

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Application of Duke</b>	)	
<b>Energy Ohio, Inc. for the Establishment of a</b>	)	<b>Case No. 12-2400-EL-UNC</b>
<b>Charge Pursuant to Section 4909.18, Revised</b>	)	
<b>Code.</b>	)	
	)	
<b>In the Matter of the Application of Duke</b>	)	
<b>Energy Ohio, Inc. for Approval to Change</b>	)	<b>Case No. 12-2401-EL-AAM</b>
<b>Accounting Methods.</b>	)	
	)	
<b>In the Matter of the Application of Duke</b>	)	
<b>Energy Ohio, Inc. for the Approval of a</b>	)	<b>Case No. 12-2402-EL-ATA</b>
<b>Tariff for a New Service.</b>	)	

**JOINT REPLY OF CONSTELLATION NEWENERGY, INC.  
AND EXELON GENERATION COMPANY, LLC**

Pursuant to Rule 4901-1-12(B)(2) of the Ohio Administrative Code (“OAC”), Constellation NewEnergy, Inc. and Exelon Generation Company, LLC (collectively as “Exelon”) respectfully submit this joint reply to Duke Energy’s October 16, 2012 Memorandum Contra. Exelon submits that its October 5, 2012 motion to intervene should be granted for the reasons set forth in the motion and in this reply.

**I. BACKGROUND**

In its October 5, 2012 Joint Motion to Intervene, Exelon explained that Constellation NewEnergy, Inc. provides electricity and energy-related services to retail customers in sixteen states, the District of Columbia and two Canadian provinces and serves over 15,000 megawatts of load and over one thousand customers. Constellation NewEnergy, Inc. holds a certificate as a competitive retail electric supplier (“CRES”) from the Commission to engage in the competitive sale of electric service and does provide such service to retail customers in Ohio.

Exelon Generation Company owns or controls approximately 30,000 MW of generating facilities nationwide, and is a leading power marketer throughout the country. Exelon Power Team is the wholesale marketing division of Exelon Generation and is a leading power marketer throughout the country. Exelon Energy Company is a wholly-owned subsidiary of Exelon Generation. These entities desire to provide wholesale electric service within the area in Ohio served by Duke Energy Ohio.

In its August 29, 2012 Application, Duke Energy Ohio, Inc. (“Duke”) claims that the final mechanism implemented by the Commission on July 2, 2012 in Case No. 10-2929-EL-UNC supplanted the interim mechanisms previously in place. Duke is requesting that the Commission determine that the rate for capacity services associated with its FRR obligations be set at \$224.15/MW-Day. Duke arrived at this figure by relying upon the formula that the Commission determined to be reasonable for Ohio Power in Case No. 10-2929-EL-UNC.

In addition to such determination, Duke is seeking authority pursuant to Section 4905.13, Revised Code, to defer the difference between the amount it has a right to collect pursuant to such state mechanism and the final zonal capacity price (“FZCP”). Duke maintains that for the remaining term of its FRR plan, the average FZCP will be approximately \$66.06/MW-Day. Reducing Duke’s capacity costs by the estimated amount charged to suppliers yields an incremental difference of approximately \$158.08/MW-Day. Duke is also seeking carrying charges on the unrecovered balance of the deferral, calculated at the long-term debt rate, and seeks approval of a new tariff (designated as Rider Deferred Recovery-Capacity Obligation (Rider DR-CO)), which would allow for the collection of this unrecovered balance. None of these terms are in the Duke Electric Service Plan Stipulation to which Exelon and Constellation are each a party.

In its October 16, 2012 memorandum contra, Duke claims that the application will have no impact on Exelon and that its business interests have no direct relationship to the proceedings<sup>1</sup>. Duke also claims that the application has no impact on the Electric Security Plan (ESP) stipulation and that neither Constellation nor Exelon can base intervention on a purported modification of the ESP stipulation<sup>2</sup>. Duke also argues that Constellation and Exelon are relying on competitive impact which in itself does not constitute a real and substantial interest<sup>3</sup>. Finally, Duke argues that no factual inquiry needs to be made in this proceeding and that the application does not require a hearing. The following arguments refute these points.

## **II. ARGUMENT**

### **A. Constellation and Exelon have a real and substantial interest**

Contrary to Duke's argument, Exelon does in fact have a real and substantial interest as justification for intervening in this case. Duke acknowledges in its Memorandum Contra that the Exelon entities operates in the Duke service area as retail and wholesale suppliers<sup>4</sup>. Thus, there is no factual dispute as to whether Exelon is directly involved in the supply of full electric service in the Duke service area. Duke in its Memorandum Contra claims that since the rate changes Duke proposes in the Application at bar will not be directly assessed against Exelon, Exelon has no interest<sup>5</sup>. On page 4 of its memorandum contra, Duke states:

“Constellation and Exelon fail to identify any position that they might take that is related to the actual merits of the case.”

Duke's position is wrong for at least two reasons.

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<sup>1</sup> Duke Memorandum Contra Intervention of Constellation and Exelon p. 2

<sup>2</sup> Id.

