

In the Matter of the Application of)
The Dayton Power and Light Company) Case No. 09-1012-EL-FAC
to Establish a Fuel Rider.)

By Entry dated June 24, 2009, the Commission authorized DP&L to institute a fuel recovery rider (“Fuel Rider”). DP&L was also required to submit an annual fuel filing, beginning in 2011, with the 2010 and 2011 filings being subject to an audit. On April 29, 2011 the report of the Commission selected auditor, Energy Ventures Analysis, Inc. (“EVA”) was filed. By Entry dated July 8, 2011, the Attorney Examiner determined this case should be set for hearing, and established a procedural schedule, which was

subsequently amended by Entry dated July 28, 2011. The hearing in this matter is now set to commence on October 19, 2011.

This proceeding involves an audit of DP&L's Fuel Rider and a detailed examination into DP&L's fuel procurement practices. The fuel adjustment mechanism is a bypassable retail rider. FES is a Competitive Retail Electric Service ("CRES") Provider as defined by OAC §4901:1-24-01(J). Further, FES is registered to provide CRES service to retail customers in DP&L's service territory. Because FES is a CRES Provider and is not a retail customer of the Dayton Power and Light Company, FES is not subject to the retail Fuel Rider. FES' customers are not subject to paying this bypassable charge. FES therefore has no legitimate interest on behalf of itself or its customers to protect by intervening in this case.

III. ARGUMENT

A. FES' Motion To Intervene In This Proceeding Should Be Denied When Considering the Nature of FES' Interest.

While it is true that the rule governing interventions is typically liberally construed in favor of intervention, there are certain instances in which intervention is not warranted, and in fact could actually be harmful to a fair outcome in the proceeding.

FES' motion to intervene in this case presents such an instance. R.C. 4903.221(B) provides, in pertinent part, as follows:

Any other person who may be adversely affected by a public utilities commission proceeding may intervene in such proceeding, provided: That the commission, in ruling upon applications to intervene in its proceedings, shall consider the following criteria:

- (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.

Ohio Administrative Code 4901-1-11 substantially tracks the language of R.C.

4903.221(B), providing specifically:

(A) Upon timely motion, any person shall be permitted to intervene in a proceeding upon a showing that:

- (1) A statute of this state or the United States confers a right to intervene.
- (2) 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.

(B) In deciding whether to permit intervention under paragraph (A)(2) of this rule, the commission, the legal director, the deputy legal director, or an attorney examiner shall consider:

- (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.

FES is a CRES Provider operating within Ohio and is a direct competitor to DP&L, providing competitive service to residential, commercial and industrial customers within DP&L's service territory. Neither the FES entity itself nor its customer base pay

the bypassable Fuel Rider and they have no legitimate interest to protect in this proceeding. As FES admits however, DP&L's fuel recovery rider is a large component of the Price-to-Compare, which is the price FES must beat to entice DP&L's customers to take service from FES. FES' interest therefore, as a direct competitor to DP&L, would be to see a dramatic *increase* in DP&L's fuel recovery rider, thus making FES' rates appear more attractive.

The Commission "shall" consider the nature of the prospective intervenor's interest in determining whether to permit intervention and in the context of this case, FES actually has an interest in increasing the fuel-related charges passed through to DP&L's Standard Service Offer ("SSO") customers in order to make FES' competitive offer appear more attractive. A higher SSO rate would also allow FES to increase its prices, presumably with no increase whatsoever to its costs, yet still provide an attractive price to its potential customers so long as it remains slightly below the SSO rate. This could also result in an increase in prices offered by other CRES providers operating within DP&L's service territory as well. The private interest of FES to maximize its own profits as a CRES provider does not meet the public interest rationale underlying the policy to allow interventions that "significantly contribute to full development and equitable resolution of the factual issues."

B. FES' Participation in the Proceeding Would Lead to Proprietary/Confidentiality Concerns Causing Undue Delays in the Proceedings.

As FES acknowledges in its motion, DP&L filed EVA's initial audit report along with a motion seeking a protective order with regard to certain information in the audit

report which DP&L considers trade secrets and/or confidential and proprietary business information. As a direct competitor of DP&L, FES cannot ever be given access to DP&L's trade secret/proprietary business information. Permitting FES to view any of these materials would allow it to mine competitively sensitive cost information from a regulated business to facilitate FES' own unregulated business. This would put DP&L at a tremendous competitive disadvantage. It would be impossible to even let FES enter into a confidentiality agreement in order to view this information. FES simply cannot "forget" what it would learn in this proceeding.

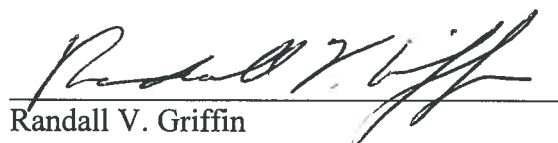
Given these confidentiality concerns, from a practical standpoint FES' presence as an intervenor would unduly prolong or delay the proceedings. For instance, whenever confidential proprietary business information was shown or discussed, the proceeding would need to be halted, and FES representatives would need to be excused from the hearing room. Given the amount of confidential information contained in the audit report and other relevant materials, this interruption could happen many times, with multiple witnesses. This would create a layer of logistical difficulties leading to an inevitable delay in the proceeding. FES' motion to intervene should be denied on this basis as well.

IV. CONCLUSION

While it is true that the Commission typically construes the rules around intervention liberally so as to permit the broadest base of interested stakeholder participation, the Commission likewise must consider the nature of the movant's interest in the proceeding when deciding on a motion to intervene. Every other intervenor in this proceeding has an interest in decreasing the fuel-related charges passed through to DP&L's SSO customers. FES is the only party moving to intervene whose interest is to

increase that rate. Given the nature of FES' interests in the context of a Fuel Rider proceeding, FES' participation would create the risk of an inequitable outcome and delay the case. FES' motion to intervene should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served either electronically or via first class mail, postage prepaid, this 9th day of August, 2011 upon counsel to the parties of record.



Randall V. Griffin

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Summary: Memorandum Memorandum of The Dayton Power and Light Company in
Opposition to Motion to Intervene of FirstEnergy Solutions Corp. electronically filed by Mr.
Randall V Griffin on behalf of The Dayton Power and Light Company