

In the Matter of the Application of the )  
Significantly Excessive Earnings Test )  
under Section 4928.143(F), Ohio Revised ) Case No. 20-1041-EL-UNC  
Code, and Rule 4901:1-35-03(C)(10), )  
Ohio Administrative Code for The Dayton )  
Power and Light Company. )

**MOTION TO INTERVENE  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

In this regard, DP&L asserts that its earnings in 2019 were \$54,484,000.<sup>2</sup> But these earnings exclude \$70,596,000 in revenue collected from customers under DP&L's Distribution Modernization Rider,<sup>3</sup> which the PUCO ruled was an unlawful charge, consistent with the Supreme Court's holding in *In re Application of Ohio Edison*, 157 Ohio St.3d 73, 2019-Ohio-2401.<sup>4</sup> DP&L's exclusion of the DMR charge revenues from the annual profits review is unlawful because Ohio law (R.C. 4928.143(F)) does not allow a utility to

<sup>4</sup> See *In the Matter of the Application of the Dayton Power & Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO *et al.*, Supplemental Opinion and Order (Nov. 21, 2019) at ¶110 (“Accordingly, in light of the Supreme Court’s decision in *Ohio Edison* the Commission finds that the DMR in DP&L’s ESP is unlawful and violates important regulatory practices and principles.”)

cherry pick electric security plan provisions and exclude them from the profits review.

Otherwise, customers are denied the protection from paying electric utilities too much profits (significantly excessive profits). DP&L customers have already been ripped off by paying for DP&L's distribution modernization charge until the PUCO overturned it. And they got no refund for the \$218 million that they paid for the unlawful charge.

OCC is filing on behalf of DP&L's 465,000 residential electric utility customers. The reasons the PUCO should grant OCC's Motion are further set forth in the attached Memorandum in Support.

Respectfully submitted,

Bruce Weston (0016973)  
Ohio Consumers' Counsel

/s/ Angela D. O'Brien

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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the	)	
Significantly Excessive Earnings Test	)	
under Section 4928.143(F), Ohio Revised	)	Case No. 20-1041-EL-UNC
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**MEMORANDUM IN SUPPORT**

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DP&L provides electric service to its customers through its electric security plan approved by the PUCO in accordance with the provisions of R.C. 4928.143. As a consumer protection written into the law, R.C. 4928.143(F) requires the PUCO to annually evaluate a utility’s earnings to determine whether they are “significantly excessive” when compared to the earnings of comparable businesses and utilities. If the PUCO determines that the plan has allowed earnings that are significantly excessive, the excess must be returned to customers.

In this case, DP&L proposes to exclude from its 2019 earnings \$70,596,000 received from customers through the illegal DMR. Excluding these earnings from the SEET review is unlawful and will deny customers significant refunds that they are entitled to under the law.

Under R.C. Chapter 4911, OCC has the authority to represent the interests of DP&L’s 465,000 residential utility customers.

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 DP&L’s residential customers in Ohio may be “adversely affected” by this case,

especially if those customers were unrepresented in a proceeding where the PUCO is determining whether customers are entitled to a refund as a result of electric security plan rates. Thus, this element of the intervention standard in R.C. 4903.221 is satisfied.

R.C. 4903.221(B) requires the PUCO 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 proceedings;
- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

First, the nature and extent of OCC's interest is representing DP&L's residential customers in this case where the PUCO will be determining whether DP&L had significantly excessive earnings in 2019 under its electric security plan and owes customers a refund. This interest is different from that of any other party, and especially different from that of the utility whose advocacy includes the financial interest of stockholders.

Second, OCC's advocacy for residential customers will include advancing the position that rates that customers pay should be no more than what is reasonable and lawful under Ohio law, for service that is adequate under Ohio law. OCC has argued and will continue to argue that the DMR charge revenues paid for by customers is a provision under the ESP plan and should be considered in utilities' annual profits review. OCC's position is therefore directly related to the merits of this

case 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 proceedings. 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 to equitably and lawfully decide 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 advocate for residential utility customers, OCC has a very real and substantial interest in this case where the PUCO will decide if customers are entitled to a refund as a result of DP&L's significantly excessive earnings in 2019.

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 PUCO shall consider "[t]he 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 in that it uniquely has been designated as the state representative of the interests of Ohio's residential utility

customers. That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio (“Court”) confirmed OCC’s right to intervene in PUCO proceedings, in deciding two appeals in which OCC claimed the PUCO erred by denying its interventions. The Court found that the PUCO abused its discretion in denying OCC’s interventions and that OCC should have been granted intervention in both proceedings.<sup>5</sup>

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. On behalf of Ohio residential customers, the PUCO should grant OCC’s Motion to Intervene.

Respectfully submitted,

Bruce Weston (0016973)  
Ohio Consumers’ Counsel

/s/ Angela D. O’Brien

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<sup>5</sup> See *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶13-20.

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Motion to Intervene was served on the persons stated below via electronic transmission, this 24<sup>th</sup> day of June 2020.

/s/ Angela D. O'Brien

Angela D. O'Brien

Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

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**in**

**Case No(s). 20-1041-EL-UNC**

Summary: Motion Motion to Intervene by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of O'Brien, Angela Ms.