

**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       | ) |                        |

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**MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT AND REQUEST FOR  
LEAVE TO INTERVENE OUT OF TIME  
BY NATURAL RESOURCES DEFENSE COUNCIL**

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**MOTION TO INTERVENE**

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For the reasons set forth in the accompanying Memorandum in Support, Natural Resources Defense Council ("NRDC") 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 NRDC the full powers and rights specifically authorized by statute or by the provisions of the Ohio Administrative Code.

NRDC acknowledges that the procedural schedule originally set forth in this proceeding set the deadline for intervention as October 20, 2018.<sup>1</sup> 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, NRDC submits that it has a direct, real, and substantial interest in the issues and matters involved in this proceeding. NRDC is

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<sup>1</sup> Entry, ¶18 (Sept. 20, 2018).

situated such that the disposition of this proceeding without NRDC's participation may, as a practical matter, impair or impede NRDC's ability to protect its interests. Additionally, NRDC'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, NRDC's participation will not unduly delay the proceedings or prejudice any other party.

NRDC 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.

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

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**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. The Natural Resources Defense Council ("NRDC") 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").<sup>2</sup>

This proceeding began in 2017 and the original intervention deadline was October 20, 2018.<sup>3</sup> The original audit was filed in this proceeding on May 18, 2020. On September 8, 2020 the Office of the Ohio Consumers' Counsel 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

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<sup>2</sup> Entry, ¶17 (November 4, 2020). ("Audit Entry")

<sup>3</sup> Entry, ¶18 (Sept. 20, 2018).

consumers or violate any utility regulatory laws, rules or orders in its activities regarding Am. Sub. H.B. 6.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> The Commission then ordered an RFP for audit of the Companies covering the period between November 1, 2016, and October 31, 2020.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

NRDC is a national, non-profit environmental organization with thousands of members in Ohio. NRDC has members within the FirstEnergy service territories. NRDC respectfully submits that it is entitled to intervene in this proceeding because NRDC has a real and substantial interest in this proceeding, the disposition of which may impair or impede NRDC's ability to protect that interest. NRDC's and its members' interests are not adequately represented by any other parties in this proceeding. As such, NRDC is entitled to intervene in the above captioned proceeding.

Because this audit is essentially a new proceeding and was not contemplated under the

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<sup>4</sup> Entry ¶11 (December 2, 2020).

<sup>5</sup> Audit Entry ¶16.

<sup>6</sup> Id. ¶17.

<sup>7</sup> Id.

<sup>8</sup> Id. ¶21.

<sup>9</sup> Entry ¶17 & ¶23 (December 2, 2020).

original Entry establishing the procedural schedule good cause exists to allow NRDC'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."<sup>10</sup> 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.<sup>11</sup>

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

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<sup>10</sup> R.C. 4903.221.

<sup>11</sup> R.C. 4903.221(B).

<sup>12</sup> R.C. 4903.221(A)(2).

The Commission's rules also provide that any person may intervene where "[t]he person has a real and substantial interest in the proceeding."<sup>13</sup> 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."<sup>14</sup>

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]."<sup>15</sup> The Commission has consistently maintained a policy to "encourage the broadest possible participation" in its proceedings, even under extenuating circumstances.<sup>16</sup> NRDC satisfies these liberal intervention standards and respectfully requests that its intervention be granted in these cases. Further, NRDC can demonstrate both good cause and extraordinary circumstances which justify intervention out of time.

### **III. NRDC is entitled to intervene under §4903.221 because the organization and its members "may be adversely affected" by the outcome of this proceeding.**

NRDC is entitled to intervene in this proceeding because NRDC 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 NRDC's interests in the proceeding is real and substantial,<sup>17</sup> as the issues involved herein are directly related to NRDC's interests in

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<sup>13</sup> Ohio Adm. Code 4901-1-11(A)(2).

<sup>14</sup> Ohio Adm. Code 4901-1-11(B).

<sup>15</sup> *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.

<sup>16</sup> 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).

