

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio)
Power Company and Columbus) Case No. 10-2376-EL-UNC
Southern Power Company for Authority)
to Merge and Related Approvals.)

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REPLY OF DUKE ENERGY RETAIL SALES

IN SUPPORT OF ITS MOTION TO INTERVENE

On October 18, 2010, Ohio Power Company and Columbus Southern Power Company (collectively, the Companies) filed an application to merge their operations. Duke Energy Retail Sales, LLC, (Duke Energy Retail) moved to intervene, as a full party of record, by motion filed on November 19, 2010. The Companies filed a memorandum opposing Duke Energy Retail's motion, on December 2, 2010. Pursuant to O.A.C. 4901-1-12(B)(2), Duke Energy Retail hereby submits its reply to the Companies' memorandum in opposition.

The Companies rely on three arguments to support their opposition: Duke Energy Retail's only interest is in legal precedent, an interest that does not support intervention; there is no need for intervention as there is no scheduled hearing in this proceeding; and Duke Energy Retail's competitive interests can be addressed in subsequent cases and will not result in its contribution to the resolution of issues in this case. This reply will address each of those arguments.

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Legal Precedent

The Companies cite three cases to support the proposition that Duke Energy Retail's intervention should be denied as its only interest is in the establishment of legal precedent. The cases cited do not support the proposition.

The first citation is to an examiner entry in a public way complaint. In that entry, the examiner did note, as stated by the Companies, that the Commission does not grant intervention to entities whose only interest is in the establishment of legal precedent that may affect that entity's interest in a subsequent case. Importantly, the examiner only cited that policy with regard to the requested intervention of a trade association and an organization representing various municipalities. In that same entry, the examiner granted motions for intervention two local exchange carriers whose facilities and business interests would be impacted by the decision in that case. *In the Matter of the Complaint of WorldCom, Inc.; KMC Telecom III, LLC; ICG Telecom Group, Inc.; and LDMI Telecommunications, Inc.*, Case No. 02-3207-AU-PWC *et al.* (Entry, May 4, 2003). The circumstances in the cited entry are not analogous to the present situation. Duke Energy Retail is not merely an organization that wishes to establish positive precedent for its members; rather, Duke Energy Retail has clear economic interests in determinations that will be made in the context of the present case.

The second citation by the Companies again is based on the proposition that a mere interest in precedent is not sufficient to support intervention. There, the Commission refused to allow intervention by a competitive provider in a complaint case, where it failed to show that its interest in the case had a direct bearing on the Commission's determination on the complainant or the respondent. It is critical to

recognize that this proceeding was a complaint by one competitive retail electric services (CRES) provider against the local utility, concerning the utility's refusal to allow it to participate in its market support generation program. The potential intervenor would not, thus, have been affected directly by the resolution of the complaint case but was only interested in whether the decision in that case could be cited to its detriment in any subsequent case. That is a classic example of legal precedent, contrary to Duke Energy Retail's interest in the potential merger's impact on its ability to operate in the territories of the Companies. *In the Matter of the Complaint of Dominion Retail, Inc. v. Ohio Edison Company, The Toledo Edison Company, and Cleveland Electric Illuminating Company*, Case No. 00-2526-EL-CSS (Entry, May 15, 2001).

The final entry cited by the Companies on this point is similar. The motions for intervention related to multiple utilities' motions to intervene in electric transition plan (ETP) proceedings of the other Ohio electric utilities. In denying the motions, the Commission indicated that the primary reason for the intervention was that a decision in one utility's ETP case might affect how a similar issue would be decided in another utility's ETP case. Again, this is classic precedent; it is not remotely similar to Duke Energy Retail's interest in how the merger of the Companies would impact its ongoing CRES business in the Companies' territories.

Scheduled Hearing

Astonishingly, the Companies argue that there is no right to intervene in a proceeding where there is no hearing, citing to R.C. 4903.221 and *Ohio Domestic Violence Network v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 311. The holding in that case was recently reevaluated by the Supreme Court of Ohio. In *Ohio Consumers'*

Counsel v. Pub. Util. Comm., 111 Ohio St.3d 384, 2006-Ohio-5853, the Court stated that “whether or not a hearing is held, intervention 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 PUCO.” *Ohio Consumers’ Counsel* at ¶20. Prior to that change of direction by the Court, the Commission typically refused intervention where there would be no hearing. *See, e.g., In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Proposed Rider ED and Rider UR in its Retail Electric Service Tariff (P.U.C.O. Electric No. 19)*, Case No. 05-633-EL-ATA (“Upon consideration, we find that it is not necessary to grant intervention . . . in order to consider its motion in our determination on this application .”) and (“Upon consideration, we find that it is not necessary to grant intervention . . . in order to consider the concerns raised in their motions to intervene”) Since the Court’s 2006 change of direction, the Commission typically grants intervention in cases with no hearing, assuming the intervention is otherwise warranted. *See, e.g., In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval for Rate PTR*, Case No. 10-455-EL-ATA.

