

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the Dayton)	
Power and Light Company for an Increase in)	Case No. 15-1830-EL-AIR
Electric Distribution Rates.)	
In the Matter of the Application of the Dayton)	
Power and Light Company for Approval to Change)	Case No. 15-1831-EL-AAM
Accounting Methods.)	
In the Matter of the Application of the Dayton)	Case No. 15-1832-EL-ATA
Power and Light Company for Tariff Approval.)	

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

The Ohio Consumers' Counsel ("OCC"), Staff, Dayton Power and Light Company ("DP&L"), and other parties agreed to settle this case on terms that benefit DP&L's 500,000 residential and nonresidential customers.¹ The PUCO approved the Settlement.²

Unfortunately, the Order misinterprets the parties' intent with respect to one issue, thereby effectively modifying the Settlement in a way that harms consumers.

In opposing the Settlement, IGS Energy and the Retail Energy Supply Association (together, the "Marketers") argued that certain costs related to DP&L's standard service offer ("SSO") should be "unbundled"—that is, they should be paid for exclusively by SSO customers, and not customers who shop for their generation with Marketers.³

¹ Stipulation and Recommendation (June 18, 2018) (the "Settlement").

² Opinion and Order (Sept. 26, 2018) (the "Order").

³ See Initial Brief of Interstate Gas Supply, Inc. (Aug. 17, 2018); Initial Post-Hearing Brief of the Retail Energy Supply Association (Aug. 17, 2018).

The PUCO wisely rejected this Marketer recommendation.⁴ But the PUCO did require DP&L to unbundle a portion of its costs, particularly, the SSO-related portion of DP&L's PUCO and OCC assessments (the "Assessments").⁵ The PUCO reasoned that the PUCO Staff recommended unbundling of these costs in its Staff Report and that the Settlement did not modify that recommendation.⁶

This portion of the Order is unreasonable and unlawful because (i) contrary to the findings in the Order, there is no disagreement among the parties to the Settlement regarding this issue, (ii) the Staff Report was, at best, ambiguous on this issue, and thus the PUCO Staff did *not* definitively recommend unbundling of the Assessments, (iii) the PUCO Staff admitted that this recommendation was erroneous, and no other party beyond the Marketers supported the unbundling of the Assessments, and (iv) OCC witness Willis explained how the Settlement did *not* adopt this recommendation from the Staff Report.

The Order is unlawful and unreasonable in the following respects:

Assignment of Error: The Order is unlawful and unreasonable under R.C. 4903.09 and R.C. 4905.22 because it misinterprets the Staff Report and the Settlement with respect to the collection of PUCO and OCC assessment expenses from customers through a bypassable rider, and as a result, SSO customers would pay unjust and unreasonable rates under the Order.

⁴ Order ¶¶ 28-31.

⁵ *Id.* ¶ 32.

⁶ *Id.*

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The PUCO approved a settlement that provides many benefits to consumers, including the return of federal tax savings to customers resulting from the federal Tax Cuts and Jobs Act of 2017, a reasonable rate of return below the lowest number proposed in the Staff Report, a revenue increase that is less than half of what DP&L proposed, and a fixed monthly charge to residential consumers of \$7.00 as compared to the \$13.73 charge that DP&L proposed.⁷

But the PUCO's Order unlawfully and unreasonably instructed DP&L to charge customers a portion of the PUCO/OCC assessment expense (the "Assessments") through a bypassable rider instead of through base rates.⁸ The PUCO's reasoning in this regard focused on single line in the Staff Report but did not take into account contrary evidence, including the PUCO Staff's own witness admitting that the relevant line from the Staff

⁷ See Post-Hearing Brief by the Office of the Ohio Consumers' Counsel at 4-5 (Aug. 17, 2018).

⁸ Order ¶¶ 28-32.

Report was erroneous. The PUCO should modify its Order and rule that the Assessments continue to be charged to consumers through base rates, not through a bypassable rider.

