

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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PUCO

In the Matter of the Application of The)
Dayton Power and Light Company for) Case No. 07-1302-EL-ATA
Approval of its Proposed Market-Based)
Standby Tariff Sheet.)

**MOTION TO INTERVENE
AND
MOTION TO AMEND TARIFFS
OR, IN THE ALTERNATIVE, MOTION FOR HEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of all 467,000 residential utility consumers of Dayton Power and Light Company ("DP&L"), moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to grant OCC's Motion to Intervene, Motion to Amend Tariffs, or in the alternative, Motion for Hearing in the above-captioned proceeding. In this case DP&L proposes to modify its existing standby rate tariffs ("Tariff or Tariffs"). The proposed Tariff affects the ability of Ohioans to connect distributed generation or cogeneration to the power grid and contains proposed charges to customers. OCC's Motion should be granted because OCC satisfies the legal standards for intervention, as explained in detail in the attached Memorandum in Support.

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Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Jacqueline Lake Roberts, Counsel of Record
Ann M. Hotz
Assistant Consumers' Counsels

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

614-466-8574 (Telephone)

614-466-9475 (Facsimile)

roberts@occ.state.oh.us

hotz@occ.state.oh.us

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On December 20, 2007, DP&L filed an application requesting the PUCO approve modifications to its existing standby service tariff. This filing follows an extensive investigation by the PUCO as required by the Energy Policy Act of 2005 ("EPAAct 2005"), in Case No. 05-1500 EL-COI ("05-1500"). At the conclusion of 05-1500 the PUCO opened Case No. 07-649 EL-UNC ("07-649") to implement the policy decisions relating to the standby service rates. OCC actively participated in Case Nos. 05-1500, and 07-649.

II. INTERVENTION

OCC moves to intervene under its legislative authority to represent residential utility consumers in Ohio.¹ In addition, R.C. 4903.221 provides, in part, that any person "who may be adversely affected" by a PUCO proceeding may seek intervention in that proceeding. The interests of Ohio's residential consumers may be "adversely affected" by this case, especially if the consumers are unrepresented in a proceeding where the PUCO approves the implementation of the policies in EPAAct 2005 via modifications to Tariffs concerning the standby rates it offers to customers. Such decisions by the PUCO

¹ R.C. Chapter 4911.

have a direct affect on residential consumers. Thus, this element of the intervention standard in R.C. 4903.221 is satisfied.

R.C. 4903.221(B) requires the Commission to consider the following criteria in ruling on motions to intervene:

- (1) The nature and extent of the prospective intervenor's interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and
- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

First, the nature and extent of OCC's interest lies in ensuring that the policies in EPAct 2005 are properly implemented by DP&L and that residential customers do not pay unjust and unreasonable charges. Nor should residential customers pay more than a reasonable and just share of any standby service costs. Customers should have reasonable and lawful standards and conditions for standby service. This interest is different than that of any other party and especially different than that of the utility that advocates for the financial interest of its shareholders.

Second, OCC will advocate a legal position that the Tariffs should be limited to assessing costs that are no more than what is reasonable and permissible under Ohio law and that the standards for standby service are reasonable and lawful. OCC's position is therefore directly related to the merits of this case pending before the PUCO.

Third, OCC's intervention will not unduly prolong or delay the proceeding. OCC has longstanding expertise and experience in PUCO proceedings, and will contribute to the process of the case. As previously stated OCC was a party to and actively

participated in the predecessor cases 05-1500 and 07-649 as well as the PUCO workshops regarding standby service rate tariff modifications.

Fourth, OCC's intervention will significantly contribute to the full development and equitable resolution of the factual issues. OCC will obtain and develop information that the PUCO should consider for equitably and lawfully deciding the case in the public interest.

OCC also satisfies the intervention criteria in the Ohio Administrative Code (which are subordinate to the criteria that OCC satisfies in the Ohio Revised Code). To intervene, a party should have a "real and substantial interest" according to Ohio Adm. Code 4901-1-11(A)(2). As the residential utility consumer advocate, OCC has a very real and substantial interest in this case where DP&L proposes to implement the policies of EPA 2005 and have the PUCO approve standby service rate tariffs that relate to expenses borne by customers, including residential customers.

