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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) Case No. 07-1079-EL-ATA
Approval of Its Proposed Economic)
Development Rider.)

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

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential utility consumers, moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to grant the OCC's intervention in the above-captioned case.¹ The application ("Application") was filed by the Dayton Power & Light Company ("DP&L" or "Company") on September 28, 2007. DP&L seeks authority to discount rates in an unspecified amount for certain commercial customers, and correspondingly to defer the lost revenues on its books for later collection from other customers (such as residential customers) in future rate cases.

The reasons for granting the OCC's motion are further set forth in the attached Memorandum in Support. This pleading also contains the OCC's protest that states the reasons that the Application cannot be approved according to Ohio law and should not be approved as a matter of policy.

¹ This motion is supported by R.C. Chapter 4911, R.C. 4903.221, Ohio Adm. Code 4901-1-11 and 4901-1-12.

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Respectfully submitted,

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MEMORANDUM IN SUPPORT AND PROTEST

I. INTRODUCTION

The OCC moves to intervene in the above-captioned docket in order to represent the interests of the approximately 450,000 residential electric customers of DP&L. In the Application, DP&L requests both approval of tariffs that would provide rate reductions to a certain commercial customers and approval of deferral accounting authority that will permit DP&L to record on its books an unspecified amount in uncollected revenues. The Company will seek to collect these deferrals through future rate proceedings that will involve rate-setting for residential customers.²

The commercial customers that are the subject of DP&L's proposed tariff are those who would occupy a large commercial space following a vacancy of no less than twelve months and who take generation service from the Company.³ DP&L proposes to not levy half of the distribution demand charges against such customers for a maximum period of twenty-four months.⁴ The proposed deferrals, which DP&L plans to collect in a

² Application, Exhibit C-1 ("Company will seek to recover deferred amounts through future rate proceedings").

³ Application, Exhibit A, Original Sheet No. D37, Page 1 of 2.

⁴ Id.

later rate case, would accumulate the amounts not collected from the commercial customers.

DP&L's proposal is illegal and its approval would be bad public policy. If the PUCO accepts DP&L's proposal to discount the rates of select commercial customers, the PUCO should at a minimum prohibit the Company from funding the discounts with collections from other customers.⁵

II. ARGUMENT

A. Intervention

The OCC moves to intervene under its legislative authority to represent residential utility consumers in Ohio, pursuant to R.C. Chapter 4911. 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 are unrepresented in a proceeding that permits the accumulation of deferrals that the Company will attempt to collect from residential customers. 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;

⁵ Any approval of the DP&L proposal, original or as modified by PUCO directive, should also contain a Commission statement that disclaims "state action" for the purpose of applying antitrust laws. See, e.g., *In re SBC/AT&T Merger*, Case No. 05-269-TP-ACO, Order (November 4, 2005); *In re Verizon/MCI Merger*, Case No. 05-497-TP-ACO, Order (November 29, 2005).

- (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 DP&L's residential customers are not charged distribution rates and charges that are unjust and unreasonable at any point in time. Such unjust and unreasonable rates would result if residential customers are charged, at any point in time, as the result of the deferrals that the Company proposes to accumulate. This interest is different than that of any other party, and is especially different than that of the utility whose advocacy includes the financial interest of the Company's stockholders.

Second, the OCC's advocacy for consumers will include advancing the position that residential distribution rates should be no more than what is reasonable and permissible under Ohio law. As more fully explored in the next portion of this pleading, the Company's proposals violate Ohio law and Commission policy, and should be rejected. The OCC's position is therefore directly related to the merits of this case that is pending before the PUCO.

Third, the OCC's intervention will not unduly prolong or delay the proceeding. The 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, the OCC's intervention will significantly contribute to the full development and equitable resolution of the factual issues. In the event the Commission entertains the Company's Application, the OCC will develop and present its legal case against the Application. The OCC will obtain and develop information that the PUCO should consider for lawfully and equitably deciding the case in the public interest.

