

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	:	Case No. 16-0395-EL-SSO
The Dayton Power and Light Company for	:	
Approval of Its Electric Security Plan	:	
 In the Matter of the Application of	:	Case No. 16-0396-EL-ATA
The Dayton Power and Light Company for	:	
Approval of Revised Tariffs	:	
 In the Matter of the Application of	:	Case No. 16-0397-EL-AAM
The Dayton Power and Light Company for	:	
Approval of Certain Accounting Authority	:	
Pursuant to Ohio Rev. Code § 4905.13	:	

**THE DAYTON POWER AND LIGHT COMPANY'S
MEMORANDUM IN OPPOSITION TO THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL'S THIRD APPLICATION FOR REHEARING**

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I. INTRODUCTION AND SUMMARY

The Office of the Ohio Consumers' Counsel ("OCC") seeks another bite at the apple by arguing, yet again, that the current Electric Security Plan ("ESP III") of The Dayton Power and Light Company ("DP&L") is not "more favorable in the aggregate as compared to the expected results" of a Market Rate Offer ("MRO")¹ given various riders approved in ESP III, including but not limited to the Smart Grid Rider. Although the Commission has twice rejected that argument,² OCC latches onto and challenges an additional legal basis that the Commission relied upon in its Third Entry on Rehearing as to why the Smart Grid Rider is immaterial to the "more favorable in the aggregate" ("MFA") test: the ability to recover grid modernization costs through Ohio Rev. Code § 4905.31 if DP&L had filed an MRO.

OCC's Third Application for Rehearing should be denied for three separate and independent reasons. First, OCC has already conceded that costs recovered under the Smart Grid Rider would be available under an MRO through a distribution rate case. May 5, 2017 Initial Post-Hearing Brief by The Office of the Ohio Consumers' Counsel, p. 62. Since the Commission has made that same finding to support its conclusion that ESP III passes the MFA test irrespective of cost recovery under Ohio Rev. Code § 4905.31 (Third Entry on Rehearing, ¶ 80), OCC has not shown that the Third Entry on Rehearing is unlawful or unreasonable. Ohio Rev. Code § 4903.10.

Second, when OCC challenged whether ESP III satisfied the MFA test in its first Application for Rehearing,³ OCC merely argued that various riders – including the Smart Grid Rider – had been set to zero and thus imposed unknown costs. OCC did not argue that Smart

¹ Ohio Rev. Code § 4928.143(C)(1).

² Oct. 20, 2017 Opinion and Order, ¶¶ 84-90; Sept. 19, 2018 Third Entry on Rehearing, ¶¶ 77-82.

³ Nov. 20, 2017 Application for Rehearing by The Office of the Ohio Consumers' Counsel.

Grid Rider costs were unrecoverable under an MRO. Since that issue could have been raised at that time, OCC has waived it and cannot raise it now. Ohio Rev. Code § 4903.10; Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300, 2006-Ohio-5789, 865 N.E.2d 213, ¶ 75 ("OCC waived this issue by not setting forth this specific ground in its first application for rehearing").

Third, the Commission is correct that costs recovered under the Smart Grid Rider could be recovered under an MRO through Ohio Rev. Code § 4905.31. That statute expressly provides that public utilities may file "a schedule . . . providing for . . . a device to recover costs incurred in conjunction with . . . any acquisition and deployment of advanced metering," without limiting such schedules to agreements with third parties, as OCC erroneously contends. Ohio Rev. Code § 4905.31(E). Thus, OCC's Third Application for Rehearing should be denied.

II. PROCEDURAL BACKGROUND

The Smart Grid Rider, as adopted by the Commission, was proposed in the March 14, 2017 Amended Stipulation and Recommendation ("Stipulation"). Pursuant to Section II.3 of the Stipulation, DP&L agreed to file a comprehensive Distribution Infrastructure Modernization Plan. The costs of DP&L's grid modernization efforts as described in that plan will be recovered through the Smart Grid Rider, which is initially set at zero. Stipulation, § II.3.c.

Whether costs recovered under the Smart Grid Rider could be recovered under an MRO was specifically addressed in the pre-filed testimony of DP&L witness Malinak, who considered whether the proposed ESP satisfied the MFA test. Malinak Test. (DP&L Ex. 2B). In discussing the impact of the Stipulation's non-bypassable riders (including the Smart Grid Rider) on his analysis, Malinak testified:

"These charges largely reflect either pass-through of various costs to customers or the recovery of costs of distribution investment that would otherwise be present in both the proposed stipulated ESP and a hypothetical MRO (through the MRO itself, a distribution case, or other proceeding). Consequently, they have no material impact of the Aggregate Price Test."

