

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The Dayton	)	
Power and Light Company for Approval to	)	Case No. 20-1708-EL-ATA
Establish a New Clean Air Fund Rider	)	

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**MOTION TO INTERVENE  
AND  
MOTION TO MAKE DP&L's NUCLEAR BAILOUT CHARGE  
FOR H.B. 6 SUBJECT TO REFUND  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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On November 17, 2020, DP&L<sup>1</sup> filed a tariff to charge its 519,000 customers over \$18.5 million in 2021 for the House Bill 6 nuclear bailout.<sup>2</sup> In the view of many, including the Ohio Consumers' Counsel, that is \$18.5 million too much for consumers to pay. There are various legal actions and legislative bills pending to stop the charge. Former PUCO Chair Randazzo, in his resignation letter last week, supported H.B. 772 for a repeal of the H.B. 6 nuclear bailout. The enactment of H.B. 6 has been followed by the indictment of the former Speaker of the Ohio House and others involved in Ohio politics, FirstEnergy's firings of its corporate leadership including its CEO Mr. Jones, two guilty pleas to crimes involving House Bill 6, and so on.

History teaches that a travesty of justice occurred in December 2016, when the PUCO denied a joint motion by OCC and the Ohio Manufacturers' Association to make

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<sup>1</sup> The Dayton Power and Light Company.

<sup>2</sup> The charge may include both nuclear and solar bailouts.

FirstEnergy's distribution modernization charge subject to refund.<sup>3</sup> After appeals of the charge by OCC and others, the anti-refund ruling by PUCO Commissioners ultimately cost two million Ohioans nearly a half-billion dollars when the Ohio Supreme Court overturned the charge *but without a refund due to the PUCO ruling against refundability*.<sup>4</sup> That sort of injustice, where Main Street subsidizes Wall Street with corporate welfare, should not be repeated here in the event the bailout is stopped. Accordingly, the PUCO should revise the tariffs that DP&L filed by adding additional language that makes it clear that customers will get the payments back if H.B. 6 is repealed. Energy Harbor's investors shouldn't keep a penny of Ohioans' money, if the H.B. 6 bailout is prevented.

Therefore, the Office of the Ohio Consumers' Counsel ("OCC") moves to intervene and moves for refundability in this case where DP&L has proposed a tariff to collect from consumers \$18.5 million in 2021 for the H.B. 6 bailout.<sup>5</sup> OCC is filing on behalf of DP&L's 465,000 residential utility customers.

The reasons the Public Utilities Commission of Ohio ("PUCO") should grant OCC's Motions are further set forth in the attached Memorandum in Support.

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<sup>3</sup> *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illumination Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*. Case No. 14-1297-EL-SSO, Finding and Order at ¶14-16 (Dec. 21, 2016); <https://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=7be8789e-5a73-4cda-98f5-16c9edd05691>.

<sup>4</sup> *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401 ¶23 ("Moreover, despite our finding that the DMR is unlawful, no refund is available to ratepayers for money already recovered under the rider. R.C. 4905.32 bars any refund of recovered rates unless the tariff applicable to those rates sets forth a refund mechanism.") (citation omitted).

<sup>5</sup> See R.C. Chapter 4911, R.C. 4903.221 and Ohio Adm. Code 4901-1-11. The so-called "Clean Air Fund Rider" ("HB 6 Charge") is authorized under R.C. 3706.46.

Respectfully submitted,

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/s/ William J. Michael

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**MEMORANDUM IN SUPPORT**

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OCC’s two motions should be granted for the following reasons. DP&L is proposing to begin collecting from consumers \$18.5 million in 2021 to subsidize nuclear plants owned by a former FirstEnergy affiliate. This charge is at the center of a scandal and efforts are underway to repeal or invalidate the charge.

Activities involving House Bill 6 have led to a federal investigation, criminal charges, and legislative efforts (in the Ohio House and Ohio Senate) to repeal the bill.<sup>6</sup> Governor DeWine has called for House Bill 6 to be repealed. “[T]he process by which it was created stinks. It’s terrible, it’s not acceptable,” Governor DeWine is reported to have said.<sup>7</sup>

Beyond the scandal, these are times of extraordinary duress for Ohioans, with a health and related financial emergency for many. The PUCO’s focus should be on protecting people’s money from giveaways to energy companies.

