FAX

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221	)))))))	Case No. 08-777-EL-ORD

REPLY COMMENTS OF THE DAYTON POWER AND LIGHT COMPANY

I. INTRODUCTION

On July 2, 2008, the Public Utilities Commission of Ohio ("Commission") issued an Entry seeking comments on the Commission Staff's ("Staff") proposed rule changes and new rules in connection with Ohio Administrative Code Chapters 4901:1-35 through 4901:1-38. The Dayton Power and Light Company ("DP&L") timely filed its comments for the Commission's consideration on July 22, 2008 pursuant to that Entry. By Entry dated July 28, 2008, the Commission extended until August 6, 2008 the time period for filing reply comments. DP&L respectfully submits its reply comments below. Section I through Section III address those proposals raised by the Ohio Consumer and Environmental Advocates (OCEA). Section IV addresses select comments of other stakeholders.

The OCEA's voluminous comments contain common threads running throughout. In light of the sheer number of comments, DP&L's reply will first highlight and address these common themes in general. While DP&L's general reply supports the rejection of

most if not all of the OCEA's proposals, certain of the OCEA's suggestions warrant more in-depth discussion. Section III of this brief addresses select proposals of the OCEA in more detail. DP&L stresses that by not specifically addressing each of the hundreds of changes proposed by the OCEA it is by no means agreeing to the OCEA's proposals, but instead asks that the Commission critically evaluate each of the OCEA's changes not specifically discussed in light of the arguments set forth in DP&L's general reply comments.

II. GENERAL REPLY COMMENTS

A. LEGISLATING THROUGH RULEMAKING

The vast majority of the proposed changes put forth by the OCEA attempt to make changes that far exceed the statutory requirements of the law that the rules are seeking to implement. For this reason alone, most of OCEA's proposals should be summarily rejected as being an inappropriate attempt to circumvent the legislative process. Throughout its comments, the OCEA seeks to put the Commission in the untenable position of re-legislating—rather than implementing—S.B. 221 as passed by the General Assembly and signed into law by the Governor.

Not only does the OCEA attempt to force the Commission into creating new law not found in S.B. 221, the OCEA's proposals also seek to expand law set forth in the new legislation outside of the statutory boundaries. For example, OCEA suggests that an earnings test should apply before rate adjustments take place, but the legislature clearly did not have that intent, stating instead that earnings are tested after the adjustments have been in place.

Another glaring example of the OCEA's attempt to re-legislate and expand S.B. 221 can be found at pages 21-23 of OCEA's brief where it proposes adding new sections to appendices A and B to introduce a "10 year procurement plan" requirement. Nowhere in S.B. 221 is there such a mandate, and this example clearly demonstrates the OCEA's overreaching in its comments.

The OCEA's attempt to make new law or expand existing law through this rulemaking process is inappropriate. For these reasons, DP&L respectfully suggests that each and every proposal throughout their brief which seeks to impose new legal requirements which are not found in S.B. 221 or which attempt to expand the law beyond what is set forth in the statutes should be summarily rejected by the Commission.

B. PRESUMPTION OF INAPPROPRIATE BEHAVIOR

Another troubling aspect of the OCEA's comments is an underlying theme which defaults to a presumption of wrongdoing or bad behavior on the part of the electric utilities. An example of this comes at pages 28-32, where the OCEA suggests language be added to the text of Appendix B to state: "the Electric Utility must demonstrate that neither the Electric Utility, its affiliates, nor the employees of the electric utility nor the employees of its affiliates can attribute revenues improperly...."[1] Another example of the OCEA's advocacy for a presumption of improper behavior follows closely: "the Electric Utility must demonstrate that neither the Electric Utility nor the affiliates incent employees to improperly attribute costs or revenues...."[2]

This theme recurs throughout the OCEA's comments and underlies many of its proposals to impose more regimented, detailed, and voluminous filing requirements on

[1] Emphasis added.

[2] Id.

electric utilities, rather than permitting the flexibility which allows the electric utility to carry its burden to demonstrate compliance in the best way possible in each given situation. This position by the OCEA does not seem to seek to clarify and refine the rules to make for better procedure, but is apparently designed to permit OCEA to propose future disallowances without having to make any showing whatsoever of improper behavior. Rather than presenting evidence of impropriety or even alleging impropriety, the OCEA could propose disallowances based solely on an argument that the utility had failed to disprove a negative presumption.

Each of the OCEA's requests to alter proposed rules to either implicitly or, in the cases above, expressly contain a presumption of impropriety on the part of the electric utilities should be rejected outright.