In addition, OCC meets the criteria of Ohio Adm. Code 4901-1-11(B)(1)-(4). These criteria mirror the statutory criteria in R.C. 4903.221(B) that OCC already has addressed and that OCC satisfies.

Ohio Adm. Code 4901-1-11(B)(5) states that the Commission shall consider the "extent to which the person's interest is represented by existing parties." While OCC does not concede the lawfulness of this criterion, OCC satisfies this criterion because it has been uniquely designated as the state representative of the interests of Ohio's residential utility consumers. That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio recently confirmed OCC's right to intervene in PUCO proceedings, in ruling on an appeal in which OCC claimed the PUCO erred by denying its intervention. The Court found that the PUCO abused its discretion in denying OCC's intervention and that OCC should have been granted intervention.²

OCC meets the criteria set forth in R.C. 4903.221 and Ohio Adm. Code 4901-1-11. Additionally, granting OCC intervention is consistent with the intervention standards explained by the Supreme Court of Ohio. On behalf of all the DP&L's residential consumers, the Commission should grant OCC's Motion to Intervene.

III. MOTION TO AMEND TARIFFS OR, IN THE ALTERNATIVE, MOTION FOR HEARING

Ohio Adm. Code 4901-01-06 provides that any party for good cause can move to amend any application that violates the PUCO's orders, etc. There is good cause to amend the Tariffs proposed in DP&L's Application.

DP&L's proposed Tariffs do not comply with the PUCO's findings and Order of March 28, 2007 in the 05-1500 case. The Tariffs, as filed, impede customer selection of standby service and must be rejected. The PUCO should require DP&L to file amended Tariffs that are conformed to the PUCO's decisions regarding standby service.

A. DP&L Did Not Meet Its Burden Of Proof By Showing The Tariffs Are Just And Reasonable As Required By R.C. 4909.18.

R.C. 4909.18 requires that an applicant filing for a change or amendment to a rate to demonstrate to the PUCO that the change is just and reasonable: "If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for a hearing...At such hearing the burden of proof to

² *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶13-20 (2006).

show that the proposals in the application are just and reasonable shall be upon the public utility.” (Emphasis added). DP&L’s filing does not meet the statutory burden of proof.

DP&L’s Tariffs do not comply with the PUCO’s determinations regarding standby service requirements, and in fact, undermine the PUCO’s goal to make standby service a tariff with market-based options. The PUCO should order DP&L to amend its Tariffs, and there should be a further opportunity for parties to comment on DP&L’s proposals. In the alternative and if DP&L fails to comply with the PUCO’s requirements, the PUCO should convene hearings to take evidence from DP&L (in support of its burden of proof) and from others, on whether the Tariffs are reasonable and lawful.

In the 05-1500 and 07-649 cases, the predecessor cases to the instant case, the PUCO determined what policies for standby service were appropriate. DP&L ignored the PUCO’s determinations when it made this filing.

As discussed, *supra*, Ohio Administrative Code 4901-01-06 provides that any party for good cause can move to amend any application that violates the PUCO’s orders, etc. By this filing, OCC moves that the PUCO require DP&L to conform its filing to the policies, terms and conditions enunciated by the PUCO on the 05-1500 and 07-649 cases. Even if the DP&L amends and re-files its Tariffs, a hearing may still be necessary for a fair opportunity for parties to contribute to the record that the PUCO will consider in making its findings, opinions, and decisions under R.C. 4903.09 and other statutes.³

B. The Tariffs Do Not Comply With the PUCO Order in Case Nos. 05-1500 EL COI.

In the 05-1500 case the PUCO required that standby rates be market-based. “We agree that a market-based approach is a reasonable alternative for self-generators in

³ OCC does not waive any right to a hearing.

addition to the current tariff.” Order at 10. Regarding unscheduled outages the PUCO stated, “backup or unscheduled maintenance power [should be] at a market rate, the derivation of that rate should be explicitly specified in the EDU's tariff.” (Language added). Order at 11. In its Tariff, DP&L has omitted an important market-based element: the forced outage component in the wholesale rate of PJM Interconnection, L.L.C. Elimination of the forced outage rate component (“EFORD”), drastically changes the charges for standby service. To illustrate the magnitude of additional costs in DP&L’s Tariffs, American Electric Power (“AEP”) filed a standby rate that included EFORD. Comparing DP&L’s rate without EFORD to the AEP rate with EFORD shows that DP&L would charge customers about \$18,000/year more for standby service under the Tariff. The Tariff must be amended to account for EFORD.

