

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Joint Application of)	
The Dayton Power and Light Company)	
and Appleton Papers, Inc. for Approval of)	Case No. 09-1701-EL-EEC
a Reasonable Arrangement to Incorporate)	
Customer Participation in PJM's Demand)	
Response Programs into DP&L's Demand)	
Reduction Program.)	

**APPLETON PAPERS, INC.'S MEMORANDUM CONTRA
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
MOTION TO INTERVENE**

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I. INTRODUCTION

On December 17, 2009, Appleton Papers, Inc. ("Appleton") and The Dayton Power and Light Company ("DP&L") filed an Application for Approval of a Reasonable Arrangement to Incorporate Customer Participation in PJM's Demand Response Program into DP&L's Demand Reduction Program ("Application"). On February 3, 2010, the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Intervene ("Motion"). Pursuant to Rule 4901-1-12(B)(1), Ohio Administrative Code ("O.A.C."), Appleton hereby respectfully requests that the Public Utilities Commission of Ohio ("Commission") deny OCC's Motion for the reasons set forth below.

II. INTERVENTION STANDARDS

Section 4903.221, Revised Code, sets forth the statutory criteria for intervention in a Commission proceeding. The Commission must weigh:

- (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 intervention by the prospective intervenor will unduly prolong or delay the proceedings; and
- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

A party seeking to participate must also satisfy the Commission's own intervention standards, which require a party to have a real and substantial interest in the proceeding.¹ The person must also be so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest.² The individual enumerated qualifications embedded in the Commission's rules largely mirror the statutory criteria, but include an additional prong that requires the Commission to consider the extent to which the person's interest is represented by existing parties.³

A. OCC has not made a showing that residential consumers have a real and substantial interest in this proceeding.

In support of its Motion, OCC oddly claims that the "interests of Ohio's residential consumers may be 'adversely affected' by this case, especially if the consumers were unrepresented in a proceeding where an agreement between DP&L and Appleton could result in the failure of DP&L to reduce actual peak demand, contrary to the purpose of R.C. 4928.66(A)(1)(b). Failure to reduce actual peak demand undermines the statutory benchmarks imposed by Ohio law and consumers could be significantly and negatively impacted." Motion at 2. As discussed below, OCC's claim in support of its Motion is

¹ Rule 4901:1-11(A)(2), O.A.C.

² *Id.*

³ Rule 4901:1-11(B)(5), O.A.C.

based on conjecture about possible future outcomes that are, at best, far flung. OCC's claim is also based on a misunderstanding of the law. Accordingly, OCC does not meet the criteria for intervention in this proceeding.

Rule 4901-1-11(A)(2), O.A.C., requires a party seeking intervention to make a showing that it has a real and substantial interest in the proceeding. OCC did not and cannot identify any real and substantial interest that residential consumers may need to protect as a result of any issues that may be resolved in this proceeding. In fact and as explained below, if the Commission approves the Application and it results in compliance costs that are subject to recovery from customers, none of the costs associated with the proposed agreement will be borne by residential consumers.

The Stipulation and Recommendation approved by the Commission in DP&L's electric security plan ("ESP") case⁴ clearly provides that any costs and lost revenue related to DP&L's programs designed to meet statutory energy efficiency and demand reduction targets will be allocated between the respective customer classes. Consequently, any costs or lost revenue resulting from the agreement between Appleton and DP&L, assuming that there are any, are to be allocated to non-residential customers.

Unable to claim that the Application subjects residential customers to any real adverse economic consequence, OCC resorts to layered assumptions about possible connections between the Application and the interests of residential customers. More specifically, OCC claims that residential customers "may" be adversely impacted if they are unrepresented in this proceeding addressing an agreement that "could" result in no

⁴ *In the matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 08-1094-EL-SSO, et al. ("ESP Case"); Stipulation at 6, Paragraph 5 (February 24, 2009).

reduction in actual peak demand that, in turn, “could” result in a negative impact on residential customers. Motion at 3. Connecting a series of speculative outcomes does not show the real and substantial interest that is required by Rule 4901-1-11(A)(2), O.A.C. OCC has not demonstrated how residential customers are so situated that the disposition of this proceeding may, as a practical matter, impair or impede its ability to protect the interests of its statutory clients.

