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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY TO DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN OPPOSITION TO OCC'S MOTIONS TO INTERVENE, AMEND TARIFFS, OR CONVENE HEARINGS BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") files this Reply Memorandum with the Public Utilities Commission of Ohio ("PUCO" or "Commission") in response to the Motion in Opposition ("Motion") filed by Dayton Power & Light Company ("DP&L" or "Company"), on February 19, 2008.[1] DP&L seeks to silence any voice for consumers and thwart the transparency of PUCO regulation in this case involving no less than the effectuation of national and state energy policy. As if that is not enough irony for one utility pleading, DP&L seeks to exclude residential consumers from this case that is the direct result of the PUCO's generic inquiry into standby rates and distributed generation[2] where the PUCO went to great lengths to be inclusive of participation by all stakeholders.

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[1] Ohio Adm. Code 4901-1-12(B)(1).

[2] *In the Matter of the Commission's Response To Provisions of the Federal Energy Policy Act of 2005 Regarding Net Metering, Smart Metering and Demand Response, Cogeneration and Power Production Purchase and Sale Requirements, and Interconnection*, Case No. 05-1500-EL-COI (05-1500 Case).

OCC is the statutory representative for all Ohio's residential utility consumers, including the approximately 467,000 residential customers of DP&L.[3] This case originated with DP&L's filing of standby tariffs with the Commission following its investigation pursuant to the requirements of the Energy Policy Act of 2005 ("EPAct 05").[4] In the 05-1500 Case the Commission redesigned Ohio's standby rates, net metering and interconnection tariffs, consistent with EPAct 05.

OCC moved to intervene in the above-captioned case.[5] DP&L opposes OCC's motion on the basis that it is "highly unlikely" the standby tariff "will impact residential customers"[6] and therefore OCC's interest in the DP&L application is small, not warranting intervention. DP&L also opposes OCC's participation in the case because supposedly the intervention will only delay their application instead of contributing to the full development and equitable resolution of the factual issues -- issues that, it should be noted in DP&L's new-found haste, have existed in some form for years.[7]

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[3] R.C. Chapter 4911.

[4] *In the Matter of the Commission's Response To Provisions of the Federal Energy Policy Act of 2005 Regarding Net Metering, Smart Metering and Demand Response, Cogeneration and Power Production Purchase and Sale Requirements, and Interconnection*, Case No. 05-1500-EL-COI (05-1500 Case).

[5] OCC's Motion to Intervene also included Motions to Amend Tariffs, or in the Alternative, for Hearings.

[6] DP&L's Memorandum in Opposition at 1.

[7] DP&L's Memorandum in Opposition at 4.

II. ARGUMENT

A. OCC Meets the Criteria of the Ohio General Assembly for Intervention, and DP&L's Claims About OCC's Interest, Delay and Contributions to the Case Resolution are Self-Serving and Wrong.

In the briefest of arguments and without the support of precedent, DP&L claims that OCC does not meet some of the statutory criteria for intervention. To begin, DP&L asserts that OCC has a "small"[8] interest in standby rates, and that OCC's motion to intervene should be denied. In ruling on motions to intervene, R.C. 4903.221(B)(1) requires the Commission to consider the nature and extent of the prospective intervener's interest. The nature and extent of OCC's interest meet the General Assembly's standard for intervention. OCC's motion should be granted.

First, OCC represents residential consumers, and some consumers may need to take service under the tariff for distributed generation. DP&L even admits that.[9]

Second, the subject of this case, standby rates, is a key component of distributed generation that is very connected to Ohio's energy future for all customers, as reflected in the Administration's policy principles and the General Assembly's consideration of Senate Bill 221. Policy leaders promoting the increased use of distributed generation understand what DP&L may not, that getting renewable and other such energy into the grid is critical for meeting future demand for electricity in ways that moderate the need -- including the residential need -- for expensive and environmentally problematic central station power plants.

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[8] DP&L's Memorandum in Opposition, page 1.

[9] DP&L's Memorandum in Opposition at 4.

