

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Market Rate Offer.)))	Case No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.)))	Case No. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.)))	Case No. 12-428-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.)))	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.)))	Case No. 12-672-EL-RDR

**MEMORANDUM CONTRA THE APPLICATIONS FOR REHEARING OF
THE DAYTON POWER AND LIGHT COMPANY
AND THE KROGER COMPANY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. ARGUMENT	4
A. The PUCO Has Authority To Now Limit The Amount Of Money That DP&L Can Seek Approval To Collect From Its Customers In 2017 To Maintain Its Financial Integrity.	4
B. It Is Neither Unjust Nor Unreasonable That, Consistent With The Policy Of The State, DP&L Is Required To File An Application To Implement Advanced Metering Infrastructure And SmartGrid Before It Can Seek Approval To Collect From Its Customers A Charge To Maintain Its Financial Stability In 2017.....	5
C. The PUCO’s September 4, 2013 Opinion And Order Giving DP&L Ten Months To File A Distribution Rate Case Is Reasonable.	7
D. The PUCO Should Reject The Use Of The 1 Coincident Peak Demand Allocation Method In Regard To How Customers Will Pay The Service Stability Charge.	8
E. The PUCO Should Reject Kroger’s Rehearing Requests Related To Its Proposed “Sunset Provision” For Customers Shopping For Five Years Or More And For No Increase In Current Stability Charges For “Long-Term Shopping Customers.”	10
III. CONCLUSION.....	12

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") files this Memorandum Contra² the Applications for Rehearing of The Dayton Power and Light Company ("DP&L" or "Utility" or "Company") and the Kroger Company ("Kroger"), to protect residential customers from paying more in unlawful and unreasonable charges to DP&L for its financial integrity. In its Application for Rehearing, DP&L seeks to remove the

² OCC's filing is in accordance with Ohio Adm. Code 4901-1-35(B).

cap on the amount of money that the Public Utilities Commission of Ohio (“PUCO” or “Commission”) found that DP&L may seek authority to collect from its customers through the Service Stability Rider Extension (“SSR-E”). DP&L also challenges the conditions that must be met before it can seek approval of the SSR-E. Finally, in regard to how customers will have to pay stability charges, DP&L seeks clarification of whether, in adopting a 1 coincident peak (“1CP”) cost allocation, the PUCO “intended for the Company to allocate only the increment of SSR that exceeds the current non-bypassable amount based on the single system peak.”³

As thoroughly explained in OCC’s Application for Rehearing, the PUCO has no authority under R.C. 4928.143(B)(2)(d) to authorize DP&L to collect money from its customers for financial stability in 2017 through the SSR-E.⁴ Additionally, when the PUCO established the SSR-E it violated numerous statutes, including R.C. 4928.38, 4903.09, 4928.02(H), and 4928.143(C).⁵ However, assuming *arguendo*, that the PUCO could lawfully establish the SSR-E, the PUCO has the authority to set reasonable limits on the SSR-E. Accordingly, DP&L’s Application for Rehearing on its claims that the PUCO cannot place any restrictions on DP&L’s ability to seek the SSR-E should be denied.

³ DP&L Memorandum in Support of Application for Rehearing at 14.

⁴ OCC Memorandum in Support of Application for Rehearing at 30-37.

⁵ OCC Memorandum in Support of Application for Rehearing at 30-37.

The PUCO's decision that customers will have to pay \$330 million to DP&L for its financial stability is unlawful.⁶ However, if any stability charge is permitted, it should be paid by all customer classes based on a per kWh allocation method.⁷

Through its Application for Rehearing, DP&L asks whether the PUCO intended to allocate the entire SSR based on a 1CP method or just the amount above DP&L's current non-bypassable rate stabilization charge ("RSC").⁸ But DP&L's request for clarification reflects the reasons why the 1CP demand allocation method should be rejected in favor of a kWh allocator. As explained further below, the PUCO should reject any use of a 1CP demand allocation method.

