite party's failure to file within the deadline).

III. Calpine is entitled to intervene under §4903.221 because the organization and its members “may be adversely affected” by the outcome of this proceeding.

Calpine is entitled to intervene in this proceeding because Calpine satisfies each of the four statutory factors demonstrating that the organization and its members “may be adversely affected” by the outcome. First, the nature and extent of Calpine’s interests in the proceeding is real and substantial,¹⁷ as the issues involved herein are directly related to Calpine’s interests in protecting its members' interests within FirstEnergy’s service territory and the competitive market as a whole. FirstEnergy’s compliance with Ohio’s corporate separation laws, regulations, and policies has a direct impact on the Ohio energy market which in turn impacts the bills of FirstEnergy’s customers. Violations of Ohio’s corporate separation laws and requirements may have a deleterious effect on Ohio’s energy market including creating an anti-competitive market.

Further, as the Commission, noted in its earlier Entry, the details contained within FirstEnergy’s Form 8-K may be connected to FirstEnergy’s actions in relation to the passage of Am. Sub. H.B.6 (“HB6”) and the subsequent referendum effort.¹⁸ HB 6 enshrined certain bailouts to the benefit of a few companies. If any corporate separations violations occurred in relation to supporting the passage of HB 6 and defeating the subsequent referendum effort those violations have impacted Calpine’s interests. Therefore, Calpine has a real and substantial interest in this proceeding.

Second¹⁹, because of the potential impacts on Calpine and the competitive market in which Calpine operates, Calpine wants to ensure that FirstEnergy has fully complied with Ohio’s corporate separation laws and regulations to ensure a fair and unbiased energy market. While other CRES providers, such as Interstate Gas Supply, Inc. have intervened, IGS is distinct and

¹⁷ R.C. 4903.221(B)(1).

¹⁸ Audit Entry ¶¶16-17.

¹⁹ R.C. 4903.221(B)(2).

separate from Calpine and does not share the same business strategies or perspectives. Furthermore, should other CRES providers seek intervention, their business and marketing strategies are also likely to diverge widely from that of Calpine's, and from those of each other. Accordingly, it would be appropriate for this Commission to grant intervention to all CRES entities that seek intervention. Therefore, no other party to the matter will adequately represent the interests of Calpine.

Third, Calpine's intervention will not unduly prolong or delay the proceeding²⁰ as this motion is being filed before the new audit has been completed and filed and Calpine is able to comply with all case management deadlines that will be established by the Commission and/or agreed to by the parties moving forward. Additionally, Calpine's interests are based on the audit ordered on November 4, 2020 and not on the prior matters in this proceeding. Therefore, no party will be prejudiced by Calpine's intervention because it is focused on the new matters under review by the Commission.

Fourth, intervention by Calpine will significantly contribute to the development, and ultimate resolution, of the facts and issues in this case by providing the perspective of a CRES provider that exclusively markets to mercantile customers. As such, Calpine should be permitted to intervene pursuant to Ohio Revised Code §4903.221.

IV. Calpine may intervene because Calpine and its members have a “real and substantial interest” in the proceeding as presented in Ohio Administrative Code 4901-1-11(B).

Calpine may also intervene in these proceedings because it satisfies each of the five factors listed in the PUCO rules demonstrating that it has a “real and substantial interest” in these

²⁰ R.C. 4903.221(B)(3).

cases.²¹ The first four factors are identical to those set forth under §4903.221(B) and, therefore, Calpine should be permitted to intervene for the same reasons as set forth in Section III above.

As for the fifth factor, Calpine's interests in these proceedings will not be fully represented by other parties.²² No other parties can adequately represent Calpine's interests because no other party has the same goals or serves the same customers as Calpine.

V. Both Good Cause and Extraordinary Circumstances Exist to Justify Intervention Out of Time.

Revised Code 4903.221(A)(2) authorizes the Commission to grant a motion to intervene out of time upon a showing of good cause. The Ohio Admin. Code Rule governing intervention at the Commission expounds upon this and states an untimely intervention will only be granted under extraordinary circumstances.²³ The Commission has previously granted motions to intervene out of time for a variety of reasons.²⁴

It is clear extraordinary circumstances exist in this case via the Form 8-K filing. The filing referenced violations of the Companies' policies and code of conduct discovered in connection with an internal investigation.²⁵ The Commission issued an Entry deeming this disclosure sufficient to initiate a new corporate separation audit.²⁶ Additionally, the Form 8-K

²¹ Ohio Adm.Code 4901-1-11(B).

