BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The	)	
Dayton Power and Light Company for	)	Case No. 10-734-EL-AEC
Approval of a Unique Arrangement with	)	
Caterpillar Inc.	)	

MOTION TO INTERVENE
AND
MOTION TO SHORTEN THE RESPONSE TIME FOR DISCOVERY
AND
MOTION FOR ELECTRONIC SERVICE OF DISCOVERY
AND
REQUEST FOR AN EXPEDITED RULING
AND
COMMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential utility consumers, moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to grant the OCC's intervention in this case where Dayton Power and Light Company ("DP&L" or "Company") is seeking to have customers fund a rate discount for Caterpillar Inc. In this regard, DP&L is seeking PUCO approval of a unique arrangement between it and Caterpillar Inc. under which Caterpillar Inc. would receive a discount of 15% applied to its "total monthly bills" for five years. Application at ¶ 3(B). The Company has requested that the PUCO "approve the recovery of 'delta revenues' as permitted through DP&L's Economic Development Rider ("EDR"), approved in its ESP proceeding, Case No. 08-1094-EL-SSO."

OCC is the statutory representative, under R.C. Chapter 4911, of DP&L's 456,000 residential customers. Under Ohio Adm. Code 4901:1-38-05(F), affected parties may file a motion to intervene and file comments and objections to a unique arrangement application within twenty days of the filing of the application.

In the attached Comments, OCC addresses its concerns about the Company's proposed reasonable arrangement and the implications of the "delta revenue" that will be created and that DP&L seeks to collect wholly from customers through increased rates. OCC understands that these initial comments and objections are a preliminary method by which it can present its concerns about the application. OCC also understands that it is in no way prohibited from developing arguments in favor or of against the application after the submission of these comments.[1]

OCC recommends that the Commission determine that the application as filed may be unjust and unreasonable. On this basis, the Commission should schedule a hearing on the application. OCC also requests that the Commission shorten the discovery response time from 20 days to 7 days and requests electronic service of discovery responses. The OCC's Motion for shortening the discovery response time should be granted to facilitate needed review, which will be further aided by granting OCC's Motion to require electronic transmittal of discovery requests and responses. OCC requests a shortened response time to assure that it has the opportunity to further develop its position in this proceeding in a timely manner. This will then assist OCC in being able to actively participate, on behalf of its client. Such participation may take the form

[1] See *In the Matter of the Application for Establishment of a Reasonable Arrangement Between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-516-EL-AEC, Entry at ¶4 (July 2, 2009).

of going forward at an evidentiary hearing, preparing more developed arguments on the application after submitting these comments, or engaging in meaningful negotiations to resolve the issues surrounding the Company's application. Finally, OCC requests an expedited ruling on its discovery motion in order to facilitate timely preparation in this proceeding.

The reasons for granting OCC's motion to intervene and discovery-related motions are set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT AND COMMENTS

The Office of the Ohio Consumers' Counsel ("OCC") welcomes the opportunity to recommend balanced solutions that promote economic development through electricity rate discounts and assure reasonable rates for Ohio customers. It is these Ohio customers who are being asked to reimburse the electric utilities, such as DP&L, for hundreds of thousands of dollars in discounts (subsidies) to customers, such as Caterpillar, Inc. ("Caterpillar"). A balance can only be achieved if, among other things, the subsidies that customers must bear are reasonable.

While OCC supports economic development in Ohio, residential customers of utilities should be protected from unjust and unreasonable rate increases to cover the costs of economic development. At a time when many Ohioans have to make choices about which bills to pay, adding more costs onto their utility bills to cover discounts to other customers may be unreasonable.

DP&L is seeking to confer discounted rates upon Caterpillar based on DP&L's total billings to Caterpillar, which would include all generation, transmission, and distribution charges, plus all riders. While DP&L estimates that the annual discount Caterpillar will receive is $71,879 per year, for providing electric distribution and generation primary service, it provides little information to back up its estimate.[2] Most importantly, the unique arrangement does not include a specific dollar cap on the delta revenues created. And yet, DP&L seeks to have the Commission make a ruling *in this proceeding* that it is entitled to recover that entire discount from other DP&L customers.

OCC moves to intervene in order to represent the interests of approximately 456,000 residential electric customers from whom DP&L seeks to collect the subsidy that DP&L identifies regarding its discount to Caterpillar. These customers are the very ones whose rates will likely be increased if the Application is approved. This unique arrangement raises fundamental issues that create concerns for residential customers. These fundamental issues are those that OCC has consistently expressed in reasonable arrangement cases in the hope of establishing an appropriate framework for assessing reasonable arrangements filed by utilities and/or mercantile customers.

