

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio to Adjust and Set the) Case No. 08-1025-EL-UNC
Annually Adjusted Component of its)
Market Based Standard Service Offer.)

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**MOTION TO INTERVENE AND MOTION TO DISMISS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential utility customers, moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to grant OCC's intervention in the above-captioned proceeding in which the application ("Application") by Duke Energy Ohio, Inc. ("Duke Energy" or "Company") for approval of rate changes for 2009 would result in a rate increase for residential customers.¹ The OCC's Motion should be granted because OCC meets the legal standards for intervention, as explained in detail in the attached Memorandum in Support.

The OCC also moves for dismissal of the above-captioned case. The Application states that it is filed pursuant to the Commission's decision in Case Nos. 03-93-EL-AIR, et al. ("*Rate Plan Case*").² The Commission did not order or otherwise provide for the filing submitted by Duke Energy. The OCC's Motion to Dismiss is also further explained in the attached Memorandum in Support.

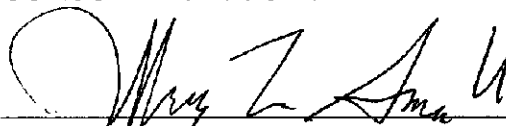
¹ See R.C. Chapter 4911, R.C. 4903.221 and Ohio Adm. Code 4901-1-11.

² Application at 1, ¶3 (August 28, 2008).

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Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

A handwritten signature in black ink, appearing to read "Ann M. Hotz", is written over a horizontal line.

Ann M. Hotz, Counsel of Record

Jeffrey L. Small

Jacqueline Lake Roberts

Michael E. Idzkowski

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

(614) 466-8574 (Telephone)

hotz@occ.state.oh.us

small@occ.state.oh.us

roberts@occ.state.oh.us

idzkowski@occ.state.oh.us

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On August 28, 2008, Duke Energy filed its Application for the approval of an Annually Adjusted Component ("AAC") charge for 2009. The approval of the Application could permit the Companies, under certain circumstances, to increase rates paid by the Companies' approximately 607,000 residential customers. The OCC is the state agency that represents Ohio's residential utility consumers. The Commission should grant the OCC's Motion to Intervene in this proceeding so that it can fully participate in the proceeding and protect the interests of the Companies' customers. In the capacity as the representative of residential utility consumers, the OCC seeks dismissal of the above-captioned case.

II. ARGUMENT

A. Motion to Intervene

Pursuant to R.C. Chapter 4911, the OCC moves to intervene under its legislative authority to represent residential utility customers of Ohio. The OCC meets the standards for intervention found in Ohio's statutes and the PUCO's rules.

The interests of residential electric customers in areas served by the Company are

“adversely affected” by this case, pursuant to the intervention standard in R.C. 4903.221. R.C. 4903.221 provides, in part, that any person “who may be adversely affected” by a PUCO proceeding is entitled to seek intervention in that proceeding. The interests of Ohio’s residential consumers may be “adversely affected” by this proceeding, especially if the customers are unrepresented in a proceeding where the Company seeks to increase rates paid by residential customers. Thus, the OCC satisfies the intervention standard in R.C. 4903.221.

The OCC also meets the criteria for intervention in R.C. 4903.221(B), which requires the PUCO, in ruling on motions to intervene, to consider the following:

- (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 proceeding; and
- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

First, the nature and extent of the OCC’s interest is to represent the residential customers of the Company regarding rates paid by residential customers. This interest is different than that of any other party and especially different than that of the utility whose advocacy includes the financial interest of its stockholders.

Second, the OCC’s legal positions include, without limitation, that the rates paid by residential customers should be reasonable and lawful. In this case, the OCC seeks dismissal of the case for reasons stated in support of the Motion to Dismiss. This legal position directly relates to the merits of the case.

Third, the OCC's intervention will not unduly prolong or delay the proceeding, but should provide insights that will expedite the PUCO's effective treatment of the Application. The OCC, with its longstanding expertise and experience in PUCO proceedings, will duly allow for the efficient processing of the proceeding with consideration of the public interest.

Fourth, the OCC's intervention will significantly contribute to the full development and equitable resolution of the factual issues. This case significantly relates to the results of the *Rate Plan Case* with which the OCC has extensive experience. Furthermore, this case has important implications for the proper application of law as recently enacted in Sub. S.B. 221, about which the OCC has extensive knowledge. The OCC will present information that the PUCO should consider for equitably and lawfully deciding this case in the public interest.

