

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)	Case No. 09-757-EL-ESS
Energy Ohio, Inc. for Approval of Proposed)	Case No. 09-1946-EL-RDR
Reliability Standards)	
)	

**DUKE ENERGY OHIO, INC.'S MEMORANDUM
IN OPPOSITION TO ALBERT E. LANE'S
SECOND CORRECTED MOTION TO INTERVENE**

I. INTRODUCTION

Duke Energy Ohio, Inc. (Duke Energy Ohio) opposes the Second Corrected Motion to Intervene filed by Mr. Albert E. Lane (Mr. Lane) in Case No. 09-757-EL-ESS. Mr. Lane filed this motion on April 23, 2010, after having filed two prior motions to intervene in this case. Mr. Lane's newest Motion to Intervene still fails to demonstrate that he meets any of the five factors to be considered in reviewing the propriety of intervention, and his motion must therefore be denied.

The majority of Mr. Lane's newest motion is verbatim the same as his prior two motions to intervene, which themselves, to a great extent, simply repeated a motion to intervene Mr. Lane filed on March 2, 2010, in Case No. 09-1946-EL-RDR. Therefore, to the extent that Mr. Lane's instant Motion to Intervene simply repeats the requests and arguments contained in his March 2, 2010 and April 8 and 9, 2010 motions, Duke Energy Ohio respectfully refers this Commission to, and incorporates by reference herein, its April 26, 2010, Memorandum in Opposition to Mr. Lane's Motion to Intervene, filed in this case. Duke Energy Ohio also respectfully refers this

Commission to, and incorporates by reference herein, the Attorney Examiner's Entry of April 14, 2010, filed in Case No. 09-1946-EL-RDR, which denied Mr. Lane's March 2, 2010, motion to intervene in that case.¹

Finally, to the extent that the instant Motion to Intervene could be construed as an interlocutory appeal of the Attorney Examiner's Entry of April 14, 2010, in Case No. 09-1946-EL-RDR, it must be denied.

II. ARGUMENT

Pursuant to Ohio Admin. Code §4901-1-11(A)(2), upon timely motion,² intervention in a proceeding before this Commission is permitted upon a showing that:

The person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties.

Ohio Admin. Code §4901-1-11(B) provides that the following factors are to be considered in evaluating motions to intervene:

- (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.
- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.
- (5) The extent to which the person's interest is represented by existing parties.

See also Ohio Revised Code §4903.221.

¹ *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of Its Distribution Reliability Rider*, Case No. 09-1946-EL-RDR, Entry, ¶11 (April 14, 2010). This same Entry also denied Mr. Lane's request, which is again repeated in his instant Motion to Intervene, to reactive and merge Case No. 08-709-EL-AIR with Case No. 09-1946-EL-RDR. *See* Case No. 09-1946-EL-RDR, Entry, ¶10.

² Pursuant to the Entry of September 25, 2009, in Case No. 09-757-EL-ESS, motions to intervene were required to be filed by December 13, 2009. Thus, Mr. Lane's current Motion to Intervene was filed over four months after the intervention deadline, and Mr. Lane has not sought leave to intervene out-of-time. Therefore, this Commission should reject Mr. Lane's latest Motion to Intervene as not timely.

1. The nature and extent of the prospective intervenor's interest

Mr. Lane now refers this Commission "to all of the official PUCO Case Records" in Case Nos. 05-0732-EL-MER, 08-0709-EL-AIR, and 09-1946-EL-RDR as evidence of his interest in these proceedings.³ Mr. Lane, however, does not explain how the pleadings in these cases demonstrate his interest in these proceedings or why the Office of the Ohio Consumers' Counsel (OCC), which has already been granted intervention in these proceedings, does not competently represent Mr. Lane's interest as a residential Duke Energy Ohio customer.⁴ Therefore, this factor weighs against granting intervention.

2. The legal position advanced by the prospective intervenor and its probable relation to the merits of the case

Mr. Lane's latest Motion to Intervene states that his proposed legal position is that electric utilities must not use smart electric meters as an excuse to neglect preventative maintenance of their electric distribution systems.⁵ Mr. Lane's comments comparing SmartGrid implementation to Capt. Chesley B. Sullenberger III's heroic landing of Flight #1549 on the Hudson River, however, are not a legal position. Even if Mr. Lane's comments constituted a legal position, Duke Energy Ohio's Proposed Reliability Standards do not contemplate terminating or reducing the preventative maintenance that it currently undertakes to maintain its electric distribution systems, such as vegetation maintenance. Mr. Lane's "legal position," therefore, is not related to a matter before the Commission. As such, this factor weighs against granting Mr. Lane intervention.

³ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of Proposed Reliability Standards*, Case No. 09-757-EL-ESS, Albert E. Lane's Second Corrected Motion to Intervene, at 2, (April 23, 2010).

⁴ *See infra*, Subsection 5 of this Memorandum in Opposition, for a discussion of the adequacy of OCC's representation of Mr. Lane's interest in these proceedings.

⁵ Case No. 09-757-EL-ESS, Lane Second Corrected Motion to Intervene, at 2.

3. Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings

According to his citation to Ohio Admin. Code §4901-1-11(3), Mr. Lane advocates that his intervention will not unduly prolong and delay the proceedings because the use of smart meters constitutes a violation of the Fourth Amendment to the United States Constitution and because a Duke Energy North Carolina employee was indicted on various crimes.⁶ Mr. Lane's argument, however, supports rather than disproves the proposition that his intervention will unduly prolong and delay the proceedings because the nature of his pleadings make them very difficult to understand and respond to.⁷ Moreover, much of the new material contained in Mr. Lane's instant Motion to Intervene is wholly unrelated to this case and simply provides more explanation of his opposition to Case Nos. 09-1946-EL-RDR and 08-0709-EL-AIR.⁸ Permitting Mr. Lane to file pleadings in this case which primarily discuss other cases will only delay and prolong these proceedings. Therefore, this factor weighs against granting Mr. Lane intervention.

4. Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues

According to his citation to Ohio Admin. Code §4901-1-11(4), Mr. Lane posits that his intervention will significantly contribute to full development and equitable resolution of the factual issues because he has requested a formal inquiry of Duke Energy Ohio based on a 45 page report issued by the South Carolina Public Services Commission.⁹ Mr. Lane also requests an explanation as to how Staff arrived at their "figures" (apparently in relation to cost recovery for the windstorm resulting from Hurricane Ike) to support his intervention under Ohio Admin.

⁶ Case No. 09-757-EL-ESS, Lane Second Corrected Motion to Intervene, at 4–5.

⁷ To the extent that Mr. Lane's Fourth Amendment comment could be construed as a legal argument, Duke Energy Ohio notes that it is incapable of violating the Fourth Amendment because it is not a state actor. Duke Energy Ohio is unable to respond to Mr. Lane's comments regarding Mr. Lavielle because Mr. Lavielle's criminal case is wholly unrelated to Duke Energy Ohio's proposed Reliability Standards.

⁸ *See, e.g.*, Case No. 09-757-EL-ESS, Lane Second Corrected Motion to Intervene, at 6–7.

⁹ Case No. 09-757-EL-ESS, Lane Second Corrected Motion to Intervene, at 4.

Code §4901-1-11(4).¹⁰ Mr. Lane, however, has still failed to allege that he is an expert in utilities' regulation, in accounting techniques, or in electric service and safety standards. Thus, it is unlikely he can provide any informed opinion regarding whether Duke Energy Ohio's Proposed Reliability Standards comply with the ESSS rules. Therefore, this factor still weighs against granting Mr. Lane intervention.

5. The extent to which the person's interest is represented by existing parties

Generously interpreting his latest Motion to Intervene, Mr. Lane now argues that OCC does not adequately represent his interest because OCC has provided Mr. Lane with only one staff member with whom to discuss his concerns.¹¹ OCC directing Mr. Lane to correspond with a specific staff member, however, does not demonstrate that OCC is ignoring Mr. Lane or not adequately responding to his inquiries. Most important, OCC's response to Mr. Lane's inquiries in no way demonstrates that OCC's interest in this case in any way differs from Mr. Lane's interest in this case. Therefore, this factor weighs also against granting Mr. Lane intervention.

III. INTERLOCUTORY APPEAL

To the extent that the instant Motion to Intervene could be construed as an interlocutory appeal of the Attorney Examiner's Entry of April 14, 2010, entered in Case No. 09-1946-EL-RDR, it must be denied. Ohio Admin. Code §4901-1-15(A)(2), which Mr. Lane has not cited to, does permit interlocutory appeal of the denial of a motion to intervene. However, Ohio Admin. Code §4901-1-15(C) requires that such an appeal be filed within five days after the relevant ruling is issued, unless extraordinary circumstances are demonstrated. Mr. Lane filed the instant motion on April 23, 2010, nine days after the Attorney Examiner issued her ruling in Case No. 09-1946-EL-RDR denying his motion to intervene in that case. Mr. Lane has not alleged that

¹⁰ Case No. 09-757-EL-ESS, Lane Second Corrected Motion to Intervene, at 6.

