

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2009 Annual Filing
of Columbus Southern Power
Company and Ohio Power Company
Required by Rule 4901:1-35-10,
Ohio Administrative Code.

Case No. 10-1261-EL-UNC

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**REPLY TO COLUMBUS SOUTHERN POWER COMPANY
AND OHIO POWER COMPANY'S MEMORANDUM CONTRA THE
KROGER CO.'S MOTION TO INTERVENE**

Pursuant to Ohio Administrative Code ("O.A.C.") 4901-1-12(B)(2), The Kroger Co. ("Kroger") files this reply to the Memorandum Contra Kroger's Motion to Intervene ("Memo Contra") filed by the Columbus Southern Power Company ("CSPC") and the Ohio Power Company ("OPC") (collectively "AEP") in the above captioned proceeding. In the Memo Contra, AEP argues that Kroger's Motion to Intervene should be denied because Kroger has not met the requirements for late intervention set forth in O.A.C. 4901-1-11(A). AEP's arguments are without merit.¹

The Ohio Supreme Court has held that statutes and rules governing intervention should be "generally liberally construed in favor of intervention."² This principle also applies to the rules governing late intervention.³

On multiple occasions intervention has been granted to parties for reasons similar to the reasons Kroger cites in its Motion to Intervene. In the AEP ESP proceeding, the late filed intervention was granted to EnerNoc and AICUO because the

¹ We would note that AEP has recently availed itself of a request for late intervention. In FERC Case No. EL11-1844, American Electric Power Service Corporation filed an intervention out of time only offering the rationale that the proceeding "is still only in its preliminary stages." *Out-of-Time Motion to Intervene of American Electric Power Service Corporation* (November 15, 2010).

² *Ohio Consumers' Counsel v. Pub. Util Comm.* (2006), 111 Ohio St.3d 384 (quoting *State ex rel Polo v. Cuyahoga Ciy. Bd. Of Elections* (1995), 74 Ohio St.3d. 143,144).

³ Case No. 06-1358-EL-BN, *In the Matter of the Application of American Municipal Power-Ohio, Inc., for a Certificate of Environmental Compatibility and Public Need for an Electric Generation Station and Related Facilities in Meigs County, Ohio*, Entry (December 4, 2007) at Finding 4.

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ESP proceeding “was the first time electric utilities have filed applications for standard service offers under Am. Sub. Senate Bill 221.”⁴ Similarly, in this proceeding, it is the first time the significantly excessive earnings test (“SEET”) is being applied to AEP under Am. Sub. Senate Bill 221, and thus the same logic is applicable.⁵ Further, *In the Matter of the Application of the Ohio Department of Development for an Order Approving Adjustments to the Universal Service Fund Riders of Jurisdictional Ohio Electric Distribution Companies*, the Ohio Manufactures Association’s (“OMA”) late motion to intervene was granted because OMA was unable to receive association approval for intervention until after the intervention deadline had past.⁶

There are additional reasons Kroger should be granted intervention in this proceeding other than those reasons already stated in Kroger’s Motion to Intervene. There may be settlement negotiations that attempt to settle multiple AEP proceedings, including this proceeding, and other proceedings wherein Kroger has already intervened. If Kroger is expected to be a signatory party to a settlement agreement that may be agreed upon in the future, that settles multiple cases, including this proceeding, then it is only appropriate that Kroger be allowed to intervene in this proceeding.

Further, this proceeding began as a fairly straightforward filing, and only after the case progressed did some of the issues which may be determined herein become apparent. Admittedly, Kroger did not foresee that this proceeding would present some of the more complex issues which may now be addressed going forward. However, this should not prevent Kroger from protecting its interests with regard to the allocation of a SEET refund that may occur as a result of this proceeding, especially since this is the

⁴ Case No. 08-917-EL-SSO, Entry (October 29, 2010) at Finding 4.

⁵ In addition, late interventions were granted to Morgan Stanley Capital Group, Wal-Mart Stores, Macy’s, Inc. and BJ Wholesale Club, Inc. in the FirstEnergy ESP. Case No. 08-935-EL-SSO.

⁶ Case No. 03-2049-EL-UNC, Motion to Intervene of Ohio Manufactures’ Association (November 6, 2003) at 2, and Opinion and Order (December 3, 2003) at 3.

first proceeding of this type to be litigated before the Commission.

Finally, contrary to what AEP argues, it is proper for the Commission to grant Kroger limited intervention. O.A.C. 4901-1-11(D)(1) authorizes intervention with respect to limited issues. Kroger submits that it will not attempt to alter the record in this proceeding and that its purpose for intervention is to participate in allocating significantly excessive earnings to customers, if a refund is ordered by the Commission. The determination of the allocation of a refund is a distinct issue that will require additional deliberation beyond what has already occurred in this proceeding. Moreover, there is no party to this proceeding that represents Kroger's interests, particularly if a SEET refund is ordered. Finally, Kroger's intervention will not unduly delay this proceeding, as Kroger is simply seeking a limited intervention, and is not seeking to reargue the issues that have already been presented in this case.

For the reasons set forth above, Kroger respectfully requests the Commission grant this Motion to Intervene.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing *Reply To Columbus Southern Power Company and Ohio Power Company's Memorandum Contra the Kroger Co.'s Motion to Intervene* was served this 17th day of November, 2010 upon the following via electronic mail and U.S. regular mail, postage prepaid.

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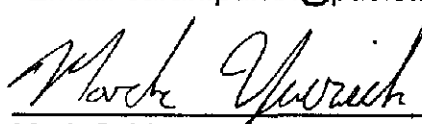
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