I. INTERVENTION

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 to approve a reasonable arrangement between DP&L and Caterpillar. The proposed unique arrangement incorporates a discounted rate for Caterpillar's full

[2] DP&L has not provided the assumptions that underlie the calculation, including the billing determinants used and the specific rate schedules the tariffed rates are drawn from. Additionally, DP&L has not provided the basis for the delta revenues calculated from 2013 through 2015, the time period covered by the agreement that extends beyond the Company's ESP term. This information is crucial to determining whether the delta revenues estimated to be produced under the agreement are reliable.

electricity requirements, without specific details regarding how much the discount will ultimately cost. 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;

(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 are in representing residential consumers in this case where DP&L is identifying a discount for one customer that DP&L wants other customers to pay. This interest is different than that of any other party, and is especially different than that of Caterpillar or DP&L whose advocacy includes their own financial interests.

Second, OCC's advocacy for consumers will include advancing the position that residential standard service offer ('SSO") generation rates, including the Economic Development Rider, should be no more than what is reasonable and permissible under Ohio law. Under the unique arrangement application, it is difficult to pin down the cumulative effect of the subsidy being sought from customers, since the arrangement extends beyond the term of the current rates for DP&L under its SSO. Moreover, the unique arrangement has no specific dollar cap, which is essential since customers have limited resources. OCC's position is therefore directly related to the merits of such a proposal in this case.

Third, OCC's intervention will not unduly prolong or delay the proceeding. 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, OCC's intervention will significantly contribute to fully developing and equitably resolving the factual issues. In the event the Commission rules upon the unique arrangement application, OCC will develop and present lawful and reasonable recommendations for resolving the case. Resolution of the case means ensuring that a balanced solution is reached between supporting economic development and preserving reasonable rates to residential customers.

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

In addition, 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 OCC has already addressed, and that 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 OCC does not concede the lawfulness of this criterion, OCC satisfies this criterion because

OCC has been uniquely designated as the statutory representative of Ohio's residential utility consumers.[3] That interest is different from, and not represented by, any other entity in Ohio.

Three years ago the Supreme Court of Ohio confirmed OCC's right to intervene in PUCO proceedings, in ruling on an appeal in which OCC claimed the PUCO erred by denying its intervention. The Court found that the PUCO abused its discretion in denying OCC's intervention and that OCC should have been granted intervention.[4]

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

II. COMMENTS

DP&L, as the applicant, bears the burden of proving to the PUCO that its application for a reasonable arrangement should be approved. OCC bears no burden of proof in this case.[5] The Company must establish that the proposal is lawful based on information that is filed with and approved by the Commission.[6] Although S.B. 221 explicitly permits reasonable arrangements, it requires all such arrangements to be filed

[3] R.C. Chapter 4911.

[4] *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶18-20.

[5] 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." As part of the Commission's rules for unique arrangements: "An electric utility filing an application for commission approval of a unique arrangement with one or more of its customers, consumers, or employees **bears the burden of proof that the proposed arrangement is reasonable and does not violate the provisions of 4905.33 and 4905.35 of the Revised Code, and shall submit to the commission verifiable information** detailing the rationale for the arrangement." ***Ohio Adm. Code 4901:1-38-05(A)(1) (emphasis added).

[6] R.C. 4905.31(E).

with and approved by the PUCO.[7] Moreover, such arrangements are to be under the supervision and regulation of the Commission and subject to "change, alteration, or modification" by the Commission.[8]

The PUCO adopted rules specifically addressing "reasonable arrangements."[9] DP&L alleges that the application is a "unique arrangement" between DP&L and one of its customers, Caterpillar, Inc. If it is a unique arrangement, it is governed by Ohio Adm. Code 4901:1-38-05 of the PUCO's adopted rules. Under subsection (A)(1) of that provision, DP&L has the burden of proving that the proposed arrangement is reasonable and does not violate R.C. 4905.33 and 4905.35. The rules further provide that a utility filing an application for a unique arrangement shall submit "verifiable information detailing the rationale for the arrangement." Under the rules, if it appears to the Commission that the application may be unjust or unreasonable, the Commission may order a hearing.[10] The Commission may also change, alter, or modify the unique arrangement.[11]

Part of the Commission's decision in this case should address the issues of how much of a discount should be provided to Caterpillar Inc, how long the discount should last, who should bear the cost of the discount, and what portion of the discount should be borne by customers vs. the electric utility. Further, the decision should address whether the arrangement is reasonable and whether it violates R.C. 4905.33 and 4905.35.

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[7] R.C. 4905.31.

[8] R.C. 4905.31(E).

[9] Ohio Adm. Code Chapter 4901:1-38. (adopted on September 17, 2008, Case No. 07-888), and subsequently modified and adopted by Entry on Rehearing (Feb. 11, 2009).

[10] Ohio Adm. Code 4901:1-38-05(A)(2).

[11] See Ohio Rev. Code 4905.31; Ohio Adm. Code 4901:1-38-05(B)(4).

A. The Application Is Unjust And Unreasonable Because It Does Not Include A Specific Dollar Cap For Delta Revenues.

Under the proposed unique arrangement, Caterpillar will receive a flat 15% discount to its bill over the next five years. Application at ¶3B. Although there is a requirement that Caterpillar's metered monthly load be greater than 500 kW, there is no ceiling to the arrangement. Caterpillar may unilaterally increase its usage at any time.