Finally, in directly addressing the statutory requirement that the Commission must weigh “the nature and extent of a prospective intervenor’s interest,”⁵ OCC asserts that OCC itself, instead of its residential customers, has an interest in this proceeding. Rather than addressing its clients’ interests, OCC asserts that “OCC’s interest is representing the residential consumers of DP&L and to ensure a sufficient opportunity to review all the facts of this proposed arrangement.” Motion at 2. This assertion hardly presents an acceptable basis for intervention in this case and wrongly implies that OCC has the right, power and authority to act in the capacity that the General Assembly has reserved exclusively for the Commission. OCC’s own notion about what it might like to do as an agency of the State of Ohio is not a legitimate basis for defining the scope of OCC’s opportunity to intervene in Commission proceedings. It is the Commission’s responsibility, not OCC’s, to ensure that a review of all the facts relevant to the application are made.

B. OCC has advanced no legal position in this proceeding.

OCC has not advanced any specific legal position with respect to the Application. Instead, OCC says that its “... advocacy for consumers will include advancing the

⁵ Section 4903.221(B)(1), Revised Code.

position that DP&L may not reduce actual peak demand under the proposed reasonable arrangement” Motion at 3. Again, OCC has dodged the specific statutory standard for intervention⁶ in favor of speculation. OCC also ignores that the required statutory standard for peak demand reduction programs to be implemented pursuant to Section 4928.66(A)(1)(b), Revised Code, is that they be “designed to achieve” reductions in peak demand. The demand response programs of PJM are clearly designed to achieve reductions in peak load within the PJM system and within DP&L’s territory and the agreement that is reflected in the Application is a means of achieving peak demand reduction.

Additionally, OCC relies on misrepresentation of fact and an erroneous reading of a Commission order to support its request. OCC claims that the agreement will result in Appleton “being compensated twice” for its demand response capabilities and that the Commission has previously prohibited simultaneous participation in agreements of the kind proposed herein and in PJM demand response programs. Motion at 1. Both statements are wrong.

OCC says that the Commission has already prohibited the kind of arrangement proposed in this case, citing a recent case in which the Commission said, “... AEP-Ohio customers under reasonable arrangements with AEP-Ohio, including, but not limited to, EE/EDR, economic development arrangements, unique arrangements, and other special tariff schedules that offer service discounts from the applicable tariff rates, are prohibited from also participating in PJM DRP, unless and until the Commission decides

⁶ Section 4903.221(B)(2), Revised Code.

otherwise in a subsequent proceeding.”⁷ But OCC has not asserted that Appleton is currently under a reasonable arrangement with DP&L because no such arrangement exists or it would have been on file with and approved by the Commission. Furthermore, the reasonable arrangement proposed herein is, indeed, before the Commission for its consideration as the vehicle to commit Appleton’s demand response capabilities to DP&L in accordance with Ohio’s portfolio requirements. Indeed, Section 4928.66(A)(2)(d), Revised Code, specifically states that “Division (A)(2)(c) of this section shall be applied to include facilitating efforts by a mercantile customer ... to offer customer-sited demand-response, energy efficiency, or peak demand reduction capabilities to the electric distribution utility as part of a reasonable arrangement submitted to the commission pursuant to section 4905.31 of the Revised Code.” Contrary to OCC’s assertion, this particular arrangement has not yet been considered by the Commission, let alone prohibited by it, and is simply the vehicle for getting Appleton’s customer-sited capability committed to DP&L so that such capability is eligible to be considered for purposes of measuring compliance with Ohio’s portfolio requirements.

OCC’s allegation that Appleton is being compensated twice for its demand response capabilities is equally false and misleading. The purpose of the Application is to allow Appleton’s demand response capabilities to be committed to DP&L at no cost to DP&L’s consumers, thereby reducing the ultimate cost of DP&L’s compliance with the statutory portfolio requirements. Section 4928.66(A)(2)(c), Revised Code, explicitly permits exemption of mercantile customers from the rider mechanism designed to

⁷ *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporation Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, et al., Entry on Rehearing at 41 (July 23, 2009).

