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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Joint Application of)
The Dayton Power and Light Company)
and Airgas, Inc. for Approval of a) Case No. 09-702-EL-AEC
Reasonable Arrangement to Incorporate)
Customer Participation in PJM's Demand) Case No. 09-1700-EL-UNC
Response Programs into DP&L's Demand)
Reduction Programs.)

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**REPLY TO DP&L'S COMMENTS ON OCC'S MOTION TO INTERVENE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

On September 14, 2009, the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Intervene in this utility-related proceeding. In this case, The Dayton Power and Light Company ("DP&L" or "Company") and Airgas, Inc. ("Airgas" or "Customer") (collectively, "Applicants") jointly seek approval of a special arrangement under Ohio Adm. Code 4901:1-39-08(B). Approval of the arrangement requested by the Applicants would permit Airgas, in exchange for a payment of \$46,500.00, to commit its demand-response capabilities for integration into DP&L's demand reduction program. Approval would also allow DP&L to attribute the energy reductions associated with Airgas' demand response capabilities to the peak demand reduction requirements DP&L must comply with under R.C. 4928.66(A)(1)(b).

On October 2, 2009, DP&L filed "Comments" on OCC's Motion to Intervene. In its Comments, DP&L professed that it "does not oppose OCC's motion to intervene."¹

¹ The Dayton Power and Light Company's Comments on Motion to Intervene by the Office of the Ohio Consumers' Counsel at 2.

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In fact, DP&L twice stated its non-opposition to OCC's Motion to Intervene.² DP&L's non-opposition is consistent with the form of DP&L's filing, which is not the memorandum contra (to a motion) that is allowed by Ohio Adm. Code 4901-1-12. Rather, DP&L filed Comments, which are not allowed under the PUCO's rules with regard to OCC's Motion to Intervene. The Commission should strike or not consider DP&L's Comments because there is no legal basis for such a filing. The PUCO should grant OCC's Motion to Intervene.

DP&L did use the occasion of its non-opposition to OCC's intervention to make comment with regard to the criteria for intervention set forth in R.C. 4903.221(B). Therefore, OCC is filing this reply even though DP&L does not oppose OCC's intervention.

Among other arguments presented in its Comments, DP&L claims that residential customers are not impacted in any way by the special arrangement proposed by DP&L and Airgas,³ residential customers have no direct pecuniary interest in the outcome of this case,⁴ and intervention by OCC will unduly prolong or delay the case.⁵

² Id. at 2, 5.

³ Id at 2.

⁴ Id at 2.

⁵ Id at 5.

II. ARGUMENT

A. **OCC Meets The Test For Intervention Under R.C. 4903.221 Because Residential Customers May Be Adversely Affected Economically And Otherwise If The Special Arrangement By The Applicants Does Not Result In An Actual Demand Reduction.**

In its Comments, DP&L contends that OCC's use of language such as "may be adversely affected" and "could result in a significant impact on customers" demonstrates the "speculative nature of [OCC's] claim."⁶ DP&L's argument ignores the express, statutory test for intervention that the Ohio General Assembly set forth in R.C. 4903.221, which provides, in part, that any person "who may be adversely affected" by a PUCO proceeding is entitled to seek intervention in that proceeding.⁷ Rather than straining to allege an adverse affect, as DP&L contends,⁸ OCC is simply applying the specific language of the statutory test in its Motion to Intervene.

OCC meets the test set forth in R.C. 4903.221 because the interests of Ohio's residential consumers may be adversely affected if the proposed special arrangement between DP&L and Airgas results in a failure by DP&L to reduce actual peak demand. Such a failure to reduce DP&L's peak demand could result in a significant economic impact on customers, because reducing peak demand through actual peak reduction efforts allows electric utilities to avoid building expensive new peak generation facilities or having to purchase peak power through a bilateral contract or from the wholesale market. Without actual reductions in peak electricity demand, the future need for new

⁶ The Dayton Power and Light Company's Comments on Motion to Intervene by the Office of the Ohio Consumers' Counsel at 3.

⁷ R.C. 4903.221.

⁸ The Dayton Power and Light Company's Comments on Motion to Intervene by the Office of the Ohio Consumers' Counsel at 3.

generation capacity or third-party electric purchases becomes more likely. Both new generation capacity and third-party electric purchases could impact DP&L's customers through higher rates.

