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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of its Peak Demand Reduction Program Portfolio Plan and Request for Waiver and Request for Amendment of the 2009 Peak Demand Reduction Benchmark Pursuant to Section 4928.66(A)(2)(b), Ohio Revised Code.	)	Case No. 09-578-EL-EEC
In the Matter of the Application of Ohio Power Company for Approval of its Peak Demand Reduction Program Portfolio Plan and Request for Waiver and Request for Amendment of the 2009 Peak Demand Reduction Benchmark Pursuant to Section 4928.66(A)(2)(b), Ohio Revised Code.	)	Case No. 09-579-EL-EEC

MOTION TO INTERVENE
AND
OPPOSITION TO AEP'S APPLICATION AND REQUESTS REGARDING THE PEAK DEMAND REDUCTION BENCHMARKS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC") moves to intervene in this case where Columbus Southern Power Company and Ohio Power Company (collectively, "AEP") request that the Public Utilities Commission of Ohio ("Commission" or "PUCO") view AEP to be in compliance with the peak demand reduction ("PDR") benchmarks in R.C. 4928.66(A)(1)(b) for 2009.[1] OCC files this pleading on behalf of AEP's residential consumers.[2] The reasons the Commission should grant OCC's Motion are further set forth in the attached Memorandum in Support.

In addition, OCC files an Opposition to the Application. AEP has presented a faulty interpretation of R.C. 4928.66(A)(1)(b). AEP also has not given sufficient reason for its proposed waiver or for the requested reduction of the PDR benchmark for 2009 to zero.

Respectfully submitted,

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[1] Application and Request for Expedited Consideration (July 9, 2009) ("Application") at 3. In the Application, AEP proffered an interpretation of R.C. 4928.66(A)(1)(b) for PUCO approval, asked for waivers of PUCO rules that the interpretation may require and asked that AEP's 2009 PDR benchmark be reduced to zero. See id. at 5-6.

[2] OCC seeks intervention pursuant to R.C. Chapter 4911, R.C. 4903.221 and Ohio Adm. Code 4901-1-11.

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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE
AND
OPPOSITION TO AEP'S APPLICATION

I. INTRODUCTION

R.C. 4928.66(A)(1)(b), which became law in 2008 with the signing of Sub. S.B. 221 ("S.B. 221"), requires that "[b]eginning in 2009, an electric distribution utility shall implement peak demand reduction programs designed to achieve a one per cent reduction in peak demand in 2009 and an additional seventy-five hundredths of one per cent reduction each year through 2018." Under R.C. 4928.66(A)(2)(b), "[t]he commission may amend the benchmarks set forth in division (A)(1)(a) or (b) of this section if, after application by the electric distribution utility, the commission determines that the amendment is necessary because the utility cannot reasonably achieve the benchmarks due to regulatory, economic, or technological reasons beyond its reasonable control."[3]

On July 9, 2009, AEP filed an Application asking the Commission to interpret the PDR benchmark obligation to preclude the need for additional PDR programs "during the present economic downturn of 2009."[4] AEP also requested waiver of any PUCO rules that the interpretation might require.[5] In the alternative, AEP asked the Commission to "amend the 2009 PDR benchmarks to zero based on regulatory and economic reasons beyond AEP Ohio's control, pursuant to the Commission's authority under Section 4928.66(A)(2)(b), Ohio Rev. Code."[6] OCC herein moves to intervene, and opposes AEP's Application, including the requests contained in the Application.

II. MOTION TO INTERVENE

R.C. 4903.221 provides, in part, that any person "who may be adversely affected" by a PUCO proceeding is entitled to seek intervention in that proceeding. The interests of Ohio's residential consumers may be "adversely affected" by this case, especially if the consumers were unrepresented in a proceeding that has ramifications regarding AEP's peak demand reductions, which in turn could affect the reliability of electric

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[3] The Commission has adopted rules implementing S.B. 221. See *In re Rules for Alternative and Renewable Energy Technologies and Resources, and Emission Control Reporting Requirements*, Case No. 08-888-EL-ORD ("08-888"), Entry on Rehearing (June 17, 2009). The rules, which are not yet effective, allow electric companies to seek Commission approval to amend the PDR benchmarks. Pending Ohio Adm. Code 4901:1-39-05(F) states: "If an electric utility determines that it is unable to meet a benchmark due to regulatory, economic, or technological reasons beyond its reasonable control, the electric utility may file an application to amend its benchmarks. In any such application, the electric utility shall demonstrate that it has exhausted all reasonable compliance options."

[4] Application at 2.

[5] Id. at 6.

[6] Id. at 2.

service to AEP's residential customers and the rates that AEP's residential customers pay. Thus, OCC satisfies this element of R.C. 4903.221.

