THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY FOR APPROVAL OF ITS ENERGY EFFICIENCY AND PEAK DEMAND REDUCTION PROGRAM PORTFOLIO PLAN FOR 2017.	**CASE NO. 16-649-EL-POR** **CASE NO. 16-1369-EL-WVR**

SECOND ENTRY ON REHEARING

Entered in the Journal on September 26, 2019

I. SUMMARY

{¶ 1} The Commission finds the application for rehearing filed by the Ohio Consumers' Counsel should be denied.

II. DISCUSSION

{¶ 2} The Dayton Power and Light Company (DP&L, Utility or Company), is an electric distribution utility as defined in R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02 and, as such, is subject to the energy efficiency and peak demand reduction (EE/PDR) requirements under R.C. 4928.64 and 4928.66. In this proceeding, the Commission reviewed DP&L's Energy Efficiency and Peak Demand Reduction Program Portfolio Plan for 2017 (2017 Portfolio Plan), pursuant to Ohio Adm.Code Chapter 4901:1-39, to ensure that the Company's 2017 Portfolio Plan consists of cost-effective EE/PDR programs that achieve the statutory benchmarks for peak-demand reduction, and meet or exceed the statutory benchmarks for energy efficiency.

{¶ 3} On September 27, 2017, the Commission issued its Opinion and Order (Sep. 27, 2017 Order) approving DP&L's 2017 Portfolio Plan, as modified by the Stipulation filed December 13, 2016, (2017 Stipulation), and to continue thereafter until otherwise ordered by the Commission.

{¶ 4} On October 27, 2017, the Ohio Consumers' Counsel (OCC) filed an application for rehearing of the Sep. 27, 2017 Order. DP&L filed a memorandum in opposition on November 6, 2017.

{¶ 5} On November 21, 2017, the Commission issued an entry granting further time to consider matters raised in the OCC's application for rehearing.

III. OCC'S ASSIGNMENTS OF ERROR

{¶ 6} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal. In its application for rehearing, OCC lists six separate grounds for rehearing.

A. Assignment of Error 1: The 2017 Stipulation benefits customers and the public interest.

{¶ 7} As its first ground for rehearing, OCC argues that the Sep. 27, 2017 Order is unreasonable because it approves a settlement that does not benefit customers or the public interest. OCC then lists four separate sub-counts regarding DP&L's recovery of lost revenues, asserting that such recovery will undermine the protection that customers will receive from the 2017 Stipulation's annual cost cap on the Company's recovery from customers of EE/PDR program costs and shared savings, not to exceed four percent of the Company's 2015 operating revenues (4.0% cap). Next, OCC claims that the Sep. 27, 2017 Order will result in DP&L's customers paying one of the highest rates of lost revenues in the country, and that residential customers will pay over $16 million in lost revenues for residential programs that cost just $8.2 million. Finally, OCC concludes that the Sep. 27, 2017 Order violates Commission precedent by failing to require the utility to prove its need for lost revenues.

{¶ 8} DP&L asserts that OCC's Application for Rehearing doesn't raise any new arguments that haven't already been rejected by the Commission. The Company argues that OCC has really only raised a single ground for rehearing: that the Commission erred in allowing DP&L's recovery of lost distribution revenues directly tied to its EE/PDR programs. The Company notes that recovery of lost distribution revenues is specifically authorized by R.C. 4928.66 and Ohio Adm.Code 4901:1-39-07(A); and that such recovery is based on actual, reported energy savings that are verified by an independent third-party. DP&L argues that it should be made whole for these lost revenues that result from the successful implementation of the Utility's approved EE/PDR programs.

