

**FILE**

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

RECEIVED-DOCKETING DIV  
MAR -8 PM 4:54  
PUCO

In the Matter of the Application of Duke ) Case No. 09-1946-EL-RDR  
Energy Ohio, Inc. to Establish and Adjust ) Case No. 08-0709-EL-AIR  
the Initial Level of its Distribution Rate )  
Rider DR )

**DUKE ENERGY OHIO, INC.'S MEMORANDUM  
IN OPPOSITION TO SHIRLEY HAYES' MOTION TO INTERVENE**

**I. INTRODUCTION**

Duke Energy Ohio, Inc. (Duke Energy Ohio) opposes the intervention of Shirley Hayes (Ms. Hayes) in Case No. 09-1946-EL-RDR (formerly designated Case No. 09-1946-EL-ATA). Ms. Hayes has not demonstrated that she meets any of the five factors to be considered in reviewing the propriety of intervention, and her motion must therefore be denied. In addition, Duke Energy Ohio respectfully requests that this Commission strike Ms. Hayes' Motion to Intervene from the docket in Case No. 08-0709-EL-AIR because Ms. Hayes has failed to request any relief in her motion regarding that case.

**II. ARGUMENT**

Pursuant to Ohio Admin. Code Section 4901-1-11(A)(2), upon timely motion,<sup>1</sup> intervention in a proceeding before this Commission is permitted upon a showing that:

<sup>1</sup> Ms. Hayes' Motion to Intervene was not, in fact, timely. While Ms. Hayes has requested that this Commission extend the deadline for the filing of motions to intervene, such a motion "will be granted only under extraordinary circumstances." Ohio Admin. Code Section 4901-1-11(F). In her motion to extend the intervention deadline, Ms. Hayes provides no explanation for her delay in filing to intervene. Indeed, she even notes that she had notice of the instant case as of February 1, 2010, well before the intervention deadline. Plainly, Ms. Hayes has not demonstrated that "extraordinary circumstances" exist to warrant the consideration of her untimely Motion to Intervene. Therefore, this Commission should reject Ms. Hayes' motion to extend the intervention deadline.

This is to certify that the impetus appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.  
Technician SM Date Processed MAR 09 2010

The person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties.

Ohio Admin. Code Section 4901-1-11(B) provides that the following factors are to be considered in evaluating motions to intervene:

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

*See also* Ohio Revised Code Section 4903.221.

**1. The nature and extent of the prospective intervenor's interest**

Ms. Hayes has a financial interest in these proceedings as a residential customer of Duke Energy Ohio. However, the Office of the Ohio Consumers' Counsel (OCC), which has already been granted intervention in these proceedings, competently represents Mr. Lane's interest as a residential Duke Energy Ohio customer.<sup>2</sup> Moreover, as but one of hundreds of thousands of Duke Energy Ohio customers, the extent of Ms. Hayes' interest is not great. Duke Energy Ohio's proposed Rider DR charge for residential customers is \$0.71 per month over the recovery period. Of course, the liability Ms. Hayes might bear could be slightly more or even a lesser amount, depending upon the total recovery approved by the Commission and whether the Commission approves Duke Energy Ohio's "per bill" mechanism of recovery as it proposed. Thus, while Ms. Hayes does have an interest in these proceedings, the extent of that interest is slight.

---

<sup>2</sup> *See infra*, Subsection 5 of this Memorandum in Opposition, for a discussion of the adequacy of OCC's representation of Ms. Hayes' interest in these proceedings.

Ms. Hayes might argue, though, that the extent of her interest is enhanced because she is the putative representative of the 1,399 Duke Energy Ohio residential customers whose signatures she collected in opposition to the creation of Rider DR. However, Ms. Hayes is not an attorney, and therefore cannot represent the legal interests of others before the Commission. If the Commission were to allow her intervention, in part, because it views Ms. Hayes as the representative of the petitioners, it would be condoning Ms. Hayes' unauthorized practice of law. Therefore, the Commission cannot consider Ms. Hayes as the representative of the 1,399 petitioners in determining the merits of her motion to intervene.

**2. The legal position advanced by the prospective intervenor and its probable relation to the merits of the case**

Ms. Hayes' motion states no legal position that has any relation to the merits of this case, which is concerned with determining whether Duke Energy Ohio's calculation of Rider DR is correct. Instead, Ms. Hayes' motion is primarily concerned with assuring that the Commission continues to consider in this case the opinions of the 1,399 petitioners who opposed the creation of Rider DR. (The Commission did, in fact, approve the creation of Rider DR by its January 14, 2009, Finding and Order entered in Case No. 08-0709-EL-AIR.) Contrary to Ms. Hayes' preoccupation, she and the 1,399 will surely not be ignored in this proceeding. As Ms. Hayes herself notes, the Ohio Consumers' Counsel (OCC) has already placed the opinions of Ms. Hayes and the 1,399 petitioners before the Commission in this case.<sup>3</sup> Thus, her stated reason to intervene in these proceedings, which is not a legal position, has already been advocated by OCC. Therefore, this factor weighs against granting Ms. Hayes intervention.

---

<sup>3</sup>*In the Matter of the Application of DukeEnergy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Rate Rider DR*, PUCO Case No. 09-1946-EL-RDR, Objections and Comments of the OCC, at 15, 15 n.26 (Feb, 23, 2010).