If Caterpillar's usage increases, the discount increases, and the subsidy increases. The delta revenues which DP&L seeks to recover from customers thus could be unlimited. The sky is not supposed to be the limit for what customers will be asked to pay in reasonable arrangement cases at the PUCO. This is contrary to the Commission's wise directive in *Ormet*[12] that, given customers' limited resources, a reasonable arrangement should contain "a maximum amount of delta revenues which the ratepayers should be expected to pay." In order to afford customers protection from unlimited delta revenue subsidies, the Commission should impose a hard dollar cap on the discount.

B. Under The Reasonable Arrangement, Caterpillar Will Be Paying A Generation Service Rate Stabilization Charge That Is Partly Attributable To Provider Of Last Resort Services. It Is Unjust And Unreasonable For DP&L To Be Compensated For POLR Service When It Will Not Be Providing Such Service As Caterpillar Has Given Up The Right To Shop.

Under the terms of the unique arrangement, DP&L is the exclusive electric supplier to Caterpillar.[13] Caterpillar has agreed to forfeit its right to shop in this case by

[12] *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC, Opinion and Order at 10 (July 15, 2009) (*Ormet*).

[13] See Exhibit B of the Application, Article Three which states that "DP&L shall supply and Caterpillar shall accept the full electric requirements of the Facility according to DP&L's P.U.C.O. No 17 Electric Distribution Service Primary and Electric Generation Service Standard Offer Primary."

entering into the five-year exclusive arrangement with DP&L. The migration risk, or the risk that Caterpillar will purchase its generation from a competitive supplier, is not present under the term of this reasonable arrangement.

If the Commission approves the unique arrangement as proposed there is no risk to DP&L that Caterpillar will shop for competitive generation and then seek to return to DP&L's POLR service while the contract is in effect. DP&L should not be compensated for a service it will not be providing. OCC thus recommends that POLR charges be excluded from the amount of delta revenues that DP&L collects from customers. In other words all POLR charges paid by Caterpillar to DP&L should be credited to DP&L's economic development rider and used to reduce the obligations of DP&L's customers under the unique arrangement.

Under DP&L's standard service offer rate approved in Case No. 08-1094-EL-SSO, there is a generation service rate stabilization charge (Sheet G25) that is intended to "provide stabilized rates for customers and Provider of Last Resort Service." These charges are collected by DP&L on a per kW basis of $1.05943 and $0.00228 per kWh.[14] OCC proposes that DP&L customers' obligations for delta revenue (if there are such obligations) should be reduced by the POLR revenues collected under the generation service rate stabilization charge. Caterpillar's discounted electric rate should be applied uniformly off of the DP&L total tariff rate, including all riders except the generation service rate stabilization rider. DP&L thus would be required to credit the full amount of the POLR component of the tariff rate which would otherwise apply, on a per kWh basis. This will ensure that DP&L is not compensated for a service it will not be providing.

[14] Dayton Power and Light, Second Revised Sheet No. G25 at 1 (April 29, 2010).

These are the mechanics of the offset approved by the Commission in both *Ormet*[15] and *Eramet.*[16]

The treatment of the POLR revenues as an offset to delta revenues collected from customers is consistent with the Commission's holdings in recent *Ormet*[17] and *Eramet*[18] cases. Under the PUCO's holdings where POLR revenues are collected from reasonable arrangement customers who will not shop during the term of the arrangement, the POLR charges collected are to be credited to offset the delta revenues collected from other customers. There is no reason to depart from the precedent established in these cases.

C. The Structure Of The Discount, Which Does Not Diminish Over The Five-Year Term, Is Unreasonable And Should Be Modified.

Under the proposed arrangement there is a flat 15% discount during each year of the five-year term. This approach fails to recognize the immediate and short-term nature of the discounted rates. OCC believes it is more appropriate to reduce the 15% discount in subsequent years so that at the end of the arrangement the customer is paying full tariff rates. A gradual phase-down of the discount over time is consistent with the expectation that the customer pay full tariff rates at the end of the arrangement. Moreover, this is an

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[15] *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC, Entry on Rehearing at ¶15 (Sept. 15, 2009).

[16] *In the Matter of the Application for Establishment of a Reasonable Arrangement Between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-516-EL-AEC, Entry on Rehearing at ¶19 (Mar. 24, 2010).

[17] *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC, Opinion and Order (July 15, 2009).

[18] *In the Matter of the Application for Establishment of a Reasonable Arrangement Between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-516-EL-AEC, Opinion and Order (Oct. 15, 2009).

approach that is consistent with modifications recommended by the PUCO Staff and ordered by the PUCO in the *Ormet* reasonable arrangement case.[19] It is also consistent with years of past practices where discounts on expansions were given for a five year term beginning at 50% and phased down each year by 10%.[20]

D. The Commission Should Order DP&L To Identify All The Benefits Attributable To It From The Reasonable Arrangement And Should Consider A Sharing Of The Delta Revenue Responsibility Between The Company And Its Customers.