C. WRITING DISINCENTIVES INTO THE RULES

Many of OCEA's proposals are misguided and as such will have the effect of creating disincentives to both the utility and to customer participation in programs which the legislature sought to encourage. An example of this can be clearly seen in the OCEA's comments with respect to OAC 4901:1-38-03 (Economic Development Schedule). The OCEA is proposing to add to the amount of information a customer must submit to qualify for the Economic Development Schedule. They rely on an older statute 4935.31(E) for program definitions and operations. In addition the OCEA is proposing that the delta revenues (that result from discounted rates) be recovered 50% from customers and 50% from utility shareholders. The OCEA also suggests that the delta revenues be recovered on a per kWh basis.[3] The OCEA puts forth no valid argument for

[3] OCEA Comments, p. 87.

why the electric utility's recovery ought to be limited, but doing so creates a disincentive to the utility to work with state agencies to promote the state policy that will help Ohio consumers, OCEA's underlying constituents, by providing jobs and economic growth to the state.

The OCEA's proposals which will result in disincentives to customer participation in any economic development programs are even greater. For example, the OCEA suggests that the term of the incentives shall not exceed the term of the ESP although it makes no suggestions why the term of the incentives is in anyway related to the term of the ESP.[4] The OCEA wants to impose stringent third-party monitoring of customer behavior: "an independent third party retained by the staff, shall perform necessary monitoring and evaluation activities to assure customer eligibility."[5] This will be costly to administer and dollars spent on monitoring customer behavior will have zero impact in actually bringing jobs to this state.

In addition, the OCEA wants all customer information subject to disclosure with no automatic confidentiality extended to cover the data.[6] The OCEA is also proposing that economic development customers must disclose all information concerning these programs and this information must be made available to OCEA and parties to the proceeding. According to the OCEA if information is deemed confidential, trade secret or proprietary the customer should request confidentiality by the commission rather than the PUCO automatically making it so. Requesting the economic development customers to disclose all information relating these programs will make it administratively

---

4 Id. at 85.

5 Id. at 87.

6 Id. at 86-87.

burdensome and time-consuming for these customers. This third group of OCEA proposals which suggest such stringent, oppressive rules so as to have the effect of creating disincentives run contrary to the policy underlying S.B. 221 and should be rejected.

D. RELIABILITY STANDARDS

A fourth theme running through many of the OCEA's comments involves reliability standards. The OCEA's attempt inject new, more stringent reliability standards into the rules implementing S.B. 221 is unnecessary and at a minimum, this is the wrong proceeding in which to advance the proposals. Reliability standards are properly addressed in the PUCO Electric Service and Safety Standards (ESSS) rules and specifically under 4901:1-10-10 (Rule 10). To the extent the OCEA's comments seek to interject reliability standard rulemaking into this rulemaking proceeding, each of their comments to that end should be rejected.

III. SPECIFIC REPLY COMMENTS

A. 4901:1-35 STANDARD SERVICE OFFER

1. 4901:1-35-03 Filing and Contents of Application

As described above, much of the content in the OCEA's comments represents a clear attempt to re-legislate or expand the law. Perhaps the most blatant example of this appears at pages 39 through 41 where they address O.R.C. 4928.143(B)(2)(h) by attempting to develop certain conditions under which utilities must file an application for a rate increase under O.R.C. 4909.18 to recover the cost of the infrastructure improvement. This directly contradicts O.R.C. 4928.66(D) which expressly provides that such application "shall not be considered an application to increase rates." Clearly the

drafters of S.B. 221 did not agree with OCEA's position and did not think infrastructure modernization cost recovery should trigger the need for an application to increase rates under O.R.C. 4909.18. Therefore OCEA's recommendation must be rejected.

The OCEA attempts to place still further restrictions on infrastructure modernization cost recovery through a "current revenue" test. This is yet another attempt to restrict infrastructure modernization improvements—something that has no basis of support in S.B. 221.

For these reasons none of OCEA's comments regarding the rules for implementing O.R.C. 4928.143(B)(2)(h) or the cost recovery for infrastructure modernization should be incorporated into the rules.

2. 4901:1-35-05 Technical Conference

The OCEA's proposal with respect to the technical conference takes a legislative mandate seeking to encourage cooperation and collaboration among stakeholders and turns it into an adversarial proceeding.[7] The OCEA's proposal would mandate utility personnel attendance at the conference and further compel their "testimony." Technical conferences are intended to be an informal opportunity to discuss a utility's filing, not a hearing where utility representatives are questioned. Should technical conferences become hearings utility representatives will become witnesses and this would totally change the dynamic of the conference. In addition, the OCEA's proposal would mandate that the Commission Staff file comments and propose alternative methodologies to the application—regardless of whether the Staff deems it necessary. The OCEA's proposals with respect to the technical conference are bad policy for purposes of implementing S.B.