Kroger applies for rehearing of its position that the SSR should not be charged to customers who have been shopping for five years or more and argues that stability charges should not be increased above current levels for "long-term" shopping customers – those who have been shopping continuously for at least three years.⁹ But Kroger fails to put forth any arguments that support a reversal of the PUCO's decision that treats all customers (both shopping and non-shopping customers) the same. Therefore, the PUCO should reject Kroger's rehearing request for a SSR sunset for shopping customers and a lower charge for long-term shopping customers. Instead, the PUCO should modify its September 4, 2013 Opinion and Order and September 6, 2013 Entry *Nunc Pro Tunc* consistent with OCC's Application for Rehearing filed on October 4, 2013.

⁶ OCC Memorandum in Support of Application for Rehearing at 10-30.

⁷ OCC Memorandum in Support of Application for Rehearing at 52-55.

⁸ DP&L Memorandum in Support of Application for Rehearing at 14.

⁹ Kroger Memorandum in Support of Application for Rehearing at 14-16.

II. ARGUMENT

A. The PUCO Has Authority To Now Limit The Amount Of Money That DP&L Can Seek Approval To Collect From Its Customers In 2017 To Maintain Its Financial Integrity.

DP&L claims that the PUCO correctly held that it could authorize the SSR-E under R.C. 4928.143(B)(2)(d).¹⁰ But DP&L also claims that the PUCO's decision to limit the SSR-E to \$45.8 million is unlawful because there is no provision that authorizes the PUCO to decide "now the level of the stability charge that DP&L would seek in a future (yet to be filed) proceeding."¹¹ DP&L alleges that if it can show in 2017 that it needs a stability charge greater than \$45.8 million, then the PUCO should authorize a higher stability charge.¹²

But DP&L's argument is based on a false premise. DP&L assumes that the PUCO's decision now is separable from its "later" decision in 2017. It is not. The term of the PUCO-approved electric security plan for DP&L extends through the first five months of 2017.¹³ Thus, the PUCO can decide now, as part of its review of DP&L's electric security plan, what charges may be collected from customers for the first five months of 2017 if the PUCO's specified conditions are met.

In fact, the PUCO must decide now. The PUCO is required by statute to issue an order approving or modifying and approving DP&L's application.¹⁴ The PUCO must, under R.C. 4928.143(C)(1), determine whether the modified electric security plan is more favorable in the aggregate for customers than the expected results under a market rate

¹⁰ DP&L Memorandum in Support of Application for Rehearing at 1; but see OCC Application for Rehearing at 30-37.

¹¹ DP&L Memorandum in Support of Application for Rehearing at 2.

¹² DP&L Memorandum in Support of Application for Rehearing at 2.

¹³ September 6, 2013 Entry at ¶4.

¹⁴ See R.C. 4928.141(A); 4928.143(C)(1) (Emphasis added).

offer. In doing that analysis, the PUCO is required to consider “pricing and *all other terms and conditions*, including any deferrals and any future recovery of deferrals.”

“All other terms and conditions” include terms and conditions offered during the term of the electric security plan. Here the PUCO approved a term for the electric security plan that extends through May 2017. The SSR-E is related to the utility’s earnings during the last five months of the ESP term—from January 2017 through May 2017. The PUCO through its ruling allowed the Utility to apply to collect additional charges from customers for that period only if specific conditions are met, including that any charge to customers is necessary to maintain DP&L’s financial integrity. That application, though to be made in the future, was of necessity ruled upon as part of the PUCO’s Order in this proceeding. DP&L’s request for rehearing on this issue should be denied.

B. It Is Neither Unjust Nor Unreasonable That, Consistent With The Policy Of The State, DP&L Is Required To File An Application To Implement Advanced Metering Infrastructure And SmartGrid Before It Can Seek Approval To Collect From Its Customers A Charge To Maintain Its Financial Stability In 2017.

DP&L challenges the PUCO’s September 4, 2013 Order that conditions the SSR-E on the filing of an application by DP&L for advanced metering infrastructure and a smart grid plan (“AMI/SmartGrid”). Specifically, DP&L alleges that this requirement is unlawful because there is no basis in the record for it.¹⁵ DP&L notes that no party asked that DP&L implement AMI/SmartGrid and there is no record regarding how much AMI/SmartGrid would cost.¹⁶ DP&L also alleges that this condition (regarding

¹⁵ DP&L Memorandum in Support of Application for Rehearing at 4.