The OCC also satisfies the intervention criteria in the Ohio Administrative Code, which are subordinate to the criteria that the 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, the OCC has a real and substantial interest in this case where the outcome could have an effect on the distribution rates paid by residential customers.

In addition, the 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 the OCC has already addressed, and that the 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 the OCC does not concede the lawfulness of this criterion, the OCC satisfies this criterion because the OCC has been uniquely designated as the statutory representative of the interests of Ohio’s residential utility consumers.⁶ That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio recently confirmed the OCC’s right to intervene in PUCO proceedings, in ruling on an appeal in which the OCC claimed the PUCO erred by denying its intervention. The Court found that the PUCO abused its discretion in denying the OCC’s intervention and that the OCC should have been granted intervention.⁷

The 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

⁶ R.C. Chapter 4911.

⁷ *Ohio Consumers’ Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶18-20.

behalf of DP&L's residential consumers, the Commission should grant the OCC's Motion to Intervene.

B. Protest: The Application Violates Ohio Law And Is Bad Public Policy.

1. At hearing, DP&L bears the burden of proof.

DP&L bears the burden of proof to gain approval for the proposed tariffs. R.C. 4909.18 provides that, in the circumstance where a proposal "may be unjust or unreasonable, the commission shall set the matter for hearing" and "the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility." OCC does not bear any burden of proof in this case.

As demonstrated below, DP&L's proposed tariff is discriminatory, predatory, fails to recognize the separation of its distribution and generation functions, is bad public policy, and should therefore be rejected. In the event there is any doubt remaining after a review of the Application on its face, the matter should be set for hearing at which DP&L would bear the burden of proof.

The Application itself does not support the proposed deferral, and any collection of such a deferral from distribution customers is unjust and unreasonable.

2. DP&L's proposed tariff is discriminatory, in violation of Ohio law.

DP&L's Application proposes to discount rates in favor of select owners of vacant commercial buildings in the Dayton area. The Company seeks to discriminate against the rest of the Company's customer base, and seeks authority for deferrals by which DP&L apparently intends to increase its charges to its larger base of customers. DP&L's proposal is discriminatory, and should be rejected.

DP&L's proposed tariff revision violates both R.C. 4905.33 and R.C. 4905.35 by providing reduced charges to a select few eligible customers. R.C. 4905.33(A) states:

No public utility shall *directly or indirectly*, or by any special rate, rebate, drawback, or other device or method, *charge, demand, collect, or receive from any person, firm, or corporation a greater or lesser compensation for any services rendered, or to be rendered*, except as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code, than it charges, demands, collects, or receives from any other person, firm, or corporation *for doing a like and contemporaneous service under substantially the same circumstances and conditions.*⁸

R.C. 4905.35 prohibits the Company from giving “undue or unreasonable preference or advantage to any ... corporation” Specifically with regard to the electric industry, it is the policy of the State of Ohio to “[e]nsure the availability to consumers . . . *nondiscriminatory* retail electric service.”⁹ Furthermore, the Commission’s corporate separation rules provide that an “electric utility shall provide comparable access to products and services . . . and . . . shall be prohibited from unduly discriminating in the offering of its products and/or services.”¹⁰

The Company proposes to provide discounts to only certain distribution customers, discriminating against other commercial customers whose distribution service characteristics are the same as those favored by DP&L. The Company also proposes to discriminate between identically situated distribution customers, favoring only those customers whose premises have been vacant and who take generation service from

⁸ Emphasis added.

⁹ R.C. 4928.02(A) (emphasis added).

¹⁰ Ohio Adm. Code 4901:1-20-16(G)(4)(i) (“Code of Conduct”).

DP&L.¹¹ The proposed tariffs are therefore discriminatory, in violation of R.C. 4905.33, 4905.35, 4928.02(A), and the corporate separation requirements contained in the Commission's rules.

