

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the Dayton Power)
and Light Company for Approval of its Electric) Case No. 16-0395-EL-SSO
Security Plan.)

In the Matter of the Application of the Dayton Power) Case No. 16-0396-EL-ATA
and Light Company for Approval of Revised Tariffs.)

In the Matter of the Application of the Dayton Power)
and Light Company for Approval of Certain) Case No. 16-0397-EL-AAM
Accounting Authority Pursuant to Ohio Rev. Code §)
4905.13.)

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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November 20, 2017

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The Office of the Ohio Consumers' Counsel ("OCC") files this Application to protect consumers from paying their utility hundreds of millions of dollars for charges such as a Distribution Modernization Rider ("DMR") that doesn't require any money to be spent on distribution and instead requires customers to subsidize coal-fired power plants.¹ In its Opinion and Order of October 20, 2017 ("Opinion and Order"), the Public Utilities Commission of Ohio ("PUCO") approved the Amended Stipulation and Recommendation ("Settlement") filed in this case that includes a number of unlawful and unreasonable customer charges, including the so-called Distribution Modernization Rider.

The Opinion and Order approved the Settlement with modifications. Under the modified Settlement, Dayton Power & Light Company ("DP&L") will collect increased

¹ See R.C. 4903.10 and O.A.C. 4901-1-35.

rates from customers until 2023. The Opinion and Order harms customers and is unreasonable and unlawful in the following respects:

ASSIGNMENT OF ERROR 1: The PUCO's Opinion and Order is unlawful because the PUCO found that DP&L's electric security plan is more favorable in the aggregate than a market rate offer for consumers, depriving them of a less expensive market rate offer. In doing so, the PUCO violated R.C. 4928.143 and important regulatory principles and practice.

ASSIGNMENT OF ERROR 2: The PUCO's Opinion and Order is unlawful because it allowed DP&L to charge customers (through the Distribution Modernization Rider and the Reconciliation Rider) for transition costs or "any equivalent revenue" that customers are no longer required to pay. The PUCO's decision harmed customers by increasing the rates they pay and was contrary to R.C. 4928.38 and important regulatory principles and practice.

ASSIGNMENT OF ERROR 3: The PUCO's Opinion and Order requires customers to subsidize economic development incentives. The PUCO's Opinion and Order lacked evidentiary support as required under R.C. 4903.09, 4928.143(B)(2)(i), and case law.

ASSIGNMENT OF ERROR 4: The PUCO's Opinion and Order is unreasonable and unlawful because it requires customers to pay for the Distribution Modernization Rider, contrary to the PUCO's Finding and Order in *In the Matter of the Application of AES Corporation*, Case No. 11-3002-EL-MER. That PUCO Finding and Order bars charging consumers for the Distribution Modernization Rider.

ASSIGNMENT OF ERROR 5: The PUCO's Opinion and Order is unreasonable and unlawful because it does not consider distribution modernization revenues when determining whether customers have funded significantly excessive earnings, and deserve a refund under R.C. 4928.143(F) and Supreme Court of Ohio precedent. This limits the potential refund to customers for significantly excessive earnings under a utility's electric security plan.

ASSIGNMENT OF ERROR 6: The PUCO's Opinion and Order is unreasonable and against the public interest because, contrary to the PUCO's assertion, the cost allocation to residential consumers who pay the Distribution Modernization Rider is not based on the cost allocation of DP&L's existing nonbypassable rider and therefore harms residential consumers by charging them too much.

