

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of Duke)	Case No. 09-1946-EL-RDR
Energy Ohio, Inc. to Establish and Adjust)	Case No. 05-0732-EL-MER
the Initial Level of its Distribution Rate)	Case No. 08-0709-EL-AIR
Rider DR)	

DUKE ENERGY OHIO, INC.'S MEMORANDUM
IN OPPOSITION TO ALBERT E. LANE'S MOTION TO INTERVENE

I. INTRODUCTION

Duke Energy Ohio, Inc. (Duke Energy Ohio) opposes the intervention of Albert E. Lane (Mr. Lane) in Case No. 09-1946-EL-RDR (formerly designated Case No. 09-1946-EL-ATA).

Mr. Lane has not demonstrated that he meets any of the five factors to be considered in reviewing the propriety of intervention, and his motion must therefore be denied. This

Commission must also deny Mr. Lane's unprecedented request to reactivate Case No. 08-0709-EL-AIR, a case finally decided by this Commission, and consolidate it with this case.

II. ARGUMENT

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

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

¹ Mr. Lane's Motion to Intervene was not, in fact, timely. While Mr. Lane has now sought leave to intervene out-of-time, such a motion "will be granted only under extraordinary circumstances." Ohio Admin. Code Section 4901-1-11(F). In his Motion for Leave, Mr. Lane states that the Commission should consider his untimely motion to intervene because he was unaware Case No. 09-1946-EL-RDR had been filed. (*In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Rate Rider DR*, PUCO Case No. 09-1946-EL-RDR, Lane Mot. for Leave to Intervene, at 1 (March 2, 2010).) Mr. Lane's inattention to the Commission's docket, however—especially when the Commission's relevant Finding and Order in Case No. 08-709-EL-AIR specifically stated that the level of Rider DR would be set in a subsequent proceeding—is plainly not an "extraordinary circumstance." Therefore, this Commission should reject Mr. Lane's Motion to Intervene as not timely.

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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

Mr. Lane 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.² Moreover, as but one of hundreds of thousands of Duke Energy Ohio customers, the extent of Mr. Lane's financial interest in these proceedings 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 Mr. Lane 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 Mr. Lane does have an interest in these proceedings, the extent of that interest is slight and is already represented by OCC.

² *See infra*, Subsection 5 of this Memorandum in Opposition, for a discussion of the adequacy of OCC's representation of Mr. Lane's interest in these proceedings.

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

Mr. Lane's Motion to Intervene 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, Mr. Lane's motion discusses his opposition to Duke Energy's merger with Cinergy and several aspects of Case No. 08-0709-EL-AIR that were wholly unrelated to Rider DR. Thus, Mr. Lane primarily seeks to relitigate cases already decided, which he did not appeal. Mr. Lane also requests that the Commission reactivate Case No. 08-0709-EL-AIR and consolidate it with this case.³ Energy Ohio strongly opposes this request. Mr. Lane cites no authority as to why Case No. 08-0709-EL-AIR should be reactivated and merged with this case. Case No. 08-0709-EL-AIR has been finally decided, and Mr. Lane did not appeal the Commission's Opinion & Order in that case. Reopening Case No. 08-0709-EL-AIR and merging it with this one would be simply unprecedented, has no apparent benefit to deciding the merits of this case, and would only prolong and delay these proceedings. As such, Duke Energy Ohio requests that the Commission deny Mr. Lane's request to reactivate Case No. 08-0709-EL-AIR and merge it with this one.

Mr. Lane's Motion to Intervene does make clear that he was opposed to the creation of Rider DR in Case No. 08-0709-EL-AIR. Again, however, the creation of Rider DR is not before the Commission in this case because by its January 14, 2009, Finding and Order entered in Case No. 08-0709-EL-AIR, the Commission approved the deferral mechanism proposed by Duke Energy Ohio to recover the expenses it incurred as a consequence of the windstorm resulting from Hurricane Ike. Instead, the only issues before the Commission are whether Duke Energy Ohio has properly deferred the Hurricane Ike windstorm related expenses for recovery and the

³ Mr. Lane did not request that Case No. 05-0732-EL-MER be merged with this case. Therefore, Duke Energy Ohio respectfully requests that his Motion to Intervene be stricken from the Case No. 05-0732-EL-MER docket.

means by which Duke Energy Ohio proposes to recover this amount. Mr. Lane has stated no legal position regarding whether Duke Energy Ohio has properly deferred the Hurricane Ike windstorm related expenses or whether the means by which Duke Energy Ohio proposes to recover this amount are appropriate. Thus, Mr. Lane has stated no legal position that has any probable relation to the merits of this case. Therefore, this factor weighs against granting Mr. Lane intervention.

