

PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of the Application of Ohio |) | |
| Power Company for Authority to |) | |
| Establish a Standard Service Offer |) | Case No. 13-2385-EL-SSO |
| Pursuant to §4928.143, Ohio Rev. Code, |) | |
| in the Form of an Electric Security Plan. |) | |
| |) | |
| In the Matter of the Application of Ohio |) | |
| Power Company for Approval of Certain |) | Case No. 13-2386-EL-AAM |
| Accounting Authority. |) | |
| |) | |

**NATURAL RESOURCES DEFENSE COUNCIL'S
REPLY TO INDUSTRIAL ENERGY USERS-OHIO'S
MEMORANDUM CONTRA MOTION TO INTERVENE**

I. INTRODUCTION

Pursuant to Ohio Administrative Code §4901-1-12(B)(2), Natural Resources Defense Council (“NRDC”) hereby files its reply to Industrial Energy Users-Ohio’s (“IEU-Ohio”) Memorandum Contra to NRDC’s Motion to Intervene (“Memo Contra”). On March 6, 2014, NRDC filed a motion seeking to intervene in these proceedings (“Motion to Intervene”) regarding the Ohio Power Company’s (“AEP”) application to establish a standard service offer in the form of an electric security plan (“Application”). In the Motion to Intervene, NRDC satisfied the liberal standard for granting intervention under both the Ohio Revised Code (O.R.C.) and the Ohio Administrative Code (O.A.C.).¹ While IEU-Ohio now asserts that NRDC’s interests are not relevant to the merits in these proceedings and are adequately represented by the Environmental Law & Policy Center (“ELPC”), as is discussed more thoroughly below, IEU-Ohio’s claims are unsubstantiated. NRDC has been a fixture in these

¹ O.R.C. §4903.221(B), O.A.C. §4901-1-11(B).

very kinds of proceedings before the Commission since 2008, having been granted intervention in *seven* Electric Security Plan filings including AEP, First Energy and Duke. Thus, NRDC respectfully requests that the Public Utilities Commission of Ohio (“Commission”) reject IEU-Ohio’s Memo Contra, grant NRDC’s Motion to Intervene without limitation, and provide NRDC with the full powers and rights granted to intervening parties.

II. LEGAL STANDARD

The O.R.C. states that “[a]ny other person who may be adversely affected by a public utilities commission proceeding may intervene in such proceeding”² provided the Commission makes the following determinations set out in §4903.221(B):

- (1) The nature and extent of the prospective intervenor’s interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; [and]
- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

The O.A.C. similarly provides that any person may intervene where “[t]he person has a real and substantial interest in the proceeding.”³ These rules set forth the same four standards that are established in O.R.C. § 4903.221(B) for determining whether a party may be “adversely affected,” and also add a fifth factor regarding “the extent to which the person’s interest is represented by existing parties.”⁴

The Ohio Supreme Court has held that the standard for intervention in proceedings before the Commission is to be liberally construed, “. . . so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the [Commission].”⁵ The

² O.R.C. §4903.221.

³ O.A.C. §4901-1-11(A)(2).

⁴ O.A.C. §4901-1-11(B).

⁵ *Ohio Consumers’ Counsel v. Pub. Util Comm’n of Ohio* (2006), 111 Ohio St. 3d 384, 388, 2006 Ohio 5853, 856

Commission has consistently maintained a policy to “encourage the broadest possible participation” in its proceedings, even under extenuating circumstances.⁶ NRDC satisfies this liberal intervention standard, as well as the factors identified in the statute and in the Commission’s rules, and thus respectfully requests that NRDC’s intervention be granted in the above-captioned proceedings.

III. ARGUMENT

1. NRDC meets the standard for intervention and IEU-Ohio fails to provide evidence to the contrary

IEU-Ohio claims that NRDC’s interests are not relevant to the merits of the proceeding and as such do not satisfy the requirement that NRDC contribute to the full development and equitable resolution of these proceedings.⁷ IEU-Ohio, however, fails to provide support for these claims in its Memo Contra. NRDC’s Motion to Intervene lays out in detail each of the criteria for intervention, satisfying the requisite hurdles set out in the O.R.C. and the O.A.C.⁸ And though IEU-Ohio would have the Commission either deny NRDC intervention in these proceedings or limit intervention to narrow issues or joint filing with ELPC, much of IEU-Ohio’s argument actually *supports* NRDC’s request for full intervenor status. Moreover, IEU-Ohio cannot overcome the liberal presumption for granting intervention where NRDC has clearly met the standards under both the statute and the Commission’s own rules.