¹⁶ DP&L Memorandum in Support of Application for Rehearing at 4.

AMI/SmartGrid) is unreasonable because it *may be* impossible or unreasonably expensive for DP&L to implement AMI/Smart Grid.¹⁷

But contrary to DP&L's assertions, the PUCO is merely carrying out the policy of the State. And the PUCO has not ordered DP&L to implement AMI/SmartGrid. DP&L is only required to come forward with a proposal for the PUCO's consideration.

Under R.C. 4928.02(D), it is a policy of the State to encourage innovation and market access for cost-effective supply- and demand-side retail electric service, including smart grid programs and implementing advanced metering infrastructure. Under R.C. 4928.06, the PUCO has a duty to ensure the policies specified under R.C. 4928.02 are effectuated. Indeed the Ohio Supreme Court expressly held that the PUCO may not approve a rate plan that violates the policy provisions of R.C. 4928.02.¹⁸

Here, in the furtherance of State policy, the PUCO ordered DP&L to file an application in regard to the implementation and deployment of smart grid technology and advanced metering infrastructure. The PUCO also directed DP&L to look at other cost effective initiatives or programs that DP&L reasonably believes would promote these State policies.

DP&L maintains that it "is not necessarily opposed to implementing AMI/SmartGrid."¹⁹ DP&L just wants to address the costs and benefits of AMI/SmartGrid before implementation.²⁰ Certainly, the PUCO itself contemplated such

¹⁷ DP&L Memorandum in Support of Application for Rehearing at 4.

¹⁸ *Elyria Foundry v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 305.

¹⁹ DP&L Memorandum in Support of Application for Rehearing at 5.

²⁰ DP&L Memorandum in Support of Application for Rehearing at 5.

an analysis when it required the filing of an application. Accordingly, there is no need for rehearing on this issue. DP&L's Application for Rehearing should be denied.

C. The PUCO's September 4, 2013 Opinion And Order Giving DP&L Ten Months To File A Distribution Rate Case Is Reasonable.

Assuming *arguendo*, that the SSR-E is lawful, the PUCO rightfully established (as one of the conditions precedent to DP&L seeking the SSR-E) that DP&L must file a distribution rate case before July 1, 2014. The PUCO explained that conducting a distribution rate case before authorizing the SSR-E will provide it and parties with increased certainty to evaluate whether DP&L's financial integrity is at risk and whether the SSR-E is necessary.²¹

But DP&L argues that the PUCO should reconsider and extend the deadline for DP&L to file a distribution rate case.²² DP&L seeks to extend the deadline from July 1, 2014 to December 13, 2014.²³ DP&L complains that it will need to do an "extraordinary amount of work" to prepare the distribution case filing.²⁴ DP&L also claims it will be nearly impossible to file a distribution rate case with "substantial amount of work" it needs to perform on other matters.²⁵

But DP&L's conclusory statements do not support a finding that the PUCO erred in establishing the July 1, 2014 deadline. That deadline (July 1, 2012) is timed to allow the PUCO to thoroughly evaluate whether DP&L needs the SSR-E in 2017. Ten months (from September 4, 2013 to July 1, 2014) is not an unreasonable amount of time to

²¹ September 4, 2013 Order at 27.

²² DP&L Memorandum in Support of Application for Rehearing at 5.

²³ DP&L Memorandum in Support of Application for Rehearing at 5.

²⁴ DP&L Memorandum in Support of Application for Rehearing at 5.

²⁵ DP&L Memorandum in Support of Application for Rehearing at 6.

prepare a rate case filing. Accordingly, the PUCO should deny DP&L's Application for Rehearing on this issue.

D. The PUCO Should Reject The Use Of The 1 Coincident Peak Demand Allocation Method In Regard To How Customers Will Pay The Service Stability Charge.

