

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,
Appellant,
v.
The Public Utilities Commission of Ohio,
Appellee.

: No. 08-0367
:
: Appeal from the Public
: Utilities Commission of
: Ohio
:
: Public Utilities Commission
: of Ohio
: Case Nos. 03-93-EL-ATA
: 03-2079-EL-AAM
: 03-2081-EL-AAM
: 03-2080-EL-ATA

DUKE ENERGY OHIO'S MOTION TO INTERVENE

Paul A. Colbert
(Reg. No. 0058582)
Counsel of Record
Associate General Counsel
Duke Energy Ohio, Inc.
155 East Broad Street
Columbus, Ohio 43215
(614) 221-7551 (telephone)
Fax No. (614) 221-7556 (fax)
Paul.Colbert@duke-energy.com

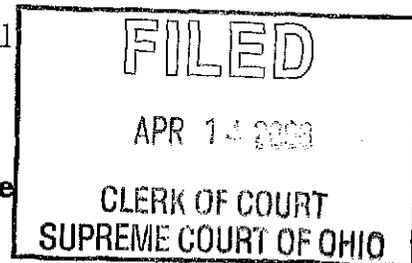
Rocco D'Ascenzo
(Reg. No. 0077651)
Counsel
Duke Energy Ohio, Inc.
139 East Fourth Street, 29 At. II
Cincinnati, Ohio 45201-0960
(513) 419-1852 (telephone)
(513) 419-1846 (fax)

**Counsel for Intervening Appellee
Duke Energy Ohio, Inc.**

Marc Dann
(Reg. No. 0039425)
Ohio Attorney General
Duane W. Luckey
(Reg. No. 0023557)
Section Chief
Thomas W. McNamee
(Reg. No. 0017352)
Counsel of Record

Sarah J. Parrot
(Reg. No. 0082197)
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215
(614) 466-4397 (telephone)
(614) 644-8764 (fax)
Duane.Luckey@puc.state.oh.us
Thomas.McNamee@puc.state.oh.us
Sarah.Parrot@puc.state.oh.us

**Counsel for Appellee
The Public Utilities Commission of Ohio**



Janine L. Migden-Ostrander

(Reg. No. 0002310)

Consumers' Counsel

Jeffrey L. Small

(Reg. No. 0061488)

Counsel of Record

Ann M. Hotz

(Reg. No. 0053070)

Assistant Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

(614) 466-8574 (telephone)

(614) 466-9475 (fax)

small@occ.state.oh.us

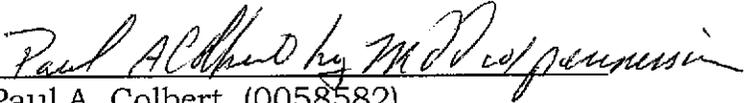
Counsel for Appellant,

The Office of the Ohio Consumers' Counsel

DUKE ENERGY OHIO'S MOTION TO INTERVENE

Now comes Duke Energy Ohio, Inc., pursuant to the Ohio Rules of Civil Procedure, Rules 1 and 24, and respectfully requests that this Court grant it leave to intervene as Intervening Appellee in the above-captioned case. The reasons for this Motion are set forth in the attached Memorandum in Support.

Respectfully submitted,


Paul A. Colbert (0058582)
Associate General Counsel
Duke Energy Ohio, Inc.
155 East Broad Street, 21st Floor
Columbus, Ohio 43215
(614) 221-7551
Fax No. (614) 221-7556

Rocco O. D'Ascenzo (0077651)
Counsel
Duke Energy Ohio, Inc.
139 East Fourth Street, 29 At. II
Cincinnati, Ohio 45201-0960
(513) 419-1852
(513) 419-1846 (fax)

Counsel for Intervening Appellee Duke
Energy Ohio, Inc.

MEMORANDUM IN SUPPORT

This case comes to the Court on appeal by the Ohio Consumers' Counsel (Appellant) from an Opinion and Order of the Public Utilities Commission of Ohio (Appellee or PUCO) dated October 24, 2007, and the PUCO's Entry on Rehearing dated December 19, 2007, in the consolidated cases noted on the caption of this Motion. The Appellant objects to substantive and procedural determinations made by the PUCO in these consolidated cases. Duke Energy Ohio, Inc. (DE-Ohio) respectfully requests that this Court grant it leave, pursuant to Ohio Civ. R. 1 and 24, to intervene as Intervening Appellee in this matter.