Malinak Test. (DP&L Ex. 2B), p. 14 (emphasis added). Thus, the cost of the Smart Grid Rider did not impact his analysis of the MFA test because costs recovered under that rider could be recovered under an MRO, as well.⁴

At the evidentiary hearing on the Stipulation, Staff witness Donlon expressed the same view as Malinak on cross-examination by OCC:

"Q. Okay. So because it's a zero-based rider, staff obviously didn't know what the cost of the SmartGrid rider will turn out to be ultimately, correct?

A. At this point it's zero. So in -- as well as in a hypothetical, it would -- I think we -- staff's belief is that it would fall under the ESP or MRO.

Q. Okay.

EXAMINER PRICE: Are you saying you think staff believes that there could be a SmartGrid rider irrespective of whether it was an ESP or MRO?

THE WITNESS: Yes.

EXAMINER PRICE: So it will be a wash.

THE WITNESS: Yes.

EXAMINER PRICE: Thank you."

Trans. Vol. V, p. 888:5-20 (emphasis added).

⁴ While the cost of the Smart Grid Rider would be a "wash" under either an ESP or an MRO since those costs could be recovered under either form of standard service offer, the Smart Grid Rider under an ESP provides several non-quantifiable benefits over recovering the same costs in an MRO, including but not limited to the availability of funds "to implement robust grid modernization in a timely manner." Malinak Test. (DP&L Ex. 2B), p. 65.

After the evidentiary hearing, DP&L argued that the Smart Grid Rider, among other riders, did not affect the MFA test, given the availability of cost recovery under an MRO. May 5, 2017 The Dayton Power and Light Company's Initial Post-Hearing Brief, pp. 24-25 ("As for other riders established in the Stipulation, the evidence at the hearing demonstrated that the riders also would be available if DP&L had filed for an MRO. . . . No opposing witnesses disputed that point. Those other riders are thus a 'wash' under the MFA test.") (citations omitted) (emphasis added).

The Commission agreed, ruling that the "[w]hile OCC submits the DMR and other riders would not be available under an MRO, the Commission finds that equivalent riders would also be available under R.C. 4928.142." Oct. 20, 2017 Opinion and Order, ¶ 90. OCC sought rehearing on various grounds, including in its first assignment of error, that "the PUCO found that DP&L's electric security plan is more favorable in the aggregate than a market rate offer for consumers." Nov. 20, 2017 Application for Rehearing by The Office of the Ohio Consumers' Counsel, pp. 4-5. In that assignment of error, OCC challenged only the fact that certain riders in ESP III were "initially set at zero," and thus had unknown costs. Id. OCC did not challenge whether costs recovered under those riders could be recovered under an MRO. As DP&L stated in response:

"OCC makes a very limited challenge to the Commission's MFA findings – namely, OCC argues (pp. 4-5) that the ESP established by the Stipulation fails the MFA test because several riders approved by the Commission are initially set to zero, and OCC claims that those riders thus have "unknown costs." However, as discussed above, the evidence showed and the Commission found that those riders would be available under either an ESP or an MRO. OCC does not contest that finding. The fact that the amounts of certain riders is presently unknown does not matter for purpose of the MFA test, since those riders would be available under either the Stipulation or under an MRO."

Dec. 4, 2017 The Dayton Power and Light Company's Memorandum in Opposition to Applications for Rehearing, p. 9 (emphasis added).

In its Third Entry on Rehearing (§ 79), the Commission denied that assignment of error by OCC, rejecting the "contention that, because some of the riders approved or continued under the proposed ESP have a variable future cost, the Commission cannot conclude that the proposed ESP is more favorable in the aggregate than an MRO." The Commission reasoned that those riders, including the Smart Grid Rider, "are either recoverable in a distribution rate case or are otherwise recoverable in the hypothetical situation that DP&L were to implement an MRO." Id. at § 80. The Commission then noted a separate ground for recovery of at least some grid modernization costs:

"R.C. 4905.31 specifically authorizes an electric light company to file a mechanism to recover the costs incurred in conjunction with any acquisition and deployment of advanced metering. Therefore, under a hypothetical MRO, DP&L could recover the costs of deploying advanced metering infrastructure pursuant to R.C. 4905.31, and DP&L could recover other distribution costs under the grid modernization program through a distribution rate case; for purposes of the ESP versus MRO test; it is a wash."

(Emphasis added.) The Commission did not find that Ohio Rev. Code § 4905.31 is the only mechanism to recover such costs; instead, the statute merely provides an independent cost-recovery device separate from a distribution rate case, both of which are available if DP&L had filed an MRO. Id.