The PUCO policy regarding economic development and the subsequent delta revenues has been in place for over 25 years.[21] The PUCO policy provides that the Application must provide for a reasonable split of the delta revenue costs that considers that both the utility and its customers will receive benefits from the reasonable arrangement and accordingly should share the associated costs. In the past the Commission has held "that a 50/50 split properly recognizes that both the company and its customers benefit from the company's policy of providing economic incentive rates to certain customers to attract new business in the utility's service territory."[22] Furthermore,

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[19] *Ormet* at 11-12.

[20] See for e.g. *In the Matter of the Application of the Cleveland Electric Illuminating Company for Approval of an Electric Power Agreement with Ford Motor Company*, Case No. 88-1656-EL-AEC, Finding and Order (Mar. 14, 1999); *In the Matter of the Application of the Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Glenville Enterprise Center*, Case No. 99-230-EL-AEC, Finding and Order (May 19, 1999); *In the Matter of the Application of the Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Neff Perkins Company*, Case No. 95-113-EL-AEC, Finding and Order (Jan. 16, 1997).

[21] See *Ohio Electric Innovative Rates Program*, page 5 of 11 (June 28, 1983). (Attachment A).

[22] *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service*, Case No. 91-418-EL-AIR, Opinion and Order at 110 (May 12, 1992).

this 50/50 sharing of the delta revenue is consistent with other decisions which addressed the issue.[23]

The Commission's historic policy complements the provisions in S.B. 221 that address economic development arrangements. Although S.B. 221 does allow a utility to seek to recover "revenues foregone" as a result of an economic development arrangement[24] the enabling rules,[25] along with the permissive statutory language,[26] make it abundantly clear that the collection of delta revenues from other customers is a matter within the discretion of the Commission.[27] Most recently in the context of the *FirstEnergy ESP* case the Commission acknowledged its 50/50 delta revenue sharing policy.[28] While noting the restructuring under S.B.221 may warrant an increase in percentage of revenue recovered by the electric utilities, the Commission indicated that it did not believe 100% recovery of delta revenues from other customers will always be warranted.[29] Rather it acknowledged that the proportion of delta revenues that utilities

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[23] See *Ohio Edison Company,* Case No. 89-1001-EL-AIR, Opinion and Order at 40-41 (August 16, 1990)' *Cleveland Electric Illuminating Co.,* Case No. 88-170-EL-AIR, Opinion and Order at 18-19 (January 31, 1989).

[24] R.C. 4905.31(E).

[25] See Ohio Admin. Code 4901:1-38 et seq.

[26] Under R.C. 4905.31(E)_a utility is not prohibited from seeking an arrangement that includes a "financial device" that "may include a device to recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone." The arrangement must then be approved by the PUCO and are subject to change, alteration, or modification by the Commission.

[27] See also Ohio Admin. Code 4901:1-38-08(A)(1).

[28] *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 Opinion and Order at 55 (Dec. 19, 2008).

[29] Id.

collect from other customers would be dealt with on a case by case basis.[30]

DP&L is likely to receive tangible benefits from providing service to Caterpillar through this unique arrangement. New load from the 1.4 million square foot distribution facility will be created. This new load generates revenue for DP&L. Indirectly, economic growth leads to more distribution sales from the customer's employees and from the local suppliers of inputs to the contracting customer. Second and third level multiplier impacts can be important.[31] If the new facility is built in an area with excess transmission and distribution capacity, this should result in the additional revenue exceeding the cost of providing that service. Staff policy has historically recognized that "as long as the company does not provide this service at a loss, it is better off with some revenue than it is with no revenue."[32] Moreover, the revenue that DP&L obtains from Caterpillar provides the utility with increased coverage of fixed costs, incrementally improving the utility's operating income.[33]

The fact that DP&L will likely be receiving benefits from the addition of Caterpillar is something the Commission should consider in determining who should bear the discount and in what amount. DP&L should be required to identify the benefits it will receive under the contract so that the Commission has this information before it.

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[30] Id. See also *In the Matter of the Application of the Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets*, Case No. 08-917-EL-SSO et al, Opinion and Order at 48 (Mar. 18, 2009), finding that the Commission has authority to determine on a case by case basis whether the economic development arrangement is in the public interest.

[31] See *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 R.C. 4928.143 in the Form of an Electric Security Plan.*, PUCO Case No. 08-935-EL-SSO, OCC Witness Gonzalez testimony at 25 (Sept. 29, 2008).

[32] See *Ohio Electric Innovative Rates Program*, page 5 of 11 (June 28, 1983). (Attachment A).

[33] Id. at 5.

Such information should be analyzed by the Commission rather than just *carte blanche* accepting DP&L's proposal to recover 100% of the delta revenues from their customers through their economic development rider.

Sharing of the discount between customer and the utility will also ensure that the utility has an incentive to negotiate a fair arrangement. At the very minimum, the utility negotiating the discount should have a stake in the interests of bringing accountability and good faith into the bargaining process. Requiring the utility to pay a percentage of the discount establishes that additional incentive for DP&L to negotiate a fair, competitive deal. If DP&L is permitted to pass 100% of the cost of the discount to the remaining customers, there is no incentive for it to negotiate a fair rate as part of a reasonable arrangement.