[7] Id. at 48-49.

221 and further set a dangerous precedent moving forward for future technical conferences. This proposal must be rejected.

B. 4901:1-37 CORPORATE SEPARATION

As an initial matter, several of the OCEA's proposals contain superfluous language which would not add clarity to the rules, but instead inject confusion. For example, several of the OCEA's comments propose adding the phrase "including employees of an electric distribution utility" after proposing actions or a restraint of action upon an electric distribution utility. In the proposed change to OAC 4901:1-37-04(A)(1), the OCEA suggests the following language be added: "each electric utility, including employees of an electric distribution utility . . ." First, the addition of the phrase "employees of an electric distribution utility" is unnecessary if the OCEA seeks to impose obligations upon an electric distribution utility. Obviously, an electric utility can only act through its employees. Listing employees in a separate category makes no sense, and indeed, can cause additional confusion just by the nature of it being a separate category. For example, the inclusion of such language could be construed as meaning that the OCEA is proposing the employees of a utility be held personally liable when acting on behalf of their electric utility employer. To the extent the OCEA proposes changes to the rules which would include "employees of an electric utility" or words to that effect, their recommendations should be rejected.

The OCEA's proposals also appear to merely rewrite the rules originally proposed by Commission Staff without materially changing the effect. For example the OCEA proposes amending OAC 4901:1-37-04 (A)(5) by adding "the Commission may consider alternative cost allocation methods if fully allocated costs are not representative of the

benefit received . . ." An alternative cost allocation method that does not fully allocate costs is not a allocation method, but rather a disallowance and should be ordered only if the requisite findings for a disallowance are made. Any concern that a particular allocation methodology fails to distribute costs appropriately across customer classes, is appropriately addressed within a specific proceeding by proposing a different allocator.

The OCEA's comments with respect to section 4901:1-37-04 (A)(6) would require the electric utility to "Demonstrate that transactions are made in accordance with rules or regulations approved by" FERC, SEC and PUCO.[8] This goes beyond requiring utilities to operate within the law and even beyond requiring utilities to have procedures designed to ensure that they operate within the law. This modification would require that a utility actually show that all transactions are in accord with rules and regulations without any allegation or reason to believe that the utility has acted improperly. Nowhere does the new legislation, or any other law for that matter, create a presumption that the utility has done something wrong until it can prove otherwise.

The OCEA's suggested change to 4901:1-37-04 (B)(11) would require that the corporate separation plan be approved by the Board of Directors. Such a proposal rewrites Ohio Corporate law, which establishes the standards applied for what types of actions can be taken by a corporation by its managers, by its Board, or by vote of its shareholders. Moreover, the OCEA seems to imply that the utility can somehow be held more accountable for compliance with its separation plan if its Board has approved it; yet if the utility proposes a plan and it is approved by the Commission, the utility is legally responsible for complying with that plan. It is no more or less obligated because its Board has expressly approved the plan. This proposed change is unnecessary.

[8] Id. at 68.

For the same reasons, the OCEA's amendment to section (B)(13), which would require corporate separation complaints to go to the Board instead of legal counsel, should be rejected. In addition, imposing this requirement would only delay the investigation by adding additional layers of administration to the process. The OCEA's proposal would therefore hinder the goals sought to be served by this provision in the rules.

Finally, there is no support in S.B. 221 for OCEA's language it seeks to have added as section 4901:1-37-06 (C), which as proposed by OCEA would allow interested parties to intervene in a utility's filed revised plan. The corporate separation plan is a set of procedures that implement the Commission's rules. It is those rules that the utility must follow and where those rules provide, an aggrieved party can file a complaint with the Commission. There is no need to make room for intervention in routine amendment filings.

C. 4901:1-38 REASONABLE ARRANGEMENTS

1. 4901:1-38-03 Economic Development Schedule

The OCEA suggests that customers should not pay more than fifty percent of the cost of the economic development riders. Adopting this proposal would violate the law. O.R.C. 4905.31 gives the utilities the right to recover cost incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program. Reducing the percentage of the delta revenue that a utility can recover will run afoul of the statute. This proposal must be rejected.

2. 4901:1-38-05 Unique Arrangements

The OCEA protests that the unique arrangements chapter does not provide any clarification on when, what or how. It is alleged that there is no indication how the Commission will evaluate, monitor and regulate these arrangements, and no clarification when these arrangements may be approved. Therefore, OCEA recommends that the Commission delete this chapter.