In its Application for Rehearing, DP&L seeks clarification of whether, in adopting a 1CP cost allocation, the PUCO "intended for DP&L to allocate only the increment of SSR that exceeds the current non-bypassable amount based on the single system peak."²⁶ In other words, DP&L asks whether the PUCO intended to allocate the entire SSR based on a 1CP method or just the amount above the current non-bypassable RSC charge.²⁷ But DP&L's request for clarification reflects the reasons why the 1CP demand allocation method should be rejected in favor of a kWh allocator. Accordingly, the PUCO should reject any use of a 1CP demand allocation method.

DP&L demonstrates, in Exhibit A to its Application for Rehearing, the dramatic difference between the class cost allocations resulting from applying a 1 CP allocation method two different ways.²⁸ And Exhibit A highlights the unjust and unreasonable results of using a 1CP demand allocation method. In particular, if the full amount (of the SSR) is allocated to customer classes based on a 1CP method, Street Lighting and Private Outdoor Lighting customers would not pay the SSR. Such a result is unreasonable and inconsistent with the PUCO's finding that the SSR will be paid by all shopping and non-

²⁶ DP&L Memorandum in Support of Application for Rehearing at 14-15.

²⁷ *Id.*

²⁸ DP&L Memorandum in Support of Application or Rehearing at 14-15 & Exh. A.

shopping customers.²⁹ Nowhere in the PUCO's Orders does the PUCO hold that some tariff customer classes do not have to pay the SSR.

DP&L's Exhibit A also illustrates the unreasonable increase that some customer classes will bear if the SSR is allocated using 1CP. For example, in regard to the residential class, the 1CP allocation would result in residential customers paying 48.29% of any authorized SSR charges even though they only use 37% of the electricity.³⁰ This allocation would be significantly greater than the current allocation of DP&L's current non-bypassable RSC to the residential class of 41%.³¹ And it would allocate almost 30% more costs to the residential class than would result from the per kWh allocation that follows from the reasons the costs are incurred.³² DP&L's proposal (to only allocate the increment above the RSC on a 1CP method) in Exhibit A would moderate this impact somewhat by lowering the allocation to residential customers to 43.23%.³³ But any 1CP demand allocation produces an unreasonable increase to residential customers and should be rejected.

As discussed in OCC's Application for Rehearing, to the extent that any SSR is allowed, it should be allocated between customer classes on a kWh basis, and the 1CP method should be rejected.³⁴ The 1CP demand allocation method is inconsistent with the

²⁹ September 4, 2013 Order at 21.

³⁰ DP&L Memorandum in Support of Application for Rehearing, Exh. A (\$53,119,974/\$110,000,000); Direct Testimony of Scott J. Rubin at 11.

³¹ Direct Testimony of OCC Witness Scott J. Rubin at 11.

³² Direct Testimony of OCC Witness Scott J. Rubin at 9, 12-13.

³³ DP&L Memorandum in Support of Application for Rehearing, Exh. A (\$47,557,646/\$110,000,000) = 43.23%.

³⁴ OCC Memorandum in Support of Application for Rehearing at 52-55.

reasons for the SSR charge.³⁵ The SSR charge is unrelated to generation/production costs as the PUCO has stated.³⁶ Even if the charge was related to production costs, production costs are no longer subject to cost-based regulation and cannot form the basis for such a charge.³⁷ And OEG's witness simply lacked the expertise, and failed to perform the analysis – including customer impact analysis – necessary to support his 1 CP proposed allocation.³⁸ Indeed, in the absence of a customer impact analysis, DP&L's concern that the 1CP method will have dramatic impacts on customers is the result of implementing an unsupported cost allocation without a customer impact analysis.

As stated above, DP&L's request for clarification reflects the reasons that the 1CP method should be rejected in favor of a kWh allocator. However, should the PUCO nonetheless adopt a 1CP allocator, DP&L's recommendation to apply the 1CP allocator to only the amount of the SSR that exceeds the current RSC³⁹ is preferable to applying the unjustified 1CP demand allocation method to the full amount of the SSR.

E. The PUCO Should Reject Kroger's Rehearing Requests Related To Its Proposed "Sunset Provision" For Customers Shopping For Five Years Or More And For No Increase In Current Stability Charges For "Long-Term Shopping Customers."