²² Ohio Adm. Code 4901-1-11(B)(5).

²³ Ohio. Admin. Code 4901-1-11(F).

²⁴ See, e.g., *Columbus S. Power*, Case No. 09-872-EL-UNC, Entry at ¶14 (Dec. 1, 2010)(granting Kroger intervention after the conclusion of the evidentiary hearing); *Re Ohio Power Co.*, Case No. 15-507-EL-EDI, Opinion and Order at 10 (Sept. 27, 2017) (allowing motions to intervene that were seven days late to be granted); *In the Matter of Columbus S. Power*, Case No. 08-917-ELSSO, Entry at Finding 4 (Oct. 29, 2008) (allowing late intervention (over one month late) for EnerNOC and AICUO); *In the Matter of the Application of Ohio Power Co.*, Case No. 11-346-EL-SSO, Entry (July 8, 2011) (permitting late interventions (one week to 2 months late) for Dominion Retail, ELPC, OEC, Ormet and EnerNOC); *In the Matter of DP&L*, Case No. 89-105-EL-EFC, Entry (Dec. 28, 1989)(granting Montgomery County Board of Commissioners intervention one month after hearing had concluded and two weeks after briefs had been filed).

²⁵ <https://sec.report/Document/0001193125-20-281617/>

²⁶ Audit Entry ¶17.

states the internal investigation was in relation to the ongoing government investigations previously disclosed in the Companies' Form 10-Q.²⁷ The Companies' Form 10-Q referenced "government investigations regarding HB 6 and related matters."²⁸

Government investigations into the Companies' actions related to HB 6 constitute extraordinary circumstances. These are extraordinary circumstances that did not exist at the time the original intervention deadline was set nor were they foreseeable. This is evidenced by both the Commission's decision to initiate a new audit based on that extraordinary circumstances and the period covered by the newly ordered audit.

The original intervention deadline was October 20, 2018 which was a year prior to the passage of HB 6. The Commission newly ordered audit covers the period from November 1, 2016 through October 31, 2020 which includes over a two year period which occurred after the original deadline for intervention. The Commission issued a new audit in this proceeding as opposed to a new docket, presumably, in part, in response to OCC's September 8, 2020 motion in this proceeding. The audit ordered on November 4, 2020, is, for all intents and purposes, a new audit with new circumstances not contemplated at the time of the original intervention deadline and including a review period which over two years after the original deadline. The Entry stated only participants to this proceeding will have access to the audit.²⁹ Therefore, Calpine respectfully submits that good cause exists to allow Calpine to intervene out of time and no party will be prejudiced as it is a new audit.

²⁷ <https://sec.report/Document/0001193125-20-281617/>

²⁸ <https://www.snl.com/Cache/IRCache/c2b5bd042-a19c-72e6-3511-965497ac9568.html>

²⁹ Audit Entry ¶21.

VI. Conclusion

For the foregoing reasons, Calpine respectfully requests that its Motion to Intervene and Request for Leave to Intervene Out of Time be granted, and Calpine be authorized to participate as a full party to this proceeding.

/s/Robert Dove

Robert Dove (0092019)
Kegler Brown Hill + Ritter Co., L.P.A.
65 E State St., Ste. 1800
Columbus, OH 43215-4295
Office: (614) 462-5443
Fax: (614) 464-2634
rdove@keglerbrown.com

(Willing to accept service by email)
Attorney for Calpine

CERTIFICATE OF SERVICE

I certify that The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case.

/s/ Robert Dove
Robert Dove

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

12/10/2020 3:12:57 PM

in

Case No(s). 17-0974-EL-UNC

Summary: Text Motion to Intervene and Memorandum in Support and Request for Leave to Intervene Out of Time electronically filed by Mr. Robert Dove on behalf of Calpine Energy Solutions, LLC