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DATE: 11/20/07 Pages to follow: 14- not including cover sheet

Message: **Case No. 07-1079-EL-ATA**
In the Matter of the Application of The Dayton Power and Light Company For the Approval of its Proposed Economic Development Rider

THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE AND PROTEST OF OFFICE OF OHIO CONSUMER'S COUNSEL.

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November 20, 2007

Via Fed Ex

Public Utilities Commission of Ohio
Docketing Division
180 East Broad Street
Columbus, OH 43215-3793

**Re: In the Matter of the Application of the Application of the Dayton
Power and Light Company For Approval of its Proposed
Economic Development Rider, 07-1079-EL-ATA**

Dear Sir/Madam:

Enclosed please find for filing ten (10) copies of The Dayton Power and Light Company's Memorandum in Opposition to Motion to Intervene and Protest Office of Ohio Consumers' Counsel.

Please return the extra copy in the self addressed stamped envelope provided.

Sincerely,

A handwritten signature in cursive script that reads "Jenna Johnson-Holmes".

Jenna Johnson-Holmes
Administrative Assistant

Enclosures

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Application of The) Case No. 07-1079-EL-ATA
Dayton Power and Light Company For)
Approval of its Proposed Economic)
Development Rider)
)**

**THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN
OPPOSITION TO MOTION TO INTERVENE AND PROTEST OF OFFICE OF
OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The Dayton Power and Light Company ("DP&L") does not oppose the motion of the Office of Ohio Consumers' Counsel ("OCC") to intervene in this matter. Because DP&L's proposed Economic Development Program ("Program") will benefit Ohio's residential electric customers—as well as all Ohioans—DP&L does not believe OCC's intervention in this case is necessary. Nonetheless, DP&L will not formally oppose OCC's motion to intervene.

DP&L does, however strenuously dispute the "Protest" portion of OCC's motion to intervene. The Program falls squarely in line with the public policy of Ohio and the long-standing policy of the Commission to support utilities in their efforts to encourage economic growth. Indeed substantially similar programs have been approved by the Commission in the past. The Program is designed so that it is not discriminatory to any customer class and is not anti-competitive. Finally, DP&L's request to defer costs for accounting purposes is properly brought before the Commission. The Commission is empowered with the authority to grant that request, as well as approve of the Program as a whole, without a hearing.

II. ARGUMENT

A. **DP&L'S ECONOMIC DEVELOPMENT PROGRAM FALLS SQUARELY IN LINE WITH THE PUBLIC POLICY OF OHIO, WHICH ENCOURAGES ECONOMIC GROWTH AND THE RESULTING JOBS FOR OHIO WORKERS.**

DP&L's proposed Economic Development Program complies with Ohio law and is directly in line with the public policy of this state, as well as the long-standing policy of the Commission to encourage economic development. The Program's incentives are available to all new non-residential customers that meet certain criteria designed to promote a stable customer base and improve local economies. As a matter of policy, Ohio has encouraged both the public and private sectors to develop programs geared towards increasing economic growth in our communities. This can be seen in many legislative and executive initiatives, such as Senate Bill 3 and more recently in the Governor's recent energy plan—"Energy, Jobs, and Progress for Ohio." The Commission has likewise acted in such a manner as to encourage growth: "[t]he Commission has long supported utility efforts regarding energy efficiency and economic development programs, finding that these programs are in the public interest."¹

DP&L's program is designed to serve these public interest goals. The Economic Development Rider is designed to encourage new businesses to enter the DP&L service territory and take occupancy in commercial or industrial sites that are currently sitting vacant. This will have several beneficial impacts on our community. First, attracting new business customers to these sites will result in increased property and tax revenues.

