

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy)	
Ohio, Inc., for the Establishment of a Charge)	Case No. 12-2400-EL-UNC
Pursuant to Revised Code Section 4909.18.)	

In the Matter of the Application of Duke Energy)	
Ohio, Inc., for Approval to Change Accounting)	Case No. 12-2401-EL-AAM
Methods.)	

In the Matter of the Application of Duke Energy)	
Ohio, Inc., for the Approval of a Tariff for a)	Case No. 12-2402-EL-ATA
New Service.)	

**DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA
OHIO POWER COMPANY'S MOTION TO INTERVENE**

On August 29, 2012, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) filed an application (Application) with this honorable Public Utilities Commission of Ohio (Commission), seeking determination of a charge for capacity services pursuant to the newly adopted state compensation mechanism, authority for a deferral of the difference between such charge and the market prices for capacity services currently being received by Duke Energy Ohio, and approval of a tariff pursuant to which such deferral could subsequently be recovered.

On October 12, 2012, Ohio Power Company (AEP Ohio) curiously moved to intervene in these proceedings. As AEP Ohio correctly indicated in its motion, interventions in Commission proceedings are governed by R.C. 4903.221 and O.A.C. 4901-1-11. However, AEP Ohio errs in applying the relevant legal parameters to the facts. And as Duke Energy Ohio demonstrates herein, AEP Ohio's intervention should be denied.

Nature of the Prospective Intervenor's Interest

The first element to be considered by the Commission, pursuant to R.C. 4903.221, is the nature and extent of the prospective intervenor's interest in the proceeding at bar. Here, however, it is readily apparent that AEP Ohio's only interests are in protecting its own recovery, as established in an entirely separate proceeding, under Ohio's state compensation mechanism and in advancing the interests of its competitive retail affiliate in service territories outside of its own. And as discussed herein, AEP Ohio cannot claim a real and substantial interest in these proceedings that warrants intervention.

AEP Ohio first argues that it has a unique interest in these proceedings as they are predicated upon a Commission decision in Case No. 10-2929-EL-UNC and it wants to ensure that no parties here "mischaracterize or distort either the evidentiary record or the decision" in that other proceeding.¹ It is thus undeniable that AEP Ohio's interest is not with these proceedings but instead with another proceeding, pursuant to which it was awarded cost-based compensation for providing services. AEP Ohio's position in this regard is dubious in that it presumes both that other parties to these proceedings will engage in manipulative behavior and that the Commission is not only incapable of discerning such manipulation but is easily swayed by it.

Moreover, these proceedings will not have any impact on Case No. 10-2929-EL-UNC. Indeed, Duke Energy Ohio's Application was not instituted for purposes of altering or otherwise affecting the issues in that case, which is currently before this Commission on applications for rehearing. And the Commission does not need the assistance of any party here to complete its accurate review of the evidentiary record in Case No. 10-2929-EL-UNC for purposes of addressing such requests for rehearing. Further, these proceedings are in their preliminary stages,

¹ AEP Ohio Memorandum in Support of Intervention, at pg. 3 (October 12, 2012).

while a final Commission order is imminent in Case No. 10-2929-EL-UNC.² As such, there is no possibility that the outcome here could “undermine the outcome in those AEP Ohio cases.”³ It thus follows that the disposition of these proceedings cannot impair or impede AEP Ohio’s interests in Case No. 10-2929-EL-UNC and its intervention is not warranted.⁴

AEP Ohio further attempts to justify its intervention on the basis of its desire to ensure that the state compensation mechanism is applied only to it.⁵ AEP Ohio boldly contends that the state compensation mechanism under PJM Interconnection, LLC’s Reliability Assurance Agreement (RAA) is utility-specific and, as such, AEP Ohio implies that Duke Energy Ohio cannot similarly be afforded just and reasonable compensation for the services it provides as a Fixed Resource Requirement (FRR) entity. But the relevant language in the RAA clearly and unambiguously renders such a conclusion false. Indeed, the RAA pertains to a state regulatory jurisdiction that has implemented retail choice (*e.g.*, Ohio) and the ability of an FRR entity in such jurisdiction to be compensated for capacity consistent with the prevailing state compensation mechanism. The RAA does not provide for the development of multiple compensation mechanisms in a single state, individually tailored for separate utilities operating within that state. And such an outcome, as undeniably advocated by AEP Ohio, would result in unnecessary confusion, unfair price disparities for capacity, and obvious inconsistency that undermines Ohio’s competitive market. Simply put, a “state compensation mechanism” is not a

² See Commission Agenda for the Week of October 15, 2012; *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, entry considering applications for rehearing.