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TABLE OF CONTENTS

| | PAGE |
|---|------|
| I. INTRODUCTION..... | 1 |
| II. STANDARD OF REVIEW | 3 |
| III. RECOMMENDATIONS..... | 4 |
| ASSIGNMENT OF ERROR 1: The PUCO's Opinion and Order is unlawful because the PUCO found that DP&L's electric security plan is more favorable in the aggregate than a market rate offer for consumers, depriving them of a less expensive market rate offer. In doing so, the PUCO violated R.C. 4928.143 and important regulatory principles and practice..... | 4 |
| ASSIGNMENT OF ERROR 2: The PUCO's Opinion and Order is unlawful because it allowed DP&L to charge customers (through the Distribution Modernization Rider and the Reconciliation Rider) for transition costs or "any equivalent revenue" that customers are no longer required to pay. The PUCO's decision harmed customers by increasing the rates they pay and was contrary to R.C. 4928.38 and important regulatory principles and practice... | 5 |
| ASSIGNMENT OF ERROR 3: The PUCO's Opinion and Order requires customers to subsidize economic development incentives. The PUCO's Opinion and Order lacked evidentiary support as required under R.C. 4903.09, 4928.143(B)(2)(i), and case law. | 6 |
| ASSIGNMENT OF ERROR 4: The PUCO's Opinion and Order is unreasonable and unlawful because it requires customers to pay for the Distribution Modernization Rider, contrary to the PUCO's Finding and Order in In the Matter of the Application of AES Corporation, Case No. 11-3002-EL-MER. That PUCO Finding and Order bars charging consumers for the Distribution Modernization Rider. | 7 |
| ASSIGNMENT OF ERROR 5: The PUCO's Opinion and Order is unreasonable and unlawful because it does not consider distribution modernization revenues when determining whether customers have funded significantly excessive earnings, and deserve a refund under R.C. 4928.143(F) and Supreme Court of Ohio precedent. This limits the potential refund to customers for significantly excessive earnings under a utility's electric security plan. | 7 |
| ASSIGNMENT OF ERROR 6: The PUCO's Opinion and Order is unreasonable and against the public interest because, contrary to the PUCO's assertion, the cost allocation to residential consumers who pay the Distribution Modernization Rider is not based on the cost allocation of DP&L's existing nonbypassable rider and therefore harms residential consumers by charging them too much. | 8 |
| IV. CONCLUSION | 9 |

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

DP&L has already charged Ohioans \$673.3 million in “stability” charges to bolster its financial integrity.² Since 2012, DP&L’s ultimate parent, AES Corporation (“AES”), has not contributed any money to help stabilize or bolster DPL Inc. (“DPL”, DP&L’s immediate parent) or DP&L’s financial integrity. Notwithstanding the enormous transfer of wealth from Ohioans to DP&L, DP&L is in a “financial crisis.”³ By its own admission, it did not get there as a result of sound management.⁴ Unfortunately for

² See *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order at 11 (December 28, 2005); *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Opinion and Order at 5 (June 24, 2009); *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Entry Nunc Pro Tunc at 2 (September 6, 2013).

³ Direct Testimony of Sharon Schroder (DP&L Exs. 3 and 4) filed March 22, 2017 (“Schroder Testimony”) at 3:17.

⁴ Hearing Transcript, Vol. I at 32:1-3.

consumers, DP&L is back asking the PUCO to authorize it to charge consumers even more money under the Settlement. It should be rejected.

Once again, DP&L is back at the PUCO asking for authority to charge consumers to bail it out – to the tune of \$315 million (and perhaps up to \$525 million). This charge, though labelled as a “Distribution Modernization Rider”, has nothing to do with modernization but everything to do with financial integrity.⁵ But if DP&L’s financial integrity is threatened, it is because of the nearly \$1 billion in debt that AES saddled DP&L’s parent, DPL, with as a result of AES’s acquisition of DP&L (“the Merger”).⁶ DPL cannot pay that debt back due to the poor financial performance of the generation assets that were part of the AES/DP&L acquisition.⁷

To protect consumers, the Settlement should be rejected. The so-called DMR violates the Merger Finding and Order, which the PUCO did not even address in its Opinion and Order, and it is an illegal transition charge or equivalent revenue. In addition, the Reconciliation Rider is an illegal transition charge or any equivalent revenue. that the PUCO cannot authorize. The Supreme Court of Ohio has told the PUCO and multiple electric utilities, including DP&L specifically, that transition charges and any equivalent revenue are illegal no matter how hard they try to dress up the charges as something else.⁸ Further, because the Settlement has “placeholder” riders, the PUCO did not, and could not have, fulfilled its obligations under R.C. 4928.143(C)(1) to determine if the proposed ESP is more favorable in the aggregate than the expected

⁵ See, e.g., Schroder Testimony at 22:9-10.

⁶ Hearing Transcript, Vol. I at 30:1-13.

⁷ Id. at 60:10-12; see also id. at 58:2-7.

⁸ See *In re Application of Columbus Southern Power Co.*, 147 Ohio St. 3d 439 (2016); *In re Dayton Power & Light Co.*, 147 Ohio St. 3d 166 (2016).

results under a market rate offer (“ESP v. MRO test”). And the purported economic development incentives are not supported, at all, with record evidence as required by statute and case law. The PUCO should not have excluded DMR revenues from SEET review, and it should revisit the cost allocation of the DMR.

