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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application to Modify, in Accordance with R.C. 4929.08, the Exemption Granted to the East Ohio Gas Company d/b/a Dominion Energy Ohio in Case No. 07-1224-GA-EXM.	:	Case No. 12-1842-GA-EXM

REPLY OF DOMINION ENERGY SOLUTIONS, INC.
TO
OCC'S MEMORANDUM CONTRA ITS MOTION TO INTERVENE

I. INTRODUCTION

Dominion Energy Solutions, Inc. ("DES") filed a motion to intervene in the above-captioned matter on April 9, 2018 in response to motions filed in this docket by the Office of the Ohio Consumers' Counsel ("OCC") and Ohio Partners for Affordable Energy ("OPAE"), which seek to undo previously approved elements of phase two of the Dominion Energy Ohio ("DEO") plan for exiting the merchant function. On April 25, 2018, OCC filed a memorandum contra DES's motion, claiming that DES's motion to intervene is not timely, that DES has not shown the existence of extraordinary circumstances that would justify granting an untimely motion to intervene, and that DES's interests are adequately represented by existing parties. OCC goes on to assert that, if DES's motion to intervene is granted, its intervention should be limited and that it should be required to consolidate its participation with other parties with similar interests. DES hereby files its reply pursuant to Rule 4901-1-12(B)(2), Ohio Administrative Code ("OAC"). As demonstrated herein, OCC's arguments are without merit. DES begins with a review of the history of the DEO plan.

II. BACKGROUND

By its opinion and order of June 18, 2008 in Case No. 07-1224-GA-EXM,[1] the Commission authorized DEO to implement phase two of its plan to exit the merchant function by transitioning from a standard service offer ("SSO") service to a standard choice offer ("SCO") service for choice-eligible customers that are not enrolled with a competitive retail natural gas service ("CRNGS") provider or members of a governmental aggregation.[2] In addition, the approved phase-two plan provided that, upon expiration of their existing supplier contracts, choice-eligible customers that do not enroll with a CRNGS provider or become a member of an opt-out aggregation are required to affirmatively elect SCO service within a specified period in order to receive service at the SCO price. Failure to make this election will result in the customer being assigned, on a rotating basis, to CRNGS providers participating in the program, with service to be priced at the posted monthly variable rate ("MVR") of the provider to which the customer is assigned. DES, under its former name, Dominion Retail, Inc., was an intervenor in Case No. 07-1224-GA-EXM and was a signatory to the stipulation adopted by the Commission that resolved that case.

On June 15, 2012, DEO and the Ohio Gas Marketer's Group ("OGMG") filed a joint motion to modify the exemption granted in Case No. 07-1224-GA-EXM by eliminating the SCO option for non-residential customers, which would mean that a choice-eligible non-residential customer that did not contract with a CRNGS provider or become a member of an opt-out

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[1] *See In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services*, Case No. 07-1224-GA-EXM (Opinion and Order dated June 18, 2008).

[2] DEO's exit from the merchant function began in 2006 with the Commission's approval of DEO's plan to restructure its provision of default commodity service by replacing the Commission-regulated gas cost recovery rate with an SSO rate based on the results of competitive wholesale auctions. *See In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a Plan to Restructure Its Commodity Service Function*, Case No. 05-474-GA-ATA (Opinion and Order dated May 26, 2006).

governmental aggregation would be assigned automatically to the next-up CRNGS provider and would be served at that provider's posted MVR. The joint motion, which was docketed as Case No. 12-1842-GA-EXM, proposed no changes to the SCO and MVR provisions of the plan relating to residential service. By a procedural entry issued July 27, 2012, the attorney examiner established August 30, 2012 as the deadline for filing motions to intervene. However, DES had no issues with the modification proposed in the joint motion, and, thus, did not move to intervene. The Commission, over the objection of OPAE, approved the proposed modification of the provision of the plan relating to non-residential customers by its opinion and order of January 9, 2013.

On March 9, 2018, OCC filed a motion in this docket pursuant to Rule 4901:1-19-11, OAC, requesting that the Commission modify the DEO plan by eliminating the MVR mechanism for residential customers and reestablishing the SCO as the default commodity service for residential customers that do not enroll with a CRNGS provider or become a member of an opt-out governmental aggregation upon the expiration of their supplier contract. The OCC motion was followed by a motion filed March 12, 2018 by OPAE requesting that the MVR be eliminated for non-residential customers and that the SCO be reestablished as the default commodity service for non-residential customers not under contact with a CRNGS provider or members of a governmental aggregation. DES determined that these modifications would adversely affect it, and, accordingly, filed a motion to intervene on April 9, 2018.