<sup>3</sup> Id at 3

<sup>4</sup> Id at 2

<sup>5</sup> Id

First, Duke's theory that Section 4903.221, Revised Code requires a direct increase in a charge or fee to meet the statutory standard of being "adversely affected" is unsupported. Moreover, Exelon, in its motion, alleges that the addition by Duke of a rider to capture legacy capacity costs on top of the existing capacity fee harms the market. All customers will be harmed by the charge, but because of the design of the charge, some customers will be harmed more than will others. This will directly impact the value to the Exelon's retail customers of their electric service. It will impact the expectations that Exelon's customers have under their current contracts as to the cost of electric service, and it is likely to affect those expectations in unanticipated ways. The proposed Rider DR-CO will also affect the type and nature of wholesale and retail products that suppliers can practically offer in the Duke service area. Finally, the higher Duke utility costs created by the rider will diminish the overall market for energy in the Duke service area.

Rather than respond to Exelon's claim of impact to the wholesale and retail electric market in the Duke service area, to refute Exelon's claim of interest, Duke cites In Re Akron Thermal, Case No. 05-05-HT-AIR, for the proposition that merely being a competitor is not a real and substantial enough interest for intervention. The *Akron Thermal* case involved a provider of heating and cooling equipment systems seeking to participate in a steam utility rate case. Unlike the matter at bar where Exelon's competitive services must go through Duke's monopoly utility system, the equipment provider sold equipment which was an alternative to the utility. The Commission ruled only that potential competition between a regulated steam utility and an unregulated equipment provider who built stand alone steam systems which the retail customer would use in lieu of the utility did not constitute a substantial interest by the equipment provider in the utility's rate case.

In stark contrast, Duke's application in the matter at bar is for utility supplied electric capacity charges which Exelon's customers must pay in order to use the Exelon contracted service. As such Duke's application has real and substantial impact on Exelon.

Second, Exelon and Constellation are signatories to the ESP Stipulation approved by the Commission. This Stipulation was intended to resolve capacity charges. Duke stipulated in that agreement to RPM priced capacity, plus an electric stability service charge (ESSC) of \$330 million, waiving its right to seek cost-based capacity rates during the term of its ESP. Duke further stipulated that it would not seek approval from the FERC of cost-based wholesale capacity charges as an FRR entity.

The new Rider DR-CO is flatly inconsistent with the stipulation which Exelon negotiated and signed. One of Exelon's principal concerns in the Duke ESP II case was the capacity charge, and Exelon must be permitted to defend the beneficial portions of that approved agreement. If Rider DR-CO had been introduced during negotiations over the Stipulation, Exelon (and other signatories) could have either rejected it outright or demanded from Duke additional pro-competitive conditions and provisions that would have benefitted the market and customers, as well as competitors. But that opportunity was not made available, and Duke seeks to foreclose that opportunity by introducing the Rider now in clear violation of the ESP II. The Commission, if it wishes to protect the integrity of the Stipulation process - - as Exelon firmly believes the Commission does - - should affirm the right of stipulation signatories to participate in any subsequent proceeding, as this one is, designed to upset the careful balance struck in the Stipulation. At this point, the ultimate question whether Rider DR-CO should be approved is not before the Commission, only whether a signatory to a Commission-approved Stipulation may be

allowed to participate in a proceeding involving a fundamental change to that Stipulation. The answer can only be affirmative.

#### **B. A Hearing is Required**

Exelon also disputes Duke's notion that there is no factual inquiry and that the application will be merely an arithmetic calculation. Recently, the Commission issued its October 17, 2012 Entry on Rehearing in Case No. 10-2929-EL-UNC where it stated:

The Commission concluded that we have an obligation under traditional rate regulation to ensure that the jurisdictional utilities receive just and reasonable compensation for the services that they render. However, rehearing is granted to clarify that the Commission is under no obligation with regard to the specific mechanism used to address capacity costs. Such costs may be addressed through an SCM that is specifically crafted to meet the stated need of a particular utility or through a rider or other mechanism.

The Commission has expressly stated that it is not limited in any way to establishing a state compensation mechanism for Duke that will necessarily be similar or identical to that which was established in Case No. 10-2929-EL-UNC for Ohio Power. In the AEP Capacity case the Commission had extensive expert testimony including outside experts retained by the Staff of the Commission to determine what constituted the legacy capacity cost for AEP Ohio. In paragraph 8 of the Application Duke claims its legacy capacity cost is \$224.15 MW-day. That is a factual allegation that should be tested in a hearing, especially since if approved it would raise rates by over \$729 million dollars<sup>6</sup>.

### **III. CONCLUSION**

In sum, Exelon has a real and substantial interest in participating in a proceeding where the Commission will determine if the capacity charge for Duke should be changed. It also has a real and substantial interest in this proceeding because the decision will ultimately affect the

retail and wholesale electric market in Ohio in which Exelon is a participant, and its motion to intervene should be granted. Finally, the magnitude and the nature of the relief Duke requests merits a hearing.

Respectfully Submitted,



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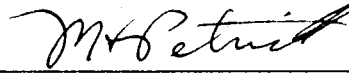
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<sup>6</sup> Application, Attachment B, page 3 of 24 and Attachment C.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing documents was served this 23<sup>rd</sup> day of October, 2012 by electronic mail, upon the persons listed below.



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

Summary: Reply Joint Reply electronically filed by M HOWARD PETRICOFF on behalf of Constellation NewEnergy, Inc. and Exelon Generation Company, LLC