

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)	
Dayton Power and Light Company to)	Case No. 20-1651-EL-AIR
Increase Its Rates for Electric)	
Distribution.)	

In the Matter of the Application of The)	Case No. 20-1652-EL-AAM
Dayton Power and Light Company for)	
Accounting Authority.)	

In the Matter of the Application of The)	Case No. 20-1651-EL-ATA
Dayton Power and Light Company for)	
Approval of Revised Tariffs.)	

**MEMORANDUM CONTRA MOTION OF DAYTON POWER AND LIGHT
COMPANY FOR ORAL ARGUMENT
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

Perhaps DP&L is frustrated that the PUCO Staff, OMA, Kroger, and others have joined OCC's call for a rate freeze – the rate freeze that DP&L itself agreed to years ago for protection of Dayton-area consumers. In any event, DP&L now wants an audience with PUCO Commissioners to continue its arguments for increasing Dayton consumers' rates despite its agreement to the contrary. And this despite the many arguments to the PUCO beginning in 2021 with OCC's response to DP&L's Notice of Withdrawal,¹ Motion to Dismiss,² and later OCC's Application for Rehearing,³ testimony, cross-

¹ Case No. 08-1094-EL-SSO, et. al., Memorandum Contra DP&L's Motions to Withdraw Its Application and Implement Previously Authorized Rates (To Increase Charges to Consumers) by The Office of The Ohio Consumers' Counsel, The Ohio Manufacturers' Association Energy Group The Kroger Company and IGS Energy (December 4, 2019).

² Motion to Dismiss DP&L's Application (August 5, 2021).

³ Application for Rehearing (November 19, 2021).

examination, and post-hearing briefs. And each one of those times, DP&L and other parties have had the opportunity to fully address those issues. In fact, the PUCO Staff, OCC, and DP&L just finished briefing those issues in an appeal before the Ohio Supreme Court.

DP&L's Motion is unnecessary and should be denied. This question has been thoroughly discussed, argued, and briefed by parties. And these issues are far from novel, having been raised and discussed in multiple forums. DP&L wants another opportunity to plead financial distress as a reason for the PUCO to let it out from under its commitment to consumers to freeze distribution rates. DP&L fails to acknowledge that its actions alone have brought it to this point—it unilaterally chose (the second time in three years) to revert to its first electric security plan. Its commitment to freeze rates to consumers was part of its electric security plan. *It must honor that commitment to consumers.* DP&L is merely seeking another bite at the apple—after the briefing deadline—to push the PUCO once again to drop the rate freeze **that DP&L agreed to.**

And it's an asymmetrical approach to the administration of justice. When things were going DP&L's way, it didn't seek oral arguments to Commissioners to hear about OCC's recommendation for a rate freeze or to end its unlawful stability charge. Moreover, it would be unfair to allow DP&L this opportunity when OCC was not given the opportunity to have an oral argument on its Motion to Dismiss DP&L's application.

At this late date and with all the arguments made to the PUCO to date, oral argument would be an administratively inefficient rehashing of the same arguments already made. The record has been sufficiently developed. The PUCO should be well positioned to decide the issues in this case. That includes whether or not to deny DP&L

an increase in the rates its Dayton-area consumers pay until the expiration of Electric Security Plan I.

But if DP&L is given the opportunity for oral argument on this issue (which it shouldn't), then OCC should likewise be given the opportunity for oral argument on an issue. That oral argument should address DP&L's collection of an (unlawful) stability charge from consumers.

II. RECOMMENDATIONS

DP&L asserts in its motion that the PUCO should grant oral argument for two reasons. First, it asserts the legal issues relating to the rate freeze are novel and oral argument is necessary for the PUCO to evaluate whether or not to enforce the rate freeze.⁴ In this regard DP&L is mistaken. And second, it asserts its usual sad song about its need for more money from consumers, this time that "the rate freeze issue is of vital importance to AES Ohio and its customers."⁵ On this we agree with DP&L. DP&L should honor its rate freeze commitment to its consumers because it is of vital importance to DP&L's approximately 500,000 residential utility consumers.

A. The legal issues relating to DP&L's commitment to freeze rates to consumers are not "novel" and oral argument is unnecessary for the PUCO to evaluate whether or not to enforce the rate freeze.

It's interesting that DP&L would argue that the rate freeze issue is "novel" as a reason for oral argument. Novel means "new and **original**, not like anything **seen** before."⁶

⁴ DP&L's Motion at 3.

⁵ DP&L's Motion at 4.

⁶ *See Novel*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/novel>.

For one thing, DP&L was granted a favorable electric security plan – years ago – with the rate freeze included. A rate freeze is not a “novel” idea for a settlement.