III. ARGUMENT

A. DES'S MOTION TO INTERVENE WAS TIMELY FILED.

OCC's claim that DES's motion to intervene in connection with OCC's proposed modification to phase two of the DEO exit plan is untimely is based on the misguided notion that

the August 30, 2012 deadline for intervention established by the attorney examiner's July 27, 2012 entry in this docket continues to apply,[3] notwithstanding that the procedural schedule put in place by that entry related solely to the modification proposed by DEO and OGMG in their joint motion of June 12, 2012, not to entirely different modifications proposed some six years later by different parties. The Commission has yet to issue the procedural schedule for its consideration of the OCC and OPAE motions. Thus, by definition, DES's motion to intervene was timely filed, and OCC's arguments to the contrary are flawed in several respects.

First, the modification sought by OCC through its March 9, 2018 motion is a modification of the stipulated plan approved by the Commission in Case No. 07-1224-GA-EXM, and has nothing whatever to do with the elimination of the SCO option for choice eligible non-residential customers proposed by DEO and OGMG and approved by the Commission in its January 9, 2013 opinion and order in this docket. If OCC had followed DEO/OGMG's lead and filed its motion under a new case number, there would be no question as to the timeliness of DES's motion to intervene. Alternatively, if OCC had filed its motion in Case No. 07-1224-GA-EXM, the proceeding in which the element of the plan it seeks to modify was established, DES would already be a party. Instead, OCC elected to file its motion in this docket, although taking the liberty of unilaterally changing the case caption on its filing to eliminate the reference to Case No. 07-1224-GA-EXM. Why did OCC file its motion in this docket rather than opening a new docket or filing its motion in Case No. 07-1224-GA-EXM? The answer is obvious. OCC has to pitch its proposed modification as a modification of the plan approved in this docket to get around R.C. 4929.08(A)(2), which limits the Commission's authority to abrogate or modify an exemption plan without the host gas distribution utility's consent to no more than eight years

[3] OCC Memorandum Contra, 2.

after the effective date of the order implementing the plan. The order implementing the plan was issued on June 18, 2008 in Case No. 07-1224-GA-EXM, which means that OCC is out of luck unless it can convince the Commission that its proposed modification is somehow tied to the modification approved by the Commission in its January 9, 2013 opinion and order in this case. DES will leave the argument as to whether the OCC motion should be dismissed on this ground to others,[4] but in no event should the Commission find that DES's ability to protect its interests in the face of a new proposed modification to the DEO plan is extinguished by virtue of the case number OCC elected to place on its motion.

Second, DES's position that the procedural schedule, including the deadline for intervention, established by the attorney examiner's July 27, 2012 entry in this docket does not apply to a new motion to modify a previously approved plan is buttressed by Rule 4901:1-19-11(B), OAC, which provides that, in considering such a motion, "(t)he commission shall order such procedures as it deems necessary, consistent with this chapter, in its consideration for modifying or abrogating an order granting an exemption, exit-the-merchant-function plan, or alternative rate plan." This rule clearly contemplates that the Commission will establish the procedures to be followed in connection with motions to modify a previously approved plan on an *ad hoc* basis, regardless of the docket in which the motion is filed. Indeed, based on this expectation, DEO has moved to intervene in response to the OCC and OPAE motions, notwithstanding that, as one of the original movants, it would technically already be a party to the case in which the OCC and OPAE motions were filed.[5]

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[4] *See* Retail Energy Supply Association, Direct Energy Services LLC and Direct Energy Business Marketing LLC Joint Memorandum Contra to OCC's Motion to Modify the 2013 Order dated March 30, 2018.

[5] *See* DEO Motion to Intervene and Memorandum In Support dated March 23, 2018, at 1-2.