The OCC also satisfies the intervention criteria in the Ohio Administrative Code (which are subordinate to the criteria that the OCC satisfies in the Ohio Revised Code). To intervene, a party should have a "real and substantial interest" according to Ohio Adm. Code 4901-1-11(A)(2). As the residential utility consumer advocate for the State of Ohio, the OCC has a real and substantial interest in this proceeding where the outcome will have an effect on the service rates paid by residential consumers.

In addition, the OCC meets the criteria of Ohio Adm. Code 4901-1-11(B)(1)-(4). These criteria mirror the statutory criteria in R.C. 4903.221(B) that the OCC already has addressed and that the OCC satisfies.

Ohio Adm. Code 4901-1-11(B)(5) states that the Commission shall consider the "extent to which the person's interest is represented by existing parties." While the OCC

does not concede the lawfulness of this criterion, the OCC satisfies this criterion in that it uniquely has been designated as the state representative of the interests of Ohio's residential utility consumers. That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio recently confirmed the OCC's right to intervene in PUCO proceedings, in ruling on an appeal in which the OCC claimed the PUCO erred by denying its intervention. The Court found that the PUCO abused its discretion in denying the OCC's intervention and that OCC should have been granted intervention.³

The OCC meets the criteria set forth in R.C. 4903.221, Ohio Adm. Code 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. On behalf of Ohio's residential consumers, the Commission should grant the OCC's Motion to Intervene.

B. Motion to Dismiss

The Application incorrectly states that it is submitted "pursuant to the Public Utilities Commission of Ohio's Entries on November 23, 2004 and December 28, 2005, in Case No. 03-93-EL-ATA" (i.e. the *Rate Plan Case*).⁴ The case cited by Duke Energy (i.e. the *Rate Plan Case*) dealt with a plan for setting standard service offer ("SSO") generation rates for the period ending December 31, 2008. The Commission's Entry in 2004 (to which the Application refers) requires an AAC filing by September 1 of each

³ *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶13-20 (2006).

⁴ Application at 1, ¶3 (August 28, 2008).

year,⁵ but to satisfy the Commission's oversight responsibilities for the remainder of the rate plan period that only extends to the end of 2008.

CG&E suggests that increases in the AAC for nonresidential consumers be set at four percent of "little g" in 2005, and additional four percent in 2006, and allowing CG&E to apply for additional recovery of actual costs in 2007 and 2008, and by setting increases in the AAC for residential consumers at six percent of "little g" during 2006 and allowing CG&E to apply for additional recovery of actual costs in 2007 and 2008.⁶

The Commission did not extend the rate plan beyond the Company's proposed plan that extended through only 2008. No order or entry in the Rate Plan Case provides for rates in 2009, the matter that is the subject of Duke Energy's Application in this case.

No confusion has existed regarding the termination of Duke Energy's current rate plan at the end of 2008. In a follow-up proceeding to the *Rate Plan Case* regarding Duke Energy's fuel costs, the Commission-required Management/Performance Audit report ("Audit Report") stated, for example, that "the FPP [approved in the *Rate Plan Case*] is to be in place through December 31, 2008."⁷ That report recognized that the Company "had filed an application to extend the FPP beyond 2008."⁸ The Audit Report referred to Case No. 06-986-EL-UNC, a case filed by Duke Energy to provide for SSO rates on January 1, 2009 and for a period thereafter.

On August 2, 2006, Duke Energy filed its application in Case No. 06-986-EL-UNC, the case referred to in the Audit Report, stating:

⁵ *Rate Plan Case*, Entry on Rehearing at 10, ¶13(a).

⁶ *Id.* at 9, ¶12(f).

⁷ *In re Setting Duke Energy's FPP Rider*, Case No. 07-723-EL-UNC, et al., Management/Performance Audit at ES-6 (November 1, 2007).

⁸ *Id.*

DE-Ohio . . . propose[s] an updated market price for the period beginning January 1, 2009. Absent approval of this application, DE-Ohio will be prepared to charge its consumers prices that reflect market prices on a more current basis.”⁹

Leaving aside Duke Energy’s rationalization for its proposed SSO pricing, the Company’s statement demonstrates that no ambiguity exists regarding the termination of the current Duke Energy rate plan at the end of 2008. The Commission’s records amply document that no confusion exists -- including no confusion on the part of Duke Energy - - that the *Rate Plan Case* does not provide for AAC charges after December 31, 2008.