{¶ 9} DP&L maintains that the 2017 Stipulation approved in the Sep. 27, 2017 Order is essentially an extension of the Company's second EE/PDR Program Portfolio Plan for 2013 through 2015 (2013 Portfolio Plan) that allows the Company to continue its programs without interruption to the benefit of customers until a new three-year portfolio plan is approved. The Company objects to OCC's citations to a June 2015 Study from the American Council for an Energy-Efficient Economy (ACEEE Study), which was referenced by OCC witness Shutrump, but not admitted into evidence; and, criticizes the lack of context for OCC's conclusions regarding the relative rates allowed for lost revenues compared to the costs of DP&L's EE/PDR programs or those of other utilities nationwide (OCC Ex. 1 at 10-11). DP&L notes that its exclusion of lost distribution revenues from the 4.0% cap is consistent with treatment of lost distribution revenues in the other Ohio utility EE/PDR portfolio cases. *See, In Re Ohio Power for Approval of Its Energy Efficiency/Peak Demand Reduction Portfolio Plan*, Case No. 16-574-EL-POR, Opinion and Order (Jan. 18, 2017) at ¶21; and *In Re Duke Energy Ohio for Approval of Its 2017-2019 Energy Efficiency and Peak Demand Reduction Program Portfolio Plan*, Case No. 16-576-EL-POR, Opinion and Order (Sept, 27, 2017) at ¶¶ 47, 63.

{¶ 10} DP&L then observes that the ACEEE Study itself recognizes that lost distribution revenues are not energy efficiency program costs, and that mischaracterization of lost revenues as program costs becomes especially misleading when lost revenues compound over time if there are long intervals between rate cases, as in DP&L's current situation (DP&L memorandum contra OCC's application for rehearing at 3-5). Finally, DP&L asserts that OCC is ignoring the Company's commitments to reset its lost distribution revenues in Case No. 15-1830-EL-AIR, and to incorporate the lost distribution revenues into a distribution decoupling rider (Sep. 27, 2017 Order at ¶ 27, 2017 Stipulation at 11, 13).

{¶ 11} DP&L also takes issue with OCC's citation to *In re Columbus Southern Power Co.*, Case No. 09-1089-EL-POR Opinion and Order (May 13, 2010) at 26, in support of OCC's claim that DP&L has not provided any evidence that its EE/PDR programs are causing it to be unable to meet its revenue requirement or to earn a fair and reasonable rate of return, as well as OCC's assertions that any recovery of lost revenues should be limited to no more than three vintage years or the life of the measure (OCC Application for Rehearing at 5-7). DP&L notes that in *Columbus Southern Power*, the Commission found that AEP-Ohio had failed to establish its actual costs of service because it had not filed a rate case in 20 years, and limited recovery of lost distribution revenues on that basis (*Id.* at 26). DP&L further notes that the Commission's decision in *Columbus Southern Power* was appealed to the Ohio Supreme Court, which found that Ohio Adm.Code 4901:1-39-07(A) does not require utilities to demonstrate their cost of service, and that R.C. 4928.66 does not prohibit recovery of lost revenues even where the utility's cost of service is unknown. *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 46, 2011-Ohio-2383 at ¶¶ 13-17.

{¶ 12} We find OCC's first assignment of error to be without merit. The Sep. 27, 2017 Order reviewed the evidence of record, including the arguments of OCC's witness, before concluding that the 2017 Stipulation, as a package, will benefit ratepayers and the public interest. As noted therein, the benefits include continuation of the Utility's programs included in the 2015 EE/PDR program budget, as well as the cost cap on program costs and shared savings, set at 4% of the Company's revenue for 2015, as well as a $4.5 million cap on the Company's shared savings for 2017. Sep. 27, 2017 Order at ¶¶ 35-44. Further, the recovery of lost distribution revenues is specifically authorized by R.C. 4928.66 and Ohio Adm.Code 4901:1-39-07(A), and DP&L's recovery of such revenues must be based on actual, reported energy savings that are verified by an independent third-party. Notwithstanding OCC's analysis and arguments, lost revenues are a mechanism to remove the utility's disincentive to adopt effective EE/PDR programs, rather than program costs to be included under the 4.0% cap. In addition, DP&L will reset its lost distribution revenues in Case No. 15-1830-EL-AIR, and incorporate such revenues into a distribution decoupling rider (Sep. 27, 2017 Order at ¶ 27, 2017 Stipulation at 11, 13). Finally, there is no statutory requirement that DP&L must demonstrate its cost of service in order to recover lost revenues. *Columbus S. Power Co.*, 129 Ohio St.3d 46 at ¶¶ 13-17. Accordingly, we deny OCC's first assignment of error.

