

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

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

**FIRSTENERGY SOLUTIONS CORP.’S REPLY
IN SUPPORT OF ITS MOTION TO INTERVENE**

FirstEnergy Solutions Corp.’s (“FES”) Motion to Intervene in this proceeding established that FES has a right to intervene. Duke Energy Ohio, Inc.’s (“Duke”) opposition is misplaced and misconstrues the relevant facts and law, which establish FES’ clear interest in this proceeding and its right to intervene. As set forth below, each of Duke’s arguments opposing FES’ intervention fail and cannot preclude FES’ participation – particularly given that Ohio law requires that a party’s right to intervene be “liberally construed.” *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, 387 (2006).

- FES has a direct and substantial interest in this proceeding as a generation provider that competes with Duke.

Duke’s Opposition to FES’ Motion disingenuously and inaccurately argues that FES has no interests that are affected by Duke’s request to recover an additional \$600 million in above-market revenue. As set forth in FES’ Motion, FES is both a wholesale and retail supplier across Ohio and in Duke’s service territory and, as such, is certainly affected by Duke’s proposal. If

Duke was authorized to recover its fully embedded costs for capacity, Duke would enjoy a competitive advantage over other capacity suppliers in PJM, such as FES.

Further, the excess cost recovery would distort the beneficial incentives associated with the competitive market in which FES is heavily invested. PJM's Reliability Pricing Model is working to incentivize appropriate generation investments that provide the right balance for reliability and competition. If Duke's Application is successful, it would obtain anti-competitive subsidies that would disrupt and impair PJM's market design.

Yet another issue for consideration under Duke's Application – and in which FES has a direct and substantial interest – is the impact of Duke's proposal after its corporate separation. Duke has committed to complete corporate separation as of December 31, 2014, but seeks in this Application to implement the above-market tariff through May 31, 2015. After its corporate separation, Duke's generation affiliate must compete on the same playing field with FES and all other generation suppliers. But, if Duke's generation affiliate receives significant, above-market revenue through Duke's proposed tariff, the affiliate will have a distinct advantage in pricing its service.

FES also has a substantial interest in encouraging parties to adhere to commitments made in stipulations filed with and approved by the Commission that relate to wholesale and retail market pricing. FES and other suppliers make significant business decisions based on such commitments. If parties can make purportedly binding commitments while settling Commission proceedings and then can reverse themselves less than one year later, the cost of doing business in Ohio will increase. This is not only bad for FES, but bad for retail consumers.

Thus, as noted in FES' Motion, Duke's proposal will negatively impact the competitive market for electric generation service in Ohio. FES unquestionably has direct and substantial interests in maintaining an effective competitive market.

- Duke's ESP Stipulation, to which FES was a Signatory Party, is implicated by Duke's Application in this proceeding.

The merits of Duke's arguments regarding the purported inapplicability of its ESP Stipulation to its request here are more properly the subject of a hearing or substantive briefing. Suffice it to say that there is a disagreement between Duke and certain Signatory Parties (as evidenced by other parties' Motions to Intervene) as to whether Duke's ESP Stipulation addresses Duke's right to collect additional revenue from SSO and shopping customers for capacity. Certainly, Sections IV and V of the ESP Stipulation relate to the Signatory Parties' agreements as to what Duke could charge for capacity based on its FRR status. At a minimum, FES' interests are implicated because, as a Signatory Party, it agreed to the package of terms embodied by the Stipulation. If the additional revenue/tariff that Duke seeks here was a part of the negotiations of the Stipulation, FES would not have supported the Stipulation. Thus, FES' participation in the ESP proceeding does indeed further establish FES' direct and substantial interest in this proceeding.

- FES' legal positions are directly affected by and relevant to this proceeding.

Over the past 18 months, FES has been an active participant in advancing the legal issues and concerns of competitive market participants as a part of Case No. 10-2929-EL-UNC (the "Capacity Case"), in which the Commission approved a state compensation mechanism for AEP Ohio. The Capacity Case has not yet concluded, and FES continues to participate in the appeal of certain aspects of the Commission's order. *See, e.g.*, FES' Application for Rehearing, Case No. 10-2929-EL-UNC (filed Aug. 1, 2012). Because Duke now seeks to apply the same state

compensation mechanism under challenge in the Capacity Case to its own shopping and SSO customers, it necessarily implicates FES' legal positions in the Capacity Case. For example, FES' concerns regarding a utility's right to collect additional, above-market revenue for capacity are equally applicable to Duke as they are to AEP Ohio. Without the right to participate in this proceeding, FES' legal positions could be prejudiced and FES would be unable to protect those interests.