Third, although DES believes that the fact that the Commission has not yet established a procedural schedule for its consideration of the OCC and OPAE motions should put an end to OCC's claim that DES's motion to intervene is untimely, there is another aspect of OCC's memorandum contra DES's motion to intervene that cannot be allowed to pass without comment. OCC makes much of the fact that DES elected not to intervene in this docket in response to the DEO/OGMG joint motion to modify the plan, going so far as to say that DES should have known that it was possible that there could be subsequent motions to modify the DEO plan that would be contrary to DES's interest.[6]

DES elected not to intervene in response to the DEO/OGMG joint motion (which, incidentally, was supported by an accompanying stipulation that OCC signed) because there was nothing about the proposed modification that was adverse to DES's interests. There were three possible outcomes. The Commission could approve the modification as proposed by DEO and OGMG in their joint motion, deny the motion, or approve the DEO/OGMG proposal subject to certain modifications. DES agrees that, by not intervening, it accepted the risk that the DEO/OGMG proposal would be denied or modified by the Commission. However, DES most certainly did not accept the risk that it would be precluded from protecting its interests in connection with any and all future proposals to modify the plan. And this is true regardless of the docket in which the new proposal happened to be filed. Thus, although OCC argues that, having not to intervened in 2012, "DES cannot get a second bite at the apple,"[7] the point that appears to be lost upon OCC is that OCC's pending motion to modify the DEO plan is a different apple despite OCC's attempt to place it in the same barrel as the earlier DEO/OGMG motion.

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[6] *See* OCC Memorandum Contra, 3-4.

[7] OCC Memorandum Contra, 4.

Fourth, OCC argues that DES has failed to show the existence of extraordinary circumstances and, thus, has not satisfied the Rule 4901-1-11(F), OAC, requirement for granting motions to intervene that are not timely.[8] For those reasons set forth above, DES's motion to intervene was not untimely, but even if it were, the entry in Case No. 08-917-EL-SSO cited by OCC has nothing whatever to do with the situation presented here.[9] As recounted by OCC, the issue in that case was whether several entities that had failed to intervene in a case before the Commission should be allowed to intervene after the case was remanded to the Commission by the Supreme Court of Ohio for further proceedings.[10] The Commission denied intervention, finding, *inter alia*, that the issues to be considered on remand were not new issues and that a remand is a possibility in any case, and, thus, did not constitute an extraordinary circumstance that would support untimely intervention under Rule 4901-1-11(F), OAC.

Here, the modification to the DEO exit plan proposed by OCC's motion presents an entirely new issue, and, although, as OCC points out, it was, of course, foreseeable that modifications to the DEO exit plan might be proposed in the future,[11] it was not foreseeable that OCC would attempt, some six years later, to shoehorn its motion to modify the plan into a docket that was created for the sole purpose of considering the modification proposed in the DEO/OGMG motion filed June 15, 2012 in view of the fact that all previous proposals to modify the plan had been assigned new case numbers. The first phase of the plan was approved in Case No. 05-474-GA-ATA. The proposal to implement the second phase of the plan was filed as Case

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[8] OCC Memorandum Contra, 3.

[9] *See* OCC Memorandum Contra, 4, citing *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO, *et al.* (Entry dated June 29, 2011).

[10] *Id.*

[11] *Id.*

No. 07-1224-GA-EXM. In 2011, DEO and OGMG moved for a modification of the plan that would consolidate the SSO and SCO auctions during the transition period. This proposal was docketed as Case No. 11-6076-GA-EXM.[12] This was followed, in 2012, by the joint DEO/OGMG motion to eliminate the SCO option for choice-eligible non-residential customers, which was assigned case No. 12-1842-GA-EXM. If OCC, like DEO and OGMG before it, had filed its motion to modify the plan in a new docket, we would not be having this discussion. And, more importantly, if the Commission had intended to change the previous protocol and require that all future motions to modify the DEO plan were to be filed in Case No 12-1842-GA-EXM, it certainly should have said so in order to provide notice to the parties to Case No. 07-1224-GA-EXM that if they did not intervene in this case in by August 30, 2012, they would be forever barred from participating in connection with any subsequent proposals to modify the plan.

Finally, not only has it been the longstanding policy of this Commission "to encourage the broadest possible participation in its proceedings," [13] but the Supreme Court of Ohio has also advised the Commission 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."[14] To rule against DES's intervention based on the mousetrap OCC is attempting to spring as a result of the case number at the top of its motion would fly in the face of this policy and run afoul of the court's directive. In view of the circumstances discussed above, it defies

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[12] *See In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio in Case No. 07-1224-GA-EXM*, Case No. 11-6076-GA-EXM (Opinion and Order Dated February 14, 2012).