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

Mr. Lane's intervention will unduly prolong and delay the proceedings. Again, Mr. Lane appears to be most interested in litigating cases already decided by the Commission and from which he did not appeal. To allow him to file additional pleadings in this case that discuss cases already decided will prolong these proceedings without any discernable benefit. Moreover, granting Mr. Lane's request to reactivate Case No. 08-0709-EL-AIR and merge it with this case would upend these proceedings, creating inordinate delays and confusion as to the issues before the Commission.⁴ Mr. Lane's request in this regard must be denied.

Furthermore, the prose of Mr. Lane's pleadings filed in this and other cases is sometimes quite difficult to follow. Requiring the parties to attempt to respond to unfounded arguments posited in future pleadings filed by Mr. Lane will only delay this case. Indeed, Mr. Lane's pleadings tend to show a lack of understanding of the issues before the Commission, as well as the attendant process. Furthermore, regarding past cases, other positions Mr. Lane appears to wish to propose, such as his allegation that Duke Energy Ohio, the Commission, and OCC are acting in concert to ignore him are simply unjustified, and demean this Commission and its Staff

⁴ As noted above, because Mr. Lane makes no request regarding Case No. 05-0732-EL-MER, his Motion to Intervene and Motion for Leave to Intervene be stricken from that docket.

and the OCC and its Staff. Such allegations contribute nothing to the resolution of this case.

Therefore, this factor weighs against granting Mr. Lane intervention.

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

Mr. Lane's 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. Mr. Lane has not alleged that he is an expert in utilities' regulation or in accounting systems. Thus, it is unlikely he can provide any informed opinion regarding whether the items deferred for recovery through Rider DR are appropriate. Therefore, this factor weighs against granting Mr. Lane intervention.

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

Ultimately, however, Mr. Lane's motion should be denied because his interest in these proceedings is more than adequately represented by OCC. Mr. Lane is a residential customer of Duke Energy Ohio. OCC was created, in part, to "intervene in . . . [Commission] proceedings . . . on behalf of the residential consumers"⁵ 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."⁶ OCC's only interest in these proceedings is to represent the interests of Duke Energy Ohio's residential customers, including Mr. Lane.

OCC, of course, has requested that the Commission deny Duke Energy Ohio's application to set the Rider DR in its entirety. While Mr. Lane has actually advanced no legal position

⁵ Ohio Rev. Code Section 4911.02(B)(2)(c).

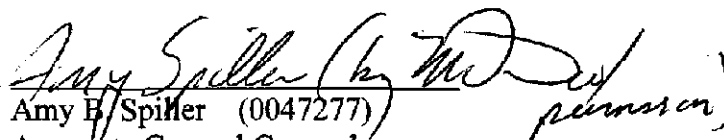
⁶ Ohio Rev. Code Section 4911.15.

regarding the propriety of Duke Energy Ohio's calculation of Rider DR, he would appear to want the Commission to deny Duke Energy Ohio's application to set the amount of Rider DR. Thus, he is advocating precisely the same position as OCC, which is adequately representing his position. Therefore, this factor weighs also against granting Mr. Lane intervention.

III. CONCLUSION

Because all the Ohio Admin. Code Section 4901-1-11(B) intervention factors weigh against granting Mr. Lane intervention, Duke Energy Ohio respectfully requests that this Commission deny Mr. Lane's Motion to Intervene. In addition, Duke Energy Ohio respectfully requests that the Commission strike Mr. Lane's Motion to Intervene and his Motion for Leave to Intervene from Case No. 05-0732-EL-MER, as Mr. Lane has requested no relief regarding that case. Finally, Duke Energy Ohio respectfully requests that the Commission deny Mr. Lane's request to reactivate Case No. 08-0709-EL-AIR and consolidate it with this case.

Respectfully submitted,


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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 8th day of March, 2010, to the following persons:

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