**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

|  |  |  |
| --- | --- | --- |
| In the Matter of the Application of the Dayton Power and Light Company d/b/a AES Ohio for Approval of Its Electric Security Plan. | )  )  )  ) | Case No. 22-900-EL-SSO |

**MOTION TO TAKE ADMINISTRATIVE NOTICE**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

Through a Settlement filed in this proceeding, agreed to by the PUCO Staff and many others,[[1]](#footnote-2) Dayton Power and Light Company (“DP&L” or “AES Ohio”) seeks to collect from Dayton-area consumers $160 million or more,[[2]](#footnote-3) including charges of approximately $73 million under its Regulatory Compliance Rider (“RCR”).[[3]](#footnote-4) These RCR charges to consumers include coal plant subsidies for AES’s share of two Ohio Valley Electric Corporation (“OVEC”) coal plants, dating back to prior periods (2014-2017 and two weeks in 2019). And DP&L would collect from its consumers other prior charges (“prior RCR”) of $6.5 million, some dating back to 1999, approved by the PUCO as “transition charges.”[[4]](#footnote-5)

The Office of the Ohio Consumers’ Counsel (“OCC”), on behalf of DP&L’s residential consumers, asks the PUCO to take administrative notice of DP&L’s Amended Application, Part F, to receive transition revenues, filed in Case No. 99-1687-EL-ETP on April 20, 2000. There is good cause to grant this Motion, as the information sought to be noticed is highly relevant to the issues before the PUCO and will help fill a potential gap in the record that might otherwise exist. Moreover DP&L’s Amended Application, Part F, presents adjudicative facts, not subject to reasonable dispute. There will be no prejudice to parties as they had prior knowledge of DP&L’s Amended Application and will have the opportunity to address it in response to this motion and in the upcoming briefs and reply briefs.

On September 21, 2000, DP&L’s Amended Application to receive transition revenues was approved by the PUCO. Under the PUCO-approved transition plan, DP&L was allowed to charge its consumers $699.2 million in transition costs and was permitted to defer another $28.6 million in “accounting related expenses.”[[5]](#footnote-6) Part F of DP&L’s Amended Application identifies the total transition costs ($699.2 million) plus the deferral amounts ($28.6 million) that the PUCO ultimately authorized for collection from consumers as “transition costs. ” Under DP&L’s Part F, Schedule TC-2, with the heading “Accounting Order Recovery” DP&L lists “Consumer Education Costs” and “Settlement System Implementation Costs.” DP&L’s Application, Part F, Schedule TC-2, specifically identifies as “transition costs” the deferrals DP&L now seeks to collect from consumers in this case (through the RCR) -- “consumer education costs” and “settlement system implementation costs.”[[6]](#footnote-7) OCC Witness Schroder confirmed that these deferrals it now seeks to collect from consumers for consumer education costs and retail settlement system costs (approximately $2.3 million)[[7]](#footnote-8) were created in DP&L’s electric transition plan filing in Case No. 99-1687-EL-ETP. (Tr. Vol. 1 at 139-141; OCC Exhibit 9).

In its Sept. 21, 2000 Order approving DP&L’s electric transition plan, the PUCO approved the accounting deferrals as “transition costs” to be collected from consumers, but without specifically identifying them other than to characterize them as “$28.6 million in accounting related expenses.”[[8]](#footnote-9) DP&L’s Amended Application, Part F, provides the tie in to the PUCO’s approval of the consumer education and settlement system implementation cost deferrals as “transition costs” to be collected from Dayton area consumers.

Under R.C. 4928.40(A), deferred expenses (recognized as regulatory assets) that are authorized by the PUCO as transition costs, must be collected from consumers no later than December 31, 2010. In other words, DP&L is 13 years late in its request to collect these charges from its consumers. And R.C. 4928.141 precludes a utility from including in its standard service offer “any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility’s rate plan.” Consequently, the Settlement provision allowing collection of these previously authorized deferred transition costs violates the law, and is thus, contrary to regulatory practices and principles, failing the third prong of the PUCO’s settlement test.