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 is representing AEP's residential consumers in order to ensure that they have a reliable source of electricity from AEP at reasonable rates. This interest is different from that of any other party and especially different from that of AEP, whose advocacy includes the financial interest of stockholders.

Second, OCC's advocacy for consumers will include advancing the position that consumers should have reliable electric service at reasonable rates. OCC's position is therefore directly related to the merits of this case that is pending before the PUCO, the authority with regulatory control of public utilities' rates and service quality in Ohio.

Third, OCC's intervention will not unduly prolong or delay the proceeding. OCC, with its longstanding expertise and experience in PUCO proceedings, will duly allow for the efficient processing of the case with consideration of the public interest.

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 the reliability of AEP's service at a reasonable rate is at stake.

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, given the language of R.C. 4903.221(B), OCC satisfies this criterion in that it uniquely has been 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 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.[7]

OCC meets the criteria set forth in R.C. 4903.221, Ohio Adm. Code 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. The PUCO should grant OCC's Motion to Intervene on behalf of Ohio residential consumers.

III. OPPOSITION TO AEP'S APPLICATION

A. AEP's Interpretation of Compliance with the PDR Benchmark Is Erroneous and Should Be Rejected.

In its Application, AEP asked that the Commission interpret the PDR benchmark obligation "to preclude the need for additional programs impacting our customers during the present economic downturn of 2009."[8] AEP's interpretation of the peak demand reduction requirements in R.C. 4928.66 – by means of counting the impact on load from economic recession and by means of potential (not actual) peak demand reductions – is faulty, and the Commission should reject it.

AEP asked the Commission to determine that the benchmark has likely been met because of the Company's reduced peak load occasioned by economic conditions, i.e., the economic downturn.[9] Such an interpretation contravenes the PDR requirements set in S.B. 221, which requires: "Beginning in 2009, an electric distribution utility *shall implement* peak demand reduction programs designed to achieve a one per cent reduction in peak demand in 2009. . . ."[10] based upon "the average peak demand on the utility in the

[7] See *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶ 13-20.

[8] Application at 2.

[9] Id. at 5, ¶ 9.

[10] R.C. 4928.66(A)(1)(b) (emphasis added).

preceding three calendar years . . . ."[11] The PDR requirements contained in S.B. 221 promote rate stability and reliability in electric service. AEP's interpretation would do nothing to promote rate stability and reliability in electric service. Any demand reductions resulting from the economic downturn are unplanned, not by utility design and implementation as required by statute.

Furthermore, the Opinion and Order in AEP's electric security plan ("ESP") cases[12] and the Entry on Rehearing in the 08-888 proceeding[13] both rejected AEP's argument that demand reductions should be counted from interruptible programs even in the absence of actual reductions.[14] Nothing in S.B. 221 supports AEP's proposal to meet peak demand reduction requirements by providing existing discounted, interruptible rates to large customers whose loads are not interrupted and where no peak demand reduction program is ever implemented by AEP. The provisions of S.B. 221 were intended to create new cost-effective peak demand reductions under the R.C. 4928.66 benchmarks.[15] In other words, if a project does not actually reduce demand, it was not designed to meet the demand reductions required under R.C. 4928.66. Electric Distribution Utilities ("EDUs") cannot know whether a program is correctly designed to meet demand reductions unless the **program** actually reduces demand.

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[11] R.C. 4928.66(A)(2)(a).

[12] *In re AEP ESP Proceedings*, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, Opinion and Order (March 18, 2009) ("ESP Order") at 46-47.

[13] Case No. 08-888-EL-ORD, Entry on Rehearing (June 17, 2009) ("08-888 Rehearing") at 5-6.

[14] Application at 3 ("potential load curtailment associated with interruptible customers qualifies").

[15] S.B. 221 calls for electric utilities to implement new PDR programs, which would result in incremental savings achieved "[b]eginning in 2009 . . . ." R.C. 4928.66(A)(1)(b).

In defending its attempt to count "potential load curtailment" to meet requirements,[16] AEP presented a red herring that requiring actual demand reductions would force utilities to curtail customers when not necessary from a system perspective. The Commission has already addressed this matter, stating that "[i]f the electric utilities cannot rely upon interruptible customers to reduce peak demand, they should seek to implement real peak-demand reductions through other means."[17] There are many types of programs that electric providers can rely on to reduce peak demand. For example, direct load control, peak time rebates, time of use rates and real time pricing can reduce peak demand. The solution to the utilities' situation is obviously the procuring of additional, cost-effective demand reduction resources; not capriciously shutting down industrial facilities critical to Ohio's economy.