permit DP&L to recover the demand reduction costs in exchange for a commitment of customer-sited capabilities to an electric distribution utility's peak demand reduction programs, if the Commission determines that the exemption reasonably encourages the commitment. In this case, the rider exemption is being sought to encourage Appleton to dedicate its customer-sited demand reduction capabilities to DP&L to help satisfy DP&L's statutory demand reduction compliance requirements. Clearly, the Application only seeks approval of the rider exemption in exchange for Appleton's commitment of its capabilities to DP&L. If the Application is rejected for any reason, DP&L will be required to, nonetheless, achieve compliance by another means and any cost of this alternative compliance strategy will then be eligible for recovery through DP&L's applicable rider. Based on the structure presented in the Application, the only cash payment Appleton actually receives for its demand reduction capabilities comes from PJM (funded by all participants in PJM's multi-state area and not just DP&L's customers) in exchange for Appleton's willingness to commit itself to participation in PJM's capacity-related demand response program. As the Commission knows, PJM tests or otherwise ensures that Appleton has an actual ability to function in the capacity that qualifies Appleton for the compensation that comes to Appleton from PJM.

In sum, OCC has failed to show how its participation in this proceeding (as an intervenor) will significantly contribute to full development and equitable resolution of the factual issues. On the contrary, the claims asserted by OCC to this point indicate that OCC wants to secure party status so that it can work to ensure an inequitable resolution of the issues and, in doing so, drive up the cost of compliance that DP&L will seek to recover from its customers.

C. OCC's intervention will unduly prolong and delay this proceeding.

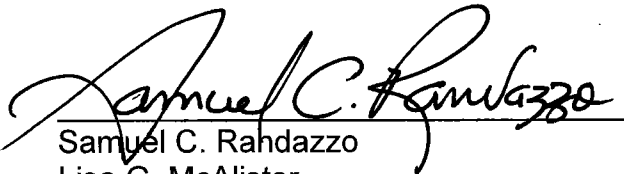
The mere participation of a party which has no real and substantial interest in a matter causes an unnecessary delay. A speedy, albeit thorough, consideration of all cases of this general type is in the best interests of all utility consumers in Ohio. Allowing the participation of non-interested parties will unfairly delay the progress that can otherwise be made to the very demanding effort required to identify and implement the capabilities required to meet the energy efficiency and demand reduction provisions of Amended Substitute Senate Bill 221. Appleton urges the Commission to not enable OCC's process-for-the-sake-of-process initiative because the practical effect of doing so will be to dissuade mercantile customers from seeking ways to contribute their customer-sited capabilities to Ohio's efforts to reduce the energy intensity of its economy.

III. CONCLUSION

OCC has failed to meet the standards necessary to support and secure intervention in this case. As seems to be true in a growing number of proceedings before the Commission, OCC's assertions seem to suggest that OCC is more interested in hijacking this proceeding for the purpose of providing OCC with another opportunity to express its own philosophical beliefs (without any clear connection to the interests of residential customers) than they are designed to provide OCC with an efficient contribution to Ohio's effort to promote energy efficiency and reduction in peak demand. The Application proposes a practical, efficient and lawful contribution to compliance with DP&L's peak demand reduction requirements and, at the same time, reduces the cost of compliance that would otherwise be eligible for recovery from DP&L's customers.

For the reasons discussed above, the Commission should deny OCC's Motion to Intervene in this proceeding and approve the Application as soon as reasonably possible.

Respectfully submitted,

A handwritten signature in black ink, reading "Samuel C. Rahdazzo", written over a horizontal line.

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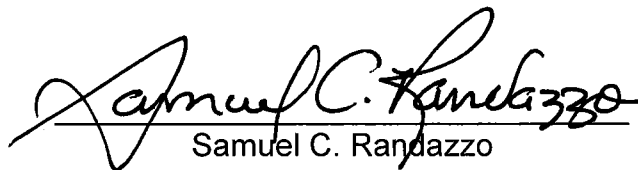
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Appleton Papers, Inc.'s Memorandum Contra the Office of the Ohio Consumers' Counsel's Motion to Intervene* was served upon the following parties of record this 12th day of February 2010, via electronic transmission, hand-delivery, or ordinary U.S. mail, postage prepaid


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Summary: Memorandum Appleton Papers, Inc.'s Memorandum Contra The Office of the Ohio Consumers' Counsel's Motion to Intervene electronically filed by Mr. Samuel C. Randazzo on behalf of Appleton Papers Inc.