But maybe DP&L at that time viewed the rate freeze as novel in a good way when that helped gain OCC’s signature on a settlement and the PUCO’s signatures on a favorable order. But now DP&L views novelty in a bad way as a problem for it. The PUCO should not accept DP&L’s flexible idea of novelty as a reason for a belated oral argument.

B. DP&L’s uses the word “novel” as grounds for its motion, but “novel” is the required standard for an interlocutory appeal, which DP&L did not request.

Additionally, DP&L’s use of the word “novel” is, of course, a standard for obtaining certification of an interlocutory appeal, per O.A.C. 4901-1-15(B). But DP&L did not take its opportunity to file an interlocutory appeal for an oral argument when the Attorney Examiner ruled on the briefing schedule as the end to the case process. The PUCO has recently been critical of OCC for not raising an issue before an Attorney Examiner when it had the opportunity.⁷

C. PUCO precedent does not permit the filing of a motion when an interlocutory appeal was the appropriate pleading.

There is PUCO precedent against filing a motion when an interlocutory appeal was called for.⁸ Interlocutory appeals of Attorney Examiner rulings must be filed within five days of the ruling, under O.A.C 4901-1-15. That rule also allows parties who do not take an interlocutory appeal to address the ruling in their initial brief or any other

⁷ Case No. 17-974-EL-UNC, Entry at ¶22 (February 10, 2022).

⁸ See Case No. 05-1444-GA-UNC, Entry at ¶10 (February 12, 2007).

appropriate filing.⁹ DP&L had the opportunity to address this issue in its initial brief and has the opportunity do so on reply. DP&L's motion is out of order and should be denied.

D. DP&L chose to revert to ESP I.

Under R.C. 4928.143(C)(2)(b), if a utility withdraws from its electric security plan, the PUCO "shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer...until a subsequent offer is authorized pursuant to this section of section 4928.142 of the Revised Code." The PUCO has interpreted this statute to mean that when a utility withdraws from its current ESP, it reverts to its previous ESP in its entirety.¹⁰

DP&L argues that "the legal issues relating to the rate freeze are novel, and oral argument will assist the Commission to evaluate them. Specifically, after AES Ohio terminated ESP III, it is undisputed that the Commission was required ("shall") to implement the 'provisions, terms, and conditions of [AES Ohio's] most recent standard service offer.' R.C. 4928.143(C)(2)(b). The parties disagree about what that means."¹¹

As OCC has argued multiple times in this case,¹² and in other cases, DP&L unilaterally chose to revert to ESP I and did so knowing full well that its commitment to freeze rates to consumers was part of the settlement. DP&L is once again attempting to cherry-pick pro-utility provisions of its ESP I (the \$76 million annual stability charge) , while disavowing any pro-consumer provisions (its commitment to freeze rates to

⁹ O.A.C 4901-1-15.

¹⁰ OCC does not concede that this is the correct legal interpretation, as OCC has argued that the law only requires the utility to revert to its most recent standard service offer, not its entire electric security plan. It is an issues that OCC has appealed. *See* S.Ct. Case No. 2021-1068.

¹¹ DP&L's Motion at 3.

¹² *See* Notes 1-5, *supra*.

consumers) that it does not like.¹³ The PUCO should put a stop to this. Now. Parties have had numerous opportunities to argue this issue – before the PUCO and the Ohio Supreme Court. The issues are no longer “novel.” The PUCO has an adequate record before it that will allow them to make a well-informed decision. Oral argument is not necessary.

E. DP&L's commitment to freeze rates to consumers is of vital importance for both consumer protection and for DP&L, but not for the same reasons.

DP&L also asserts that the rate freeze issue “is of vital importance to AES Ohio and its customers...AES Ohio's current rates were set based upon a 2015 test year, and costs have increased significantly since then. For example, the cost to trim vegetation on a mile of AES Ohio's distribution lines has increased by 170% since 2015.”

But DP&L knew this when it *chose* to revert to ESP I. Consumers should not be forced to pay more because DP&L might have miscalculated the financial implications of its decision to revert to ESP I. DP&L still is collecting more than \$75 million per year from consumers in through its so-called rate stability charge (“RSC”) – a stability charge that would not withstand legal challenge today, given post-2009 Supreme Court rulings and PUCO decisions. Under the 2009 plan, while the stability charge is being collected, consumers were to benefit from DP&L’s commitment to freeze distribution rates. To protect consumers, the PUCO should enforce the terms of ESP I in their entirety, including DP&L’s commitment to freeze rates, which is an agreed-upon consumer protection.

To the contrary, the PUCO’s interpretation of R.C. 4928.143(C)(2)(b)—that a utility reverts to its most recent ESP in its entirety—compels such a conclusion. The

¹³ *Id.*

PUCO must freeze DP&L's base rates at whatever level they were set at the time DP&L reverted to ESP I. DP&L reverted to ESP I in December 2019. Thus, the PUCO is required to enforce DP&L's commitment to freeze rates for as long as ESP I remains in effect.