The underlying reasons that led the Ohio legislature to impose peak reduction requirements, such as the postponement of expensive new electric generating capacity and price stability, remain during the current economic circumstances. AEP, therefore, should be required to develop and implement new PDR programs designed to meet the one percent PDR for 2009.

B. The Commission Should Not Waive the 2009 Peak Demand Reductions Specified in R.C. 4928.66(A)(1)(b).

In its Application, AEP requested that, if the Commission requires AEP to develop and implement PDR programs designed to meet the benchmarks for 2009, then the Commission should amend the 2009 PDR benchmarks to zero "based on regulatory

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[16] Application at 3.

[17] 08-888 Rehearing at 6.

and economic reasons beyond AEP Ohio's control . . . ."[18] AEP based this request on the PUCO's authority under R.C. 4928.66(A)(2)(b).[19] Under R.C. 4928.66(A)(2)(b), "[t]he commission may amend the benchmarks set forth in division (A)(1)(a) or (b) of this section if, after application by the electric distribution utility, the commission determines that the amendment is necessary because the utility cannot reasonably achieve the benchmarks due to regulatory, economic, or technological reasons beyond its reasonable control."

AEP gave three reasons for its request: (1) the need "to wait until after the 08-888 rulemaking was completed to finalize or implement those [PDR] plans";[20] (2) compliance issues not resolved in AEP's ESP cases (Case Nos. 08-917-EL-SSO and 08-918-EL-SSO);[21] and (3) the state of the national economy.[22] The three situations discussed by the Companies may have caused some uncertainties in moving forward with PDR compliance, but they do not constitute sufficient cause to waive the requirement.

S.B. 221 was signed into law on May 31, 2008, and thus AEP has known for over a year that a one percent reduction in peak demand was required in 2009. As noted above, in the ESP Order and the 08-888 Rehearing the Commission rejected AEP's argument that demand reductions should be counted from interruptible programs even in the absence of actual reductions.

The PDR rules the PUCO adopted in 08-888 conform to common practice in the demand-side management industry, so they should have not come as a surprise to AEP.

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[18] Application at 2.

[19] Id.

[20] Id at 2-3.

[21] See id. at 3.

[22] See id. at 7.

Therefore, the reasons given by AEP in its request for waiver are insufficient to support such a waiver. A waiver under such circumstances would undermine the requirements stated in S.B. 221.

In addition, as noted above, the amendment of PDR programs pursuant to R.C. 4928.66(A)(2)(b) must be based upon the **inability** of an EDU to meet the benchmark, due to "regulatory, economic, or technical reasons beyond its control." AEP does not allege that it is unable to meet the benchmark. Rather, AEP asserts that it **already meets** the benchmark due to the recession or it should be permitted to count "potential" rather than actual demand reductions. Thus, AEP's Application does not support amending the PDR requirements based upon R.C. 4928.66(A)(2)(b). AEP's request for waiver of its PDR requirement for 2009 should be rejected.

C. In the Alternative, Any PUCO Waiver of the Peak Demand Reduction Benchmarks for AEP Should Make the 2009 Peak Demand Reduction Benchmark Cumulative to the 2010 Benchmark.

Under R.C. 4928.66(A)(1)(b), AEP must implement PDR programs designed to reduce peak demand by one percent in 2009 and 0.75 percent for each year from 2010 through 2018. As noted above, a waiver of this requirement, based on peak demand reductions resulting from the economic downturn instead of an AEP-designed PDR program, would contravene R.C. 4928.66(A)(1)(b).

If, however, the PUCO determines that a waiver based on the Application is appropriate, the PDR benchmark for 2009 should not be discarded. Instead, AEP should be required to implement a PDR program for 2010 designed to reduce peak demand by both the one percent benchmark required for 2009 and the 0.75 percent benchmark for 2010. Thus, AEP's PDR program for 2010 should reduce peak demand by 1.75 percent.

This would be consistent with R.C. 4928.66(A)(1)(b), and would prevent AEP from benefiting from the economic downturn and from its lack of due diligence. In addition, the Commission should make clear that any waiver granted AEP would be limited to only the calendar year 2009 PDR requirements.

IV. CONCLUSION

The Commission should grant OCC's intervention in this proceeding. In addition, for the reasons discussed herein, the Commission should reject AEP's interpretation of R.C. 4928.66(A)(1)(b) and deny the various requests contained in AEP's Application. If a waiver is granted, however, it should be limited only to calendar year 2009 requirements and should require AEP to reduce peak demand by 1.75 percent in 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Motion to Intervene and Opposition by the Office of the Ohio Consumers' Counsel was served by First Class United States Mail, postage prepaid, to the persons listed below this 6th day of August 2009.

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