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

[14] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d, 2006-Ohio-5853, ¶ 20.

reason that the Commission would find that the August 30, 2012 deadline for intervention established in connection with DEO/OGMG June 15, 2012 motion applies to the OCC and OPAE motions to modify the plan filed some six years later. Because the Commission has yet to establish the procedural schedule for proceeding on these motions pursuant to Rule 4901:1-19-11(B), OAC, DES's motion to intervene is unquestionably timely.

B. BECAUSE DES'S MOTION TO INTERVENE WAS TIMELY, OCC'S ARGUMENT THAT DES HAS FAILED TO DEMONSTRATE THE EXISTENCE OF EXTRAORDINARY CIRCUMSTANCES IS MOOT.

As OCC correctly points out, Rule 4901-1-11(F), OAC, provides that "(a) motion to intervene that is not timely will be granted only in extraordinary circumstances."[15] However, because DES's motion to intervene was timely filed, there was no reason for DES to argue in the memorandum supporting its intervention that extraordinary circumstances exist that justify granting its motion. However, if the Commission determines that the August 30, 2012 deadline for intervention established in connection with the June 15, 2012 DEO/OGMG motion for a modification of the DEO plan somehow applies to the OCC and OPAE motions now before it, DES respectfully submits that entertaining these motions in the same docket does represent an unforeseeable, extraordinary circumstance in view of the uniform past practice of assigning new case numbers to motions to modify the existing DEO plan. Further, as discussed above, if the Commission intended that all subsequent motions to modify the DEO plan were to be filed in this docket, the parties to Case No. 07-1224-GA-EXM were entitled to notice that they would be forever be precluded from protecting their interests in connection with all subsequent proposed modifications if they failed to intervene in this docket by August 30, 2012. Obviously, this was not the Commission's intent but, because there was no such notice, basic principles of fairness

[15] *See* OCC Memorandum Contra, 3.

would require that DES's motion to intervene be granted even if the August 30, 2012 deadline for intervention applied.

C. DES'S INTEREST IN THE PROPOSALS CONTAINED IN THE OCC AND OPAE MOTIONS IS NOT ADEQUATELY REPRESENTED BY EXISTING PARTIES.

OCC next argues that, even if DES's motion to intervene is deemed timely, DES has failed to show that its interest is not adequately represented by existing parties as required by Rule 4901-1-11(A)(2), OAC.[16] The Commission should give this argument the short shrift it deserves.

At the outset, it is important to note that OCC does not claim that DES does not "have a real and substantial interest in this proceeding" or that DES is not "so situated that the disposition of the proceeding may, as a practical matter, impair or impede *[its]* ability to protect that interest," which are the other two criteria for intervention set forth in the above-cited rule. Rather, OCC suggests that OGMG and the Retail Energy Supply Association ("RESA") adequately represent DES's interest.[17] DES would offer the following observations.

First, the Commission has routinely permitted individual competitive retail suppliers to intervene in proceedings in which groups and organizations representing competitive supplier interests have also intervened as parties, even in instances where the individual competitive suppliers were members of the group or organization granted intervention.[18] As explained in the memorandum in support of its motion for leave to intervene, DES is not a member of either

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[16] *See* OCC Memorandum Contra, 5-6.

[17] Not to split hairs, but OCC is incorrect in stating that OGMG and RESA "have been granted intervention in this proceeding." Actually, OGMG was not granted intervention in this docket, but is a party by virtue of being a joint movant on the June 15, 2012 filing this docket was opened to consider.

[18] *See, e.g., In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an*

OGMG or RESA and has, in fact, taken positions contrary to the positions taken by OGMG and RESA in Commission proceedings.[19] If, as history indicates, the Commission has no problem with granting intervention to individual competitive suppliers in proceedings in which organizations of which they are members have also intervened, the case for allowing DES, which is not a member of OGMG or RESA, to intervene in this case is even stronger.