II. STANDARD OF REVIEW

After an order is entered, intervenors in a PUCO proceeding have a statutory right to apply for rehearing “in respect to any matters determined in the proceeding.”⁹ An application for rehearing must “set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”¹⁰

In considering an application for rehearing, R.C. 4903.10 provides that the PUCO may grant and hold rehearing if there is “sufficient reason” to do so. After such rehearing, the PUCO may “abrogate or modify” the order in question if the PUCO “is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted.”¹¹

The Order is unlawful, unreasonable, unjust, and unwarranted under R.C. 4903.10. The PUCO should grant OCC’s application for rehearing. It should abrogate or modify the Order as OCC recommends in this application for rehearing.

⁹ R.C. 4903.10.

¹⁰ R.C. 4903.10(B). *See also* Ohio Admin. Code 4901-1-35(A).

¹¹ R.C. 4903.10(B).

III. ASSIGNMENTS OF ERROR

Assignment of Error 1. The Order is unlawful and unreasonable under R.C. 4903.09 and R.C. 4905.22 because it misinterprets the Staff Report and the Settlement with respect to the collection of PUCO and OCC assessment expenses from customers through a bypassable rider, and as a result, SSO customers would pay unjust and unreasonable rates under the Order.

In the Order, the PUCO ruled that DP&L must recover the “SSO generation revenue percentage of the PUCO/OCC assessment expense” through a bypassable rider.¹² The PUCO found that (i) the Staff Report recommended this result, (ii) no signatory party objected to this recommendation, and (iii) the Settlement did not address this issue.¹³ Thus, the PUCO reasoned, it must adopt the recommendation.¹⁴ The PUCO should amend the Order to remove this ruling because it misinterprets the Staff Report and Settlement and would result in unjust and unreasonable rates.

A. The Staff Report’s recommendation regarding unbundling of the Assessments is ambiguous at best, and thus, it was reasonable for parties to resolve the ambiguity at hearing.

It is true that the Staff Report states: “Staff recommends that the SSO generation revenue percentage of the PUCO/OCC assessment expense be recovered through an appropriate bypassable rider.”¹⁵ It appears that the PUCO relied on this sentence as the sole basis for its conclusion that these expenses be charged to customers through a bypassable rider as opposed to through base rates.¹⁶ But this sentence cannot be read in isolation. The PUCO should consider the context in which this statement was made and

¹² Order ¶ 32.

¹³ *Id.*

¹⁴ *Id.* (“it would be unfair and improper to permit Staff to withdraw a recommendation absent a pending objection or a provision in the stipulation directly addressing the recommendation”).

¹⁵ Staff Report at 28.

¹⁶ Order ¶ 32.

the other evidence regarding how it should be interpreted. Once the other evidence is considered, the PUCO should conclude that the parties to the Settlement did not intend that this recommendation be adopted.

First, if the PUCO Staff intended to recommend that the Assessments be included in a bypassable rider, then the schedules attached to the Staff Report should reflect a reduction to the base rate revenue requirement in the amount that the PUCO Staff intended to shift to a bypassable rider. But the schedules to the Staff Report do not make any such adjustment.¹⁷ This supports the conclusion that the PUCO Staff did not definitively conclude that the Assessment expense should be recovered through a rider as opposed to base rates.

Second, the PUCO should note that immediately preceding this sentence in the Staff Report, the report notes that Staff identified the Assessments as only a “*potential*” expense to be included in a bypassable rider.¹⁸ The use of the word “potential” implies that the PUCO Staff had not concluded that the Assessments should be included in a bypassable rider but instead should be subjected to further review. And PUCO Staff witness Smith confirmed this interpretation of the Staff Report on cross examination, stating that at the time of the Staff Report, “Staff’s opinion was one *possible* avenue of costs that may have a direct relationship and a direct causation to SSO revenue was the PUCO/OCC assessment.”¹⁹

¹⁷ See Tr. Vol. I at 100:8-17 (acknowledging that the Staff Report makes the recommendation in the text but testifying that the corresponding adjustment was not made).

¹⁸ Staff Report at 28 (emphasis added).

¹⁹ Tr. Vol. II at 307:11-15.

Third, neither the Staff Report nor any other admitted evidence provides the details that would be necessary to implement this recommendation. The Staff Report does not identify a particular bypassable rider through which customers would be charged for the Assessments.²⁰ Neither does the Settlement. Likewise, there is no evidence regarding the amount that would be charged to customers through a bypassable rider. Without these details, it would be impossible for the PUCO to determine that it is just and reasonable to charge SSO customers exclusively for these expenses. This further corroborates the conclusion that the Staff Report's recommendation was subject to additional review and analysis.

