

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. :

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REPLY
OF
DOMINION RETAIL, INC.
TO
DUKE ENERGY OHIO, INC.
MEMORANDUM CONTRA MOTION TO INTERVENE

By the above-styled applications filed herein on August 29, 2012, Duke Energy Ohio, Inc. (“Duke”) seeks approval of a new rate mechanism to recover the difference between the cost of capacity determined in accordance with the terms of its current ESP¹ and the cost of capacity service Duke alleges it would be permitted to recover under the state compensation mechanism established in the recent AEP-Ohio capacity pricing proceeding.² On October 15, 2012, Dominion Retail, Inc. (“Dominion Retail”), filed a motion to intervene pursuant to Section 4903.221, Revised Code, and Rule 4901-1-11, Ohio Administrative Code (“OAC”). In the

¹ See *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO (Opinion and Order dated November 22, 2011) (hereinafter, the “Duke ESP Case”).

² See *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC (Opinion and Order dated July 2, 2012).

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supporting memorandum accompanying its motion, Dominion Retail explained that it is a duly-authorized provider of competitive retail electric service (“CRES”) in Duke’s service territory, and, as such, has a real and substantial interest in these proceedings.

On October 16, 2012, Duke filed a cookie-cutter memorandum contra opposing Dominion Retail’s motion to intervene, which, like the essentially identical memoranda contra Duke filed against all other CRES providers seeking intervention in these proceedings,³ is based on the notion that, because CRES providers will continue to pay for capacity at the FZCP price established as a result of the PJM auction process as provided in the Duke ESP Case, these providers are unaffected by the proposals in Duke’s August 29, 2012 application. Thus, according to Duke, CRES providers, including Dominion Retail, do not meet the standards for intervention under the statute and the applicable Commission rule. Dominion Retail disagrees, and hereby submits its reply pursuant to Rule 4901-1-12(B)(2), OAC.

Dominion Retail begins with the observation that the Commission’s long-standing policy in considering motions to intervene is “to encourage the broadest possible participation in its proceedings.”⁴ Indeed, the Supreme Court of Ohio has endorsed this policy in finding that, as under the civil rules, the Commission’s rule governing intervention is “generally liberally construed in favor of intervention.”⁵ Thus, although Dominion Retail does not believe this to be

³ See Duke Memorandum Contra Motion to Intervene of Interstate Gas Supply, Inc. dated October 16, 2012; Duke Memorandum Contra Motion to Intervene of DPL Energy Resources dated October 16, 2012; Duke Memorandum Contra Motion to Intervene of Constellation NewEnergy and Exelon Generation Company, LLC dated October 16, 2012; Duke Memorandum Contra Motion to Intervene of Retail Energy Supply Association dated October 16, 2012; and Duke Memorandum Contra Motion to Intervene of FirstEnergy Solutions Corp. dated September 13, 2012.

⁴ See, e.g., *Cleveland Elec. Illum. Co.*, Case No. 85-675-EL-AIR (Entry dated January 14, 1986, at 2).

⁵ See *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, 387 (2006), citing *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144 (1995).

a close question, the Commission should keep this policy firmly in view in deciding whether to grant Dominion Retail's motion to intervene over Duke's objection.

Duke contends that because Dominion Retail's cost of doing business would be unaffected by the implementation of the charge proposed in its application, Dominion Retail has no real and substantial interest in this proceeding. This is wrong on several counts.

First, authorizing Duke to charge its distribution customers, including shopping customers, for generation capacity will impact the competitive environment in Duke's service territory because the collection of above-market revenues for capacity would create a ratepayer-funded subsidy that would undermine the competitive equilibrium that the PJM auction-based capacity charge approved in the Duke ESP Case was intended to produce. Thus, the mere fact CRES providers will not pay the charge themselves does not mean that they will not be affected if Duke is authorized to impose this charge. CRES providers must compete against Duke's default generation rate as well as against Duke's marketing affiliates, which share a common parent as Duke. The revenues that would be generated by the proposed charge would eliminate the level playing field created by the market-based capacity charge authorized by the Commission in the Duke ESP Case.⁶

Second, Duke also maintains that, because the initial rider rate would be set at zero, Dominion Retail's argument that it will be adversely affected by the creation of this above-market capacity cost compensation mechanism is premature.⁷ However, this view of the world assumes that a party opposing the concept underlying the proposed charge should sit idly by while the Commission approves the rider, then raise its objections to the underlying concept in

⁶ In this connection, Dominion Retail would also note that the application makes no mention of the how the above-market revenues that would be generated by the proposed charge would impact the Duke corporate separation plan, which is currently scheduled for implementation at the end of 2014.

⁷ See Duke Memorandum Contra, 2.

the proceeding in which the rider rate is actually established. On its face, this makes no sense. The primary issue here is whether Duke should be authorized to implement the proposed charge in the first place, and this is the case in which that issue will be decided. Thus, Dominion Retail has a real and substantial interest in this proceeding and, accordingly, should be granted leave to intervene.

Third, Duke argues that the mere fact that Dominion Retail has a competitive interest in the outcome of this proceeding is not, of itself, sufficient to demonstrate the real and substantial interest required to support intervention under the statute and the Commission's rule. However, the precedent upon which Duke relies for this proposition – a 2005 Commission entry denying intervention in a steam and hot water rate case⁸ – is clearly distinguishable on its facts from the situation presented here. In the Akron Thermal Case, an unregulated supplier of design-build, customer-owned steam and hot water package systems sought intervention in the utility's rate case, asserting that the utility was providing service at below cost for the purpose of destroying competition.⁹ As the Commission was quick to point out, the applicant utility was seeking a rate increase that would be determined in accordance with the statutory ratemaking formula and, although the movant provided an alternative to the type of service provided by the utility, the mere fact that the movant was a provider of heating and cooling equipment systems did not create the direct relationship to the subject matter of the application necessary to demonstrate that it had a real and substantial interest in the rate proceeding.¹⁰ Here, Dominion Retail, like the other CRES providers seeking leave to intervene, has a direct relationship with Duke because it

⁸ See OIE Memorandum Contra, 3, citing *In the Matter of the Application of Akron Thermal, Limited Partnership for an Increase in its Rates for Steam and Hot Water Service*, Case No. 05-5-ST-AIR, *et al.* (Entry dated June 14, 2005) (the "Akron Thermal Case").

⁹ See Case No. 05-5-ST-AIR, *et al.* (Entry dated June 14, 2005, at 1-2).

¹⁰ See Case No. 05-5-ST-AIR, *et al.* (Entry dated June 14, 2005, at 2-3).

is subject to Duke's supplier tariff and offers the identical service – generation supply service – that Duke provides to non-shopping customers. Moreover, the charge Duke proposes to implement in this case is not based on a statutory formula, but, rather, represents an after-the-fact attempt by Duke to alter the Commission-approved stipulation that resolved the Duke ESP Case, a case to which Dominion Retail was a party. Plainly, the interest asserted by Dominion Retail and the other CRES providers seeking leave to intervene in this proceeding is markedly different than the interest asserted by the movant in the Akron Thermal Case.

WHEREFORE, Dominion Retail respectfully requests that the Commission grant its motion to intervene.

Respectfully submitted,



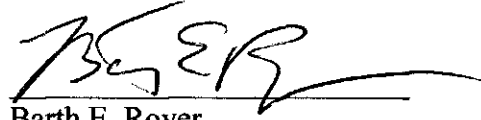
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by regular US mail, postage prepaid, and/or by electronic mail this 23rd day of October 2012.


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