

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of The)
AES Corporation, Dolphin Sub, Inc., DPL)
Inc. and The Dayton Power and Light)
Company for Consent and Approval for a)
Change of Control of The Dayton Power)
and Light Company)

Case No. 11-3002-EL-MER PUCO

**REPLY IN SUPPORT OF MOTION TO INTERVENE
OF FIRSTENERGY SOLUTIONS CORP.**

I. INTRODUCTION

FirstEnergy Solutions Corp. ("FES"), an interested party and potential intervenor to this merger proceeding, hereby files its Reply in Support of its June 14, 2011 Motion to Intervene ("Motion"). AES Corporation, Dolphin Sub, Inc., DPL, Inc. and the Dayton Power and Light Company ("DP&L") (collectively, the "Applicants") filed a Memorandum in Opposition ("Opposition") to FES's Motion in which they incorporated the arguments from their May 26, 2011 Joint Motion to Establish Deadlines for Initial and Reply Comments and to Hold Motions to Intervene in Abeyance ("Joint Motion"). Citing the Commission's review of the Duke/Cinergy merger proceeding, Applicants request that the Commission delay its decision on FES's Motion until after it has reviewed the comments of interested persons and decided whether or not to hold a hearing.

However, as demonstrated below and in FES's Motion, which is incorporated herein by reference, FES has a number of real and substantial interests in the outcome of this proceeding, these interests are not represented by any existing party, and FES satisfies the intervention requirements of the Revised Code and the Commission's rules. Moreover, while Applicants

assert that the Duke/Cinergy proceeding is “similar” to this proceeding, they provide no factual support for this assertion. In fact, the Commission has granted intervention in more recent merger proceedings under Revised Code Section 4905.402, even where a hearing was not held. Accordingly, there is no reason for the Commission to delay ruling on FES’s timely Motion, and the Commission should grant FES intervention.

II. BACKGROUND AND DISCUSSION

In response to FES’s Motion, Applicants argued that intervention is not necessary in this proceeding because interested persons may file comments, which Applicants assert will be “more than adequate” to permit the Commission to perform its statutorily-mandated review of the Application. Joint Motion, p. 2. Instead of permitting interested persons to intervene, the Applicants requested that the Commission set a schedule that would: 1) allow interested persons to file comments; 2) review the Application and the comments filed by interested persons and Staff; 3) determine whether a hearing is necessary; and 4) allow intervention only if a hearing is necessary. *Id.* Contrary to Applicants’ arguments, FES’s intervention is warranted here to ensure that competitive issues in the retail and wholesale markets in DP&L’s territory are fully considered in these proceedings.

1. FES Satisfies the Statutory Requirements for Intervention

As demonstrated more fully in its Motion, as a retail provider and active wholesale supplier operating in the Applicants’ territory, FES has a direct and substantial interest in the outcome of this proceeding, and its interests are not represented by any existing parties or potential intervenors. *Id.* at 4-5. Further, FES satisfies all of the factors to be considered by the Commission when granting intervention -- a fact Applicants fail to refute. *See generally* Opposition & Joint Motion. Instead, Applicants argue that the Commission should delay ruling

on FES's Motion because it delayed ruling on motions to intervene in the Duke/Cinergy merger. However, Applicants provide no facts or analysis whatsoever to support their assertion that delay is likewise warranted here. Given that FES has established the basis for its intervention, and Applicants failed to provide any substantive basis to delay or deny FES intervention, the Commission should grant FES's Motion.

2. The Commission has Granted Intervention in other Merger Proceedings

The Commission's denial of intervention in the Duke/Cinergy merger proceeding is an insufficient basis in and of itself to deny intervention here, particularly given that the Commission granted intervention in subsequent merger proceedings with substantially similar competitive issues to those here. *See, e.g., In the Matter of the Joint Application of Nova Telephone Company and VNC Enterprises, LLC Pursuant to Section 4905.0402, Revised Code*, Case No. 10-849-TP-ACO, Opinion and Order, p. 9 (September 1, 2010) (approving merger pursuant to R.C. § 4905.402 and granting motion to intervene of OCC).¹ For instance, the Commission granted intervention to several parties in a recent merger proceeding, explaining that, despite the applicants' characterization of the transaction as "simply a change of ownership among holding companies, the consequences of such a transaction ripple through operating subsidiaries and ultimately have an effect on consumers." *In the Matter of the Joint Application of Frontier Communications Corporation, New Communications Holdings, Inc., and Verizon Communications Inc. for Consent and Approval of a Change in Control*, Case No. 09-454-TP-ACO, Entry, ¶ 16 (August 24, 2009) ("Toward this end, intervention should be granted to allow the full development of a record upon which to render a complete evaluation of the

¹ While the *Nova Telephone* merger involved entities with lesser assets than those at issue here, that fact only strengthens FES's argument for intervention since a larger merger proceeding involving entities with substantial assets and revenue presents more information for the Commission to review and may have a greater impact on the industry. Thus, the more substantial the merger proceeding, the greater the need for the intervention of entities with specialized knowledge regarding the market.

application.”). The Commission has also granted intervention in merger proceedings in which it did not hold a hearing. For example, in the SBC/AT&T merger proceeding, the Commission concluded that a hearing was not necessary but nonetheless granted intervention to various parties. *See In re SBC Communications Inc.*, Case No. 05-269-TP-ACO, Entry, ¶¶ 4, 6 (May 5, 2005) (“Upon review of the motions to intervene by the above-listed entities, we find that they are reasonable and should be granted, limited to those issues addressed in Finding (2).”). As in the cited cases, intervention of interested persons, particularly those with competitive issues such as FES, is warranted here.

FES’s interest in this proceeding is similar to the interest of Qwest Communications Corporation (“Qwest”) in the Verizon/MCI merger proceeding where the Commission granted intervention despite not holding hearings on the application. Qwest, a competitive telecommunications carrier in the Ohio market, moved to intervene and argued that the merger could potentially affect competition in Ohio. *In re Verizon Communications Inc.*, Case No. 05-497-TP-ACO, Entry, ¶ 8 (June 29, 2005). In overruling arguments against intervention substantively similar to those advanced by Applicants here, the Commission stated that it “must acknowledge that ... providers like Qwest have a real and substantial interest in this proceeding” and granted intervention to Qwest. *Id.* Just like Qwest in the Verizon/MCI proceeding, FES should be granted intervention here in order to ensure that the potential effects of the proposed merger on the retail and wholesale electricity market in Ohio are fully assessed.

III. CONCLUSION

Applicants fail to rebut, or even address, FES’s satisfaction of the requirements necessary to intervene in a Commission proceeding. Applicants similarly fail to offer any substantive support for denying intervention to FES. Given that (1) FES seeks intervention to ensure that its

interests as a competitor in the retail and wholesale markets in Ohio are represented; (2) no other party or potential intervenor adequately represents FES's interests; and (3) FES satisfies the legal requirements for intervention in this proceeding, its Motion should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply in Support of Motion to Intervene of FirstEnergy Solutions Corp.* was served this 23rd day of June, 2011, via e-mail and regular U.S. Mail, postage pre-paid, upon the parties below.

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