Second, the attorney examiner's entry in this docket of October 9, 2012 granting RESA's motion to intervene has already spoken to this issue. OPAE had opposed RESA's motion to intervene on the ground OGMG, which was already a party, adequately represented RESA's interests, and pointed out that certain members of OGMG were also members of RESA. The attorney examiner rejected this argument, noting that both OGMG and RESA had indicated that the positions they take are consensus positions and do not necessarily represent the position of any of their individual members.[20] Plainly, if OGMG and RESA do not speak on behalf of their own individual members, they most certainly do not speak on behalf of DES.

Third, the case OCC relies on in support of the proposition that OGMG and RESA adequately represent DES's interest is inapposite. Although OCC cites the attorney examiner's denial of a motion to intervene in a January 7, 2016 entry in Case No. 14-1693-EL-RDR as precedent for denying DES's motion on the ground that DES has failed to show that its interests are not adequately represented, a review of that entry will show that the reason the movant's

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Electric Security Plan, Case Nos. 11-346-EL-SSO, et al. (Entries dated March 23, 2011 and July 8, 2011) whereby RESA and numerous individual CRES providers were granted intervention, including RESA members Constellation NewEnergy, Inc., and Exelon Energy Company.

[19] *See, e.g., In the Matter of the Commission's Review of its Rules for Competitive Retail Natural Gas Service Contained in Chapters 4901:1-27 through 4901:1-34 of the Ohio Administrative Code,* Case No. 12-1925-GA-ORD (Finding and Order dated December 18, 2013, as modified by Entry on Rehearing dated February 26, 2014).

[20] Entry dated October 9, 2012, at 3.

untimely motion to intervene was denied in that case was because the movant failed to show the existences of extraordinary circumstances that would warrant granting its untimely motion to intervene.[21] In that case, after finding that there were no extraordinary circumstances that would justify granting the untimely motion, the attorney examiner did go on to state that she disagreed with the movant's assertion that its interest in the proceeding was unique, finding that, even if there were extraordinary circumstances that would support untimely intervention, there was an existing party that represented the identical interest that the movant had identified.[22]

However, in this instance, DES's motion is timely, and there is no existing party that adequately represents its interest. Yes, there may be other parties that come down on the same side of the issues presented by the modification of the plan proposed by OCC as DES, but that is not the test. If it were, the right to intervene would be determined based on the winner of a race to file motions to intervene with the Commission's docketing department. As the Commission well knows, it is common for, say, several groups representing the industrial customers as well as individual industrial customers to be granted intervention in electric ESP cases. If one batch of motions to intervene are granted in one entry, does that mean that all subsequent timely motions to intervene would be denied because the industrial interests are represented by existing parties? Of course not, but that is precisely where the OCC argument takes us.

Although Rule 4901-1-11(A)(2), OAC, provides that entities that otherwise would qualify for intervention will not be granted leave to intervene if their interest is adequately represented by existing parties, Rule 4901-1-11(B), OAC, sets out the considerations that are to be taken into account in determining whether intervention should be granted under Paragraph

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[21] *See In the Matter of the Application seeking approval of Ohio Power Company's Proposal to Enter into an Affiliated Purchase Power Agreement*, Case No. 145-1693-EL-RDR (Entry dated January 7, 2016, at 5-7).

[22] *See* Case No. 145-1693-EL-RDR (Entry dated January 7, 2016, at 7-8).

(A)(2) of the rule. Paragraph (B)(5) provides that consideration is to be given to the extent to which the person's interest is represented by existing parties, which is a matter that must necessarily be evaluated on a case-by-case basis. As noted, DES is not a member of either OGMG or RESA. In fact, the members of OGMG and RESA are its competitors. Under these circumstances, it would be unreasonable for the Commission to find that DES's interests are adequately represented by existing parties.

D. DES SHOULD BE GRANTED FULL PARTY STATUS.

OCC concludes its memorandum contra with the proposition that, if DES is granted is granted intervention, its intervention should be limited and that it should be required to consolidate its examination of witnesses and presentation of testimony with other parties with substantially similar interests.[23] In presenting this proposition, OCC has muddled two different concepts. Rule 4901-1-11(D), OAC, provides as follows:

> (D) Unless otherwise provided by law, the commission, the legal director, the deputy legal director, or the attorney examiner may:
>
> (1) Grant limited intervention, which permits a person to participate with respect to one or more specific issues, if the person has no real and substantial interest with respect to the remaining issues or the person's interest with respect to the remaining issues is adequately represented by existing parties.
>
> (2) Require parties with substantially similar interests to consolidate their examination of witnesses or presentation of testimony.