Therefore, the appropriate setting of standby rates is an important issue for residential customers. Distributed generation benefits the grid and produces cost efficiencies for the electric distribution system, as OCC discusses below. Residential customers also can be adversely affected when DP&L's tariffs are not limited to assessing costs that are no more than what is reasonable and permissible under Ohio law and that the standards proposed for standby service are not unreasonable and unlawful.

EPAct 05 provided guidance for states in reaping the benefits of distributed generation for the benefit of all customers, including residential customers. In response to this national priority, the Commission redesigned its approach to standby rates and required all Ohio utilities to file market-based standby rates.

DP&L's second claim is that because OCC has a "small" interest in this case, OCC will not significantly contribute to the full development and equitable resolution of the factual issues. This claim relates to the fourth criterion for intervention under the statue, R.C. 4903.221(B)(4). Here again, DP&L's brevity of argument surpasses only its mistakenness. In the 05-1500 Case where the issues involving distributed generation encompassed standby rates, OCC contributed to the resolution of the case in workshops, technical conferences, and written comments.

In the 05-1500 Case, OCC presented the experts Wilson Gonzalez (OCC staff) and Gary Nakarado, a consultant and expert at the National Renewable Energy Laboratory. It is incredible that DP&L would oppose OCC's intervention in this case on standby rates considering that OCC moderated the PUCO's technical conference on standby rates,[10] and OCC made several standby rate proposals for the Commission to

[10] Technical Conference-2, Case No. 05-1500-EL-COI (March 23, 2006).

consider. And OCC's positions were frequently cited in the PUCO's Order in the 05-1500 Case.

Some of the standby rate and distributed generation issues affecting residential consumers that OCC addressed include that:

- On-site generation brings great benefits to the system
- On-site generation can improve system reliability
- On-site generation improves efficiency
- Utilities find huge benefits from load diversity
- Cost allocations inherent in current standby should be evaluated rates for bias against publicly beneficial ability to shift, reduce, and shape load. Real cost data should be used to consider innovative rate approaches -- recognizing benefits of on-site generation

Standby rates can encourage or discourage distributed generation. Residential customers can be harmed by standby rates that discourage distributed generation when the system and load benefits described-above are lost. Residential customers can also be harmed by rates that encourage distributed generation when the standby rates do not reflect reasonable and lawful costs. OCC has contributed its expertise to this issue in the past and will continue to do so in this and other PUCO dockets.

And finally, DP&L devotes all of one sentence to claiming OCC will "only delay" the proceedings.[11] R.C. 4903.221(B)(3) provides for the PUCO to consider whether a movant to intervene would "unduly" delay a proceeding. In its solitary sentence DP&L missed the General Assembly's use of the word "unduly." While OCC does not expect to

[11] DP&L's Memorandum in Opposition, page 4.

delay the proceeding (that has been years in the making), the statute turns on whether there is undue delay and not just any delay. There will be no undue delay from OCC. In fact, OCC's expertise on this subject--which was called upon to contribute to the PUCO's adjudication of distributed generation issues in the 05-1500 Case and the basis for testimony before the Senate and House regarding Senate Bill 221 -- will serve the efficiency of resolving this case with facts and opinions offered to assist the Commission.

In the same single sentence where DP&L presented its thought on the subject of delay, DP&L also mentioned that OCC's "presence" will result in discovery.[12] Here again, the Ohio General Assembly has spoken on the subject of discovery and has provided for "full and reasonable discovery" under R.C. 4903.082. Even so, that does not mean OCC will conduct much discovery. But OCC will seek whatever information, if any, is needed to "facilitate thorough and adequate preparation...," pursuant to Ohio Adm. Code 4901-1-16(B).

DP&L is wrong that OCC does not meet the statutory criteria for intervention, and OCC's motion should be granted.