The information found in DP&L’s Amended Application, Part F, will provide the PUCO with a more complete record, upon which to base its decision on this matter. The PUCO should grant OCC’s motion for reasons more fully explained in the attached Memorandum in Support.

Respectfully submitted,

Bruce Weston (0016973)

Ohio Consumers’ Counsel

*/s/ Maureen R. Willis*

Maureen R. Willis (0020847)

Legal Director

Counsel of Record

John Finnigan (0018689)

Connor D. Semple (0101102)

Assistant Consumers’ Counsel

**Office of the Ohio Consumers’ Counsel**

65 East State Street, Suite 700

Columbus, Ohio 43215

Telephone: Willis (614) 466-9567

Telephone: Finnigan (614) 466-9585

Telephone: Semple (614) 466-9565

[maureen.willis@occ.ohio.gov](mailto:maureen.willis@occ.ohio.gov)

[john.finnigan@occ.ohio.gov](mailto:john.finnigan@occ.ohio.gov)

[connor.semple@occ.ohio.gov](mailto:connor.semple@occ.ohio.gov)

(willing to accept service by e-mail)

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

|  |  |  |
| --- | --- | --- |
| In the Matter of the Application of the Dayton Power and Light Company d/b/a AES Ohio for Approval of Its Electric Security Plan. | )  )  )  ) | Case No. 22-900-EL-SSO |

**MEMORANDUM IN SUPPORT**

The PUCO has broad discretion to conduct its own hearings.[[9]](#footnote-10) The PUCO is not stringently confined to the rules of evidence,[[10]](#footnote-11) but is directed by statute to observe the practice and rules of evidence in civil proceedings.[[11]](#footnote-12)

Under Rule 201 of the Ohio Rules of Evidence, judicial notice may be taken of any adjudicative fact that is not subject to reasonable dispute. This rule permits courts to fill gaps in the record. Accordingly, courts have judicially noted documents filed, testimony given, and orders or findings. Under subsection (F) of Rule 201, “Judicial notice may be taken at any stage of the proceeding.”

The Supreme Court of Ohio has held that while there is no absolute right for the taking of administrative notice, there is no prohibition against the PUCO taking administrative notice of facts outside the record in a case.[[12]](#footnote-13) The important factors for applying administrative notice, according to the Court, are that the complaining party has prior knowledge of and an opportunity to rebut the materials judicially noticed.[[13]](#footnote-14) The appropriate scope of notice is broader in administrative proceedings than in trials.[[14]](#footnote-15)

The PUCO itself has recognized that it may take administrative notice of adjudicative facts,[[15]](#footnote-16) cases,[[16]](#footnote-17) entries,[[17]](#footnote-18) expert opinion testimony, and briefs and other pleadings filed in separate proceedings.[[18]](#footnote-19) The PUCO has also taken administrative notice of the entire record[[19]](#footnote-20) and evidence presented in separate cases.[[20]](#footnote-21)

In this case, OCC is asking the PUCO to take administrative notice of DP&L’s Amended Application, Part F, to receive transition revenues, filed in Case No. 99-1687-EL-ETP on April 20, 2000. DP&L’s Amended Application to receive transition revenues was approved by the PUCO on September 21, 2000. Under that PUCO Order DP&L was allowed to charge its consumers $699.2 million in transition costs and was permitted to defer $28.6 million in “accounting related expenses.” [[21]](#footnote-22) Part F of DP&L’s Amended Application identifies the total transition costs plus the deferral amounts that the PUCO ultimately authorized for collection from consumers as “transition costs.” On Schedule TC-2, under the heading “Accounting Order Recovery” DP&L lists “Consumer Education Costs” and “Settlement System Implementation Costs.” DP&L’s Amended Application specifically identifies the deferrals DP&L now seeks to collect from consumers in this case -- “consumer education costs” and “settlement system implementation costs.”[[22]](#footnote-23) OCC Witness Schroder confirmed that these deferrals it now seeks to collect from consumers were created in DP&L’s electric transition plan filing in Case No. 99-1687-EL-ETP. (Tr. Vol. 1 at 139-141; OCC Exhibit 9).