As defined in Paragraph (D)(1) of the rule, "limited intervention" refers to a limitation on the issues with respect to which a specific intervenor may participate. Although it is far from clear, it appears that OCC is suggesting that this provision should be invoked to preclude DES from supporting the argument RESA and Direct made in their March 19, 2018 joint

[23] *See* OCC Memorandum Contra, 6-7.

memorandum contra OCC's motion to modify the DEO plan (*i.e.*, that OCC's proposed modification violates the R.C. 4929.08(A)(2) limitation on the Commission's authority to abrogate or modify an exemption plan without the host gas distribution utility's consent to no more than eight years after the effective date of the order implementing the plan). However, although DES happens to agree with this argument, DES has mentioned it only to explain why OCC unexpectedly broke with the longstanding practice of filing proposed modifications to the DEO exit plan in new dockets. As previously stated in both its memorandum in support of its motion to intervene and in this reply, DES is leaving this argument to others.[24] OCC has offered no reason why DES's intervention should be limited with respect to substantive issues. Accordingly, DES should be granted full party status.

Turning to the OCC proposal that DES should be required to consolidate its examination of witnesses and presentation of testimony with other parties pursuant to Rule 4901-1-11(D)(2), OAC, DES submits that such a ruling would be premature at this time. At this point, the parties have not seen the OCC and OPAE testimony, and, thus, have yet to formulate their responses to same. Moreover, the presiding attorney examiner has ample authority to prevent repetitive cross examination and the presentation of cumulative evidence at hearing. Thus, there is no need for the Commission to order, in the context of a ruling on a motion to intervene, that parties with substantially similar interests consolidate their examination of witnesses or presentation of testimony.[25]

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[24] *See* DES Memorandum in Support, 3, n. 6, and *supra*, 5.

[25] In discussing its consolidation proposal, OCC claims that "(a)gain, DES misconstrues the standard," stating that the fact DEO is not a member of OGMG or RESA and has previously taken positions contrary to both groups is irrelevant as to whether parties have "substantially similar interests" as the term is used in Rule 4901-1-11(D)(2), OAC. However, DES has not heretofore addressed this rule. Thus, OCC is just flat wrong in claiming that DES has misconstrued this standard. As must surely be obvious, DES raised these points to show that OGMG and RESA do not adequately represent its interests in connection with the Rule 4901-1-11(A)(2), OAC, test, which has nothing do with whether the Commission should order parties to consolidate their presentations at hearing.

IV. CONCLUSION

For those reasons set forth above, DES respectfully requests that its motion to intervene be granted.

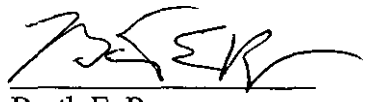
Respectfully submitted,

Barth E. Royer (0016999)
Barth E. Royer, LLC
2740 East Main Street
Bexley, Ohio 43209
(614) 817-1331 – Phone
(614) 817-1334 – Fax
BarthRoyer@aol.com – Email
(will accept email service)

Attorney for
Dominion Energy Solutions, Inc

Certificate of Service

I hereby certify that a copy of the foregoing has been served upon the following persons by electronic mail this 1st day of May 2018.



Barth E. Royer

Terry Etter
Larry Sauer
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-4213
terry.etter@occ.ohio.gov
larry.sauer@occ.ohio.gov

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

Colleen L. Mooney
Ohio Partners for Affordable Energy
PO Box 12451
Columbus, OH 43212-2451
cmooney@ohiopartners.org

Mark A. Whitt
Andrew J. Campbell
Rebekah J. Glover
WHITT STURTEVANT LLP
The KeyBank Building, Suite 1590
88 East Broad Street
Columbus, Ohio 43215
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com

Scott Dismukes
Daniel Clearfield
Sarah Stoner
Kristine Marsilio
Eckert Seamans Cherin & Mellott, LLC
U.S. Steel Tower, 600 Grant Street, 44th Floor
Pittsburgh, PA 15219
sdismukes@eckertseamans.com
dclearfield@eckertseamans.com
sstoner@eckertseamans.com
kmarsilio@eckertseamans.com

Michael J. Settineri
Gretchen L. Petrucci
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
misettineri@vorys.com
glpetrucci@vorys.com