The Commission has rejected discriminatory marketing programs similar to the one proposed by DP&L based on the violation of R.C. 4905.33 and R.C. 4905.35. In a case involving Ameritech, the Commission stated that “[a] classification of customer [that] bears no rational relationship to current rate justifications or any other nondiscriminatory segmentation of customers of a monopoly service, [sic] must be considered the granting of an undue preference or advantage....”¹² In the Ameritech case, the Commission held that Ameritech -- as a monopoly provider of residential local telephone service -- could not offer rebates (i.e. “AmeriChecks”) for Ameritech telephone service through its cable television affiliate. The Commission ordered Ameritech to cease the promotion because the AmeriChecks were considered “the granting of an undue preference or advantage by Ameritech Ohio to customers of its [cable company] affiliate....”¹³

In DP&L's proposal in the instant case, a customer must receive generation service from DP&L to be eligible for the distribution demand charge discount. The granting of a preference to certain distribution customers based upon their use of competitive generation service provided by DP&L is comparable to the promotion offered by Ameritech that the Commission rejected. The Application should be rejected,

¹¹ Application, Exhibit A, Original Sheet No. D37, Page 1 of 2.

¹² *In re Complaint of the Ohio Cable Telecommunications Association*, Case No, 97-654-TP-CSS, Finding and Order at 4-5 (July 21, 1997).

¹³ *Id.*

and the Commission should reject the accumulation of any deferrals that could be used to increase residential rates.

3. DP&L's proposed tariff is predatory and anticompetitive, in violation of Ohio law.

DP&L is a provider of generation services, and seeks the Commission's assistance to further a predatory scheme to prevent competition as such a provider of generation services. R.C. 4933.05(B) provides: "No public utility shall furnish free service or service for less than actual cost for the purpose of destroying competition." Pursuant to Ohio statutes, the enforcement of that division of R.C. 4933.05(B) against DP&L as a generation provider remains as applicable today as it did before the enactment of R.C. Chapter 4928 regarding the provision of generation service to customers.¹⁴

DP&L seeks to leverage its statutory monopoly over distribution service to improperly and illegally extend that monopoly to competitive generation service. The Company proposes to provide distribution service to certain customers for less than the cost of that service, as that cost was presented to the PUCO in previous rate-setting proceedings to support the existing distribution rates. DP&L's proposed requirement that rate reductions for distribution services be tied to the provision of generation services by DP&L is anticompetitive and illegal.¹⁵

The most obvious application of the prohibitions against predatory behavior contained in R.C. 4933.05(B) is the prohibition against the furnishing of generation

¹⁴ R.C. 4928.05 states that "competitive retail electric service supplied by an electric utility . . . shall not be subject to the supervision and regulation . . . by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, *except* section 4905.10, *division (B) of 4905.33*, and sections 4905.35 . . ." Emphasis added.

¹⁵ The PUCO previously stated that it was "concerned by the impact [of a DP&L proposal] . . . on competition" in a recent case. *In re DP&L Generation Surcharge Case*, Case No. 05-276-EL-AIR, Order at 9 (December 28, 2005). The PUCO should not ignore the cumulative effect on competition of the Company's proposals.

service for less than the cost of providing that generation service. However, the statute is not limited by its terms to that situation. As long as DP&L operates without full structural separation between its distribution and generation functions, its discriminatory proposal to tie distribution service discounts to buying DP&L's generation service is also predatory in furtherance of complete dominance of the market for generation service. Residential customers are interested in the development of a competitive market for generation service that provides these customers with supply options. Such development is inhibited by DP&L's predatory proposal, which is illegal and should be rejected.

4. DP&L's proposed tariff fails to respect the separation of distribution and generation functions, in violation of Ohio law.

DP&L proposes to tie generation and distribution services that were unbundled and rendered distinct under electric restructuring legislation. The Supreme Court of Ohio has stated:

With the advent of customer choice of a generator of electricity under S.B. 3, it became necessary for electric utilities to unbundle the three service components and their own components, so that customers could evaluate offers from competitive generators. Unbundling of the service components also ensured that an electric utility would not subsidize the competitive generation portion of its business by allocating generation expenses to the regulated distribution service provided by the utility. Conversely, it ensures that distribution service could not subsidize the generation portion of the business. In short, *each service component was required to stand on its own.*¹⁶

DP&L's proposed tariff ignores the requirement that distribution and generation services be distinct.

