

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of Duke Energy)
Ohio for Approval to Establish A Standard Service)
Offer Pursuant To Section 4928.143, Revised Code,) Case No. 11-3549-EL-SSO
In the Form of an Electric Security Plan, Accounting)
Modifications and Tariffs For Generation Service)

In the Matter of the Application of Duke Energy)
Ohio for Authority to Amend Its Certified Supplier) Case No. 11-3550-EL-ATA
Tariff, P.U.C.O. No. 20)

In the Matter of the Application of Duke Energy)
Ohio for Authority to Amend its Corporate) Case No. 11-3551-EL-UNC
Separation Plan)

REPLY MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE OF
CINCINNATI BELL INC.

I. INTRODUCTION

On July 15, 2011, Cincinnati Bell Inc. ("Cincinnati Bell") filed its Motion to Intervene and Request For Leave to File Motion to Intervene Out of Time. On July 18, 2001, Duke Energy Ohio ("Duke") opposed the Motion to Intervene, but did not oppose the request for leave to file out of time.¹ Duke's opposition to Cincinnati Bell's Motion to Intervene is without merit and the Motion to Intervene should be granted.

¹ One other party also moved to intervene out of time, to which Duke has consented. There is no prejudice to Duke or any other party by allowing Cincinnati Bell to intervene at this time. Cincinnati Bell has agreed to abide by the existing procedural schedule and to accept the record as it finds it.

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By Cincinnati Bell's count, there have been thirty motions to intervene² filed in this proceeding. Duke has only opposed one such motion, Cincinnati Bell's.

II. ARGUMENT

The parties agree on the statutes and rules that govern intervention, but disagree on their meaning. Intervention in Commission proceedings is governed by Revised Code § 4903.221, as further stated in Commission Rule 4901-1-11, Ohio Administrative Code:

Upon timely motion, any person shall be permitted to intervene in a proceeding upon a showing that:

* * *

(2) 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.

Revised Code § 4903.221(B)(1) directs the Commission to consider "the nature and extent of the prospective intervenor's interest." The intervention statute is to be liberally construed so that all parties' views can be considered. *Consumers' Counsel v. Pub. Util. Comm.* 111 Ohio St.3d 384,

² Other intervenors include three associations of industrial customers (Industrial Energy Users-Ohio, The Ohio Energy Group, Ohio Manufacturers' Association), three consumer advocates (Office of the Ohio Consumers' Counsel, Ohio Partners for Affordable Energy, People Working Cooperatively), three environmental advocates (Ohio Environmental Council, Environmental Law & Policy Center, Natural Resources Defense Council), ten CRES providers (FirstEnergy Solution Corp., Constellation NewEnergy, Inc./Constellation Energy Commodities Group, Inc., AEP Retail Energy Partners LLC, Eagle Energy, LLC, Vectren Retail, LLC, Retail Energy Supply Association, Interstate Gas Supply, Inc., Direct Energy Services, LLC/Direct Energy Business, LLC, Duke Energy Retail Sales, LLC, Dominion Retail), four large electric generators (Columbus Southern Power Company/Ohio Power Company, PJM Power Providers Group, American Municipal Power, Exelon Generation), two large retailers (The Kroger Company, Wal-Mart Stores East, LC/Sam's East, Inc.), a health care organization (Greater Cincinnati Health Council), two organizations with particular energy interests (Enernoc, Inc., Compete Coalition), educational institutions (Miami University/University of Cincinnati) and a municipality (City of Cincinnati).

2006-Ohio-5853, 856 N.E.2d 940. Inexplicably, Duke would prevent Cincinnati Bell's views from being heard in this case.

A. Cincinnati Bell has a real and substantial interest in this proceeding.

Duke contends that Cincinnati Bell does not have an interest in this case because it identified four subsidiaries that are Duke's customers. Apparently, Duke believes that the subsidiaries should have intervened, rather than the parent company. Duke confuses a "real and substantial interest" with legal standing to bring a claim. The concept of legal standing, such as that embodied in the "real party in interest" standard in Civil Rule 17(A), is not required to intervene in a public utility rate proceeding. Revised Code § 4903.221 and Commission Rule 4901-1-11 do not require legal "standing," only a "real and substantial interest." Unlike a complaint case, where only the "real party in interest" may bring a claim, a rate case does not involve "claims and defenses." There is no single "real party" in a rate case, which involves the interests of various constituencies.

