

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

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

**DUKE ENERGY OHIO, INC.'S MEMORANDUM
CONTRA THE MOTION TO INTERVENE OF
FIRST ENERGY SOLUTIONS CORP.**

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 September 10, 2012, First Energy Solutions Corp. (FES) moved to intervene in these proceedings. As FES correctly indicated in its motion, interventions in Commission proceedings are governed by R.C. 4903.221 and O.A.C. 4901-1-11. However, FES errs in its application of the relevant legal parameters to the facts. And as Duke Energy Ohio demonstrates herein, FES's motion 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. Here, FES does not articulate an interest that is implicated by, or relevant to, Duke Energy Ohio's Application. Rather, FES merely submits that Duke Energy Ohio's "proposal will impact both wholesale and retail suppliers, such as" FES. FES continues with a note that the proposal will "impact the competitive market for electric generation service in Ohio."¹

While Duke Energy Ohio recognizes that FES operates in its territory as both a competitive retailer and a wholesaler, it fails to explain any way in which the Application in these proceedings could possibly impact such businesses. The proposal, designed to mirror that which was recently set in place by the Commission for another, similarly situated utility, will not impact suppliers. It does not change any of a retailer's or wholesaler's costs of doing business. It does not impose any additional charges, or raise any current charges, due from a retailer or a wholesaler. Indeed, in the Application, Duke Energy Ohio concedes that suppliers will continue to be charged the final zonal capacity price, which is a market-based price.² Thus, the proposal has no impact on FES.

FES also suggests that the proposal "*could* directly impact FES' ability to ... compete on an even playing field with Duke Energy Ohio, which through affiliates also serves as a retail and wholesale provider in Ohio."³ FES, through this argument, obfuscates the facts and the law. FES, as a competitive retail electric service (CRES) provider, competes with other CRES providers for customers. It does not compete with the local electric utility for customers; the

¹ FES Memorandum in Support of Motion to Intervene, at 1 (September 10, 2012).

² Duke Energy Ohio Application at paragraph 7.

³ Id at 3 (emphasis added).

utility simply supports competition among the CRES providers. FES, as a wholesaler, similarly does not compete with Duke Energy Ohio. It is noteworthy, in this regard, that even FES recognizes that its competitive efforts are with affiliates of Duke Energy Ohio, which are not applicants in these proceedings. The competition among Duke Energy Ohio's affiliates and FES has nothing whatsoever to do with the Commission's approval of the Duke Energy Ohio's Application in these proceedings with regard to a service that cannot even be described as a retail electric service.

Beyond that, it is critical that the established precedent of the Commission does not allow intervention on the justification that a movant wishes to protect its competitive position. Competitive impacts, in themselves, do not demonstrate a real and substantial interest. This approach was explained clearly by the Commission in 2005, where it refused intervention by FirstEnergy Facilities Services on the ground that it had not demonstrated an interest of the type that might assist the Commission's primary interest of securing the best possible service for the public under a just and reasonable rate structure. After noting that the motion to intervene would be denied, the Commission summarized its rationale as follows:

We find our ruling is consistent with past precedent where we have stated in several cases that the fact that a company is a competitor of a regulated utility does not, of itself, constitute "a real and substantial interest" sufficient to automatically entitle it to participate in a Commission proceeding. ... Although the Commission has granted intervention to competitive interests in more recent years with the advent of more competitive utility service, intervention by competitors usually involves utility services by regulated or unregulated providers of those services and where there has been a direct relationship to the proceeding.⁴

In the present situation, FES has made no claim that it provides the capacity services that are the fundamental issue at bar. FES's business interests have no direct relationship to the proceedings.

⁴ *In the Matter of the Application of Akron Thermal, Limited Partnership for an Increase in its Rates for Steam and Hot Water Service*, Case No. 05-5-HT-AIR, *et al.* (Entry, June 14, 2005) (internal citations omitted).

Finally, FES incorrectly asserts that the application seeks a modification of the terms of the stipulation that was approved in Duke Energy Ohio's most recent standard service offer proceedings (ESP Stipulation).⁵ But this is not the case. The ESP Stipulation did address the amount that wholesale and retail suppliers would be charged for capacity. Significantly, however, it did not address the fair and reasonable compensation to which Duke Energy Ohio is entitled in exchange for fulfilling its obligations as a fixed resource requirement entity under Ohio's newly adopted state compensation mechanism. Thus, the Application here has no impact on the ESP Stipulation and FES cannot base intervention on a purported modification of the ESP Stipulation.

FES has failed to identify an 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. Again, however, FES fails to identify any position that it might take that is related to the actual merits of the case. The proceedings will have no impact on costs that FES will incur, no impact on any legally cognizable competition between Duke Energy Ohio – the applicant herein – and FES (as there is none), and no impact on the ESP Stipulation. FES 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

⁵ *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.*

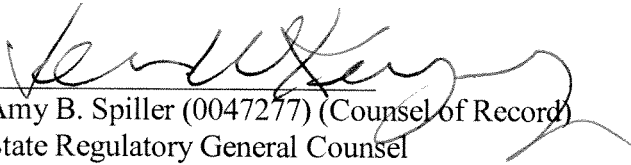
and whether the prospective intervenor will provide a significant contribution to full development and equitable resolution of the factual issues. Neither of these elements is satisfied in the instant request for intervention.

As Duke Energy Ohio fully explained in the Application, these proceedings seek approval of a tariff to collect for services not previously covered by a tariff and do not seek any increase; thus, no hearing is required under R.C. 4909.18 unless the Application may be unjust or unreasonable. As the Commission has just adopted the state compensation mechanism and approved the determination of a charge pursuant thereto, with a deferral and subsequent recovery over time for a comparable entity, the Application here cannot be deemed unjust or unreasonable. The Application merely seeks arithmetic calculations and the application of an outcome that has already been found to be just and reasonable. It is indisputable that the Application does not require a hearing. Thus, FES's effort to intervene in these proceedings can have no other impact than to delay the resolution. As there is no factual inquiry to be made, since the state mechanism relies on existing federal filings, FES's input will not provide a significant contribution to development or resolution of factual issues.

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

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

Respectfully submitted,
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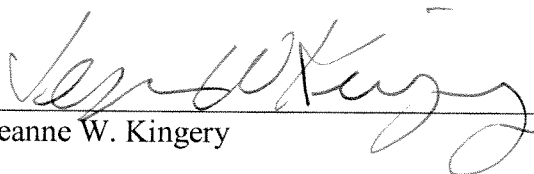
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail, on this 13th day of September, 2012, to the following parties.



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