Not only has there been no determination as to whether or not a hearing will be held in this case, it is also clear that such a decision has no relevance to the grant or denial of a motion to intervene.

Duke Energy Retail’s Interests in the Proceeding

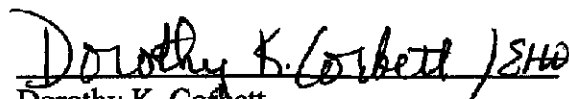
Duke Energy Retail is certified by the Commission to provide CRES services in the territories of both Companies and currently has both residential and nonresidential customers in one of the Companies’ territories. The Companies’ opposition to Duke Energy Retail’s intervention appears to indicate that the only interest that Duke Energy

Retail could possibly have would be in the rates to be charged. That could not be further from the truth. Although rate structures are certainly relevant to the business interests of a CRES provider, there are numerous other ways that a local utility can impact the ability of a CRES provider to compete in its territory. Some of these are set forth in tariffs; some in contracts between the CRES providers and the utilities; and some in operational decisions. All of these matters could be impacted by the merger of the Companies. Competition in the electric industry has been described as an important state policy by the Ohio Legislature. R.C. 4928.02. Without a presence in the merger proceeding, Duke Energy Retail will be unable to protect its ability to compete in the currently divergent territories of the Companies.

The Supreme Court of Ohio has made it clear that intervention is to be liberally allowed. *Ohio Consumers' Counsel* at ¶20. Duke Energy Retail respectfully requests that the Commission grant its motion to intervene.

Respectfully submitted,

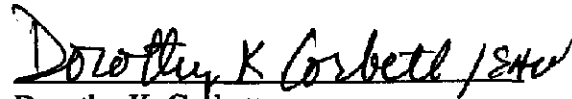
DUKE ENERGY RETAIL SERVICES, LLC

A handwritten signature in dark ink, appearing to read "Dorothy K. Corbett /SHO".

Dorothy K. Corbett
Associate General Counsel
Duke Energy Business Services LLC
2500 Atrium II
P.O. Box 961
Cincinnati, Ohio 45201
(513) 419-1809
Dorothy.corbett@duke-energy.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 9th day of December, 2010, by electronic mail, upon the persons listed below.


Dorothy K. Corbett

Steven T. Nourse
Anne M. Vobel
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
stnourse@aep.com

Samuel C. Randazzo
Joseph E. Olikier
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
sam@mwncmh.com
joliker@mwncmh.com

Daniel R. Conway
Porter, Wright, Morris & Arthur
Huntington Center
41 South High Street
Columbus, OH 43215
dconway@porterwright.com

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vssp.com

David I. Fein
Vice President, Energy Policy – Midwest
Constellation Energy Group, Inc.
550 West Washington Blvd., Suite 300
Chicago, IL 60661
David.fein@constellation.com

Cynthia Fonner Brady
Senior counsel
Constellation Energy Resources, LLC
550 West Washington Blvd., Suite 300
Chicago, IL 60661
Cynthia.brady@constellation.com

David Rinebolt
Colleen Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839-8860
drinebolt@ohiopartners.com
cmooney2@columbus.rr.com

Matthew White
Chester Wilcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, OH 43215
mwhite@cwslaw.com

Mark A. Hayden
First Energy Service Company
76 South Main Street
Akron, Ohio 44308
haydenm@firstenergycorp.com

David A. Kutik
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

Grant W. Garber
Jones Day
P.O. Box 165017
Columbus, OH 43216-5017
gwwgarber@jonesday.com

Maureen Grady
Terry Etter
Jody Kyler
Office of Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

grady@occ.state.oh.us

Clinton A. Vince
Douglas G. Bonner
Daniel D. Barnowski
Emma F. Hand
Keith C. Nusbaum
Sonnenschein Nath & Rosenthal LLP
1301 K Street NW
Suite 600, East Tower
Washington, DC 20005
Clinton.vince@snrdenton.com
Douglas.bonner@snrdenton.com
Dan.barnowski@snrdenton.com
Emma.hand@snrdenton.com
Keith.nusbaum@snrdenton.com

Lisa McAlister
Thomas J. O'Brien
Brickler & Eckler LLP
100 South Third Street
Columbus, OH 43215
lmcalister@bricker.com
tobrien@bricker.com