

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc. for the Establishment of a Charge Pursuant to Revised Code Section 4909.18.)	Case No. 12-2400-EL-UNC
)	
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)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.)	Case No. 12-2401-EL-AAM
)	
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In the Matter of the Application of Duke Energy Ohio, Inc. for the Approval of a Tariff for a New Service.)	Case No. 12-2402-EL-ATA
)	

**REPLY MEMORANDUM IN SUPPORT OF THE MOTION TO INTERVENE
OF OHIO POWER COMPANY**

On August 29, 2012, Duke Energy Ohio, Inc. (Duke) filed an application with the Commission seeking, among other things, an order from the Commission “establishing the amount of the cost-based charge, pursuant to Ohio’s newly adopted state compensation mechanism, for the provision by Duke Energy Ohio of capacity services throughout its service territory. . . .”¹ Because the disposition of this and other issues in these proceedings may adversely affect its interests, Ohio Power Company (AEP Ohio) filed a motion to intervene on October 16, 2012. Like most of the other motions to intervene filed in this case, Duke opposes AEP Ohio’s intervention. As further explained below, the Commission should reject Duke’s curious anti-intervention stance and keep this proceeding open to all interested parties.

¹ August 29, 2012 Duke Application at ¶ 2 (internal quotations omitted).

Based on its systematic opposition to and intervention from any entity that is not a retail customer or customer group (and one group that does represent retail customers), it is evident that Duke would like the Commission to adopt a stringent and restrictive intervention policy in this case. In addition to opposing AEP Ohio's intervention request, Duke has opposed intervention requests filed by FirstEnergy Solutions Corp., Exelon Generation Company, Dominion Retail, Constellation NewEnergy, DPL Energy Resources, AEP Retail Energy Partners, Interstate Gas Supply, Retail Energy Suppliers Association, and Industrial Energy Users-Ohio. These parties are routinely granted intervention in Commission proceedings. And the Supreme Court of Ohio has found that "intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO."² There is no way to square Duke's crusade to largely block intervention in this case with the Supreme Court's mandate for liberal intervention.

As such, Duke's anti-intervention position must yield and should be rejected. Focusing more specifically on the intervention criteria being applied to AEP Ohio, the criteria for intervention were reviewed and demonstrated in AEP Ohio's motion to intervene. The additional points below reply to specific points made in Duke's memorandum in opposition.

AEP Ohio's interest in this proceeding is substantial and its positions relate directly to the issues presented in the Application

Duke argues (at 2-3) that it is unnecessary for AEP Ohio to defend and protect the 10-2929 decision and record here since the Commission itself is savvy enough to

² *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, 387, 2006-Ohio-5853, ¶20 (2006).

recognize and stem any manipulations on its own. AEP Ohio agrees that the Commission is capable of recognizing manipulations of its own decision. For example, the Commission has independently refuted Duke's key mischaracterization of the 10-2929 decision through its recent Entry on Rehearing in that case. Specifically, contrary to Duke's prevalent and repeated assertion in this case that the 10-2929 decision created a statewide SCM that applies equally to Duke and AEP Ohio, the Commission unequivocally stated:

The Commission initiated this proceeding *solely to review AEP-Ohio's capacity costs* and determine an appropriate capacity charge for *its FRR obligations*.

10-2929 Entry on Rehearing at 32 (emphasis added). *See also id.* at 58 ("This proceeding was initiated by the Commission for the purpose of reviewing AEP Ohio's capacity charge for its FRR obligations.") Regardless, Duke's position opposing AEP Ohio's intervention based on the Commission's independent capability to recognize flaws in parties arguments completely misses the mark.

Duke's position is essentially that AEP Ohio's participation is inappropriate because it *might be* unnecessary for AEP Ohio to defend and protect the 10-2929 decision and record, provided the Commission independently recognizes and corrects the parties' statements and arguments concerning the 10-2929 decision and record. But the decisionmaker's independent capabilities cannot possibly form a relevant basis for denying intervention to an interested party – that would be an unfair and unlawfully restrictive approach to intervention. The fact is that parties can and do assist the Commission in reaching policy determinations on complex matters such as Duke's Application. Accordingly, Duke's argument that the Commission may not need AEP

Ohio's assistance is not only speculative but is also irrelevant to the appropriate criteria for intervention.