The Tariff also requires that standby customers qualify as qualifying facilities (“QFs”). QFs were established under the Public Utilities Regulatory Policies Act of 1978 (“PURPA “). EPAct of 2005 eliminated the Federal Energy Regulatory Commission’s determination of QFs under PURPA. Thus, the language of the Tariff would suggest that standby service customers could only be those that were determined to be QFs prior to the enactment of EPAct 2005. OCC believes this was not the intention of the PUCO when it issued the Order in 05-1500. DP&L’s Tariffs must be amended to eliminate references to QFs and instead define what types of generation qualify for the standby rate.

The alternative to amending and correcting Tariffs consistent with the PUCO’s determinations regarding standby rates is to hold hearings on the appropriateness of such Tariffs.

C. DP&L Cannot Charge Customers for Standby Charges Unless the Charges are Specified in the Tariffs.

DP&L must file all proposed standby charges with the PUCO for approval. R.C. 4909.18 provides “Any public utility desiring to establish any rate,.....or modify, amend, change , increase or reduce any existing rate.....shall file a written application...” with the PUCO.⁴ The proposed Tariffs specify that “administrative fees”⁵ (“Administrative Fees”) will be assessed standby customers. The language of the Tariffs gives customers no information as to what the Administrative Fees will be. The Tariffs must be amended to propose for PUCO consideration what, if any, Administrative Fees customers will be required pay, or to eliminate any reference to Administrative Fees. Otherwise, no such fees or charges may be assessed against customers who elect standby service from DP&L.

Finally, The Tariffs include, without explanation an, “Environmental Investment Rider”⁶ which is applied to the standby rate. What the Environmental is and why it is an appropriate component of a standby rate must be explained and justified to the PUCO, if it can be justified.

IV. CONCLUSION

For the reasons stated above, the Commission should grant OCC’s Motion to Intervene, on behalf of residential consumers in DP&L’s service area. The PUCO should also grant OCC’s Motion to amend the Application so that the proposed Tariffs are

⁴ See also, R.C. 4905.32, Public utilities can only charge according to their schedules filed with the PUCO.

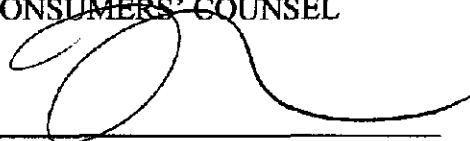
⁵ Tariffs, First Revised Sheet No. G21 Page 2 of 3.

⁶ Tariffs, Exhibit B, page 2 of 3.

compliant with the PUCO's requirements for standby service. If DP&L does not become compliant with PUCO standards for Tariffs, then OCC's Motion for a hearing should be granted to resolve the matter in the public interest.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Jacqueline Lake Roberts, Counsel of Record
Ann M. Hotz
Assistant Consumers' Counsels

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
614-466-9475 (Facsimile)
roberts@occ.state.oh.us
hotz@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's *Motion to Intervene* was provided to the persons listed below via first class U.S. Mail, postage prepaid, this 1st day of February 2008.



Jacqueline Lake Roberts
Assistant Consumers' Counsel

SERVICE LIST

Duane Luckey
Attorney General's Office
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215

Judi Sobecki
Dayton Power and Light Company
1065 Woodman Drive
Dayton, Ohio 45432

Samuel C. Randazzo
Lisa G. McAlister
Daniel J. Neilsen
Joseph M. Clark
McNees Wallace & Nurick LLC
21 E State St., 17th Floor
Columbus, Ohio 43215-4228