IEU-Ohio fails to rebut NRDC’s demonstration that its interests in these proceedings are relevant to the merits of AEP’s proposed Electric Security Plan (“ESP”). In its Application, AEP specifies that the ESP addresses a broad range of issues, including the energy efficiency and

N.E.2d 940.

⁶ See e.g. *In the Matter of the Application of The Dayton Power and Light Company*, 2009 WL 322883 at 1, Ohio PUC February 5, 2009 (Commission granted motion to intervene in light of policy to encourage participation, despite party’s failure to file within the deadline).

⁷ IEU-Ohio’s Memo Contra at 2-3.

⁸ NRDC’s Motion to Intervene at 5-7.

renewable and alternative energy resource benchmarks established under Am. Sub. SB No. 221.⁹ AEP states that it will continue to support compliance with these benchmarks via the proposed ESP. NRDC has an interest in ensuring that AEP meets this goal and in developing any additional opportunities within the proposed ESP to pursue clean energy opportunities. NRDC has been actively engaged on these issues in Ohio for several years. As described in the Motion to Intervene, NRDC is a national, non-profit environmental organization that has worked for its 40 year history to, among other things, promote energy efficiency and renewable energy sources.¹⁰ NRDC has more than 10,600 members in Ohio, many of whom reside in AEP's service area and/or live near the utility's power generating facilities.¹¹ NRDC's members are interested in having access to clean and efficient sources of energy, while also ensuring that they are receiving reliable, low-cost service from their utility. As an organization, NRDC also has an interest in promoting policies that further investment in cost-effective energy efficiency and other clean energy resources for the benefit of Ohioans and the environment. These interests are central to the issues that AEP has indicated it will address in the proposed ESP.

IEU-Ohio itself points out NRDC's longstanding record of engagement on Ohio's energy-related dockets, providing further support that NRDC's intervention in these proceedings is appropriate. As IEU-Ohio states in its Memo Contra, NRDC intervened in AEP's 2012-2014 energy efficiency and peak demand reduction ("EE/PDR") portfolio plan and is currently an active member of AEP's energy efficiency collaborative which is in the process of addressing the contents of the utility's upcoming plan.¹² IEU-Ohio is also correct in noting that NRDC has recently filed comments on the Commission's five-year review of its energy efficiency and

⁹ AEP's Application and Testimony of Company Witnesses: Vegas, Spitznogle, Dias, Allen, Gabbard, and Roush, Section 1 of 9 at 4.

¹⁰ NRDC's Motion to Intervene at 5.

¹¹ Id.

¹² IEU-Ohio's Memo Contra at 3.

renewable and alternative energy resource rules.¹³ But while IEU-Ohio asserts that this participation should obviate NRDC's intervention in the current proceedings,¹⁴ nothing under the O.R.C. or O.A.C. dictates denial of intervention where a party is involved in other proceedings that may address parallel issues. In fact, several other intervenors on the current docket have a similar record of participation with AEP and in energy matters before the Commission - yet those requests for intervention have not been challenged.¹⁵ Rather than supporting IEU-Ohio's arguments, NRDC's longstanding engagement on these issues in Ohio actually demonstrates that it is an appropriate party to participate in the efficient resolution of the proposed ESP.

IEU-Ohio also implies that the energy efficiency and renewable and alternative energy resource issues raised in AEP's proposed ESP will mirror those addressed in the other proceedings in which NRDC is involved, and thus claims that NRDC's participation in those dockets sufficiently satisfies its interests. This is not the case, however. In its upcoming EE/PDR plan docket AEP will be focusing on the specific program design and deployment elements of its next energy efficiency portfolio, as well as cost-effectiveness and cost-recovery issues. There will likely be some overlap with this filing and the proposed ESP docket; but energy efficiency and alternative energy will be addressed in different contexts - and potentially on different merits - between the two. Thus, there is no support for IEU-Ohio's claim that

¹³ IEU-Ohio's Memo Contra at 3. NRDC notes that IEU-Ohio has also submitted comments on the Commission's energy efficiency and renewable energy rules docket, intervened in AEP's last EE/PDR portfolio docket, and is currently an active member of AEP's energy efficiency collaborative. *See In the Matter of the Commission's Review of its Rules for Energy Efficiency Programs Contained in Chapter 4901:1-39 of the Ohio Administrative Code*, Case Nos. 13-651-EL-ORD, *et al.*, Industrial Energy-User's Comments; *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Case Nos. 11-5568-EL-POR.