OCC now seeks to expand the scope of its initial Application for Rehearing by arguing that the Commission erred in relying on Ohio Rev. Code § 4905.31 and, thus, misapplied the MFA test. At the same time, however, OCC ignores the availability of cost recovery under a

distribution rate case (as it previously recognized) and selectively quotes Ohio Rev. Code § 4905.31. As shown below, OCC's Third Application for Rehearing should be denied.

III. STANDARD OF REVIEW

The Order in this proceeding modified and approved a stipulation. Pursuant to Ohio Admin. Code § 4901-1-30(A), "[a]ny two or more parties may enter into a written or oral stipulation concerning . . . the proposed resolution of some or all of the issues in a proceeding." Although stipulations are not binding on the Commission, their terms are "'properly accorded substantial weight.'" Office of Consumers' Counsel v. Pub. Util. Comm., 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992) (*per curiam*) (quoting Akron v. Pub. Util. Comm., 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978) (*per curiam*)).

When the Commission considers a stipulation, "the ultimate issue . . . is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted." In re Application of The Cincinnati Gas & Elec. Co., Case No. 91-410-EL-AIR, Order on Remand, (Apr. 14, 1994). The Commission considers whether (1) "the settlement [is] a product of serious bargaining of capable, knowledgeable parties," (2) "the settlement, as a package, benefit[s] ratepayers and the public interest," and (3) "the settlement package violate[s] any important regulatory principle or practice." The Supreme Court of Ohio has endorsed the Commission's use of these criteria "to resolve its cases in a method economical to ratepayers and public utilities." Office of Consumers' Counsel, at 126, 592 N.E.2d 1370.

Applications for rehearing following an order of the Commission must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." Ohio Rev. Code § 4903.10(B). The Supreme Court of Ohio has strictly construed

that requirement, holding that when an appellant's grounds for rehearing fail to specifically allege in what respect the Commission's order was unreasonable or unlawful, "the requirements of R.C. 4903.10 have not been met." Discount Cellular, Inc. v. Pub. Util. Comm., 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 59. Accord: City of Cincinnati v. Pub. Util. Comm., 151 Ohio St. 353, 378, 86 N.E.2d 10 (1949) ("[T]he General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant's application for rehearing used a shotgun instead of a rifle to hit that question.").

IV. OCC'S THIRD APPLICATION FOR REHEARING SHOULD BE DENIED

A. OCC Has Not Shown That the Third Entry on Rehearing Was Unreasonable or Unlawful

In its Third Application for Rehearing, OCC fails to satisfy the strict requirement of R.C. 4903.10 to "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." (Emphasis added.) Accord: Discount Cellular, Inc. v. Pub. Util. Comm., 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 59; City of Cincinnati v. Pub. Util. Comm., 151 Ohio St. 353, 378, 86 N.E.2d 10 (1949).

OCC merely opposes the Commission's reliance on Ohio Rev. Code § 4905.31 as an independent basis to recover grid modernization costs under an MRO, and argues that the Commission, as a result, supposedly misapplied the MFA test. OCC ignores the fact, however, that the Commission found that such costs could be independently recovered in a distribution rate case. Third Entry on Rehearing, ¶ 80 ("Therefore, under a hypothetical MRO, DP&L could recover the costs of deploying advanced metering infrastructure pursuant to R.C. 4905.31, and DP&L could recover other distribution costs under the grid modernization program through a distribution rate case; for purposes of the ESP versus MRO test; it is a wash."). Accord: In re First Energy, Case No. 12-1230-EL-SSO, Second Entry on Rehearing (Jan. 30, 2013) at 22-23

("Therefore, to the extent that the Companies have made capital investments since the last distribution rate case, those investments will be recovered to an equal extent, through either Rider DCR or distribution rates, provided that the property is used and useful in the provision of distribution service."). Thus, even if the Commission were to accept OCC's view of Ohio Rev. Code § 4905.31 (which, as shown below, it should not), OCC has not demonstrated why the Commission's Third Entry on Rehearing is unreasonable or unlawful. Ohio Rev. Code § 4903.10.

Moreover, OCC has already conceded that grid modernization costs can be recovered under an MRO through a distribution rate case. In arguing that the Smart Grid Rider did not benefit customers, OCC stated: "Under an MRO, DP&L could proceed with PUCO-approved and cost-beneficial grid modernization because DP&L could recover such costs through a standard base rate case. Because the same smart grid investments could be made under an MRO or an ESP, grid modernization via the SGR is no benefit." May 5, 2017 Initial Post-Hearing Brief by The Office of the Ohio Consumers' Counsel, p. 62. OCC cannot argue that the Third Entry on Rehearing was unreasonable or unlawful for providing an alternate route to the same destination. Ohio Rev. Code § 4903.10.