Ohio law contains requirements for setting rates after the expiration of rate plan provisions, which in the case of Duke Energy means SSO rates after 2008. In particular, Duke Energy’s SSO proposals must comply with the provisions stated in R.C. 4928.141 through R.C. 4928.143, enacted as part of Sub. S.B. 221, under which Duke Energy must submit an electric security plan (“ESP”) in order to provide a SSO to its customers following the expiration of an existing rate plan.¹⁰ On July 31, 2008, Duke Energy submitted an ESP plan and set in motion the process by which SSO rates would be set for the beginning of 2009 and beyond. That proposal included the rate proposal for an AAC charge that was separately stated in the Application in the above-captioned case.¹¹ The OCC’s Motion to Dismiss applies to the separate proposal in the above-captioned case, a

⁹ *In re Extension of Duke Energy’s Rate Plan*, Case No. 06-986-EL-UNC, Application at 3-4 (August 2, 2006). The application was later withdrawn.

¹⁰ R.C. 4928.141(A).

¹¹ *In re Duke Energy ESP Proposal*, Case Nos. 08-920-EL-SSO, et al., Application at 10 (July 31, 2008) (“identical to the calculation of DE-Ohio’s current AAC except that DE-Ohio also proposes to include . . . new cost-effective generation projects”). Duke Energy proposed the identical revenue requirements in support of AAC rates for 2009, as stated in the above-captioned case. See *In re Duke Energy ESP Proposal*, Case Nos. 08-920-EL-SSO, et al., Application, Volume II, Part B, Schedule 3, and compare with Case No. 08-1025-EL-UNC, Attachment WDW-1, Schedule 1, Page 1 of 4 (both showing a “Total Revenue Requirement” of \$141,276,736 based on sub-components for “Environmental Compliance,” “Homeland Security,” and “Tax Changes”).

proposal that is not provided for under the new requirements stated in Sub. S.B. 221.

The Application is apparently intended by Duke Energy to reach an unlawful result in the event that the Commission disapproves Duke Energy's ESP application or the Commission adjusts the ESP and Duke Energy rejects the Commission's adjustments. Under such circumstances, R.C. 4928.143 provides for continuation of the utility's "most recent standard service offer, along with any expected *increases or decreases in fuel costs* from those contained in that offer, until a subsequent offer is authorized."¹² The Application seeks an increase related to matters unrelated to the fuel costs, and therefore the Application conflicts with the provisions contained in the Revised Code.

Duke Energy seeks, under the guise of an adjustment pursuant to an approved rate plan, to increase rates beyond those provided for under Ohio law. As demonstrated above, Duke Energy's existing rate plan terminates at the end of 2008. A terminated rate plan cannot be "adjusted" for the period after the date of termination as proposed in Duke Energy's Application. The rate increase sought by Duke Energy should be dealt with in the Company's ESP case, and is unlawful as a separate increase in rates. The case should be dismissed.

III. CONCLUSION

For the above-stated reasons, the OCC's Motion to Intervene should be granted.

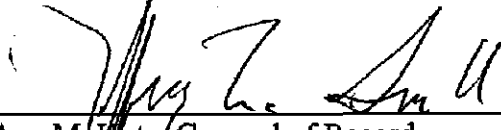
Furthermore, this case should be dismissed. The Commission did not order or otherwise provide for the filing that Duke Energy claims is responsive to the Commission's decision in Case No. 03-93-EL-AIR, et al. The Application is also

¹² R.C. 4928.143(C)(2)(b) (emphasis added).

inconsistent with the provisions of R.C. Chapter 4928 that resulted from enactment of
Sub. S.B. 221.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Ann M. Hotz, Counsel of Record

Jeffrey L. Small

Jacqueline Lake Roberts

Michael E. Idzkowski

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

(614) 466-8574 (Telephone)

hotz@occ.state.oh.us

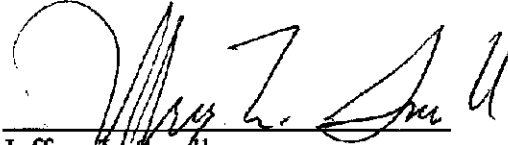
small@occ.state.oh.us

roberts@occ.state.oh.us

idzkowski@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Motion to Intervene and to Motion to Dismiss* was served on the persons stated below, via First Class U.S. Mail, postage prepaid, this 8th day of September, 2008.


Jeffrey L. Small
Assistant Consumers' Counsel

SERVICE LIST

Paul A. Colbert
Associate General Counsel
Duke Energy Ohio
2500 Atrium II
P.O. Box 961
Cincinnati, OH 45201

Duane Luckey
Attorney General's Office
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, OH 43215

Duke Energy Ohio, Inc.

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202

Ohio Energy Group