¹⁴ IEU-Ohio's Memo Contra at 3.

¹⁵ *See, e.g.* Ohio Environmental Council and Environmental Defense Fund's Motion to Intervene; Office of the Ohio Consumers' Counsel's Motion to Intervene; Ohio Hospital Association's Motion to Intervene; Ohio Energy Group's Motion to Intervene.

NRDC's participation in other matters will provide it sufficient opportunity to be heard on the clean energy issues that may arise in the current proceedings.

With respect to the third element, NRDC filed its motion by the deadline set for intervention and there is no indication that its participation will unduly burden or delay these proceedings. NRDC has a track record of intervening in ESP dockets and in energy-related proceedings before the Commission and has a demonstrated commitment to assisting in the efficient resolution of each case - a commitment which NRDC plans to honor in the above-captioned proceedings. IEU-Ohio makes no claim to the contrary. Further, the inclusion of NRDC in these proceedings would have no detrimental effect on a docket in which over a dozen other interested parties have also intervened (and for which intervention will be presumably granted).

With respect to the fourth element, NRDC brings a great deal of expertise to bear on the energy efficiency and renewable energy issues raised in AEP's proposed ESP. This expertise would significantly contribute to the full development of the record, including NRDC staff and consultants who have extensive experience in analyzing the potential for cost-effective energy efficiency and in assessing ways to acquire more robust energy efficiency within the confines of applicable benchmarks. NRDC has intervened and/or provided testimony on similar clean energy-related proceedings in a number of states including Illinois, Minnesota, Wisconsin, New York, Oregon, California, New Jersey, and Iowa. NRDC has regularly presented testimony before the U.S. Congress and various state legislatures related to the electric utility industry. As indicated above, NRDC has also intervened in numerous dockets related to energy efficiency and

alternative and renewable energy issues before the Commission, including AEP-Ohio's last EE/PDR portfolio plan and recent portfolio plan filings for Duke and First Energy.¹⁶

In fact, NRDC has been a fixture in other ESP dockets before the Commission, having been granted intervention in the last *seven* of these filings of AEP, First Energy and Duke since 2008.¹⁷ Oddly, though, IEU-Ohio counts this depth of engagement against NRDC in the current proceedings. Again, nowhere in the O.R.C or the O.A.C. would a party be denied intervention because of its previous or current involvement in related case dockets. To the contrary, NRDC's track record in these proceedings and numerous appearances before the Commission render it a valuable party that would significantly contribute to the energy efficiency and renewable energy components of the proposed ESP.

Finally, with regard to the fifth factor, the interests of NRDC and its members in Ohio cannot be adequately represented by any other party to these proceedings. IEU-Ohio fails to rebut this fact in its Memo Contra. While ELPC and NRDC certainly collaborate on energy-related issues in many forums in Ohio, the two organizations are in fact quite different and one cannot simply be substituted for the other. ELPC and NRDC represent different members, have

¹⁶ See, e.g., NRDC's participation in the most recent EE/PDR program portfolios for AEP's 2012-2014 EE/PDR (Case No. 11-5569-EL-POR), First Energy's 2013-2015 EE/PDR (Case No. 12-2190-EL-POR), Duke's 2014-2016 EE/PDR (Case No. 13-0431-EL-POR).

¹⁷ See *In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment To its Corporate Separation Plan*, Case No. 08-0918-EL-SSO; see also *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish A Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, 11-347-EL-SSO; *In the Matter of the Application of Duke Energy Ohio for the Approval of an Electric Security Plan*, Case No. 08-0920-SSO; *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*, Case No- 11-3549-EL-SSO; *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R. C. 4928.143 in the Form of an Electricity Security Plan*, 08-935-EL-SSO; *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R. C. 4928.143 in the Form Of and Electric Security Plan*, 10-0388-EL-SSO; *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO.