<sup>17</sup> R.C. 4903.221(B)(1).

protecting its members' interests within FirstEnergy's service territory. 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, including those who are NRDC members. Violations of Ohio's corporate separation laws and requirements could result in a deleterious effect on Ohio's energy market including negatively impacting the development of clean energy and raising the cost of electric service NRDC members must pay.

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.<sup>18</sup> NRDC is intervened in Case No. 20-1502-EL-UNC in which the Commission is reviewing FirstEnergy's spending related to HB6 and the subsequent referendum effort. 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 both NRDC members' bills and the conservation and clean energy options available to them. Therefore, NRDC has a real and substantial interest in this proceeding.

Second<sup>19</sup>, because of the potential impacts on NRDC and its members, NRDC wants to ensure that FirstEnergy has fully complied with Ohio's corporate separation laws and regulations and ensure negative impacts, if any, on Ohio's conservation and clean energy options and NRDC's members' bills are addressed. Therefore, no other party to the matter will adequately represent the interests of NRDC.

Third, NRDC's intervention will not unduly prolong or delay the proceeding<sup>20</sup> as this motion is being filed before the new audit has been completed and filed and NRDC is able to

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<sup>18</sup> Audit Entry ¶¶16-17.

<sup>19</sup> R.C. 4903.221(B)(2).

<sup>20</sup> R.C. 4903.221(B)(3).



comply with all case management deadlines that will be established by the Commission and/or agreed to by the parties moving forward. Additionally, NRDC interests are based on the audit ordered on November 4, 2020. Therefore, no party will be prejudiced by NRDC's intervention because it is focused on the new matters under review by the Commission.

Fourth, intervention by NRDC will significantly contribute to the full development of the record in this proceeding.<sup>21</sup> NRDC will bring significant expertise to bear in these proceedings. NRDC routinely intervenes and/or provides testimony before the Commission. NRDC has regularly presented testimony before the U.S. Congress and various state legislatures related to a myriad of energy policies. As such, NRDC should be permitted to intervene pursuant to Ohio Revised Code §4903.221.

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

NRDC 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 cases.<sup>22</sup> The first four factors are identical to those set forth under §4903.221(B) and, therefore, NRDC should be permitted to intervene for the same reasons as set forth in Section III above.

As for the fifth factor, NRDC's interests in these proceedings will not be fully represented by other parties.<sup>23</sup> No other parties can adequately represent NRDC's interests as a national environmental organization, with members in Ohio that is interested in environmental protection and the promotion of clean energy and smart, cost-effective distribution system investments. Because no other party to these proceedings advocates from a national platform at

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<sup>21</sup> R.C. 4903.221(B)(4).

<sup>22</sup> Ohio Adm.Code 4901-1-11(B).

<sup>23</sup> Ohio Adm. Code 4901-1-11(B)(5).

the intersection of these issues, and no other party represents the interests of NRDC's members in Ohio, no other party can represent NRDC's interests and the interests of its members.

**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.<sup>24</sup> The Commission has previously granted motions to intervene out of time for a variety of reasons.<sup>25</sup>

It is clear extraordinary circumstances exists 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.<sup>26</sup> The Commission issued an Entry deeming this disclosure sufficient to initiate a new corporate separation audit.<sup>27</sup> Additionally, the Form 8-K states the internal investigation was in relation to the ongoing government investigations previously disclosed in the Companies' Form 10-Q.<sup>28</sup> The Companies' Form 10-Q referenced "government investigations regarding HB 6 and related matters."<sup>29</sup>

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<sup>24</sup> Ohio. Admin. Code 4901-1-11(F).

<sup>25</sup> 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).

<sup>26</sup> <https://sec.report/Document/0001193125-20-281617/>

<sup>27</sup> Audit Entry ¶17.

<sup>28</sup> <https://sec.report/Document/0001193125-20-281617/>

<sup>29</sup> <https://www.snl.com/Cache/IRCache/c2b5bd042-a19c-72e6-3511-965497ac9568.html>

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. Therefore, NRDC respectfully submits that good cause exists to allow NRDC to intervene out of time and no party will be prejudiced as it is a new audit.

## **VI. Conclusion**

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

*[Signature block on the next page.]*

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**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

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Summary: 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 Natural Resources Defense Council