E. Caterpillar Should Commit Its Demand Response Capabilities To DP&L Through The Commission Defined Process Under Ohio Adm. Code Rule 4901:1-39-05, Without Extracting An Additional Price From Customers For Committing Its Capabilities.

According to the Application, Caterpillar has agreed to work with DP&L to explore the possibility of applying to commit the results of its energy efficiency and/or demand response measures and programs for integration with DP&L's energy efficiency and demand response program portfolio. Application at ¶3, 6. This is purportedly to assist DP&L in complying with Ohio's energy efficiency and peak demand reduction requirements.[34] Application at ¶3, 6.

While it appears that DP&L and Caterpillar may be taking a small step in the right direction, the details of the benefits and the measurements in the application are vague

[34] The energy efficiency and peak demand reduction requirements are contained in R.C. 4928.66.

and indefinite. If the Commission is to consider the energy efficiency and demand response capabilities that are directly associated with the proposed facility investment as a benefit of the arrangement, and a factor in determining whether the proposal is just and reasonable, those capabilities need to be quantified, assessed, and committed, if appropriate, to DP&L's compliance portfolio.

OCC believes that the parties should follow the Commission rules which establish a process to be pursued when a customer seeks to commit its demand response and energy efficiency programs for integration with a utility's programs.[35] Under Rule 4901:1-39-05(G), a mercantile customer may file an application to commit its demand reduction or energy efficiency programs for integration with an electric utility. The rules identify five requirements that the application must fulfill.

Such a defined process should be used in place of an agreement to "explore the possibility of applying to commit" as a term introduced within the context of a unique arrangement contract. Additionally, the Commission should make it clear that Caterpillar cannot obtain a discount in this case from DP&L (and ultimately other customers) that helps fund facility investments while also seeking to extract an additional price from DP&L (and ultimately other customers) for the energy efficiency capabilities of that same facility investment, regardless of whether that efficiency is quantified at this time or at some later date.

[35] For instance Eramet filed an individual application to do so, which was approved in conjunction with its economic development arrangement. See *In the Matter of the Application of Eramet Marietta, Inc. to Incorporate Customer's Peak Demand Reduction Capabilities into Columbus Southern Power Company's Demand Reduction Program*, Case No. 10-188-EL-EEC, Application (Feb. 12, 2010).

III. MOTIONS FOR A SHORTENED RESPONSE TIME FOR DISCOVERY AND ELECTRONIC SERVICE OF RESPONSES AND REQUEST FOR EXPEDITED RULING

Under Ohio Adm. Code 4901:1-38-05 (F), motions to intervene and comments and objections to unique arrangement applications are due within twenty days of the filing of the application. Ohio Adm. Code 4901:1-38-05(B)(3) provides that the Commission may fix a time and place for a hearing if an application appears to be unjust or unreasonable.

The short time frame established under these rules provides the parties with a very limited time in which to review the application and formulate arguments in favor of or against the application. The right to conduct ample discovery, as guaranteed by R.C. 4903.082, can be vitiated in such a time frame, if parties use the general twenty day response period set under Ohio Adm. Code 4901-1-19(A).

However, under Ohio Adm. Code 4901-1-19(A), the Commission, legal director, deputy legal director, or an attorney examiner may direct responses to discovery to be served within a shorter period of time.[36] OCC seeks, for good cause shown, a ruling that requires DP&L to respond to discovery within seven days of service of the discovery requests. Moreover, the Commission should require service of all discovery requests and responses by e-mail. Service by e-mail is allowed, but not required, by Ohio Adm. Code 4901-1-5(C).

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[36] See also Ohio Adm. Code 4901-1-17(G) permitting the Commission, the legal director, the deputy legal director, or an attorney examiner to enlarge the time period for discovery sua sponte or upon motion of any party for good cause shown.

Ohio Adm. Code 4901-1-14 authorizes attorney examiners and others to enter procedural rulings such as that requested here. Pursuant to Ohio Adm. Code 4901-1-27(B)(7)(d), examiners are authorized to "assure that the hearing proceeds in an orderly and expeditious manner," and this objective should be followed by proceeding with a seven day turn-around and e-mail service for discovery.

Expedited discovery has been ordered in other cases before the Commission that are expedited by statute.[37] The PUCO has altered the manner of service for discovery in many previous cases.[38] The PUCO should do so again in this case where timely discovery is important.

In order to facilitate the timely development of this case, the Commission should grant the OCC's motions on an expedited basis pursuant to Section 4901-1-12(C) of the Ohio Adm. Code. Counsel for DP&L, Ms. Sobecki, indicated that the Company does not object to the issuance of an expedited ruling on OCC's discovery motions.

Granting this Motion will allow OCC an opportunity for prompt and expeditious use of discovery. This will facilitate thorough and adequate preparation for participation in this commission proceeding. Participation in this proceeding could mean going forward with an evidentiary hearing, the filing of more detailed arguments in favor of or against the application after the submission of these preliminary initial comments, or engaging in negotiations with DP&L and Caterpillar in an attempt to resolve issues in contention. Any one of these avenues of participation would be significantly enhanced if

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[37] See, e.g., *In re FirstEnergy 2009 MRO Proceeding*, Case No. 09-906-EL-SSO, Entry at 1 (October 29, 2009) (proceeding set on ninety day timeline as required by R.C. 4928.143).