different perspectives as organizations, bring different expertise and skills to the table, and at times promote different strategies to accomplish their policy objectives. Specifically, NRDC states in its Motion to Intervene that it has more than 10,600 members in Ohio and, beyond this Ohio-level focus, works nationally to bring its significant expertise to bear on energy proceedings across the U.S. and in front of a host of public utilities commissions and state legislatures.¹⁸ In contrast, ELPC is a *regional* organization that focuses in the Midwest states on “green” economic development, including new manufacturing and job creation, and is interested in both the environmental health of Ohio and in ensuring that clean energy development is used as an economic development tool.¹⁹ Because ELPC has a narrower regional focus and addresses a more discrete range of issues than NRDC, and because their members in Ohio are wholly separate, NRDC and its members’ interests would not be adequately represented by ELPC in these proceedings. It is also important to note that NRDC and ELPC have intervened separately on the same dockets in recent years, which has not resulted in burden to the parties or any undue delay in those proceedings.²⁰

NRDC has a real and substantial interest in these proceedings, and the Commission must liberally construe intervention to encourage the broadest possible participation.²¹ NRDC satisfies this liberal standard, the four factors for intervention identified in the O.R.C., and the

¹⁸ NRDC’s Motion to Intervene at 5.

¹⁹ ELPC’s Motion to Intervene at 3.

²⁰ See, e.g. NRDC’s and ELPC’s intervention in the most recent EE/PDR program portfolios for First Energy’s 2013-2015 EE/PDR (Case No. 12-2190-EL-POR) and Duke’s 2014-2016 EE/PDR (Case No. 13-0431-EL-POR). NRDC also notes that while it often files jointly in the interest of judicial economy when its positions align with its environmental colleagues, where they have different interests in a case - as NRDC and ELPC do in these proceedings - they appropriately file separately.

²¹ See *Ohio Consumers’ Counsel v. Pub. Util Comm’n of Ohio* (2006), 111 Ohio St. 3d 384, 388, 2006 Ohio 5853, 856 N.E.2d 940; See also *In the Matter of the Application of The Dayton Power and Light Company*, 2009 WL 322883 at 1, Ohio PUC February 5, 2009 (Commission granted motion to intervene in light of policy to encourage participation, despite party’s failure to file within the deadline).

five factors in the O.A.C. IEU-Ohio's Memo Contra fails to rebut this demonstration. Thus, NRDC respectfully requests that the Commission approve its Motion to Intervene.

2. Because NRDC meets the standard for intervention, there is no legitimate reason to limit NRDC's participation in these proceedings

IEU-Ohio fails to establish that NRDC does not meet the standard for intervention, and thus its request in the alternative to grant NRDC limited intervention should similarly be denied. Under O.A.C. §4901-1-11(D), the Commission may grant limited intervention on specific issues where a person has no real and substantial interest with respect to the remaining issues or the person's interest with respect to the remaining issues is adequately represented by existing parties. As discussed above, however, NRDC's Motion to Intervene clearly establishes that NRDC meets the requisite criteria under the O.R.C. and the O.A.C. Specifically, NRDC has demonstrated a real and substantial interest in the energy efficiency and renewable standards issues that AEP has indicated will be addressed in its proposed ESP. Further, ELPC cannot adequately represent the interests of NRDC and its members in these proceedings. Thus, limited intervention status is inappropriate.

And while its Memo Contra also states that intervention should be granted on a limited basis "to ensure that NRDC's participation does not unduly delay the proceeding," IEU-Ohio nowhere establishes that NRDC's intervention will cause delay. In fact, as discussed above, NRDC has a longstanding record of intervening in ESP dockets and other energy efficiency and renewable energy-related proceedings before the Commission and has a demonstrated commitment to assisting in the efficient resolution of these kinds of proceedings. IEU-Ohio makes no claim to the contrary.

IV. CONCLUSION

For the foregoing reasons, NRDC respectfully request that the Commission reject IEU-Ohio's Memo Contra, grant NRDC's Motion to Intervene without limitation, and provide NRDC with the full powers and rights granted to intervening parties.

Dated: March 18, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Natural Resource Defense Council's Reply to Industrial Energy Users - Ohio's Memorandum Contra Motion to Intervene*, submitted on behalf of the Natural Resources Defense Council, was served by electronic mail, upon the following Parties of Record, this 18th day of March, 2014.

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Case No(s). 13-2385-EL-SSO

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