**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| --- | --- | --- |
| In the Matter of the Application of the Significantly Excessive Earnings Test under Section 4928.143(F), Ohio Revised Code, and Rule 4901:1-35-03(C)(10), Ohio Administrative Code for The Dayton Power and Light Company d/b/a AES Ohio. | ))))))) | Case No. 21-588-EL-UNC |

**MOTION TO INTERVENE**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Office of the Ohio Consumers’ Counsel (“OCC”) moves to intervene[[1]](#footnote-2) where the Public Utilities Commission of Ohio (“PUCO”) will examine The Dayton Power and Light Company’s (“DP&L” or “AES”) 2020 profits to determine if they were “significantly excessive” and if customers are entitled to a refund.

In this regard, DP&L asserts that its profits in 2020 were $50,879,000 and that its unadjusted per books return on equity was 8.9%.[[2]](#footnote-3) However, for purposes of the Significantly Excessive Earnings Test (“SEET”) under R.C. 4928.143(F), DP&L calculated an adjusted return on equity of just 3%. DP&L’s adjusted return on equity is based on improper adjustments that result in understated profits to DP&L that could negatively impact potential refunds to consumers. In addition, DP&L’s proposed SEET threshold of 15.72% to 19.80% is unreasonably high and should be rejected by the PUCO.

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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## MEMORANDUM IN SUPPORT

 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 whether a utility is earning too much as a result of rates charged under its electric security plan. Specifically, the PUCO is charged with examining a utility’s profits to determine whether they are “significantly excessive” when compared to the profits of comparable businesses and utilities. If the PUCO determines that the plan has allowed profits that are significantly excessive, the increment of earnings above excessive earnings (significantly excessive) must be returned to customers.

 In this case, DP&L has proposed an adjusted return on equity of 3%, far below its unadjusted per books return on equity of 8.9%. DP&L’s adjusted return on equity is the result of the improper application of adjustments for property taxes in 2019 and 2020, the Tax Cuts and Jobs Act (“TCJA”) for 2019, prior generation asset impairments, and future equity contributions by DP&L’s parent company for 2021.[[3]](#footnote-4) These adjustments to DP&L’s return on equity for purposes of the SEET review are unreasonable and could deny customers refunds that they are entitled to under the law. DP&L also proposes an unreasonably high SEET threshold of 15.72% to 19.80%,[[4]](#footnote-5) which could also negatively impact potential refunds to customers.

 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 depending upon the level of earnings derived from the 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 2020 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. The PUCO should hear recommendations from parties in this regard. The PUCO should especially hear positions on any adjustments proposed by DP&L that would give the appearance, on paper, that DP&L’s profits are lower than the level that would warrant refunds to consumers. 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 profits in 2020.

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.[[5]](#footnote-6)

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*

Angela D. O’Brien (0097579)

Counsel of Record

Christopher Healey (0086027)

Assistant Consumers’ Counsel

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(willing to accept service by e-mail)

**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 27th day of May 2021.

 */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:

**SERVICE LIST**

|  |  |
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1. *See* R.C. Chapter 4911, R.C. 4903.221, and Ohio Adm. Code 4901-1-11. [↑](#footnote-ref-2)
2. DP&L Direct Testimony of Patrick Donlon, at 7, and Exhibit PJD-2. [↑](#footnote-ref-3)
3. DP&L Direct Testimony of Patrick Donlon, at 3-7. [↑](#footnote-ref-4)
4. DP&L Direct Testimony of Dustin Illyes, at 4. [↑](#footnote-ref-5)
5. *See Ohio Consumers’ Counsel v. Pub. Util. Comm*., 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶13-20. [↑](#footnote-ref-6)