The legislature recognized that not all special circumstances that may arise in the future can be identified and defined in advance. Not having a precise "when, what or how" is what makes these special arrangements "special." Attempting to create standardized requirements for reviewing non-standard circumstances would be a meaningless exercise. Under "standard" conditions, the Commission can develop standard requirements and standard tariff language that would precisely define "when, what or how." But, the legislature is relying on the Commission to exercise its good judgment as conditions warrant, recognizing unique circumstances as they arise. These unique arrangements will give the utilities the flexibility to work with their customers while having commission oversight. Unique arrangements are mandated by S.B. 221 and deleting this chapter would conflict with the law.

IV. REPLY COMMENTS SUPPORTING SELECT COMMENTS OF OTHER STAKEHOLDERS

A. REPLY TO COMMENTS OF DUKE ENERGY OHIO

DP&L agrees with Duke Energy Ohio's comment that "[t]here is, however, one issue that the Commission might clarify by rule. Revised Code Section 4928.143(F) requires the Commission to annually consider utility earnings under its ESP, 'if any such adjustments resulted in excessive earnings…' There are many adjustments that may be

proposed during and ESP that cannot result in excessive earnings. For example fuel cost recovery, a simple pass through of actual costs, cannot affect earnings."[9] A fuel clause or for that matter any cost recovery clause that is a pass through of actual costs cannot, by definition, affect earnings and therefore its existence cannot result in excessive earnings and should not trigger an earnings test. The performance of this cost recovery mechanism will be examined within the context of the annual review to ensure the actual cost pass through.

B. REPLY TO COMMENTS OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

DP&L agrees with the combined Comments of Ohio Edison, CEI, and Toledo Edison which state:

> Am. Sub. S.B. 221 does not impose an express requirement that every ESP application achieves the policy goals set forth in R.C. 4928.02, and therefore the Commission's rules should not impose such a requirement.

To impose the additional standard of achieving state policy places an unreasonable burden of proof on the utilities. DP&L agrees that it is reasonable to expect that applications would be generally consistent with the state policy goals; however imposing a requirement to demonstrate achievement of state policy goals as a precondition to granting an ESP application would be unreasonable.

In addition, Ohio Edison, CEI, and Toledo Edison suggest that if a customer applies to the Commission for a unique arrangement, there should be a requirement that the utility also consent to the terms prior to the Commission approval.[10] DP&L agrees. It

---

[9] Duke Energy Comments, p. 5.

[10] Ohio Edison, CEI, and Toledo Edison Comments, p. 31.

would be unfair and inefficient for the Commission and the customer to develop a unique arrangement which the utility would not be able to implement—for example an arrangement including complex billing that the utility's billing system can not handle without significant, costly modifications. The utility's consent to the unique arrangement is critical to its feasibility.

C. REPLY TO COMMENTS OF THE ALLIANCE FOR REAL ENERGY OPTIONS

The Alliance for Real Energy Options (AREO) suggests with respect to OAC 4901:1-38 that an economic development applicant must "agree to forfeit any benefits if it fails to comply with this rule or the application submitted to the commission by the applicant contains false or misleading information."[11] DP&L agrees with this proposal. Any customer found to have provided false or misleading information should be required to forfeit any future benefits and be required to pay back any benefits it received under false pretenses.

D. REPLY SUPPORTING COMMENT OF THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

Finally, DP&L agrees with one addition proposed by the OCEA. With respect to special arrangements, the OCEA suggests a new subsection be added to OAC 4901:1-38-09 to permit the intervention of any interested stakeholder in an electric utility's request for a special arrangement so long as the potential intervenor satisfies the requirements set forth in O.R.C. 4903.221.[12] This proposal would serve the policy of openness and transparency in these arrangement and DP&L supports this amendment to the rules.

---

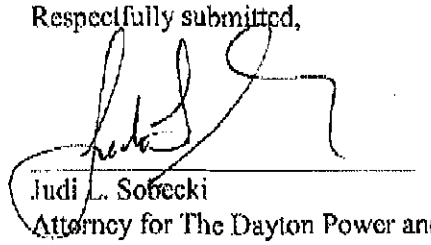
[11] AREO Comments to Section 4901:1-38, pages 4 and 6.

[12] OCEA Comments, at p. 102-103.

V. CONCLUSION

DP&L appreciates the opportunity to reply to the initial comments submitted by other stakeholders and strongly urges the Commission to reject the proposals set forth by the Ohio Consumer and Environmental Advocates, as they overreach the policy and law set forth in S.B. 221, create disincentives to participation, and create inappropriate presumptions which would amount to a shifting legal standard not found anywhere else in the law or rules.

Respectfully submitted,



Judi L. Sobecki
Attorney for The Dayton Power and Light Company
1065 Woodman Drive
Dayton, OH 45432
937-259-7171
Judi.Sobecki@DPLINC.com