B. Assignment of Error 2: The Sep. 27, 2017 Order does not violate R.C. 4903.09 or precedent.

{¶ 13} As its second assignment of error, OCC cites a 2016 decision, *In re Application of Columbus S. Power Co.*, 147 Ohio St. 3d 439, 2016-Ohio-1608 at ¶¶ 66, in contending that the Sep. 27, 2017 Order violates R.C. 4903.09 by failing to set forth the reasons for rejecting OCC's argument that DP&L should not recover lost revenues for 2016 and 2017. OCC maintains that the Sep. 27, 2017 Order does not address why DP&L's recovery of such revenues is reasonable when such charges are nearly double the cost of DP&L's EE/PDR programs, and is not capped or limited by a number of years. Further, OCC asserts, the Sep. 27, 2017 Order does not address OCC's argument that such recovery of lost revenues is not required by rule or statute. Moreover, OCC claims, the Sep. 27, 2017 Order failed to address OCC's argument that it was not unfair to deny DP&L lost revenues for 2016 because the Utility had the option to request modification of its portfolio under 2014 Sub .S.B. No. 310 (S.B. 310) but chose not to do so.

{¶ 14} In response to the OCC's arguments, DP&L counters that the instant case is readily distinguishable from the 2016 case, *Columbus S. Power 2*, 147 Ohio St. 3d 439, where the Court held that the Commission never explained why it failed to conduct a statutorily required common equity comparison of comparable utilities. In this case, DP&L asserts, there is no claim that the Commission failed to consider or implement a statutorily required analysis. Further, DP&L notes, the Sep. 27, 2017 Order summarized OCC's arguments regarding the reasonableness of the Company's recovery of lost distribution revenues as well as the counter-arguments of the opposing parties, and then addressed these arguments at ¶¶ 35-44. DP&L also notes that the Sep. 27, 2017 Order, at ¶¶ 48-52, contains a detailed analysis of OCC's and the Company's respective arguments relative to the $72 million lost distribution revenue cost cap in the 2013-2015 EE/POR Plan, and whether that cap should have any impact on cost recovery for 2016, with the Commission specifically finding there was insufficient evidence to prohibit the recovery of lost distribution revenues for 2016. *Id*. at ¶52.

{¶ 15} With respect to OCC's arguments regarding the extension of DP&L's existing 2013 Portfolio Plan under S.B. 310, the Company notes that the Sep. 27, 2017 Order contains detailed analysis of the respective arguments relative to the $72 million lost distribution revenue cap in the 2013 Portfolio Plan, and the impact such cap would have on lost revenue recoveries for 2016 at ¶¶ 49-52. DP&L asserts that the Sep. 27, 2017 Order painstakingly recited the parties' arguments and positions in great detail, and then stated why it agreed that the 2017 Stipulation should be adopted. Therefore, DP&L concludes, the Sep. 27, 2017 Order does not violate R.C. 4903.09 or Ohio Supreme Court precedent.

{¶ 16} We agree. The Sep. 27, 2017 Order expressly finds, at ¶ 51, that it would be patently unjust and unreasonable to permit customers to benefit under the extension of DP&L's programs that were continued through 2016, while not also making the Utility whole for its lost distribution revenues. Moreover, OCC has not presented any evidence that the parties to the Oct. 2, 2013 Stipulation in Case No. 13-833-EL-POR (2013 Stipulation) intended for the $72 million cost cap on recovery of lost distribution revenues negotiated for DP&L's 2013 Portfolio Plan to apply to any subsequent lost distribution revenues by virtue of the Company's election to extend its EE/PDR programs through 2016 under S.B. 310. *Id.* at ¶ 52. Further, as discussed above, *Columbus S. Power*, 147 Ohio St. 3d 439, is not applicable here. Accordingly, we find no merit in OCC's second assignment of error, and hold that it should be denied.