The PUCO has an opportunity to stand between the public interest and DP&L charging consumers hundreds of millions of dollars to subsidize, via government regulation, old, inefficient, coal-fired power plants that cannot compete in a market deregulated by the Ohio General Assembly over 16 years ago. It should ensure that its Opinion and Order is reasonable and lawful. Unfortunately for consumers, it is not. To protect consumers and the public interest, it should reconsider its Opinion and Order as described herein. Upon reconsideration of any one of those decisions, the PUCO should find that the Settlement should be rejected.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.” OCC entered an appearance and filed testimony regarding DP&L’s Application and the Settlement. It participated in the evidentiary hearing on the Settlement.

R.C. 4903.10 requires that an application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the

order to be unreasonable or unlawful.” Additionally, Ohio Adm. Code 4901-1-35(A) states: “An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing.”

In considering an application for rehearing, R.C. 4903.10 provides that “the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.” The statute also provides: “[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.”

The statutory standard for abrogating some portions of the Opinion and Order and modifying other portions are met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Opinion and Order.

III. RECOMMENDATIONS

ASSIGNMENT OF ERROR 1: The PUCO’s Opinion and Order is unlawful because the PUCO found that DP&L’s electric security plan is more favorable in the aggregate than a market rate offer for consumers, depriving them of a less expensive market rate offer. In doing so, the PUCO violated R.C. 4928.143 and important regulatory principles and practice.

The PUCO concluded that the ESP embodied in the Settlement passed the ESP v. MRO test.⁹ The PUCO should reconsider this conclusion because it did not consider, and

⁹ See Opinion and Order at 42-46.

due to DP&L's lack of evidence, could not have considered, the cost of the myriad proposals created but initially set at zero.¹⁰

The statutory test instructs the PUCO to consider pricing and all other terms and conditions in evaluating if an ESP is more favorable in the aggregate than an expected MRO. *In re Ohio Edison Co.*, 146 Ohio St. 3d 222, 226 (2016). Without such consideration, the PUCO does not meet its obligations under R.C. 4928.143(C)(1). Because so many of DP&L's proposals have unknown costs, the PUCO should not find, and cannot find, that the ESP embodied in the Settlement passes the ESP v. MRO test.

Rehearing should be granted on Assignment of Error No. 1.

ASSIGNMENT OF ERROR 2: The PUCO's Opinion and Order is unlawful because it allowed DP&L to charge customers (through the Distribution Modernization Rider and the Reconciliation Rider) for transition costs or "any equivalent revenue" that customers are no longer required to pay. The PUCO's decision harmed customers by increasing the rates they pay and was contrary to R.C. 4928.38 and important regulatory principles and practice.

The PUCO determined in its Opinion and Order that the DMR and Reconciliation Rider do not allow DP&L to collect untimely transition costs or equivalent revenues.¹¹ Based on recent Ohio Supreme Court precedent, the PUCO should reconsider that determination and find that the DMR and Reconciliation Rider do, in fact, allow DP&L to collect untimely transition revenues.

The Ohio Supreme Court explained just recently that "R.C. 4928.38 bars the commission from authorizing the 'receipt of transition revenues or any equivalent

¹⁰ Some examples include the DIR, Regulatory Compliance Rider, Uncollectible Rider, Storm Cost Recovery Rider, Economic Development Rider, etc. See Direct Testimony of Jeffrey Malinak (DP&L Ex. 2b) filed March 22, 2017 at 14:9-20. Further, the Reconciliation Rider's cost is unknown.

¹¹ Opinion and Order at 49-51; 54-56.

revenues' after December 31, 2010.”¹² It therefore found that the PUCO erred in approving AEP Ohio's Retail Rate Stability Rider.¹³ That unlawful rider is indistinguishable from the DMR and Reconciliation Rider. As the record evidence here shows, the riders allows DP&L to collect untimely transition revenues.¹⁴

The PUCO should grant rehearing on Assignment of Error No. 2.

ASSIGNMENT OF ERROR 3: The PUCO's Opinion and Order requires customers to subsidize economic development incentives. The PUCO's Opinion and Order lacked evidentiary support as required under R.C. 4903.09, 4928.143(B)(2)(i), and case law.

It is axiomatic that the PUCO must base its decisions on record evidence.¹⁵ Yet it approved various economic development incentives without any demonstration of need or specific commitments by those purportedly receiving the incentives.¹⁶ Without any demonstration of need or specific commitments, the PUCO should not approve the alleged economic development incentives. Without record support they are improper.

The PUCO should grant rehearing on Assignment of Error No. 3.

¹² *In re Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Under R.C. 4928.143 in the Form of an Electric Security Plan*, Oh. S. Ct. 2016-1608, Slip Opinion at ¶ 18 (April 21, 2016).