In its September 21, 2000 Order approving DP&L’s electric transition plan, the PUCO approved the deferrals as transition costs to be collected from consumers, but without specifically identifying them other than to characterize them as “$28.6 million in accounting related expenses.”[[23]](#footnote-24) DP&L’s Amended Transition Plan Application, Part F, provides the tie in to the PUCO’s approval of the consumer education and settlement system implementation cost deferrals as “transition costs” to be collected from consumers.

The PUCO taking administrative notice of DP&L’s Amended Application to receive transition costs would not prejudice any party. DP&L and other parties are (or should be) well aware of the regulatory assets created in its transition plan filing. DP&L witness Sharon Schroeder testified at hearing that the consumer education and settlement system implementation cost deferrals sought to be collected in the Settlement in this case were created in Case No. 99-1687-EL-ETP.[[24]](#footnote-25) DP&L and others will have the opportunity to address this matter in the upcoming briefs and reply briefs. They will also have an opportunity to respond to this motion to take administrative notice.

Taking administrative notice will provide the PUCO with a more complete record upon which to base its decision whether to approve the settlement in this case. The adjudicative facts sought to be noticed are relevant to whether the Settlement satisfies the third prong of the PUCO’s settlement standard. The PUCO should grant OCC’s Motion.

Respectfully submitted,

Bruce Weston (0016973)

Ohio Consumers’ Counsel

*/s/ Maureen R. Willis*

Maureen R. Willis (0020847)

Legal Director

Counsel of Record

John Finnigan (0018689)

Connor D. Semple (0101102)

Assistant Consumers’ Counsel

**Office of the Ohio Consumers’ Counsel**

65 East State Street, Suite 700

Columbus, Ohio 43215

Telephone: Willis (614) 466-9567

Telephone: Finnigan (614) 466-9585

Telephone: Semple (614) 466-9565

[maureen.willis@occ.ohio.gov](mailto:maureen.willis@occ.ohio.gov)

[john.finnigan@occ.ohio.gov](mailto:john.finnigan@occ.ohio.gov)

[connor.semple@occ.ohio.gov](mailto:connor.semple@occ.ohio.gov)

(willing to accept service by e-mail)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Take Administrative Notice has been served electronically upon those persons listed below this 10th day of May 2023.

*/s/ Maureen R. Willis*

Maureen R. Willis

Legal Director

The PUCO’s e-filing system will electronically serve notice of the filing of this document on the following parties:

**SERVICE LIST**

|  |  |
| --- | --- |
| [werner.margard@ohioAGO.gov](mailto:werner.margard@ohioAGO.gov)  [ambrosia.wilson@ohioAGO.gov](mailto:ambrosia.wilson@ohioAGO.gov)  [shaun.lyons@ohioAGO.gov](mailto:shaun.lyons@ohioAGO.gov)  [kherrnstein@bricker.com](mailto:kherrnstein@bricker.com)  dparram@brickergraydon.com  dborchers@brickergraydon.com  rmains@brickergraydon.com[dproano@bakerlaw.com](mailto:drpoano@bakerlaw.com)  [ahaque@bakerlaw.com](mailto:ahaque@bakerlaw.com)  [eprouty@bakerlaw.com](mailto:eprouty@bakerlaw.com)  [knordstrom@theOEC.org](mailto:knordstrom@theOEC.org)  [ctavenor@theOEC.org](mailto:ctavenor@theOEC.org)  [leonard.bazelak@daytonohio.gov](mailto:leonard.bazelak@daytonohio.gov)  [bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)  [easley@carpenterlipps.com](mailto:easley@carpenterlipps.com)  mwarnock@bricker.com  Attorney Examiners:  [Gregory.price@puco.ohio.gov](mailto:Gregory.price@puco.ohio.gov)  [Patricia.schabo@puco.ohio.gov](mailto:Patricia.schabo@puco.ohio.gov) | [christopher.hollon@aes.com](mailto:christopher.hollon@aes.com)  [jsharkey@ficlaw.com](mailto:jsharkey@ficlaw.com)  [djireland@ficlaw.com](mailto:djireland@ficlaw.com)  [mwatt@ficlaw.com](mailto:mwatt@ficlaw.com)  [mkurtz@bkllawfirm.com](mailto:mkurtz@bkllawfirm.com)  [kboehm@bkllawfirm.com](mailto:kboehm@bkllawfirm.com)  [jkylercohn@bkllawfirm.com](mailto:jkylercohn@bkllawfirm.com)  [stacie.cathcart@igs.com](mailto:stacie.cathcart@igs.com)  [evan.betterton@igs.com](mailto:evan.betterton@igs.com)  [michael.nugent@igs.com](mailto:michael.nugent@igs.com)  [Joe.Oliker@igs.com](mailto:Joe.Oliker@igs.com)  [stephanie.chmiel@thompsonhine.com](mailto:stephanie.chmiel@thompsonhine.com)  [mary.csarny@thompsonhine.com](mailto:mary.csarny@thompsonhine.com)  [mpritchard@mcneeslaw.com](mailto:mpritchard@mcneeslaw.com)  [bmckenney@mcneeslaw.com](mailto:bmckenney@mcneeslaw.com)  awalke@mcneeslaw.com  [dromig@armadapower.com](mailto:dromig@armadapower.com)  [mjsettineri@vorys.com](mailto:mjsettineri@vorys.com)  [glpetrucci@vorys.com](mailto:glpetrucci@vorys.com)  [paul@carpenterlipps.com](mailto:paul@carpenterlipps.com)  [trent@hubaydougherty.com](mailto:trent@hubaydougherty.com)  [rdove@keglerbrown.com](mailto:rdove@keglerbrown.com)  [cgrundmann@spilmanlaw.com](mailto:cgrundmann@spilmanlaw.com)  [dwilliamson@spilmanlaw.com](mailto:dwilliamson@spilmanlaw.com) |