[38] See, e.g., *In re AEP's Proposed IGCC Generating Facility*, Case No. 05-376-EL-UNC, Entry at ¶10 (May 10, 2005) and *In re Prudence Review of DP&L's Billing System Modification Costs*, Case No. 05-792-EL-ATA, Entry at 4-5 (October 4, 2005).

the discovery process were adjusted to enable a quicker exchange of information between DP&L and OCC.

IV. CONCLUSION

The Commission should rule that the application may be unjust and unreasonable in its present form and set the matter for hearing. There is no need or justification for rubber stamping the unique arrangement proposal here, without permitting a thorough and adequate review as established and required under the Revised Code and the Administrative Code of Ohio. Such a review should be conducted and OCC and other interested parties should be permitted expedited discovery rights. OCC further urges the Commission to change, alter or modify the arrangement, consistent with the recommendations and comments presented here and in furtherance of the public interest for Ohio customers.

Respectfully submitted,

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Attachment A

CAMERA OPERATOR [illegible]

ATTACHMENT II

POLICY PRECEDENT FILE

TITLE Ohio Electric Innovative Rates Program Page 1 of 11

Ohio Economic Recovery Initiatives Approved by J. D. Morrows, D. R. Mayo

Electric Rate Incentives Date Effective 6 / 28/ 83

1.0 Staff Treatment	2.0 Legal Authority	3.0 Applied Treatment
1.1 Current	2.1 Statute	3.1 Methodology
1.2 Alternative Approaches - Not Current Treatment	2.2 PUCO Rule	3.2 Adjustments
1.3 Rationale	2.3 Commission Orders	3.3 Staff Report Language
1.4 Background	2.4 Appellate Decisions	

1.0 STAFF TREATMENT

1.1 Current Staff Treatment

The Staff policy is to recommend Commission approval of reasonable utility proposals as short-term electric rate economic recovery incentives. Approved incentives are of two types;

- Individualized service and rate agreements between a utility and a customer, pursuant to Section 4905.31, Ohio Revised Code (Reasonable Arrangements Allowed; Variable Rate), and

- Modifications to Tariff rate schedule provisions, providing for wavier of minimal bills pursuant to Section 4909.18 Ohio Revised Code (Application for Tariff Approval, Not For An Increase In Rates).

Staff recommended rate incentives apply to customers with the following characteristics;

- New customers and corresponding new load, which otherwise would not have occurred, resulting in marginal revenue, not otherwise received, or

- Existing customers with load which otherwise would not have occurred, resulting in marginal revenue, not otherwise received, or

- Maintenance of existing customers and load which otherwise would be lost.

1.2 Alternative Approaches - Not Current Treatment

Alternative treatment of the unrecovered cost of service, resulting from sales attrition, is to allocate it among all classes of customer rates.

1.3 Rationale

The Electric Economic Recovery Rate Program is designed only to recapture sales attrition, incrementally improve efficiency of use of existing facilities and thereby contribute to the maintenance of all customer class rate levels.

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Electric Rate Incentives | Date Effective 6 / 28/ 83

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Significant attrition of electric, industrial and commerical sectors sales occurred from 1979 through 1983. Such sales attrition significantly reduced revenue coverage of the embedded cost of service, reduced the efficiency of existing facilities used and reduced load factor by three percent. Based on the short run definition, sales and load attrition results in less efficient use of facilities, currently included in established rates. Such revenue attrition requires that the unrecovered cost of service and the less efficient use of existing facilities be allocated to other customer class rates.

1.4 History of Program

Industrial and commercial customer sales and load statistics for the period 1979 through 1983 showed significant sales attrition and revenue erosion. On June 20, 1983, the Commission solicited electric utility comments and proposals to spur short-term industrial production opportunities. On June 28, pursuant to the Commission Chairman's solicitation, the Commission, Staff and utility representatives met at the Commission offices and exchanged economic development incentives. The result is the current Commission and Staff electric economic recovery rate program. The attachments document this program's evolution.

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2.0 LEGAL AUTHORITY

2.1 Statute

Applicable Sections: 4905.31 O.R.C., 4909.18 O.R.C .

Section 4905.31 O.R.C. specifies that a public utility may enter into any reasonable arrangement with its customers providing for any financial device that may be practicable or advantageous to the parties interested. No such arrangement is lawful unless it is filed with and approved by the PUCO and under the supervision and regulation of the Commission. The Ohio Electric Innovative Rates Program, with the authority of §4905.31, is not violative of O.R.C. §4905.33, which prohibits a public utility from furnishing free service or service for less than actual cost.

Section 4909.18, O.R.C., requires a public utility desirous of modifying any existing rates to file a written application with the PUCO according to the specifications under that and other applicable statutes.