DP&L claims that OCC's Motion to Intervene is based on a false premise that arrangements such as the one at issue in this case will make the future need for more generation capacity more likely.⁹ DP&L states, "PJM's demand response programs do offer an effective means for reducing the need for construction of additional generation capacity within the PJM region, and Airgas' participation in the program reduces the demand for electricity within the DP&L zone."¹⁰ But in light of the Commission's decision in the AEP ESP case,¹¹ the Commission's interpretation of what constitutes demand reduction in the draft green rules,¹² and the Staff's perspective as noted in the FirstEnergy ESP case,¹³ OCC's position is reasonable and DP&L's assertion appears to be the false premise.

⁹ Id. at 2-3.

¹⁰ Id. at 2.

¹¹ In AEP ESP Case No. 08-917-El-SSO, the Commission Order issued on March 18, 2009 was specific that only "actual" peak demand reductions will meet the peak demand reduction compliance requirement of SB 221" (pages 26-27). To the extent that PJM's interruptible peak demand reduction program at a minimum requires only a one hour "test curtailment," that program element may fail to satisfy the Commission's requirement of "actual" interruptions, and may not lead to actual curtailments.

¹² In *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Amended Substitute Senate Bill No. 221*, Case No. 08-888-EL-ORD, the Commission's Entry on Rehearing at paragraph 12 states, "The Commission believes that the benefits of SB 221 cannot be realized unless real peak-demand reductions are realized."

¹³ In *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO at 45, the Commission's Opinion and Order notes, "As for interruptible programs counting toward annual benchmarks, Staff believes that such reductions would have to actually occur to be credited (Staff Ex. 2 at 12-13)".

By reducing peak demand through actual peak reduction efforts, electric utilities can avoid building new peak generation facilities or avoid having to purchase peak power through a bilateral contract or from the wholesale market. This saves customers money. But arrangements such as the one proposed by DP&L and Airgas could cost customers, economically and otherwise. Under their proposed arrangement, Airgas agrees to reduce demand, but Airgas can circumvent the arrangement by paying certain financial penalties. This results in no actual peak demand reduction and the potential that future peak demand could surpass existing generation capacity. In this scenario, in which insufficient generation capacity has been built based on the DP&L-Airgas notion of demand reductions, all customers, including residential customers, could be adversely affected by wholesale pricing spikes, voltage reductions (e.g. rolling blackouts) and reduced reliability. These are further ways that DP&L's residential customers may be adversely affected by the outcome of this case.

B. Residential Customers Would Be Further Adversely Affected Economically If They Are Made To Pay For A Portion Of PJM's Peak Load Reduction Programs That Is Later Paid For By Other DP&L Customers.

In its Comments, DP&L mistakenly alleges that OCC has made a false claim regarding the payment for PJM's administration of its peak demand reduction programs.

DP&L states:

The OCC next claims that approval of the agreement between DP&L and Airgas would result in all of DP&L's customers – including residential customers – paying twice for PJM's administration of its peak demand reduction programs. This claim, too, is false.¹⁴

¹⁴ The Dayton Power and Light Company's Comments on Motion to Intervene by the Office of the Ohio Consumers' Counsel at 4.

But in its Motion to Intervene, OCC stated, “The costs to implement and deliver these programs, however, would later be paid for a second time by **other DP&L** customers (as demonstrated by the \$46,500 cost of this contract), with no additional interruption.”¹⁵ (Emphasis added.) Thus, while OCC rightly advocates that residential customers should not be required to fund DP&L’s demand reduction programs when **other DP&L** customers are likewise funding them, OCC is not claiming that residential customers will pay twice. Nevertheless, the fact remains that if the proposed arrangement between DP&L and Airgas is approved, Airgas will be paid twice for the same interruption, i.e., once by PJM and once by DP&L.

C. OCC’s Intervention Will Not Unduly Prolong Or Delay The Proceeding.

In its Comments, upon repeating its assertion that DP&L “does not oppose” OCC’s intervention,¹⁶ DP&L presents the discordant claim that “since residential customers simply will not see a direct pecuniary impact from the outcome of this case, the mere participation by a non-interested party will inherently cause unnecessary delay.”¹⁷ Further, DP&L warns the Commission of “the potential of setting precedent for the OCC’s intervention in these types of proceedings” which “presents a risk of delay in similar proceedings for all utilities in the future, by creating a bottleneck in the system.”¹⁸

¹⁵ OCC’s Motion to Intervene at 3-4.

¹⁶ The Dayton Power and Light Company’s Comments on Motion to Intervene by the Office of the Ohio Consumers’ Counsel at 5-6.