1. Stipulation and Recommendation at 40-41 (Apr. 10, 2023), with Signatory Parties consisting of DP&L, PUCO Staff, the City of Dayton, Ohio Partners for Affordable Energy, Ohio Manufacturers’ Association Energy Group, Ohio Energy Leadership Council (formerly IEU Ohio), the Kroger Company, the Ohio Energy Group, the Ohio Hospital Association, IGS, University of Dayton, RESA, ChargePoint, Constellation, and Walmart and Non-Opposing Parties consisting of One Energy, Citizens Utility Board and the Ohio Environmental Council. [↑](#footnote-ref-2)
2. *See* OCC Ex. 8. [↑](#footnote-ref-3)
3. Direct Testimony of Jonathan J. Borer at 2 (Apr.26, 2023),(adding in $8.8 million for deferred O&M expenses associated with AES Ohio’s new Customer Information System (Settlement provision B.5 and $6,515,070 for uncollectibles (Settlement provision B.6, OCC Ex. 20). [↑](#footnote-ref-4)
4. *In the Matter of the Application of the Dayton Power and Light Company for Approval of Its Transition Plan Pursuant to Section 4928.31, Revised Code and for the Opportunity to Receive Transition Revenues as Authorized under Sections 4928.31 to 4928.40, Revised Code*, Case No. 99-1687-EL-ETP, et al., Opinion and Order at 27 (Sept. 21, 2000). [↑](#footnote-ref-5)
5. *In the Matter of the Application of the Dayton Power and Light Company for Approval of Its Transition Plan Pursuant to Section 4928.31, Revised Code and for the Opportunity to Receive Transition Revenues as Authorized under Sections 4928.31 to 4928.40, Revised Code*, Case No. 99-1687-EL-ETP, et al., Opinion and Order (Sept. 21, 2000). [↑](#footnote-ref-6)
6. *Id.,* Application to Receive Transition Revenues (Revised), Summary of Transition Costs, Part F, File TC-2 (Apr. 20, 2000). [↑](#footnote-ref-7)
7. OCC Ex. 9. [↑](#footnote-ref-8)
8. Case No. 99-1687-EL-ETP, et al., Opinion and Order at 27 (Sept. 21, 2000). [↑](#footnote-ref-9)
9. *See, e.g.,* R.C. 4903.02, 4903.03, 4903.04; O.A.C. 4901-1-27. [↑](#footnote-ref-10)
10. *See Greater Cleveland Welfare Rights v. Pub. Util. Comm*. (1982), 2 Ohio St.3d 62. [↑](#footnote-ref-11)
11. R.C. 4903.22. [↑](#footnote-ref-12)
12. *See Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1, 17-18 (citing to *Allen, D.B.A. J & M Trucking, et al., v. Pub. Util. Comm*. (1988), 40 Ohio St.3d 184, 185. [↑](#footnote-ref-13)
13. *See, e.g., Allen,* 40 Ohio St.3d at 186. [↑](#footnote-ref-14)
14. *See Banks v. Schweiker*, 654 F.2d 637, 641 (9th Cir. 1981). [↑](#footnote-ref-15)
15. *In the Matter of the Review of the Interim Emergency and Temporary PIPP Plan Riders Contained in the Approved Rate Schedules of Electric and Gas Companies*, Case No. 83-303-GE-COI, Entry at ¶ 6 (Feb. 22, 1989) (administrative notice taken of facts adduced at hearing in another investigation, information compiled by Staff from the 1980 Census Report, and customer information reported pursuant to the Ohio Administrative Code). [↑](#footnote-ref-16)
16. *In the Matter of the Amendment of Chapter 4901:1-13, Ohio Administrative Code, to Establish Minimum Gas Service Standards*, Case No. 05-602-GA-ORD, Entry on Rehearing at 33 (May 16, 2006) (administrative notice taken of case filed where utility presented problems with remote technology and sought to discontinue new installation of remote meters). [↑](#footnote-ref-17)
17. *In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 89-1001-EL-AIR, Opinion and Order at 110 (Aug. 19, 1990) (administrative notice taken by the Attorney Examiner of entries and orders issued in an audit proceeding and an agreement filed in the audit docket). [↑](#footnote-ref-18)
18. *See In the Matter of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 12-1230-EL-SSO, Opinion and Order at 18-21 (July 18, 2012) (finding that the Court has placed no restrictions on taking administrative notice of expert opinion testimony, and that it declined to impose such restrictions*); In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Entry at ¶ 6*,* (April 6, 2010), aff’d by Entry on Rehearing at ¶ 14 (May 13, 2010) (both Entries allowing the entire record of a prior proceeding to be administratively noticed in the ESP proceeding and ruling that all briefs and pleadings “may be used for any appropriate purposes”). [↑](#footnote-ref-19)
19. Case No. 10-388-EL-SSO, Entry at ¶ 6 (Apr. 6, 2010), aff’d by Entry on Rehearing at ¶ 14 (May 13, 2010). [↑](#footnote-ref-20)
20. ## *Id.;* *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in Electric Rates in Its Service Area,* Case No. 91-410-EL-AIR, Opinion and Order at 19 (May 12, 1992) (administrative notice taken of the record in the Zimmer restatement case and evidence presented in the case).

    [↑](#footnote-ref-21)
21. *In the Matter of the Application of the Dayton Power and Light Company for Approval of Its Transition Plan Pursuant to Section 4928.31, Revised Code and for the Opportunity to Receive Transition Revenues as Authorized under Sections 4928.31 to 4928.40, Revised Code*, Case No. 99-1687-EL-ETP, et al., Opinion and Order (Sept. 21, 2000). [↑](#footnote-ref-22)
22. Application to Receive Transition Revenues (revised), Summary of Transition Costs, Part F, File TC-2 (April 20, 2000). [↑](#footnote-ref-23)
23. Case No. 99-1687-EL-ETP, et al., Opinion and Order (Sept. 21, 2000) at 27. [↑](#footnote-ref-24)
24. *See* Tr. Vol. 1 at 139-141. [↑](#footnote-ref-25)