B. OCC's Motion to Amend Tariffs or in the Alternative, to Convene Hearings Should be Granted.

DP&L dismisses several of the questions raised by OCC to convince the PUCO that hearings are not required or that its tariffs need not be amended. DP&L attempts to demonstrate OCC does not raise valid issues and has nothing to contribute to this case and therefore the tariffs should be accepted as filed. This is not how regulation works in Ohio - the statutory and administrative requirements for intervention, discussed *above,*

[12] Id.

and in OCC's motion, do not require an intervenor to develop a case before obtaining party status.[13] As recently as May 24, 2007 the PUCO held that:

> ...we do not require such specification at this early stage in the proceeding. Our rules clarify that the "legal position" of a movant is its showing of a real and substantial interest in the subject at hand, where the proceeding may impair or impede his ability to protect that interest, unless the interest is already represented by other parties. *In re East Ohio Gas Company,* Case No. 06-1452-GA-WVR, Entry dated May 24, 2007.

OCC was not required to identify *any* issue in its request for intervention or prove its truth - this is the role of the later case process. Neither the Commission nor the statutes require establishing issues before being granted party status in a case. The PUCO was concerned in the 05-1500 Case about the development of the market-based rate and attendant tariffs. It is a question of fact and law whether DP&L has complied. In the 05-1500 Case Order the Commission stated:

> The Commission finds that the main purpose of staff's recommendation is to "define" the derivation of the "market rate" to be charged to customers selecting the market-based option. We believe that any procedures regarding the market based option should be clearly and specifically defined in the utilities' stand-by tariffs. Finally, any "terms" pursuant to this recommendation should be expressly defined in the tariffs to avoid confusion.[14]

[13] 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 intervener'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.

[14] *In the Matter of the Commission's Response To Provisions of the Federal Energy Policy Act of 2005 Regarding Net Metering, Smart Metering and Demand Response, Cogeneration and Power Production Purchase and Sale Requirements, and Interconnection,* Case No. 05-1500-EL-COI (05-1500 Case) (March 28, 2007) at 11.

The PUCO required standby rates to be both market-based and have clearly defined terms, conditions, and costs that customers can understand. DP&L's standby tariff is neither, and it does not deny this.

First, DP&L's proposed market-based rate is not market-based – it admittedly eliminates the forced outage rate component ("EROFd") - an essential element of market rates. DP&L believes it can ignore relevant market rate components in designing the market-based rate because the Commission "did not order that all EDU's include the EFORd element in their charges for standby service"[15] and that "each utility was given the latitude to tailor its rate based upon circumstances unique to the individual EDU."[16] The elimination of EFORd drastically changes the charges for standby service. In fact, it increases DP&L's "market-based" standby rate by 20 times as compared to AEP's market-based rate that includes EFORd. DP&L's tariff must be amended to account for EFORd -- or the standby rate must be rejected as not being market-based.

Second, when OCC identified the lack of specificity of in the tariffs, for example administrative fees,[17] DP&L responded "The administrative fees will be specified in the service agreement."[18] This does not comply with the PUCO requirement that the terms of the rate should be expressly defined in the tariffs to avoid confusion.

DP&L must re-file a true market-based rate and revise it tariffs to expressly define the terms of the tariff.

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[15] DP&L's Memorandum in Opposition, page 6.

[16] Id.

[17] Dayton Power and Light Company Tariffs, First Revised Sheet No. G21 Page 2 of 3.

[18] DP&L's Memorandum in Opposition, page 7.

III. CONCLUSION

DP&L's opposition to OCC's intervention is self-serving and contrary to the law of the Ohio General Assembly in an important case that is really about serving the need for America and Ohio to develop new strategies for our energy future affecting everyone. OCC satisfies the statutory requirements for intervention and the consumer voice that DP&L would silence should be heard just as the PUCO heard the consumer voice in the predecessor case to this one, the 05-1500 Case. Moreover, the Supreme Court of Ohio has recently spoken on intervention in PUCO proceedings and that decision also supports granting OCC's intervention.[19] OCC should be granted intervention in this proceeding and OCC's recommendations should be adopted.

Respectfully submitted,

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[19] *Toledo Coalition for Safe Energy v. Public Utilities Commission of Ohio*, 69 Ohio St.2d 559 (1982); Ohio Consumers' Counsel v. Pub. Util Comm., 111 Ohio St.3d 384.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the OCC's *Reply Memorandum* was served on the persons stated below via first class U.S. Mail, prepaid postage, and/or electronically served to all parties this 29th day of February 2008.

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