- A hearing is appropriate and, regardless, FES' intervention will not unduly delay these proceedings.

Duke argues that because a hearing is not warranted, FES' intervention *de facto* causes a delay. First, the Attorney Examiner's September 13, 2012 Entry set a deadline of October 15, 2012 for motions to intervene. FES' Motion was filed well in advance of that deadline and, thus, is timely.

Second, a hearing is warranted pursuant to R.C. § 4909.18. Duke is requesting an increase in an existing rate for capacity that was approved by the Commission in its November 22, 2011 Opinion and Order in Case No. 11-3549-EL-SSO. Duke's request to implement an increase in rates to recover over \$600 million in three years surely raises questions as to whether the increased rate is just or reasonable. *See* R.C. § 4909.18. At the very least, the Commission and Duke's customers would be best served to initiate a hearing process and to insure the development of relevant evidence before unilaterally authorizing such an increase in rates. Because FES' request to intervene was filed before any procedural schedule has been issued, its Motion is timely and its intervention will not cause any undue delay.

Notably, Duke's Opposition to FES' request to intervene does not challenge FES' ability to add value to these proceedings. Indeed, FES' participation will only promote the development of a thorough record for the Commission's consideration of the impact of Duke's Application,

including the impact on the competitive market across Ohio. Accordingly, as set forth herein and in FES' Motion to Intervene, FES respectfully requests that the Commission grant its Motion to Intervene.

Respectfully submitted,

/s/ Mark A. Hayden

Mark A. Hayden (0081077)
Associate General Counsel
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7735
(330) 384-3875 (fax)
haydenm@firstenergycorp.com

James F. Lang (0059668)
Laura C. McBride (0080059)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
1405 East Sixth St.
Cleveland, OH 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com

Attorneys for FirstEnergy Solutions Corp.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Reply in Support of Its Motion to Intervene* was served this 20th day of September, 2012, via e-mail and regular U.S. Mail, postage pre-paid, upon the parties below.

/s/ Laura C. McBride
One of the Attorneys for FirstEnergy Solutions Corp.

Amy B. Spiller
Rocco O. D'Ascenzo
Jeanne W. Kingery
Elizabeth H. Watts
Duke Energy Business Services LLC
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
amy.spiller@duke-energy.com
rocco.dascenzo@duke-energy.com
jeanne.kingery@duke-energy.com
elizabeth.watts@duke-energy.com

Maureen R. Grady
Kyle L. Kern
Office of the Ohio Consumers' Counsel
10 West Broad St., Suite 1800
Columbus, OH 43215
grady@occ.state.oh.us
kern@occ.state.oh.us

David F. Boehm
Michael L. Kurtz
Jody M. Kyler
Boehm, Kurtz & Lowry
36 East Seventh St., Suite 1510
Cincinnati, OH 45202
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
jkyler@bkllawfirm.com

Douglas E. Hart
441 Vine Street, Suite 4192
Cincinnati, OH 45202
dhart@douglasshart.com

Samuel C. Randazzo
Frank P. Darr
Joseph E. Olikier
Matthew R. Pritchard
McNees Wallace & Nurick
21 East State St., 17th Floor
Columbus, OH 43215
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima St.
Findlay, OH 45840
cmooney2@columbus.rr.com

Kimberly W. Bojko
Mallory M. Mohler
Carpenter Lipps & Leland LLP
280 North High St., Suite 1300
Columbus, OH 43215
bojko@carpenterlipps.com
mohler@carpenterlipps.com

Thomas J. O'Brien
Bricker & Eckler
100 South Third St.
Columbus, OH 43215
tobrien@bricker.com

J. Thomas Siwo
Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
tsiwo@bricker.com
mwarnock@bricker.com

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Summary: Reply in Support of FES' Motion to Intervene electronically filed by Ms. Laura C. McBride on behalf of FirstEnergy Solutions Corp.