2.2 PUCO Rule - None Specifically Applicable

2.3 Commission Orders

The Opinion & Order issued by the Commission for the consolidated cases 83-1342-EL-ATA/83-1343-HT-ATA, comments on §4905.31 O.R.C. as follows:

> "Thus ... arrangements must be reviewed and approved by the Commission before it becomes effective so as to ensure that it is just and reasonable and to ensure that it will not adversely affect the balance of the company's customers."

The Commission also recognized that "so long as the company does not provide this service at a loss, it is better off with some revenue than it is with no revenue, the situation which would obtain if a given customer was not on the system at all. In general, the balance of the company's customers benefit from this maximization of revenues, for it tends to forestall the company's next general rate application."

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Although the Commission denied CEI's request to amend its filed schedules for electric service and steam service in this case, it did so because:

1. CEI wished to provide electric and steam service to certain customers without regard to cost of service considerations in order to be competitive with other energy sources (possibly causing the existing customers to subsidize this service).

2. CEI wished to use its own discretion for each individual case, violative of O.R.C. §4905.31 and 4909.18.

2.4 Appellant Decisions - None Specifically Applicable

3.0 APPLIED TREATMENT

3.1 Methodology

Staff determines reasonable incentive rate proposals based on a combination of the following criteria:

- The term of the rate initiative is short-term; i.e. five years.
- The short run marginal revenue derived from application of the rate incentive is greater than the short run marginal cost of providing the service.
- The rate incentive applies primarily to increases in usage and load from that which occurred on a historical, or base level.
- Incremental usage and load occurs in combination with increased short-term customer production, and corresponding increases employment and local economic activity.
- The proposing utility reasonably satisfies utility specific regulatory reporting requirements for identifying and quantifying the short-term effects of the specific proposed initiative.
- The application of a rate incentive does not discriminate against other customers and does not adversely affect other customer services and rates.
- The rate initiative, terms and conditions of the proposal are understandable and is administratively convenient to apply.

3.2 Adjustments

Appropriate treatment of the Economic Recovery Rate contract customers will require modification of traditional cost of service methodology and rate treatment. In order that all customers receive benefits and that no customers be adversely affected, it is necessary to distinctly identify the special contract customers as a separate rate class. The creation of a separate customer class will assure equitable treatment for all ratepayers.

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TITLE Ohio Electric Innovative Rates Program

Ohio Economic Recovery Initiatives Approved by J. D. Borrows, D. R. Meeg

Electric Rate Incentives Date Effective 6 / 28/ 83

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Special attention is directed towards treatment of the revenue difference between that actually recovered under the Economic Recovery Rate and what would have been recovered had the sales been made at the applicable standard rate. This difference is the "Delta Revenue".

If not recovered, this "Delta Revenue" would constitute a shortfall, or deficiency, in the utility's proposed or Commission authorized revenue. There are a number of methods by which the deficiency could be recovered.

Staff recommends that the Economic Recovery Rate Program contract revenue deficiency be recovered on a shared or "split" basis; a portion to be recovered by the general customers and the remainder contributed by the utility. In the Staff's opinion, it is equitable that both the benefits and the costs of economic recovery be distributed to both customers and the company. The short run marginal sales in revenue from the Economic Recovery Rate Program contracts are a benefit to both the general ratepayers and the utility. The additional sales and revenue help to utilize the system more efficiently, provide increased coverage of fixed costs, incrementally improve the utility's operating income and result in a lesser cost of service by reducing the level of capacity which otherwise would be allocated to all customer classes.

The following chart is a hypothetical example to show the magnitude of revenue and deficiency under the Economic Recovery Rate Program contracts compared to the otherwise applicable tariffed rate revenue.

ECONOMIC RECOVERY RATE PROGRAM CONTRACT COMPARISONS*

	Average Tariffed Rates	Average Contract Rates	Contract Revenue Deficiency
Revenue	$ 600	$ 500	$ 100
Rate Base	$1,000	$1,000	N.A.
Operating Income	$ 138	$ 38	$ 100
Rate of Return	13.8%	3.8%	10%

* This example is not reflective of any tax effects.

The Economic Recovery Rate Program contracts earned a 3.8% rate of return compared with the tariffed schedule rates (13.8%), resulting in a revenue deficiency of $100 in the form of operating income. The operating income deficiency should be distributed among the individual class rates and the utility as a contribution to the economic recovery effort. Staff recommends that half of the deficiency be borne by the utility as its contribution and half of the revenue deficiency be distributed to customers in accordance with the Staff recommended interclass revenue distribution. The following chart shows a hypothetical example of the manner in which the Economic Recovery Rate Program contract revenue deficiency should be recovered.

ECONOMIC RECOVERY RATE PROGRAM DEFICIENCY RECOVERY

	Residential	General Service	Other	Utility	Total
Revenue	$ 4,000	$3,000	$3,000	N.A.	$10,000
Percent Revenue	40%	30%	30%	N.A.	100%
Economic Recovery Rate Program Contributions	$ 20.00	$15.00	$15.00	$50.00	$ 100

3.3 Staff Report Language

The Economic Recovery Rate Program is designed such that each contract is evaluated separately. The individual utilities are providing information on a contract by contract basis. The review process by the Staff is evolutionary. The following is an excerpt from a recent Staff Report. This information must be looked upon as specifically tailored to Ohio Edison Company and its contract customers. Subsequent Staff Report language may be modified to appropriately address existing circumstances.