¹ In the Matter of the Applications of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period, 2004 Ohio PUC: LEXIS 176 (Ohio PUC 2004)

Second, attracting new business and other non-residential customers (including new non-profit or governmental customers) to these areas will result in local job creation, counteracting high unemployment rates and the social problems in adjoining neighborhoods caused by unemployment. Third, attracting new non-residential customers will generate revenue to help offset the revenues that were lost when the former occupants of these sites vacated the premises. When customers of any class are lost, all remaining customers in all classes can be adversely affected as fixed costs are spread over a smaller customer base; conversely, attracting new customers to offset those losses will benefit all customer classes, including residential customers, by allowing fixed costs to be spread over a larger customer base. Finally, encouraging new businesses and other non-residential customers to enter into now abandoned buildings will have a community-wide impact by improving aesthetics and bringing in people and activity, which will positively impact safety, health and welfare of the people living in the communities surrounding what are now vacant buildings.²

DP&L is far from alone in its efforts to encourage these positive developments, and indeed its proposed program is not new. As more fully described below, substantially similar programs have already been approved by the Commission, having been found to comply with the laws and regulations of the state, as well as being good public policy. DP&L's program should likewise be approved.

² As more fully described in Section II (B)(2) in this memorandum, the Commission has already found that programs such as DP&L Economic Development program serve the public interest. Specifically, in approving a similar Duke Energy Ohio program, the Commission held "[t]he Commission believes that proposed Riders ED and UR may enhance economic development in the Company's service area, bringing new investment and jobs to Ohio."

**B. DP&L'S PROGRAM IS NOT "ILLEGAL," DISCRIMINATORY,"
"PREDATORY," OR "BAD PUBLIC POLICY."**

**1. The Commission Has the Statutory Power to Approve the
Proposed Economic Development Program.**

OCC wrongly claims that the proposed rider violates Ohio law because it would "discriminate between identically situated customers, favoring only those customers whose premises have been vacant and who take generation service from DP&L."¹ If OCC's claims were true, the Commission itself would lack a power that it has exercised repeatedly over the years to establish incentive rates and discounts. OCC's Protest essentially ignores the key role of the Commission in analyzing and determining the legality of a program like the Economic Development Program before it is implemented to ensure that an electric utility does not institute a program which violates Ohio law. DP&L respectfully submits that the Commission has the requisite authority to analyze the application and to make a finding that there is a reasonable basis for creating an incentive rate structure for customers who meet the criteria specified in the proposed Rider. In this instance, DP&L has merely asked the Commission to approve a program strikingly similar to other economic development initiatives previously approved by the Commission. OCC's hyperbole has no place in a reasoned analysis.

**2. The Commission Has Already Approved of Programs Similar
to DP&L's Economic Development Rider.**

OCC's wild claim of illegality notwithstanding, the Commission has already approved of economic development programs which are fundamentally the same as DP&L's. For instance the Commission approved of the predecessor to this program. ---

¹ OCC Protest at 6-7.

DP&L's "Partners in Business Plus Incentive Rate" Rider, approved by Commission Order dated August 7, 1997, in Case No. 97-378-EL-ATA.⁴

Currently, Duke Energy Ohio ("Duke") has an "Urban Development Rider," which was approved by Commission Order dated May 31, 2006, in Case No. 05-653-EL-ATA. Customers become eligible under that Rider by meeting criteria that include: locating in an existing building of 25,000 square feet or more which has been unoccupied for an extended period; maintaining specific minimum demand load requirements for a twelve month period; and the requested service necessary to serve the new demand load requirements must not result in additional investment by the company in distribution or transmission facilities. These are essentially identical to the criteria set forth in DP&L's proposal, which is not a coincidence. In formulating its proposal, DP&L reviewed Duke's application and the Commission's order approving it. In addition to the foregoing, Duke's Tariff also provides: "The customer will pay the full amount of the riders so indicated including the entirety of the applicable market-based standard service offer."⁵ Thus, a program under which the customer takes standard generation service in the context of an economic development distribution incentive—a main point of contention for OCC—has already been approved by the Commission.

While not entirely analogous to the DP&L's Economic Development Rider at issue in this case, the Commission has also in the past approved of another similar Duke program "Brownfield Redevelopment Rider," by Order dated December 3, 1998, Case

⁴ In fact, that program also had a predecessor program, "Business and Partners in Business Incentive Rate Rider," which expired May 31, 1997, making this current application the third generation in DP&L's lengthy history of implementing programs to encourage economic investment and resulting job growth in its Ohio service territory.