Recognizing the ambiguity in the Staff Report, the signatory parties sought to clarify their intent at hearing. OCC witness Willis testified on direct examination that one benefit of the Settlement is that “no distribution costs will be reallocated to customers who use DP&L’s standard service offer for electric generation service.”²¹ On cross examination, Mr. Willis confirmed this interpretation, testifying that the schedules to the Settlement did not make the necessary adjustment to remove these expenses from base rates and put them in a rider.²² PUCO Staff witness Smith testified similarly on cross examination that this recommendation “was not incorporated into the Stipulation.”²³ And similar to the Staff Report, if the Settlement were to have adopted the recommendation that the Assessments be charged through a bypassable rider, the Settlement would have (i) identified a bypassable rider for such charges, and (ii) modified the base rate revenue

²⁰ And as the PUCO concluded in the Order itself, a new rider cannot be created in this case. *See* Order ¶¶ 28-31.

²¹ OCC. Ex. 1 (“Willis Testimony”) at 8:9-14 (emphasis added).

²² Tr. Vol. I at 100:13-17.

²³ Tr. Vol. II at 309:20-22.

requirement to remove these charges from base rates. The Settlement did neither of these things.

The Staff Report may be ambiguous regarding the recommendation to shift the Assessments to a bypassable rider. But the evidentiary record makes clear that (i) two signatory parties (OCC and the PUCO Staff) interpreted the Settlement as not adopting the recommendation, (ii) DP&L's own analysis did not support shifting any costs from base rates to a bypassable rider,²⁴ and (iii) the PUCO Staff admitted that the recommendation was erroneous. On balance, therefore, the PUCO should reasonably have concluded that the Settlement did not adopt this recommendation and that the Assessments should continue to be charged to customers through base rates, not through a bypassable rider.

B. The standard service offer benefits all customers, so all customers should pay the distribution costs associated with it.

As OCC explained in its post-hearing briefs, the standard service offer benefits all customers, and thus, all customers should pay the distribution costs associated with it.²⁵ The same logic applies to the Assessments. Regardless of whether any portion of the Assessments is related to the SSO, all customers should pay for those expenses. So even if the PUCO believes that the Staff recommended charging SSO customers for the Assessments through a bypassable rider, it should reject that recommendation for the

²⁴ See, e.g., The Dayton Power and Light Company's Post-Hearing Brief at 7 (Aug. 17, 2018) ("An evaluation was done by DP&L as well as the PUCO Staff, with both concluding that no costs should be shifted to the SSO.").

²⁵ See Post-Hearing Brief by the Office of the Ohio Consumers' Counsel at 6 (Aug. 17, 2018); Reply Brief by the Office of the Ohio Consumers' Counsel at 5-6 (Aug. 27, 2018).

same reasons it rejected the Marketers' proposal to charge additional distribution costs to SSO customers through a bypassable rider.²⁶

C. Even if the PUCO Staff recommended that PUCO/OCC assessment expenses be charged to customers through a rider instead of base rates, the PUCO is not bound by that recommendation and should not adopt it.

In the Order, the PUCO focuses on whether the PUCO Staff is allowed to “withdraw” the recommendation that a portion of the PUCO/OCC assessments be unbundled and thus charged exclusively to SSO customers.²⁷ The Order states that “this recommendation has not been withdrawn” and that “[a]bsent extraordinary circumstances, it would be unfair and improper to permit Staff to withdraw a recommendation absent a pending objection or a provision in the stipulation directly addressing the recommendation.”²⁸ But the question is not whether the PUCO Staff’s recommendation was withdrawn; the question is whether the PUCO should adopt that recommendation based on the evidentiary record before it.

Although the PUCO Staff’s recommendations play an important role in cases before the PUCO, the PUCO is not bound by them. As the Staff Report itself concedes: “It does not purport to reflect the views of the Commission nor should any party to the proceeding consider the Commission as bound in any manner by the representations or recommendations.”²⁹ Indeed, there are many instances where the PUCO has modified or otherwise not adopted the recommendations made by its Staff.

²⁶ Order ¶¶ 28-31.