Duke also argues (at 3) that the RAA "does not provide for the development of multiple compensation mechanisms in a single state" and claims (at 4) that the 10-2929 decision "did not direct the establishment of a state compensation mechanism that is restricted in its application to only AEP Ohio." As already demonstrated above, Duke is clearly wrong about the Commission's intended scope of the SCM created for AEP Ohio in the 10-2929 case. AEP Ohio submits that Duke is also wrong about the unduly restrictive interpretation of the RAA. There can be no question that the RAA contemplates and permits a cost-based SCM based on the FRR entity's cost of providing capacity; it is obvious that a cost-based rate will vary by FRR entity. Thus, Duke's suggestion that the RAA requires statewide uniformity is baseless. Indeed, Duke itself has already stated in this case that it seeks a different rate than what AEP Ohio received based on the same formula.³ While AEP Ohio has no intention of fully addressing merits issues as part of the intervention process, it is sufficient here to say that Duke's continued and pervasive misapplication of the 10-2929 decision and record only serves to reinforce AEP Ohio's stated interest to further participate in this case. AEP Ohio also observes that the pleading exchange between Duke and AEP Ohio regarding the simple matter of intervention has resulted in some very poignant and revealing statements by Duke about the nature of its Application; thus, the exchange provides a window into the usefulness of AEP Ohio's ongoing participation in this case.

³ Duke's Memorandum in Support of Motion to Vacate the October 3, 2012 Entry at 5-6. *See also* Application at 3; Application for Review and Interlocutory Appeal at 8.

Duke's opposition to AEP Ohio's intervention also fails to address the fact that Duke's Application is "designed to *mirror* that which was recently set in place by the Commission for [AEP Ohio]"⁴ and "merely seeks arithmetic calculations and the application of an outcome that has already been found to be just and reasonable."⁵ Thus, not only is Duke's Application premised on the decision in AEP Ohio's case but the proposal hinges on a determination that AEP Ohio and Duke are similarly situated – a matter that AEP Ohio is uniquely qualified to address. This situation is highly unique based on the way Duke has premised its request on the decision in AEP Ohio's capacity case. To the extent that Duke's Application and arguments are entirely premised on the decision in Case No. 10-2929-EL-UNC, AEP Ohio has a strong interest in this case that no other party adequately represents.

AEP Ohio's motion to intervene set forth a second and completely distinct interest in this proceeding based on R.C. 4928.146. Specifically, AEP Ohio is an electric distribution utility within the definition of Revised Code § 4928.01 and, as such, may provide competitive retail electric service to electric load centers within the certified territory of another such utility pursuant to R.C. § 4928.146. AEP Ohio maintains that its prospective legal right to compete in Duke's service territory under R.C. 4928.146 provides another distinct interest for purposes of intervening in this case.

Duke criticizes this basis for intervention (at 5) as being a prospective interest that is not a real and substantial interest. Duke fails to recognize that a statutory right under R.C. 4928.146 is presently vested in AEP Ohio even if it is not being presently exercised.

⁴ See Duke's September 13, 2012 Memorandum in Opposition to FirstEnergy Solutions Corporation's Motion to Intervene at 2 (emphasis added).

⁵ Duke's Memorandum in Support of Motion to Vacate the October 3, 2012 Entry at 5-6. See also Application at 3; Application for Review and Interlocutory Appeal at 8.

Duke's argument is the same as saying a certified CRES provider that has no current customers cannot intervene; while Duke has made such flimsy objections to CRES intervention in this case, its arguments opposing AEP Ohio's intervention are no less meritless and should fare no better. A prospective ability does constitute a present interest, regardless of whether it is being exercised (since a proceeding could permanently terminate or otherwise affect the ability to exercise those rights in the future). Thus, if the Commission is to grant intervention to any CRES providers in this proceeding, it must also grant intervention to AEP Ohio because and EDU's interest under R.C. 4928.146 is substantively identical to a CRES provider when it comes to a determination of wholesale capacity charges.

AEP Ohio's motion to intervene also set forth a third basis to establish an interest in this case that is related to the Duke SSO stipulation. In particular, AEP Ohio was a party to Duke's most recent ESP case, Case No. 11-3549-EL-SSO and is concerned that Duke's present Application seeks to modify or undermine the outcome reached in the SSO case. Duke criticizes this point alleging (at 6) that AEP Ohio is merely "[p]arrot[ing] the statements of its competitive affiliate." Duke's statement that AEP Ohio is acting on behalf of AEP Retail is completely baseless and otherwise inappropriate. More importantly, the issue concerning the SSO Stipulation is hardly a novel question raised by AEP affiliates but, rather, has been pursued more aggressively *by nearly every intervenor in this case!* Duke's bitter and unsupported statements in this regard lack any credibility and should be rejected or ignored.

AEP Ohio's intervention will not unduly prolong or delay these proceedings.

AEP Ohio's motion to intervene was filed before the October 15, 2012, intervention deadline established by the attorney examiner's September 13, 2012, entry and is, therefore, timely. While Duke asserts a hollow claim (at 8) to the contrary, there is no basis to conclude that AEP Ohio's intervention will unduly prolong or delay the proceedings.