Cincinnati Bell has a real and substantial interest in this case in several ways. First, as identified in its motion, Cincinnati Bell Inc.'s wholly owned subsidiaries are significant Duke customers. As their names indicate, Cincinnati Bell Telephone Company LLC, Cincinnati Bell Wireless, LLC and Cincinnati Bell Extended Territories LLC are limited liability companies, of which Cincinnati Bell Inc. is directly or indirectly the sole member. Thus, its relationship to these companies is more than just that of an ordinary shareholder. Cincinnati Bell Inc. is the controlling member and/or sole shareholder of each of these companies. By way of contrast, Duke has not opposed intervention by numerous associations and non-profit organizations, none of which is itself a customer and none of whom can control its individual members.

As stated in Cincinnati Bell's Motion to Intervene, the Cincinnati Bell companies consume approximately 94 million kWh at nearly 600 locations. While Duke bills the various Cincinnati Bell subsidiaries separately, the subsidiaries' customer relationship is not Cincinnati Bell's sole interest in this case. Cincinnati Bell Inc. is party to a single supply contract with a CRES provider covering its operating companies' electric usage. That contract term is through the end 2013, two years past the termination of Duke's current ESP plan. Significantly, the rates paid by Cincinnati Bell Inc. under that contract include *both* capacity and energy. The ESP plan Duke has proposed in this case would require all distribution customers to purchase their capacity from Duke. That plan is in direct conflict with Cincinnati Bell Inc.'s existing commitments. As Cincinnati Bell Inc. is already under contract to purchase capacity from another party for the first two years of Duke's proposal, it is absolutely interested in the terms of Duke's plan so to ensure that it does not overpay or pay twice for capacity. To Cincinnati Bell's knowledge, no other customer intervenor has identified itself as being in the same position.

Lastly, Duke contends that intervention by Cincinnati Bell Inc. on behalf of its subsidiaries might prejudice Duke in pursuit of discovery against such non-parties. This argument carries no weight. In that regard, Cincinnati Bell is in no different position than the numerous associations that have moved to intervene, but who have no control over discovery from their individual members. It is curious that Duke would oppose Cincinnati Bell's intervention on this ground, but not the various unincorporated associations. However, unlike a trade association, as the owner of its operating subsidiaries, Cincinnati Bell Inc. has access to its subsidiaries' information and/or the ability to require those entities to respond, making information that is otherwise properly discoverable available to Duke through Cincinnati Bell

Inc. In any event, it is unclear what discovery Duke would need from Cincinnati Bell's operating companies that would be relevant to *Duke's* rate case.

B. Cincinnati Bell's interests are not represented by other customer intervenors.

Duke contends that Cincinnati Bell should be content to let other intervenors represent its interests in this case. To the contrary, Cincinnati Bell seeks to intervene in this matter because it cannot be sure that other parties will adequately represent its interests. Duke cannot pretend to know at this early date what each of the various intervenors' specific interests will be, or who will raise what issue. Cincinnati Bell should be allowed to intervene to ensure that it is able to express its views. Duke has not suggested that there are too many CRES providers present in this case (there are at least ten), or too many other electric generators (at least four), or too many environmental or consumer advocate groups (three each) or that any other individual intervenor should be excluded because there are already other parties representing similar interests. Duke fails to explain how it would be harmed by allowing intervention by Cincinnati Bell.

While several other customer parties have sought intervention in this proceeding, none of them is similarly situated to or represents the interests of Cincinnati Bell. Cincinnati Bell is the only intervenor that represents the communications and data business. The availability of an economical electric supply is critical to maintaining affordable communications and data services. It is Cincinnati Bell's understanding that most of the other customer intervenors are in the TS (transmission) and DP (primary distribution voltage) distribution rate classes. The vast majority of Cincinnati Bell's service is billed at DS (secondary distribution voltage) rates, while a number of its sites are billed at DM (secondary distribution service - small) rates. And, despite hundreds of service locations, the vast majority of Cincinnati Bell's usage is at one location.

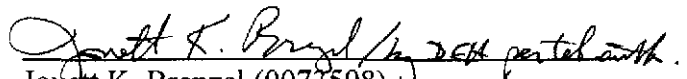
Thus, Cincinnati Bell's participation in this case would provide representation for customer rate classes that are not adequately represented by existing intervenors.

III. CONCLUSION

The Commission should grant Cincinnati Bell's Motion to Intervene. In the event the Commission does not conclude that Cincinnati Bell Inc.'s interests in this case are sufficiently direct for it to be allowed to intervene, then Cincinnati Bell Inc. requests that the Commission consider the Motion to Intervene to have been made directly by Cincinnati Bell Telephone Company LLC, Cincinnati Bell Wireless, LLC, Cincinnati Bell Extended Territories LLC and Cincinnati Bell Technology Solutions Inc. and to grant those parties intervenor status.

For these reasons, Cincinnati Bell respectfully requests that its Motion to Intervene in the above-captioned proceedings be granted.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the parties of record listed below this 21st day of July, 2011 by electronic service.



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