⁵ Duke Energy Ohio, P.U.C.O. Electric No. 19, Sheet No. 101.1, Page 1 of 2. (Emphasis added).

No. 98-585-EL-ATA, in which the Commission noted "[t]he Rider will benefit the State of Ohio by helping to promote development which will provide tax revenues and new jobs. The redeveloped sites will provide use for previously abandoned property and buildings. The Rider will also enable CG&E to utilize previously unused facilities to the benefit of its ratepayers.⁶ OCC's claim that DP&L's proposed rider is illegal is unsupportable given this history.

3. The Proposed Rider is Not Discriminatory.

Contrary to OCC's assertions, different charges for different customers do not necessarily mean discriminatory treatment in violation of R.C. 4905.33 and R.C. 4905.35.

R.C. 4905.33(A) provides, in pertinent part, as follows:

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 . . . 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.⁷

R.C. 4905.35(A) provides:

No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

R.C. 4905.33 and 4905.35 "do not require uniformity in utility prices and rates. A reasonable differential or inequality of rates may occur where such differential is based

⁶ Emphasis added.

⁷ Emphasis added.

upon some actual and measurable differences in the furnishing of services to the consumer."⁸

DP&L's Economic Development Rider is not prejudicial or unfairly preferential because the customers eligible for the incentive payments will take service under different circumstances from other non-residential customers, and there are measurable differences in furnishing services to the participating customers. First, in order to be eligible for the incentive payment, the new non-residential customer must sign a service agreement in which it commits to meeting certain criteria, including a specific threshold demand load, for a five year period. This is not the case with other non-residential customers, who make no such commitment to DP&L. Further, in order to be eligible, the new customer must hit certain demand milestones consistently for 12 consecutive months. Again, no such commitment is required of other non-participating customers.⁹

In addition, the initial investment in serving these new customers places them on a different footing than other new customers that choose to locate in a non-qualifying site. The facilities to serve new customers eligible for the Economic Development Program are already in place and ready to serve. A new business contemplating a move to the Dayton area can either move into the areas in which these existing facilities are waiting to serve their needs, or can move into new, undeveloped areas, which could require DP&L and various municipal or county agencies to make new capital investments in infrastructure. By encouraging a move into buildings and on property where the

⁸ Ohio Consumers' Counsel v. PUC, (2006), 109 Ohio St. 3d 328, 336, 847 N.E.2d 1184, 1193.

⁹ It is for these reasons that OCC's reliance on In re Complaint of the Ohio cable Telecommunications Association, Case No. 97-654-TP-CSS, 1997 Ohio PUC Lexis 539 (July 17, 1997) is misplaced. In that case, the service offered was identical, the cost of service was the same, and the customers to whom the rebates were given were *existing* customers who were identically situated to those not receiving rebates.

infrastructure already exists, DP&L's costs to provide the service are lower, justifying the incentive payment to the new business customer that is selecting what might not be its first choice in location.

Indeed, one of the cases upon which OCC relies in its brief actually supports the notion that rate differentials are permissible when circumstances between customers in the same class vary. In Migden-Ostrander v. PUC of Ohio (2004), 102 Ohio St. 3d 451, 459, the OCC argued that the commission unlawfully and unreasonably approved stipulations incorporating line-extension tariffs that were discriminatory, in violation of R.C. 4905.33 and R.C. 4905.35. Although conceding that the tariffs in question there allowed different charges for different customers, the Commission nonetheless noted—and the Supreme Court agreed—that the customers were situated differently:

Differences reasonably affecting the expense or difficulty of performing the same or similar service in different areas or circumstances may be reflected in differences in cost recovery rates, and . . . such differences are neither unlawful nor discriminatory.¹⁰

The fact is that the participating non-residential customers will not be taking service "under substantially the same circumstances and conditions" of other customers, and will in turn receive a cost saving mechanism as a result of the different footing. This does not unlawfully discriminate against any other customers, or provide any unfair advantage over other customers choosing not to locate on a previously abandoned piece of land.