B. OCC Has Waived the Issue of Whether the Smart Grid Rider Is Available Under a Market Rate Offer

As shown above, while the issue of whether costs recovered under the Smart Grid Rider could be recovered under an MRO was presented at the evidentiary hearing (Trans. Vol. V, p. 888:5-20 (Donlon); Malinak Test. (DP&L Ex. 2B), p. 14), and while the Commission found that such costs "would also be available under R.C. 4928.142" (Opinion and Order, ¶ 90), OCC did not challenge the availability of such cost recovery under an MRO in its first Application for Rehearing. Nov. 20, 2017 Application for Rehearing by The Office of the Ohio Consumers'

Counsel. Instead, it argued only that ESP III failed the MFA test because riders like the Smart Grid Rider were initially set to zero. Id. at 4-5.

Pursuant to Ohio Rev. Code § 4903.10 and Ohio Admin. Code § 4901-1-35(A), an applicant must include all grounds for rehearing in their first application for rehearing; if an issue could have been raised at that time and was not, then it cannot be raised in a subsequent application for rehearing. Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300, 2006-Ohio-5789, 865 N.E.2d 213, ¶ 75 ("OCC waived this issue by not setting forth this specific ground in its first application for rehearing"). Accord: Ohio Partners for Affordable Energy v. Pub. Util. Comm., 115 Ohio St.3d 208, 2007-Ohio-4790, 874 N.E.2d 764, ¶ 15; Office of Ohio Consumers' Counsel v. Pub. Util. Comm., 70 Ohio St.3d 244, 247, 638 N.E.2d 550 (1994).

Since OCC did not challenge whether costs recovered under the Smart Grid could be recovered under an MRO in its initial Application for Rehearing, that issue is waived, regardless of whether additional justifications for such cost recovery are identified in the future. The Commission should not allow OCC – nearly a year later – to expand its first Application for Rehearing to include an issue that it should have raised at that time. OCC's Third Application for Rehearing should be denied for this reason as well.

C. The Commission Correctly Ruled that Advanced Metering Costs Can Be Recovered under Ohio Rev. Code § 4905.31

Finally, the Commission was correct to conclude that under an MRO, DP&L could recover grid modernization costs under Ohio Rev. Code § 4905.31. The statute provides, in pertinent part:

"Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., 4927., 4928., and 4929. of the Revised Code do not prohibit a public utility from filing a schedule or establishing or entering into any reasonable arrangement with another public utility or with one or

more of its customers, consumers, or employees, and do not prohibit a mercantile customer of an electric distribution utility as those terms are defined in section 4928.01 of the Revised Code or a group of those customers from establishing a reasonable arrangement with that utility or another public utility electric light company, providing for any of the following:

...

(E) Any other financial device that may be practicable or advantageous to the parties interested. In the case of a schedule or arrangement concerning a public utility electric light company, such other financial device may include a device to recover . . . any acquisition and deployment of advanced metering, including the costs of any meters prematurely retired as a result of the advanced metering implementation No such schedule or arrangement is lawful unless it is filed with and approved by the commission pursuant to an application that is submitted by the public utility or the mercantile customer or group of mercantile customers of an electric distribution utility and is posted on the commission's docketing information system and is accessible through the internet."

(Emphasis added.)

Thus, contrary to the narrow reading of OCC (p. 4), the statute does not require "reasonable arrangements' *between* parties." (Emphasis sic.) Indeed, OCC cites no authority for that proposition. Instead, the Commission should follow the plain language of the statute, which allows public utilities to file either a schedule or a reasonable arrangement to establish a financial device to recover "advanced metering" costs. Ohio Rev. Code § 4905.31(E). There is no requirement in the statute that such a schedule be coupled with a customer agreement, as OCC suggests. Citizens Gas Users Ass'n v. Pub. Util. Comm., 165 Ohio St. 536, 138 N.E.2d 383 (1956) (allowing a public utility to impose a minimum charge under R.C. 4905.31 without a customer agreement).

While the availability of this mechanism under Ohio Rev. Code § 4905.31 does not affect the Commission's conclusion that ESP III satisfies the MFA test, it does provide that decision with additional support.

V. CONCLUSION

For the foregoing reasons, the Commission should deny the October 19, 2018 Third Application for Rehearing by The Office of the Ohio Consumers' Counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to The Office of the Ohio Consumers' Counsel's Third Application for Rehearing has been served via electronic mail upon the following counsel of record, this 29th day of October, 2018.

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Summary: Memorandum The Dayton Power and Light Company's Memorandum in Opposition to The Office of the Ohio Consumers' Counsel's Third Application for Rehearing electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company