Kroger applies for rehearing of its position that the SSR should not be charged to customers who have been shopping for five years or more.⁴⁰ In addition to applying for

³⁵ OCC Memorandum in Support of Application for Rehearing at 52-55.

³⁶ OCC Memorandum in Support of Application for Rehearing at 52-53, *citing* September 4, 2013 Order at 21-22 (the PUCO held that DP&L's proposed SSR is related to "financial integrity," not stranded generation costs that should have been collected prior to December 2010).

³⁷ OCC Memorandum in Support of Application for Rehearing at 53-54.

³⁸ *See* OCC Reply Brief at 48, *citing* Transcript Vol. VIII-Public at 1975-77.

³⁹ DP&L Memorandum in Support of Application for Rehearing at 15.

⁴⁰ Kroger Memorandum in Support of Application for Rehearing at 14-16.

rehearing of this “sunset” recommendation, Kroger argues that stability charges should not be increased above current levels for “long-term” shopping customers – those who have been shopping continuously for at least three years.⁴¹ But Kroger provided no support for these proposals to treat shopping customers more favorably than non-shopping customers with respect to stability charges. Indeed, Kroger’s witness admitted that he had made no recommendation, and had not evaluated, whether non-shopping customers should also have a sunset provision.⁴² Instead, he agreed that “long-term shoppers, short-term shoppers, and non-shoppers all have an interest in ensuring that DP&L maintains its ability to provide stable service.”⁴³

While Kroger argues that sunset dates are “inherently reasonable,” this assertion is apparently based on its view that “the rationale for assessing a charge for legacy costs diminishes the longer a customer has purchased generation from a CRES.”⁴⁴ But Kroger’s argument assumes that SSR charges are related to such “legacy [generation] costs” when the PUCO has found that DP&L’s SSR charge is not a generation-related charge but a charge for maintaining “financial integrity” for DP&L’s combined operations.⁴⁵ As OCC emphasized in its Application for Rehearing, if DP&L’s SSR is for such legacy generation costs, then it is an illegal transition charge.⁴⁶ While OCC agrees with Kroger’s “primary” position that the PUCO should reject the SSR in its entirety,⁴⁷

⁴¹ Kroger Memorandum in Support of Application for Rehearing at 14-16.

⁴² Transcript Vol. VII – public, pages 1643-44.

⁴³ Transcript Vol. VII – public, pages 1658-59.

⁴⁴ Kroger Memorandum in Support of Application for Rehearing at 14-15.

⁴⁵ September 4, 2013 Order at 22.

⁴⁶ OCC Memorandum in Support of Application for Rehearing at 21, 26.

⁴⁷ Transcript Vol. VII-public at 1643-44; Kroger Memorandum in Support of Application for Rehearing at 10-14.

there is simply no support for Kroger's position that shopping customers should be treated differently than non-shopping customers in paying the SSR. And the law prohibits discriminatory rate treatment where the service is essentially the same.⁴⁸ Kroger has failed to show that there are different circumstances justifying differential treatment for long-term shopping customers as compared non-shopping customers or short-term shopping customers. Kroger has also failed to show that all customers aren't similarly responsible for "stability," to the extent any such "stability" charges are justifiable. Therefore, the PUCO should reject Kroger's rehearing request for an SSR sunset for shopping customers and a lower charge for long-term shopping customers.

III. CONCLUSION

For all the reasons discussed above, the OCC urges the PUCO to deny DP&L's Application for Rehearing and thereby protect consumers from further future increases in rates. And the PUCO should deny Kroger's Application for Rehearing in regard to its requests for a SSR sunset for shopping customers and a lower charge for long-term shopping customers. Instead, the Commission should modify its September 4, 2013 Opinion and Order and September 6, 2013 Entry *Nunc Pro Tunc*, consistent with the OCC's Application for Rehearing filed on October 4, 2013.

⁴⁸ R.C. 4905.33.

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Memorandum Contra* was served via electronic mail to the persons listed below this 31th day of October, 2013.

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Summary: Memorandum Memorandum Contra the Applications for Rehearing of the Dayton Power and Light Company and the Kroger Company by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Yost, Melissa R. Ms.