¹⁰ Migden-Ostrander v. PUC of Ohio (2004), 102 Ohio St. 3d 451, 459, 812 N.E.2d 955, 963, citing Buckeye Lake Chamber of Commerce v. Pub. Util. Comm. (1954), 161 Ohio St. 306, 119 N.E.2d 51.

3. The Proposed Rider is Not "Predatory" or "Anti-competitive."

OCC argues based upon R.C. 4905.33(B)¹¹ that DP&L's economic development plan is somehow predatory and anti-competitive because it will allegedly provide free service or service for less than the actual cost for the purpose of destroying competition.¹² This assertion is simply incorrect. The text of the proposed tariff itself makes it clear that the service to be provided to Program participants is not free, below cost, or for the purpose of destroying competition.

First, the only service that is discounted is the distribution component of rates, which is not a competitive service. Second, because the Program requires that the distribution facilities necessary to serve the customer already be in place and that customers pay 100% of the generation, transmission and ancillary service charges, there is no basis for OCC's claim that the service is provided below cost. Third, the customer's commitment to take service, including generation service, from DP&L for five years permits a recovery of the fixed generation, transmission, ancillary, and distribution costs that were initially incurred to serve what are now vacant premises. Absent such a commitment, these fixed costs would be spread over a smaller customer base, which benefits no customer class nor DP&L. OCC's error is to view the incentive in a vacuum without consideration of the obligations on the part of the participating customer. To analyze the cost of service versus the participating customers' payments, the incentive payment must be viewed in the context of the five year commitment on the part of the

¹¹ § 4905.33(B) provides: "No public utility shall furnish free service or service for less than actual cost for the purpose of destroying competition."

¹² OCC Protest at 10-11.

incoming non-residential customer to meet certain demand criteria. The proposed Tariff provides, in part, as follows:

Customer shall enter into an agreement with the Company stating that expected load meets or exceeds all of the above criteria and that it is intended to continue to meet such criteria *for a minimum period of 5 years from the time new service is initiated.*¹³

The proposed tariff provides further:

If the Customer meets the above criteria for 12 consecutive months, DP&L will provide an incentive payment to the Customer in the amount of 50% of the distribution demand charges paid by the Customer over that 12 month period. The Customer may receive a maximum of two incentive payments which incorporate the first two 12 month periods which meet the above criteria.¹⁴

Consequently, of the five years in which the customer takes service from existing facilities that are currently sitting in place unused, the 50% of the distribution demand charge incentive is available for a maximum of only two years, while the new customer will pay the full demand charge for three years. The amount paid by the new non-residential customer over this five year period will exceed the incremental cost of service for that new customer, even with the temporary incentive reduction of one component of the bill. Thus the program as designed does not violate R.C. 4905.33(B).

Finally, for the reasons more fully explained earlier, DP&L is offering the distribution service incentive to encourage economic development in currently depressed areas and to offset revenue losses flowing from what are now idle capital investments made to serve what are now vacant buildings—not for the purpose of destroying competition. The new non-residential customer will contribute towards recovery of that lost revenue and, over time, will benefit all customers and all customer classes by helping

¹³ DP&L Application Exhibit A, Original Sheet No. D37, Page 1 of 2. (Emphasis added).

¹⁴ Id.

to contribute towards the fixed costs of DP&L's investments to provide generation, transmission, ancillary and distribution services.

C. OCC IS PREMATURE IN OBJECTING TO DP&L'S REQUEST TO DEFER THE COSTS OF THE PROGRAM BECAUSE DP&L MERELY SEEKS APPROVAL OF AN ACCOUNTING PROCEDURE AND OCC WILL HAVE AMPLE OPPORTUNITY TO VOICE THEIR CONCERNS REGARDING THE DEFERRAL WHEN DP&L FORMALLY SEEKS TO RECOVER THE COSTS THEMSELVES IN A FUTURE RATE PROCEEDING.