³ AEP Ohio Memorandum in Support of Motion to Intervene, at pg. 3. AEP Ohio also incorrectly contends that the outcome of its electric security plan, filed under Case No. 11-346-EL-SSO, *et al.*, could be undermined by the Application, although it advances no explanation as to how. The contention, therefore, should be disregarded.

⁴ See *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case No. 11-281-EL-FAC, Ohio Power Company’s Memo Contra Duke Energy Ohio’s Motion to Intervene, at pg. 3 (July 25, 2012), wherein Ohio Power Company argued that intervention was not appropriate in the absence of a real and substantial interest in the proceeding at hand.

⁵ AEP Ohio Memorandum in Support of Motion to Intervene, at pg. 3.

“state” mechanism if it applies to only a single utility/service territory within the state, especially when there are other similarly situated and qualifying utilities. Rather, the mechanism would be a service territory compensation mechanism, which is plainly not supportable under the RAA. Importantly, the limited application advocated by AEP Ohio would yield dramatic price disparity and inconsistent regulatory treatment between adjacent and similarly situated utilities, thereby undermining the single, statewide competitive market. Such an outcome runs afoul of the Commission’s rationale in adopting a state compensation mechanism.

Importantly and without regard to just AEP Ohio, the Commission has acknowledged that, pursuant to R.C. 4905.22, “all charges for service shall be just and reasonable and not more than allowed by law or order of the commission.”⁶ And, as the Commission confirmed, its “obligation under traditional rate regulation is to ensure that *jurisdictional utilities* receive reasonable compensation for the services they render.”⁷ Even AEP Ohio acknowledges the Commission’s “wide-ranging authority over public utilities in Ohio,” which it agrees is broad and complete.⁸ In light of its obligations and the applicable statutes, the Commission undeniably and unambiguously concluded “that the state compensation mechanism shall be based on the costs incurred by the FRR Entity for its FRR capacity obligations.”⁹ Although the Commission employed a formulaic methodology to arrive at a discreet charge for AEP Ohio, the Commission did not direct the establishment of a state compensation mechanism that is restricted in its application to only AEP Ohio. Rather, recognizing its obligation to ensure just and reasonable

⁶ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order, at pg. 22 (July 2, 2012).

⁷ *Id.* (Emphasis added.)

⁸ *State, ex rel. Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, Case No. 11-1494, Motion to Intervene as Respondent of Ohio Power Company and Motion to Dismiss, at pg. 13 (September 25, 2012).

⁹ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order, at pg. 23 (July 2, 2012).

compensation for jurisdictional utilities, the Commission adopted a state compensation mechanism that, under the plain reading of the RAA, prevails in Ohio.

AEP Ohio's attempt to force limited application of Ohio's compensation mechanism under the RAA must further be rejected for reasons previously advanced by it. As AEP Ohio argued in seeking rehearing in Duke Energy Ohio's electric security plan docketed under Case No. 11-3549-EL-SSO, *et al.*, utilities must be afforded equal treatment. Indeed, AEP Ohio has admitted the importance of ensuring "that pertinent statutory provisions are applied in a consistent and lawful manner."¹⁰ And it has maintained that a disparate application of controlling statutes would be unjust and unlawful.¹¹ The outcome is no different here. Relevant statutory provisions (*e.g.*, R.C. 4905.04, 4905.05 and 4905.06) and contractual provisions (*i.e.*, the RAA) must be applied consistently and uniformly to preclude disparate application among Ohio's jurisdictional utilities.

Oddly, AEP Ohio further seeks to justify intervention on its *prospective* ability to become an active competitive retail electric service (CRES) provider in Duke Energy Ohio's service territory. But intervention is not predicated upon prospective interests; it instead requires the existence of a real and substantial interest.

Assuming, *arguendo*, that the Commission agrees with AEP Ohio that "the implementation, design, and structure of any cost-based capacity charge established by the Commission in these proceedings could adversely affect AEP Ohio's ability to pursue its opportunity to provide competitive retail electric services within Duke [Energy Ohio's] service

¹⁰ See, *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Application for Rehearing and Memorandum in Support of Columbus Southern Power Company and Ohio Power Company, at pg. 5 (December 22, 2011).

¹¹ *Id.* at 13.

territory,”¹² intervention still is not warranted. The Application will not impact competitive suppliers, including those possible, future suppliers such as AEP Ohio that have demonstrated no immediate intention of seeking certification via Commission regulation. The proposals as set forth in the Application do not change any of a retail supplier’s current or imagined costs of doing business. And they do not impose any additional charges, or raise any current charges, due from a retail supplier. Thus, even an entity such as AEP Ohio that could possibly, at some point in the future, become a CRES provider in southwest Ohio cannot demonstrate a legitimate reason for intervention in these proceedings.