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

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<sup>6</sup> See, e.g., “Ex-Ohio House Speaker Larry Householder indicted in federal bribery case,” *Cincinnati.com* (July 30, 2020); <https://www.cincinnati.com/story/news/2020/07/30/ohio-house-speaker-larry-householder-indicted-federal-bribery-case/5544166002/>.

<sup>7</sup> See, e.g., “Gov. DeWine calls for repeal of House Bill 6,” *Cleveland.com* (July 23, 2020), <https://www.cleveland.com/open/2020/07/gov-mike-dewine-calls-for-repeal-of-house-bill-6.html>.

Ohio's residential customers may be "adversely affected" by this case, especially if customers were unrepresented in a proceeding where DP&L seeks to charge them \$18.52 million under tainted House Bill 6. Although DP&L has included subject-to-refund language in its proposed tariff (unlike AEP and FirstEnergy) it has only made refunds available as "ordered by the Commission as the result of audits...."<sup>8</sup> This means that consumers may not see a refund if H.B. 6 is repealed. Accordingly, the PUCO should revise the tariffs that DP&L filed by adding language that the H.B. 6 charges are refundable if H.B. 6 is repealed. Without such language, it is unlikely that consumers could obtain a refund of the H.B. 6 Charge even if tainted House Bill 6 is repealed. That is contrary to consumers' interest. Thus, this element of the intervention standard in R.C. 4903.221 is satisfied.

R.C. 4903.221(B) requires the PUCO 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 proceedings;
- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

First, the nature and extent of OCC's interest is representing the residential customers of DP&L in this case involving the nuclear bailout charges. Without OCC's refund language, it is unlikely that consumers could obtain a refund of the H.B. 6 charges

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<sup>8</sup> See Application, Exhibit B, Original Sheet No. 129.

even if tainted House Bill 6 is repealed or invalidated. That is contrary to consumers' interest. OCC's interest is different than that of any other party and especially different than that of the utility whose advocacy includes the financial interest of stockholders.

Second, OCC's advocacy for residential customers will include, among other things, advancing the position that the nuclear bailout charges should be collected from consumers, if at all, only under a tariff that states specifically the charge is subject to refund if H.B. 6 is repealed. Without such language, it is unlikely that consumers could obtain a refund of the charges if tainted House Bill 6 is repealed or invalidated in Court. That is contrary to consumers' interest. OCC's position is therefore directly related to the merits of this case, which is pending before the PUCO, the authority with regulatory control of public utilities' rates and service quality in Ohio.

Third, OCC's intervention will not unduly prolong or delay the proceedings. 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 full development and equitable resolution of the factual issues. OCC will obtain and develop information that the PUCO should consider for equitably and lawfully deciding the case in the public interest.

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 advocate for residential utility customers, OCC has a very real and substantial interest in this case where DP&L seeks to charge consumers \$18.52

million in 2021 under tainted House Bill 6 without including language in its tariff that the charge is subject to refund if H.B. 6 is repealed. Without such language, it is unlikely that consumers could obtain a refund of the HB 6 Charge even if tainted House Bill 6 is repealed. That is contrary to consumers' interest.

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), which OCC already has addressed, and which OCC satisfies.

Ohio Adm. Code 4901-1-11(B)(5) states that the PUCO 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 in that it uniquely has been designated as the state representative of the interests of Ohio's residential utility customers. That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio ("Court") confirmed OCC's right to intervene in PUCO proceedings, in deciding two appeals in which OCC claimed the PUCO erred by denying its interventions. The Court found that the PUCO abused its discretion in denying OCC's interventions and that OCC should have been granted intervention in both proceedings.<sup>9</sup>

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 Ohio residential customers, the PUCO should grant OCC's motion to intervene and

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<sup>9</sup> See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶13-20.

should grant OCC's motion to make the nuclear bailout charge for H.B 6 subject to refund if H.B. 6 is repealed.

Respectfully submitted,

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Ohio Consumers' Counsel

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Motion to Intervene was served on the persons stated below via electronic transmission, this 25th day of November 2020.

/s/ William J. Michael

William J. Michael

Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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Summary: Motion Motion to Intervene and Motion To Make DP&L's Nuclear Bailout Charge For H.B. 6 Subject To Refund by the Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of Michael, William J.