OCC's argument concerning the deferral puts the cart before the horse. The concerns raised by OCC, while unfounded, can more properly be addressed in any future proceeding by DP&L in which DP&L actually makes the application to recover the costs of the Economic Development Program. These proceedings haven't been filed yet, and OCC's attempt to be heard on subjects not yet before the Commission is premature and improper.

The Commission should exercise its authority at this time to grant DP&L's request with respect to the deferral for accounting purposes only. R.C. 4905.13 grants the commission authority to establish a system of accounts for public utilities and to prescribe the manner in which the accounts must be kept. The Commission has a great deal of discretion under R.C. 4905.13 and recognizing this, the Ohio Supreme Court "generally will not interfere with the accounting practices set by the Commission."¹⁵ As the Ohio Supreme Court has noted, "the Commission's authority pursuant to R.C. 4905.13 over public-utility accounting practices is distinct from the ratemaking statutes in

¹⁵ Consumers' Counsel v. Pub. Util. Comm. (1987), 32 Ohio St.3d 263, 271, 513 N.E.2d 243.

R.C. Chapter 4909."¹⁶ The Commission's accounting orders have been upheld by the Court in cases where the accounting procedure did not affect current rates and the ratemaking effect of the accounting order would be reviewed in a later rate proceeding.¹⁷

Here, DP&L is only seeking permission to defer the distribution costs of the Economic Development Program for later recovery, and OCC will have ample opportunity to be heard on the actual cost recovery at that time.

D. NO HEARING IS NECESSARY.

DP&L's entire application should be granted without hearing pursuant to R.C. 4909.18, which provides that, where an application proposes a new service, and it is not for an increase in any rate or charge, the Commission must set the matter for hearing only if it finds that the proposals may be unjust or unreasonable. Where a proposed tariff amendment proposes a new service, it is, as a matter of law, not for an increase in rates.¹⁸ DP&L's application should be granted without hearing.

III. CONCLUSION

DP&L's Economic Development Plan complies with Ohio law and serves the public policy of Ohio, which is precisely why initiatives substantially similar to DP&L's already have been approved by the Commission on several occasions. In addition, the accounting treatment that DP&L requests falls within the Commission authority, and

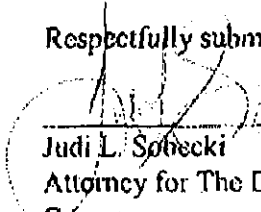
¹⁶ See Office of Consumers' Counsel v. Public Utilities Comm. (1983), 6 Ohio St.3d 377, 378-379, 453 N.E.2d 673; Dayton Power & Light Co. v. Pub. Util. Comm. (1983), 4 Ohio St.3d 91, 104, 447 N.E.2d 733.

¹⁷ Elyria Foundry Co. v. PUIC, 114 Ohio St. 3d 305, 309 (Ohio 2007), *citing to Consumers' Counsel v. Pub. Util. Comm.* (1992), 63 Ohio St. 3d 522, 524, 589 N.E.2d 1267; Dayton Power & Light Co., 4 Ohio St.3d at 104, 4 OBR 341, 447 N.E.2d 733.

¹⁸ Cookson Pottery v. Pub. Util. Comm. (1954), 161 Ohio St. 498 (1954), City of Cleveland v. Pub. Util. Comm. (1981), 67 Ohio St.2d 446 (1981), In the Matter of the Application of Southeastern Natural Gas Company for Authority to Amend its Tariffs to Establish New Services, Make Amendments to the Terms of Other Tariffs, and to Make Certain Housekeeping Corrections, Case No. 06-1251-GA-ATA, Entry (November 21, 2006).

granting the request will have no current rate impact on any customer class. Nothing in the proposal constitutes a change in rates and, thus, the Commission has and should exercise the authority to approve DP&L's application in whole without a hearing. DP&L's application should be approved so the program can be implemented without delay.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was served via First Class U.S. Mail, postage prepaid, this 20th day of November, 2007, upon the following:

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