AEP Ohio argues that if current certified suppliers are granted intervention in these proceedings, that it *must* also be granted intervention because its interests under R.C. 4928.146 are “substantively identical” to those of CRES providers.¹³ AEP Ohio grossly mischaracterizes its business operations with such a statement. To be clear, AEP Ohio is not an active CRES provider in Duke Energy Ohio’s service territory and has not made any filings at the Commission to even position itself as such. But it is affiliated with a CRES provider that is active in Duke Energy Ohio’s service territory and it is thus apparent that AEP Ohio’s contrived claim to intervention here is predicated upon its desire to assist its affiliate in contesting Duke Energy Ohio’s Application. Such is not the proper use of intervention or Commission proceedings.

Parroting the statements of its competitive affiliate, AEP Ohio also wrongly concludes that Duke Energy Ohio’s Application seeks to alter the terms of the stipulation that was approved

¹² AEP Ohio Memorandum in Support of Motion to Intervene, at pg. 4 (October 12, 2012)(Conveniently, but likely not coincidentally, AEP Ohio’s competitive affiliate, AEP Retail Energy Partners, made an identical assertion in its motion to intervene filed on October 3, 2012).

¹³ *Id.*, at pg. 5.

in Duke Energy Ohio's most recent standard service offer proceedings (ESP Stipulation).¹⁴ But this is not the case. The ESP Stipulation did address the amount that Duke Energy Ohio would charge wholesale and retail suppliers for capacity; however, it did not address the amount, if any, that Duke Energy Ohio would receive as compensation for its obligations as an FRR entity. Thus, the Application has no impact on the ESP Stipulation.

AEP Ohio has utterly failed to identify any interest sufficient to warrant intervention in these proceedings.

Legal Position and Probable Relation to Merits of the Case

The second element to be considered by the Commission, pursuant to R.C. 4903.221, is the prospective intervenor's legal position and its probable relation to the merits of the case. Here, AEP Ohio fails to articulate a legal position that affects of this case. Rather, AEP Ohio is intent only on ensuring that the Commission's decision in Case No. 10-2929-EL-UNC is preserved such that it receives cost-based compensation for capacity. But this is not the docket in which legal positions unrelated to Duke Energy Ohio should be advanced. The interests of AEP Ohio in protecting its own receipt of cost-based compensation will not be impaired or impeded by these proceedings and AEP Ohio should not be granted intervention, as it is undeniably unaffected by this Application.

Undue Delay and Significant Contribution

The third and fourth elements to be considered by the Commission, pursuant to R.C. 4903.221, are whether the requested intervention will unduly prolong or delay the proceeding and whether the prospective intervenor will provide a significant contribution to full

¹⁴ *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, *et al.*

development and equitable resolution of the factual issues. Neither of these elements is satisfied in the instant request for intervention.

AEP Ohio's intervention will undeniably delay these proceedings. AEP Ohio has expressed a desire to inject in these proceedings a review of the evidentiary record in Case No. 10-2929-EL-UNC and to invite a protracted debate over said review. Further, as there is no factual inquiry to be made, since the state compensation mechanism relies on existing federal filings, AEP Ohio's input will not provide a significant contribution to development or resolution of factual issues pending in these proceedings. Moreover, assuming the Commission to consider AEP Ohio's status as a possible CRES provider, it is undeniable that AEP Ohio has no experience in such a role and thus cannot significantly contribute to the full development and equitable resolution of alleged factual issues. Its intervention simply would not be constructive.

The elements to be considered for intervention in Commission proceedings have not been met by AEP Ohio.

WHEREFORE, Duke Energy Ohio respectfully requests that the Commission deny the motion by AEP Ohio for intervention in the above-referenced proceedings.

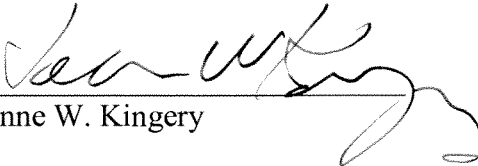
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 16th day of October 2012, by U.S. mail, postage prepaid, or by electronic mail upon the persons listed below.



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in

Case No(s). 12-2400-EL-UNC, 12-2401-EL-AAM, 12-2402-EL-ATA

Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum Contra Ohio Power Company's Motion to Intervene electronically filed by Miss Kristen Cocanougher on behalf of Duke Energy Ohio and Spiller, Amy B. Mrs. and D'Ascenzo, Rocco Mr. and Kingery, Jeanne W. Mrs. and Watts, Elizabeth Mrs.