¹¹ Case No. 09-757-EL-ESS, Lane Second Corrected Motion to Intervene, at 3.

any extraordinary circumstances existed that delayed his filing. Therefore, this Commission should deny Mr. Lane's Second Corrected Motion to Intervene, to the extent it could be interpreted as an interlocutory appeal, as untimely.

In addition, to the extent that Mr. Lane's Second Corrected Motion to Intervene can be construed as an interlocutory appeal, it should be denied because he has not attached a copy of the relevant Entry to his pleading, as required by Ohio Admin. Code §4901-1-15(C).

Finally, insofar as Mr. Lane's Second Corrected Motion to Intervene might be construed an interlocutory appeal, it should be denied because Mr. Lane has not demonstrated any prejudice as a result of the denial of his motion to intervene in Case No. 09-1946-EL-RDR.¹² The Attorney Examiner denied Mr. Lane's motion to intervene in Case No. 09-1946-EL-RDR because he failed to demonstrate why OCC did not adequately represent his interest in that case. OCC continues to be an intervenor in Case No. 09-1946-EL-RDR and will therefore continue to adequately represent Mr. Lane's interest as a residential customer of Duke Energy Ohio. Because his interest is adequately represented in Case No. 09-1946-EL-RDR and because Mr. Lane has not advocated a position that in any way varies from OCC's position in that case, his inability to intervene in Case No. 09-1946-EL-RDR will not prejudice him. Therefore, to the extent that Mr. Lane's instant Motion to Intervene could be construed as an interlocutory appeal of the Attorney Examiner's Entry of April 14, 2010, entered in Case No. 09-1946-EL-RDR, it must be denied.

IV. CONCLUSION

Because all the Ohio Admin. Code §4901-1-11(B) intervention factors weigh against granting Mr. Lane intervention, Duke Energy Ohio respectfully requests that this Commission deny Mr. Lane's Motion to Intervene.

¹² See Ohio Admin. Code §4901-1-15(E)(2).

To the extent not fully addressed within the attorney examiner's decision of April 15, 2010 in Case No. 09-1946-EL-RDR, Duke Energy Ohio also respectfully requests that the Commission deny Mr. Lane's request to reactivate Case No. 08-0709-EL-AIR and consolidate it with this case.

Finally, to the extent that Mr. Lane's Second Corrected Motion to Intervene could be construed as an interlocutory appeal of the Attorney Examiner's Entry of April 14, 2010, in Case No. 09-1946-EL-RDR, Duke Energy Ohio respectfully requests that it be denied.

Respectfully submitted,

/s/ Elizabeth Watts
Amy B. Spiller (0047277)
Associate General Counsel
Elizabeth H. Watts (0031092)
Assistant General Counsel
Duke Energy Business Services, LLC
Room 2500 Atrium II
P.O. Box 960
Cincinnati, Ohio 45201-0960
(513) 419-1810 (telephone)
(513) 419-1846 (facsimile)
e-mail: amy.spiller@duke-energy.com

Attorneys for Duke Energy Ohio, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served via first-class mail delivery, postage prepaid, and/or electronic mail delivery on this the 27th day of April, 2010, to the following persons:

Duane Luckey
Assistant General Attorney
Chief, Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215

Ann Hotz
Richard Reese
Office of Consumers' Counsel
10 West Broad St, Suite 1800
Columbus, Ohio 43215

Albert E. Lane
7200 Fair Oaks Drive
Cincinnati, Ohio 43237-2922

Matthew White
Chester, Wilcox & Saxbe, LLP
65 E. State Street, Suite 1000
Columbus, Ohio 43215

Shirley M. Hayes
3730 Sarah St.
Franklin, OH 45005

/s/ Elizabeth Watts
Elizabeth Watts

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Summary: Memorandum DUKE ENERGY OHIO, INC.'S MEMORANDUM IN OPPOSITION
TO ALBERT E. LANE'S SECOND CORRECTED MOTION TO INTERVENE
electronically filed by Carys Cochern on behalf of Watts, Elizabeth H