¹³ *Id.*

¹⁴ See generally OCC's Brief at 12-20.

¹⁵ *Tongren v. PUCO*, 85 Ohio St. 3d 87 (1999).

¹⁶ Opinion and Order at 56.

ASSIGNMENT OF ERROR 4: The PUCO’s Opinion and Order is unreasonable and unlawful because it requires customers to pay for the Distribution Modernization Rider, contrary to the PUCO’s Finding and Order in *In the Matter of the Application of AES Corporation*, Case No. 11-3002-EL-MER. That PUCO Finding and Order bars charging consumers for the Distribution Modernization Rider.

OCC demonstrated in its brief that the DMR is barred by the Merger Finding and Order.¹⁷ A condition precedent to AES obtaining approval for the merger was its commitment to the PUCO – and Ohio consumers – not to charge DP&L’s customers for costs associated with closing the transaction or for any acquisition premium.¹⁸ But that is exactly what it is trying to do in the Settlement.¹⁹ The PUCO did not address the matter in its Opinion and Order. It must.²⁰ After doing so, the PUCO should reject the Settlement.

The PUCO should grant rehearing on Assignment of Error No. 4.

ASSIGNMENT OF ERROR 5: The PUCO’s Opinion and Order is unreasonable and unlawful because it does not consider distribution modernization revenues when determining whether customers have funded significantly excessive earnings, and deserve a refund under R.C. 4928.143(F) and Supreme Court of Ohio precedent. This limits the potential refund to customers for significantly excessive earnings under a utility’s electric security plan.

The PUCO excluded DMR revenues from the significantly excessive earnings test (“SEET”) in R.C. 4928.143(F).²¹ The PUCO should reconsider this determination because it would result in consumers funding significantly excessive earnings in violation of the statute and *In re Columbus Southern Power Co.*, 134 Ohio St. 3d 392, 400-401 (2012). Upon reconsideration, DMR revenues should not be excluded from SEET.

¹⁷ See, e.g., OCC’s Brief at 27-28.

¹⁸ See, e.g., *id.*

¹⁹ See, e.g., *id.*

²⁰ See, e.g., *In re Application of Columbus Southern Power Co.*, 147 Ohio St. 3d 439 (2016).

²¹ Opinion and Order at 57-58.

The PUCO should grant rehearing on Assignment of Error No. 5.

ASSIGNMENT OF ERROR 6: The PUCO's Opinion and Order is unreasonable and against the public interest because, contrary to the PUCO's assertion, the cost allocation to residential consumers who pay the Distribution Modernization Rider is not based on the cost allocation of DP&L's existing nonbypassable rider and therefore harms residential consumers by charging them too much.

The PUCO said that “the cost allocation for the DMR is based on the cost allocation of DP&L’s existing nonbypassable rider [and,] [t]herefore, the Commission finds the principle of gradualism supports using a similar cost allocation to reduce impact on customer bills.”²² Previously, however, the PUCO correctly noted that “DP&L responds that the cost allocation proposed in the Amended Stipulation has 34 percent allocated based on five coincident peaks, 33 percent allocated based on distribution revenue, and 33 percent allocated based on historic allocation of the currently charged nonbypassable rider.”²³ Thus, only 33% of the cost allocation methodology governing the DMR adopted in the Settlement is actually based on the cost allocation of DP&L’s existing nonbypassable rider.

As described in the testimony of OCC witness Robert B. Fortney, the difference between allocating the \$105,000,000 DMR based on the combination methodology approved in the Settlement and allocating the DMR based on the previously approved nonbypassable rider results in nearly \$5,000,000 in additional charges being paid by the residential class on an annual basis. This revenue shift is harmful to residential customers and is not in the public interest.²⁴

The PUCO should grant rehearing on Assignment of Error No. 6.

²² Id. at 52.

²³ Id.

²⁴ Direct Testimony of Robert B. Fortney filed March 29, 2017 (OCC Ex. 14) at 7.

IV. CONCLUSION

The PUCO should grant rehearing on OCC's claims of error and modify or abrogate its Opinion and Order because it will harm customers. Granting rehearing as requested by OCC is necessary to ensure that DP&L customers are not subject to unreasonable and unjust charges. Without rehearing, Ohio consumers will end up paying for a whole host of unreasonable and unlawful charges, including, but not limited to, a government ordered subsidy of deregulated, old, inefficient, coal-fired power plants by captive monopoly customers that under the law should be competing in a competitive market.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was served on the persons stated below via electronic transmission, this 20th day of November 2017.

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Summary: App for Rehearing Application for Rehearing by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Michael, William Mr.