²⁷ Order ¶ 32.

²⁸ *Id.*

²⁹ Staff Report at 2.

For example, in Duke Energy Ohio's most recent natural gas distribution rate case, the PUCO Staff recommended charges to consumers for cleanup of manufactured gas plants of no more than about \$6.4 million.³⁰ The PUCO did not adopt this recommendation and instead allowed Duke to charge customers nearly \$56 million.³¹

In FirstEnergy's recent energy efficiency portfolio case, the PUCO Staff recommended a 3.0% cost cap on charges to consumers for utility-run energy efficiency programs.³² And in Duke's recent energy efficiency portfolio case, the PUCO Staff similarly recommended a 3.5% cost cap.³³ In each of these cases, the PUCO modified the Staff's recommendation and instead ordered a 4.0% cost cap.³⁴

In a recent case involving charges to consumers for utility-administered energy efficiency programs, the PUCO Staff recommended that the PUCO order the utility to improve its accounting practices to protect consumers from paying unreasonable energy efficiency charges.³⁵ The PUCO rejected this recommendation.³⁶

³⁰ *In re Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, Opinion & Order at 28 (Nov. 13, 2013).

³¹ *Id.* at 26 (\$62.8 million, which included about \$5 million in carrying costs), 77 (allowing Duke to recover the \$62.8 million minus the \$5 million in carrying costs and minus another \$2.3 million, for a total allowance of about \$55.5 million).

³² *In re Application of [FirstEnergy] for Approval of [its] Energy Efficiency & Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-743-EL-POR, Opinion & Order ¶ 43 (Nov. 21, 2017).

³³ *In re Application of Duke Energy Ohio, Inc. for Approval of its 2017-2019 Energy Efficiency & Peak Demand Reduction Program Portfolio Plan*, Case No. 16-576-EL-POR, Opinion & Order ¶ 39 (Sept. 27, 2017).

³⁴ *In re Application of [FirstEnergy] for Approval of [its] Energy Efficiency & Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-743-EL-POR, Opinion & Order ¶ 57 (Nov. 21, 2017); *In re Application of Duke Energy Ohio, Inc. for Approval of its 2017-2019 Energy Efficiency & Peak Demand Reduction Program Portfolio Plan*, Case No. 16-576-EL-POR, Opinion & Order ¶ 47 (Sept. 27, 2017).

³⁵ *In re Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to its Energy Efficiency & Demand Response Programs for 2014*, Case No. 15-534-EL-RDR, Opinion & Order ¶ 22 (Oct. 26, 2016).

³⁶ *Id.* ¶ 44.

It does not really matter whether the PUCO Staff could withdraw its recommendation. What matters is that the evidentiary record does not support the recommendation, for the reasons explained above. Thus, the PUCO should not adopt this recommendation and should amend its Order accordingly.

D. SSO customers would be double-charged for the Assessments under the Order, which is unjust and unreasonable.

The PUCO should not allow DP&L to charge any portion of the Assessments exclusively to SSO customers. But under the Order, the situation is even worse than simply shifting some costs from shopping customers to SSO customers. Under the Order, SSO customers could pay the Assessments twice: once in base rates and once through a rider.

As explained above, neither the Staff Report nor the Settlement removes the Assessments from the base rate revenue requirement. Thus, if no adjustment is made to that revenue requirement, customers will pay for those expenses through base rates. But under the Order, DP&L would charge customers for the Assessments through a rider. This will result in double-charging SSO customers for these expenses. To avoid this double-charge, the PUCO should amend the Order and rule that DP&L can charge customers only once for the Assessments: through base rates.

IV. CONCLUSION

The Staff Report is ambiguous regarding the recommendation to charge only SSO customers for a portion of the PUCO/OCC assessment expense. And all other record evidence in this case—the PUCO Staff’s testimony, OCC testimony, Staff Report schedules, and Settlement schedules—show that the Settlement is not intended to adopt this recommendation. The PUCO should modify its Order and rule that the Assessments

be charged to customers through base rates, not through a bypassable rider. Otherwise, SSO customers would be charged twice, once in base rates and once through the bypassable rider. This is an unjust and unreasonable result.

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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 26th day of October 2018.

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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 Healey, Christopher Mr.