¹⁶ *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St. 3d 451, 452-453 (August 11, 2004) (emphasis added).

The Customer must receive generation service under DP&L's applicable standard generation service tariff to be eligible for the distribution demand charge discount proposed in the Application.¹⁷ As explained by the Supreme Court of Ohio, tying together the provision of distribution and generation is illegal regardless of whether DP&L explains this combination as distribution service supporting the provision of its generation service or vice versus.¹⁸ As explained by the Court, "*each service component [is] required to stand on its own.*"¹⁹

5. DP&L's proposed tariff is bad policy.

The deferral request violates the Commission's recognized policies, absent a demonstration of exigent circumstances. Even under circumstances where the Commission has authority to grant accounting authority for deferrals, which are not presented in this case due to the illegality of the proposed tariffs, the Commission has stated that deferrals will only be considered in situations where the applicant demonstrates both an exigent circumstance and good reason for the deferrals. In a case that involved deferrals proposed by the FirstEnergy companies, for instance, the Commission stated:

Although the granting of such deferral authority is within the discretion of the Commission, we believe that to approve such a measure requires that we find there to be both exigent circumstances and good reason demonstrated before such amounts should be treated differently from ordinary expenses.²⁰

¹⁷ Application, Exhibit A, Original Sheet No. D37, Page 1 of 2.

¹⁸ As recently stated by the Supreme Court of Ohio, both circumstances violate Ohio law as stated in R.C. 4928.02(G). *Elyria Foundry v. Pub. Util. Comm.*, 114 Ohio St. 3d 305, 314-315, 2007 Ohio 4164 at ¶¶47-58.

¹⁹ *Migden-Ostrander* at 453 (emphasis added).

²⁰ *In re FirstEnergy Generation Charge Adjustment Rider*, Case No. 05-704-EL-ATA, Finding and Order at 17-18 (January 4, 2006).

DP&L has not demonstrated any need for its proposed deferral, let alone “exigent circumstances.”

DP&L has not provided any basis to support its position that other distribution customers should subsidize the owners of buildings who have failed to successfully market their facilities. Other customers, especially residential customers, cannot lawfully be expected to finance a windfall for the building owners and DP&L, and further DP&L’s proposed tying arrangement between its distribution service and generation service. The Company proposes open-ended deferrals whose price tag for residential consumers is unspecified. The Company’s proposal does not allege exigent circumstances and does not present any reason for a departure from normal regulatory accounting practices. The proposal should be rejected on legal grounds, but also as a violation of Commission policy.

III. CONCLUSION

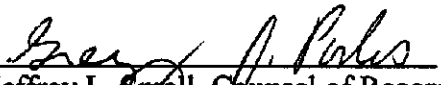
As set forth herein, the OCC satisfies the criteria set forth in R.C. 4903.221 and the Commission’s rules for intervention. Therefore, on behalf of DP&L’s approximately 450,000 residential electric customers, the OCC respectfully requests that the Commission grant the OCC’s Motion to Intervene. The OCC’s participation will contribute to a just resolution of the serious issues involved in this proceeding and will not cause undue delay.

Also as set forth herein, the Application should be rejected on both legal and policy grounds. DP&L’s proposed tariff is discriminatory and predatory, and would result in illegal subsidies. The Application violates the statutory separation of

distribution and generation functions by proposing a tying arrangement whereby a customer would be required to take generation service from DP&L in order to receive a distribution discount. DP&L does not demonstrate the need for such a program and does not explain any exigent circumstances that might support the Company's proposal. DP&L's proposal is illegal and its approval would be bad public policy. The Application should be rejected on both grounds.

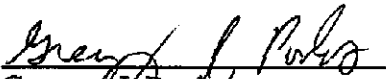
Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing The Office of the Ohio Consumers' Counsel's *Motion to Intervene and Protest* has been served upon the below-stated counsel, via regular U.S. Mail, postage prepaid, this 5th day of November, 2007.


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