C. Assignment of Error 3: The Sep. 27, 2017 Order does not violate DP&L's 2013 Portfolio Plan or S. B. 310

{¶ 17} As its third assignment of error, OCC contends that the Sep. 27, 2017 Order modifies DP&L's 2013 Portfolio Plan in contravention of S.B. 310. OCC asserts that, under Section 6(A) of S.B. 310, DP&L was required to continue its programs with no amendments to the plan through the end of 2015, the duration that the Commission had originally approved; and that under Section 6(D) of the Act, DP&L's 2013 Portfolio Plan was automatically continued through the end of 2016 with no amendments to the plan. OCC then concludes that the Commission has retroactively modified DP&L's 2013 Portfolio Plan by allowing DP&L to recover its lost revenues for 2016. OCC cites funding commitments for the Utility's OPAE, OHA, PWC, and Residential Lighting Programs made in the 2013 Stipulation, stating that, by continuing DP&L's 2013 Portfolio Plan without modification for 2016 under S.B. 310, each of these funding obligations also continued for 2016. OCC argues that while all of DP&L's funding obligations for 2015 carry through to 2016, the Commission's elimination of the cap on lost revenues for 2016 is unreasonable, selective, and an inconsistent interpretation of S.B. 310. OCC concludes that any ruling that allows DP&L to collect more than $72 million in lost revenues through 2016 constitutes an unlawful modification to DP&L's 2013 Portfolio Plan, and as the Utility has already collected the full $72 million before the end of 2015, DP&L is not entitled to any lost revenues for 2016.

{¶ 18} DP&L argues that OCC's comparison to the funds for OPAE, OHA, PWC, and lighting programs is misleading because those were annual amounts as opposed to the one-time cap on lost distribution revenues that only lasted through 2015. DP&L contends that the 2013 Stipulation expressly contemplated the Company's recovery of lost distribution revenues beyond December 31, 2015 through a third Portfolio Plan filing. In any event, DP&L asserts that it would have been statutorily authorized to recover lost distribution revenues for 2016 by operation of law.

{¶ 19} OCC's arguments were considered and rejected in the Sep. 27, 2017 Order at ¶¶ 4, 6, 46, 48-52. We note that Sections 6 and 7 of S.B. 310 are silent as to the recovery of lost distribution revenues, but expressly provided the Utility with the option of continuing its EE/PDR programs if it chose to do so. DP&L was not required by S.B. 310 to continue its programs, and there is no statutory requirement that forces DP&L to forego recovery of lost distribution revenues resulting from its continuing programs. As discussed in the Sep. 27, 2017 Order at ¶¶ 51-52, OCC's interpretation of S.B. 310 would produce patently unjust and unreasonable results by permitting customers to benefit from the continuation of DP&L's EE/PDR programs through 2016, while not also making the utility whole for its lost distribution revenues resulting from such programs. Accordingly, OCC's third assignment of error will be denied.

D. Assignment of Error 4: The Sep. 27, 2017 Order does not violate the terms of the 2013 Stipulation.

{¶ 20} For its fourth assignment of error, OCC contends that the Sep. 27, 2017 Order is unlawful and unreasonable because it violates the 2013 Stipulation, which was approved by the Commission's Dec. 4, 2013 Opinion and Order, and limited DP&L's collection of lost distribution revenues to $72 million through December 31, 2015. OCC now appears to be claiming, for the first time, that because a "hearing" was not held relative to the Company's Third Portfolio Plan filing, DP&L can not recover any lost distribution revenues beyond December 31, 2015 without violating Paragraph H of the 2013 Stipulation, at 13.

{¶ 21} DP&L counters that the Sep. 27, 2017 Order does not violate the terms of the 2013 Stipulation. DP&L asserts that the 2017 Stipulation and corresponding Sep. 27, 2017 Order in this proceeding grew out of DP&L's Third Portfolio Plan application, and approves the consensus of the Company, Staff and numerous signatory or non-opposing parties in this proceeding that the DP&L is authorized to recover lost distribution revenues beyond 2015. Moreover, DP&L notes, there was a hearing held on February 7, 2017 in the instant case wherein testimony and exhibits were admitted into the record and OCC, the Company, and other parties filed post-hearing briefs. DP&L contends that OCC can not now argue that no hearing took place in this proceeding.