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Ohio Electric Innovative Rate Programs - Ohio Edison Company
Case No. 84-1359-EL-AIR

On September 25, 1981, Staff issued its document entitled "Ohio Electric Innovative Rate Programs". The document represents an effort on the part of the Commission to separate the topics of rate levels from rate design in order to better understand utility pricing policies, philosophies and related operations. The study was prepared by the Staff and representatives of the state's investor-owned electric utilities. The participants met regularly over the course of fifteen months during 1980 and 1981 with the intention of elaborating on specific rate design objectives and activities which are conducted to support and encourage innovations. The resulting report was directed at initiating a better structure for identifying innovative rate opportunities.

Staff finds that the individual electric utility submittals to the Innovative Rate Program are beneficial to the Staff and Commission. Utility statements of rate design philosophy, policies, objectives and corresponding implementation activities provide an additional basis for better evaluating specific utility rates and rate schedule proposals. In the Staff's opinion, utility rationale of this nature should be relatively consistent with respect to desired longer term achievements and may add elements of integrity and credibility to rate proposals beyond that which may exist in case specific applications. Such a presentation by the utility may help to minimize the resources required by the Staff and Commission to evaluate rate proposals. And, Staff finds that the Innovative Rate Document could provide a basis for establishing an additional level of utility accountability, particularly with respect to authorized innovations.

Continued emphasis should be placed on promoting economic efficiencies. This can be achieved by promoting the use of the product (electricity) which will create increases in revenues and lessen the need for continual rate increase requests. It must be stressed that the goal is to more efficiently utilize existing facilities rather than creating a worse situation whereby additional facilities will need to be built to overcome a deteriorating system load factor.

Staff recommended in Case No. 83-1130-EL-AIR that within forty-five days subsequent to the issuance of the Commission's Opinion and Order, the Applicant submit to the Staff a document updating and revising the contents of its

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Electric Innovative Rate Program. Applicant submitted the requested information after the filing of the above case, in the format requested. Applicant also appropriately filed the up-date to incorporate any additions or revisions which included the Special Arrangements for Economic Development Program (SAED).

The SAED Program incorporates limited term billing demand discounts, as an incentive to new industrial customers to locate in Applicant's service area, and also encourages existing customers to expand their operations. In both instances exist the possibility for new or retained jobs in addition to increased revenue from sales.

Applicant has filed with the Commission, on a case by case basis, applications for Special Arrangements for Economic Development approval. Applicant is actively encouraging industrial load growth by this program to better utilize the capital investment in plant facilities and to add jobs in its service territory.

Staff believes that Applicant, prudently, is attempting to better its financial position and also the economic well-being of its customers by offering programs that will encourage the recovery of revenue from investment in plant, thereby bringing stability to its service area.

Staff finds that in each SAED filing, Applicant represented to the Commission that the approval would not operate to the detriment of any of its customers. In the instant case, Applicant did not consider the annualized impact of the loads of the customers (SAED) coming on line nor did Applicant introduce the revenue effect experienced by Applicant through the demand discount incentive. Staff has found in its investigation that, to date, the SAED customers coming on Applicant's system represent a load addition of less than 2/10 of 1% related to total system load.

In answer to Staff's Data Request, Applicant stated that "all demand and KWH data in the [instant] case has been projected without regard to these programs". Applicant will propose a methodology to adjust for and appropriately split benefits when they experience a significant impact.

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Staff recommends that, within 60 days subsequent to the issuance of the Commission's Opinion and Order, the Commision order Applicant to submit to the Staff a report demonstrating the following:

(1) All probable benefits, direct and indirect, to each specific customer class.

(2) All possible detriments, direct and indirect, to each specific customer class.

(3) A case study of an actual SAED customer, measuring and detailing, with specificity, the revenue and expense differences between the regular rate and SAED rate and the effect it has on the following:

(a) Applicant's corporate structure

(i) Financial

(ii) Production and reserve balances

(iii) Transmission and distribution systems

(b) Inter class effect

(c) Intra class effect

(d) Jurisdictional service area economic impact study demonstrating the effect on, but not limited to, the following:

(i) Company revenue and expense

(ii) Property tax base

(iii) New Jobs

(iv) New housing starts

(v) Support systems (i.e., new commercial development)

(vi) Other

(4) Case studies of various load levels (i.e., 25MW, 50MW, 100MW, 200MW) employing the average load factor for the GS-Large Customer Class, and, where appropriate, using the data developed in No. 3 above as a model.

(5) Specifically detail the criteria upon which Applicant will determine if the revenue and expense effect is significant enough to apply a methodology of treatment.

(6) Applicant's methodology(ies) for treatment of the revenue and expense effect, caused by the program, in future rates cases.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading has been served upon the below-named persons via regular U.S. Mail Service, postage prepaid, this 21st day of June, 2010.

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