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 5.

As demonstrated above and in its Motion to Intervene, residential customers have a pecuniary interest in this case, principally because the improper treatment of the demand reduction issue could significantly impact residential customers through higher rates. Thus, OCC's participation is crucial to this proceeding and DP&L's contention that OCC will "inherently" cause unnecessary delay is unfounded. Rather, 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.

The Commission has repeatedly stated that it will not grant an intervention to a party concerned with precedent rather than the outcome of the case.¹⁹ Nor should the Commission deny an intervention on DP&L's basis that such intervention would establish precedent. Importantly, DP&L's warning is irrelevant to the test for intervention set out in R.C. 4903.221(B).

D. OCC's Intervention Is Necessary To Provide For The Full Development Of The Issues In This Case.

OCC—on behalf of residential consumers—has an interest in seeing effective demand reduction programs implemented through a proceeding taking no longer than necessary and appropriate. Given the opportunity to intervene, OCC intends to contribute the benefit of its experience in this subject area without unduly prolonging or delaying the proceeding, in accordance with R.C. 4903.221(B)(3). OCC will advocate that R.C. 4928.02(D) clarifies that a goal of S.B. 221 in establishing the benchmarks under R.C. 4928.66 is to:

¹⁹ *In re Complaint of Dominion Retail v. the FirstEnergy EDUs*, Case No. 00-2526-EL-CSS, Entry at 2 (April 19, 2001).

Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure.

OCC will further advocate that actually reducing all customers' demand, through effective demand reduction efforts directed at industrial, commercial or residential demand, will benefit residential customers through the reduced demand for electricity, which will reduce the price for all customers, including residential customers. The economic effect of demand reduction efforts is a central OCC interest in this case and demonstrates that OCC's positions are directly related to the merits of the proposed agreement between DP&L and Airgas.

The Company fails to recognize that OCC will have a different role in this case than the Applicants, the Commission, and its Staff. For example, OCC's role will include presenting arguments and information on behalf of residential consumers regarding the proper methodology to be used and relied upon to determine demand reduction under S.B. 221. OCC may provide suggestions and offer alternatives to the methodologies proposed by the Commission, the Staff or the Applicants. These special arrangement cases are new for the Commission and all interested parties. This case provides much opportunity for the Applicants, the Commission, the Staff and OCC to learn about existing and potential demand reduction programs and the challenges and benefits of various approaches to demand reduction. Allowing OCC to participate will better ensure that the intended demand reduction benefits accrue to all customers. Thus, OCC's intervention will significantly contribute to fully developing and equitably resolving the factual and legal issues, and not unduly delay this proceeding.

E. DP&L's Comments Were Improperly Filed By Electronic Means In This Case.

Commission entries in Case Nos. 06-900-AU-WVR and 07-535-AU-ORD establish that certain document types and cases with certain designations may be electronically filed. Those cases designated by the letters AEC or EEC, such as the instant cases, are not among the cases designated as eligible for electronic filing. Therefore, DP&L's Comments do not conform to the above-cited authority and should be stricken.

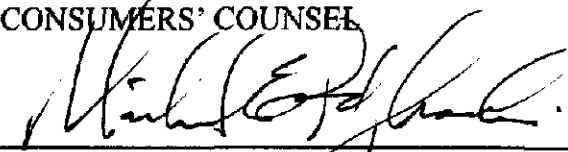
III. CONCLUSION

OCC has demonstrated that it has the authority, jurisdiction, and interest under Ohio law, PUCO rule, and Ohio Supreme Court precedent²⁰ to warrant its intervention in this proceeding on behalf of the residential customers of DP&L. Those residential consumers should be represented and protected, and OCC is uniquely qualified and statutorily designated to do so. Accordingly, the Commission should grant OCC's Motion to Intervene.

²⁰ *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940 at paragraphs 18-20.

Respectfully submitted,

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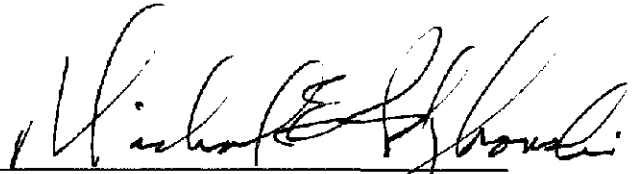
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply to DP&L's Comments on OCC's Motion to Intervene has been served upon the below-named persons via regular U.S. Mail Service, postage prepaid, this 13th day of October, 2009.


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