{¶ 22} We find OCC's fourth assignment of error to be without merit. OCC argues that DP&L "effectively" withdrew its Third Portfolio Plan application and replaced it with a settlement that continues DP&L's 2013 Portfolio Plan for one more year. Such characterization is incorrect and fails to acknowledge that, in any event, a hearing was held in the instant case at which OCC was permitted to offer evidence and present its arguments as to its interpretations of the 2013 and 2017 Stipulations. OCC's arguments were considered and rejected in the Sep. 27, 2017 Order at ¶¶ 12, 14, 21-22, 27, 33, 35, 38-39, 41, 44, 45-52. Accordingly, OCC's fourth assignment of error will be denied.

E. Assignment of Error 5: The Sep. 27, 2017 Order results in retroactive ratemaking

{¶ 23} For its fifth assignment of error, OCC contends that the Sep. 27, 2017 Order is unlawful and unreasonable because it results in retroactive ratemaking in violation of R.C. 4928.66 to the detriment of customers who would pay more for energy efficiency. OCC contends that the Sep. 27, 2017 Order violates Ohio Supreme Court precedent, citing *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 259 (1957); *Lucas Cnty. Comm'rs v. Pub. Util. Comm.*, 80 Ohio St. 3d 344, 347-48 (1997); and *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 514-15, 2011-Ohio-1788.

{¶ 24} OCC's arguments were considered and rejected in the Sep. 27, 2017 Order at ¶¶ 45-48, 51. As noted therein, the prohibition against retroactive ratemaking does not apply where there is an established recovery mechanism that allows the utility to pass variable costs directly to customers. *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 512-

514, 433 N.E. 2d 568 (1982). The Commission has statutory authority granted through R.C. 4928.66 to establish a recovery mechanism under Ohio Adm.Code 4901:1-39-07(A), and the recovery of lost revenues is a variable cost resulting from effective EE/PDR programs that is directly passed through to customers. Moreover, OCC has failed to offer any evidence that the Utility's mechanism for the recovery of lost revenues is somehow flawed. Accordingly, OCC's fifth assignment of error will be denied.

F. Assignment of Error 6: The Sep. 27, 2017 Order does not violate R.C. 4928.66(D).

{¶ 25} For its last assignment of error, OCC contends that the Sep. 27, 2017 Order is unreasonable because it approves DP&L's lost revenue mechanism without any showing that the mechanism reasonably aligns the interests of the utility and of its customers, as required by R.C. 4928.66(D). OCC argues that neither the Staff nor Company witnesses offered testimony to explain how the recovery of lost revenues reasonably aligns the interests of DP&L and its customers. OCC asserts that the interest of the Company and its customers could not be less aligned because the customers pay $20 million in lost revenues but get nothing in return.

{¶ 26} DP&L argues that OCC provided no evidence in the proceeding that the Company's collection of lost distribution revenues will result in a substantial increase to consumers' electric bills. DP&L asserts that OCC is ignoring the fundamental reality that improved energy efficiency leads to savings for customers. The Utility asserts that OCC cannot have it both ways. DP&L maintains that customers should be responsible for lost distribution revenues because improved energy efficiency leads to reduced generation costs for consumers. Accordingly, DP&L concludes, the 2017 Stipulation approved by the Commission directly aligns the interests of both the Company and its customers.

{¶ 27} We find OCC's final assignment of error to be without merit. OCC has not offered any new evidence or argument that the Utility's mechanism for the recovery of lost revenues is flawed. Rather, OCC continues to complain about the size of lost revenues compared to program costs. As discussed above and noted in the Sep. 27, 2017 Order at ¶¶ 41, 44, 48, the rate adjustment mechanisms referenced in Ohio Adm.Code 4901:1-39-07(A) allow for regular true-ups for the recovery of EE/PDR program costs and lost revenues, and DP&L's recovery of lost distribution revenues reflects energy saved since 2009 that will be reset in DP&L's distribution rate case. Accordingly, we deny OCC's sixth assignment of error, and hold that OCC's application for rehearing should be denied.

IV. ORDER

{¶ 28} It is, therefore,

{¶ 29} ORDERED, That the OCC's application for rehearing be denied. It is, further,

{¶ 30} ORDERED, That a copy of this Second Entry on Rehearing be served upon each party of record.

COMMISSIONERS:
Approving:
Sam Randazzo, Chairman
M. Beth Trombold
Daniel R. Conway
Dennis P. Deters
Recusal:
Lawrence K. Friedeman

RMB/mef