In addition, while Ms. Hayes filed her Motion to Intervene in Case No. 08-0709-EL-AIR, she requested no relief regarding that case. Therefore, Duke Energy Ohio respectfully requests that her Motion to Intervene be stricken from that docket.

**3. Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings**

Ms. Hayes' intervention will unduly prolong and delay the proceedings. Any pleadings Ms. Hayes files will only contain arguments duplicative of those of OCC, as noted above. Permitting additional rounds of pleadings to these proceedings, when the opinions contained in those pleadings are already represented by other parties, adds nothing to this case except increased expense and delay. Therefore, this factor weighs against granting Ms. Hayes intervention.

**4. Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues**

Ms. Hayes' intervention will not significantly contribute to full development and equitable resolution of the factual issues. The factual issues presented in this case are whether Duke Energy Ohio properly calculated the deferred storm expense and whether its proposed recovery mechanism is reasonable. Ms. Hayes has not alleged that she is an expert in utilities' regulation or in accounting systems. Thus, it is unlikely she can provide any informed opinion regarding whether Duke Energy Ohio has appropriately applied various accounting mechanisms in its calculation of Rider DR or whether the items included in Rider DR are appropriate. Therefore, this factor weighs against granting Ms. Hayes intervention.

**5. The extent to which the person's interest is represented by existing parties**

Ultimately, however, Ms. Hayes' interest in these proceedings is more than adequately represented by OCC. Ms. Hayes is a residential customer of Duke Energy Ohio. OCC was

created, in part, to "intervene in . . . [Commission] proceedings . . . on behalf of the residential consumers"<sup>4</sup> and to represent residential consumers "whenever an application is made to the public utilities commission by any public utility desiring to establish, modify, amend, change, increase, or reduce any rate, joint rate, toll, fare, classification, charge, or rental."<sup>5</sup> OCC's only interest in these proceedings is to represent the interests of Duke Energy Ohio's residential customers, including Ms. Hayes and the 1,399 petitioners.

OCC, of course, has requested that the Commission deny Duke Energy Ohio's application to set the Rider DR in its entirety. While Ms. Hayes has actually advanced no legal position regarding the propriety of Duke Energy Ohio's calculation of Rider DR, she would appear to want the Commission to deny Duke Energy Ohio's application to set the amount of Rider DR. Thus, she is advocating precisely the same position as OCC, which is adequately representing her position. Moreover, OCC has already cited to Ms. Hayes' petition in its pleadings, the saliency of which is the primary reason Ms. Hayes has sought leave to intervene. There is no need for Ms. Hayes to intervene to simply call this Commission's attention to a document, which OCC has already called to the Commission's attention. Thus, this factor also weighs against granting Ms. Hayes intervention.

### **III. CONCLUSION**

Because all the Ohio Admin. Code Section 4901-1-11(B) intervention factors weigh against granting Ms. Hayes intervention, Duke Energy Ohio respectfully requests that this Commission deny Ms. Hayes' Motion to Intervene. Furthermore, Duke Energy Ohio also respectfully requests that this Commission strike Ms. Hayes' Motion to Intervene from the

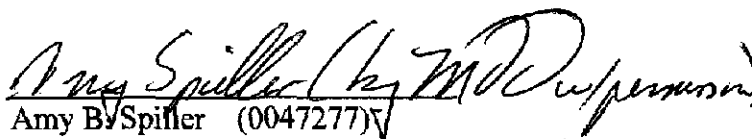
---

<sup>4</sup> Ohio Rev. Code Section 4911.02(B)(2)(c).

<sup>5</sup> Ohio Rev. Code Section 4911.15.

docket in Case No. 08-0709-EL-AIR because Ms. Hayes has failed to request any relief in her motion regarding that case.

Respectfully submitted,



Amy B. Spiller (0047277)  
Associate General Counsel  
Elizabeth H. Watts (0031092)  
Assistant General Counsel  
Duke Energy Business Services, LLC  
Room 2500 Atrium II  
P.O. Box 960  
Cincinnati, Ohio 45201-0960  
(513) 419-1810 (telephone)  
(513) 419-1846 (facsimile)  
e-mail: [amy.spiller@duke-energy.com](mailto:amy.spiller@duke-energy.com)



Michael Dortch  
Kravitz, Brown & Dortch, LLC  
65 East State Street  
Suite 200  
Columbus, Ohio 43215  
(614) 464-2000  
(614) 464-2002  
Email: [mdortch@kravitzllc.com](mailto:mdortch@kravitzllc.com)  
*Attorneys for Duke Energy Ohio, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was served via first-class mail delivery, postage prepaid, and/or electronic mail delivery on this the 8<sup>th</sup> day of March, 2010, to the following persons:


Duane Luckey  
Assistant General Attorney  
Chief, Public Utilities Section  
180 East Broad Street, 9<sup>th</sup> Floor  
Columbus, Ohio 43215

Ann Hotz  
Office of Consumers' Counsel  
10 West Broad St, Suite 1800  
Columbus, Ohio 43215

Albert E. Lane  
7200 Fair Oaks Drive  
Cincinnati, Ohio 43237-2922

Matthew White  
Chester, Wilcox & Saxbe, LLP  
65 E. State Street, Suite 1000  
Columbus, Ohio 43215

Shirley M. Hayes  
3730 Sarah St.  
Franklin, OH 45005

  
Michael D. Dortch