I. The Applicability of The Civil Rules To Movant's Request In This Court.

Rule 1(A) of the Ohio Rules of Civil Procedure provides that "[t]hese rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in subdivision (C) of this rule." Rule 1(C) then provides that "[t]hese rules, **to the extent that they would by their nature be clearly inapplicable**, shall not apply to procedure (a) upon appeal to review any judgment, order or ruling. . . (Emphasis supplied.) Thus, except when a rule is *clearly* inapplicable, Civil Rule 1 extends application of the Ohio Rules of Civil Procedure to all courts of Ohio in the exercise of civil jurisdiction, including this Honorable Court. See Klein and Darling, Civil Practice, 2d ed., §§1:23 – 1:32 (Baldwins', 2004).

In this case, DE-Ohio invokes Rule 24 of the Ohio Rules of Civil Procedure to seek intervention from this Court. DE-Ohio asserts that the provisions of Civil Rules 24(A) and 24(B) are not clearly inapplicable to appeals to this Court. DE-Ohio further asserts that those portions of Civil Rule 24(C) which directs that "a pleading, as defined in Civ. R. 7(A)" accompany this motion are clearly inapplicable in this instance, because no "pleadings" as described within Rule 7(A) exist in the record below, and none would serve a purpose before this Court. This matter is presently on direct appeal to this Court from the Public Utilities Commission of Ohio. The proceedings below began with an "Application," rather than a complaint, by DE-Ohio, Inc. f/k/a The Cincinnati Gas & Electric Company. No responsive pleadings were necessary or even permitted by the Rules of Practice before the PUCO.

II. Intervention of Right Pursuant to Ohio Civ. R. 24(A).

Ohio Civ. R. 24(A) states the following:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

DE Ohio respectfully asserts that it has "an interest relating to the property or transaction that is the subject of the action" and "is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest." This appeal by the Office of Ohio Consumers' Counsel comes to the Court from an Order on Remand of the

PUCO dated October 24, 2007 and Appellee's Entry on Rehearing dated December 19, 2007 in the consolidated cases noted on the caption of this Motion. Appellee issued its Order on Remand in response to this Court's decision in an earlier appeal of these same cases.¹ The OCC again objects to the Commission's Remand Order in respect to substantive and procedural issues, indeed, issues which were the subject of the previous appeal to this Court.

DE-Ohio is an electric distribution utility serving approximately 600,000 electric consumers in southwestern Ohio. DE-Ohio has a direct interest in this appeal because it will determine the market price for competitive retail electric service that DE-Ohio may charge its consumers. Should Appellant prevail, DE-Ohio will suffer irreparable harm due to its inability to set market prices for its competitive retail electric services outside the narrow parameters suggested by the OCC. DE-Ohio therefore has an interest relating to the subject of this appeal, the disposition of the action may impair or impede its ability to protect that interest, and its interests are not adequately represented by existing parties.

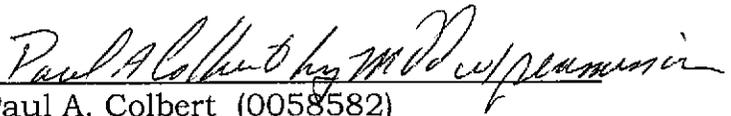
DE-Ohio therefore, respectfully requests that this honorable Court grant DE-Ohio's Motion to Intervene as an intervening appellee.

¹ Ohio Consumers' Counsel v. Public Util. Comm., 111 Ohio St. 3d 300, 2006-Ohio-5789.

III. Conclusion.

For all of the reasons stated herein, DE-Ohio respectfully requests that this Honorable Court grant DE-Ohio's Motion to Intervene as an Intervening Appellee.

Respectfully submitted,



Paul A. Colbert (0058582)
Associate General Counsel

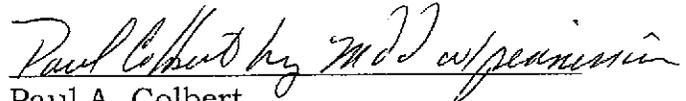
and

Rocco O. D'Ascenzo (0067274)
Counsel

Duke Energy Ohio
155 East Broad Street
21st Floor
Columbus, Ohio 43215
(614) 221-7551

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing pleading was served either electronically or by first class U.S. mail, postage prepaid, upon the following, this 14th day of April, 2008.


Paul A. Colbert

Jim Petro (0022096)
Attorney General of Ohio
Duane W. Luckey (0023557)
(Counsel of Record)
Assistant Attorney General
Chief, Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43266-0573
(614) 644-8698
Fax No. (614) 644-8764

Jeffrey L. Small (0061488)
(Counsel of Record)
Ann M. Hotz (0053070)
10 West Broad Street
Columbus, Ohio 43215-3485
(614) 466-8574

Counsel for Appellant,
Ohio Consumers' Counsel

Counsel for Appellee, The Public
Utilities Commission of Ohio