OCC's expert witness Mr. Willis recommended that rates to DP&L residential consumers be frozen at the current levels as supported in OCC's August 5, 2021, Motion to Dismiss DP&L's Application for a Rate Increase.¹⁴ This recommendation is consistent with the settlement that DP&L previously agreed to as part of ESP I.¹⁵ And it is consistent with the PUCO rulings that "the Commission cannot arbitrarily choose some of the various provisions of the ESP to continue after the termination date of the ESP and choose other provisions of the ESP not to continue." *In re Application of Dayton Power & Light Co. for Approval of its Market Rate offer*, Case No. 12-426-EL-SS), Entry on Rehearing at ¶10 (Feb. 19, 2013).

After the hearing in this case, DP&L filed rebuttal testimony to attempt to rebut OCC's witness Mr. Willis's recommendation that the PUCO should freeze DP&L's distribution rates at their current level.¹⁶ DP&L witness Ms. Storm indicated that "freezing AES Ohio's distribution rates at their current level would have a negative effect on AES Ohio's ability to provide service by forcing the Company to reduce spending to levels that may not maintain compliance, proactive maintenance, or line clearance."¹⁷

¹⁴ *Id.*

¹⁵ ESP I 2009 Opinion at 5, 9.

¹⁶ Rebuttal Testimony of Kathryn Storm at 1 (February 2, 2022) ("Storm Rebuttal").

¹⁷ Storm Rebuttal at 3.

But Ms. Storm misses the point. DP&L is *required* to provide safe, adequate, and reliable service to consumers. And this requirement stands regardless of whether DP&L receives rate increases. *See* R.C. 4905.22 (“every public utility shall furnish necessary and adequate service and facilities***.”). And Ms. Storm admitted in her testimony that this is entirely within the control of DP&L. In her testimony, she claimed this would require DP&L to reduce operation and maintenance ("O&M") expenses by over \$25 million for 2022-2024 and reduce capital spending by more than \$120 million for the same period.¹⁸ At hearing, however, she admitted that DP&L would need to revise its budget if the PUCO rejects the rate increase, and there could be other available sources of funding for O&M expenses.¹⁹

DP&L controls its spending. DP&L controls when it comes in for a rate case. DP&L controls the fact that it withdrew from ESP III and reverted to ESP I. ESP I contains DP&L’s commitment to consumers to freeze rates while it is collecting a rate stability charge and is operating under its 2009 electric security plan. The PUCO should not permit DP&L to cherry-pick provisions of ESP I because it does not like the rate freeze.

And DP&L is far from broke. DP&L is collecting a \$79 million per year non-cost-based stability/provider of last resort (“POLR”) charge from Dayton-area consumers until its next electric security plan is in place. And DP&L has produced no evidence, in this case (or others) that justifies that revenue collection from consumers. DP&L is not the only party suffering financial difficulties. Consumers are suffering as well resulting

¹⁸ *Id.* at 4.

¹⁹ Tr. Vol. VII at 1489-1537 (Cross-Examination of Kathryn Storm by Mr. Finnigan) (February 7, 2022).

from the ongoing coronavirus pandemic. For example, 29.6% of Ohioans living in the Dayton area live in poverty conditions,²⁰ and food insecurity in Montgomery County is at 17.5%.²¹ Dayton-area consumers already struggle to eat. And consumers that cannot afford their service will be disconnected; and DP&L will lose even more revenue. It is mutually beneficial for DP&L to work with the money they have to maintain service than to raise rates to the extent that disconnections increase.

The PUCO should deny DP&L's motion for oral argument, and it should dismiss DP&L's application for an increase until the expiration of ESP I. But if DP&L is given the opportunity for oral argument on this issue (which it shouldn't), then OCC should likewise be given the opportunity for oral argument on DP&L's collection of the stability charge from consumers.

III. CONCLUSION

For consumer protection, the PUCO should deny DP&L's Motion for oral argument in this case. These issues have been thoroughly argued in this case, and there is sufficient record evidence for the PUCO to decide. Granting DP&L oral argument will only give the Utility yet another bite at the apple after the case has been fully briefed.

²⁰ United States Census Bureau, *QuickFacts: Dayton city, Ohio*, available at <https://www.census.gov/quickfacts/daytoncityohio>.

²¹ Montgomery County, *Food for Thought*, available at https://www.mcoho.org/residents/mc_food_policy/food_for_thought.php.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below *via* electronic transmission, this 21st day of March 2022.

/s/ Ambrosia E. Wilson

Ambrosia E. Wilson

Assistant Consumers' Counsel

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Summary: Memorandum Memorandum Contra Motion of Dayton Power and Light
Company for Oral Argument by Office of the Ohio Consumers' Counsel
electronically filed by Mrs. Tracy J. Greene on behalf of Wilson, Ambrosia E.