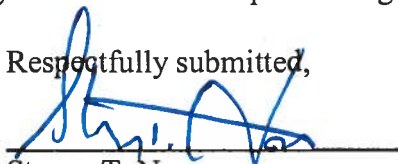
AEP Ohio's intervention will contribute to the development of a full record

Lastly, given its direct experience and intimate understanding of the issues these proceedings raise, AEP Ohio will be able to significantly contribute to the full development and equitable resolution of the factual issues in these proceedings. As referenced above, Duke's decision to premise its entire case on the decision and record developed in the 10-2929 case – a case that was conducted solely with AEP Ohio in mind – necessitates AEP Ohio's participation in this case.

CONCLUSION

AEP Ohio respectfully requests that the Commission grant this motion to intervene and that AEP Ohio be made a party of record to these proceedings.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Steven T. Nourse", is written over a horizontal line.

Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Service
Corporation
1 Riverside Plaza 29th Floor
Columbus, Ohio 43215
Telephone: (614)-716-1608
Fax: (614) 716-2950
Email: stnourse@aep.com
mjsatterwhite@aep.com

Counsel for Ohio Power Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served upon the below-named counsel via electronic mail this 23rd day of October, 2012.



Steven T. Nourse

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

Bruce J. Weston
Consumers' Counsel
Maureen R. Grady
Kyle L. Kern
Deb J. Bingham
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
grady@occ.state.oh.us
kern@occ.state.oh.us
bingham@occ.state.oh.us

Douglas E. Hart
411 Vine Street, Suite 4192
Cincinnati, Ohio 45202
dhart@douglasshart.com

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
tobrien@bricker.com

Colleen L. Mooney
David C. Rinebolt
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45839-1793
Cmooney2@columbus.rr.com
drinebolt@aol.com

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

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

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

Mark A. Hayden
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
haydenm@firstenergycorp.com

James F. Lang
Laura C. McBride
N. Trevor Alexander
Calfee, Halter & Griswold LLP
1405 East Sixth Street
Cleveland, Ohio 44114
jlang@calfee.com
lmcbride@calfee.com
tallexander@calfee.com

Steven Beeler
John Jones
Assistant Attorney General
Ohio Attorney General's Office
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215
steven.beeler@puc.state.oh.us
john.jones@puc.state.oh.us

Samuel C. Randazzo
Frank P. Darr
Joseph E. Olier
Matthew R. Pritchard
Mcnees Wallace & Nurick LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

Teresa Orahod
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
torahood@bricker.com

Sandra Coffey
Public Utilities Commission of Ohio
180 E. Broad St.
Columbus, Ohio 43215
sandra.coffey@puc.state.oh.us

Carys Cochern
Duke Energy
155 East Broad St
21st Floor
Columbus, Ohio 43215
carys.cochern@duke-energy.com

M. Howard Petricoff
Lija Kaleps-Clark
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com
lkalepsclark@vorys.com

Jay E. Jadwin
Yazen Alami
American Electric Power Service
Corporation
155 Nationwide Ave
Columbus, Ohio 43215
jejadwin@aep.com
yalami@aep.com

Kevin J. Osterkamp
Roetzel & Andress, LPA
PNC Plaza
12th Floor
155 East Broad Street
Columbus, Ohio 43215
kosterkamp@ralaw.com

Rick D. Chamberlain
Behrens, Wheeler & Chamberlain
6 Northeast 63rd Street, Ste. 400
Oklahoma City, OK 73105
Rdc_law@swbell.net

Judi L. Sobecki
Randall V. Griffin
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, Ohio 45432
judi.sobecki@DPLINC.com
randall.griffin@DPLINC.com

Barth Royer
Bell & Royer Company, LPA
33 South Grant Avenue
Columbus, Ohio 43215-3927
BarthRoyer@aol.com

Gary A. Jeffries
Assistant General Counsel
Dominion Resources Services, Inc.
501 Martindale Street, Ste. 400
Pittsburgh, PA 15212-5817
Gary.A.Jeffreies@dom.com

Joseph G. Strines
DPL Energy Resources
1065 Woodman Drive
Dayton, Ohio 45432
Joseph.strines@DPLINC.com

Katie L. Stenman
Christine M. T. Pirik
Attorney Examiners
Public Utilities Commission of Ohio
189 East Broad Street, 12th Floor
Columbus, Ohio 43215
Katie.Stenman@puc.state.oh.us
Christine.Pirik@puc.state.oh.us

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Summary: Reply Memorandum in Support of the Motion to Intervene of Ohio Power Company electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company