BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan.	)))	Case No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	))))	Case No. 12-428-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.	)))	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.	)))	Case No. 12-672-EL-RDR

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

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April 18, 2014

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

As part of our advocacy for residential consumers of Dayton Power and Light Company ("DP&L" or "Utility") to receive adequate service at reasonable rates, the Office of the Ohio Consumers' Counsel ("OCC") files this Second Application for Rehearing. OCC seeks rehearing of the Second Entry on Rehearing ("Second Rehearing Entry") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in the above-captioned proceedings on March 19, 2014. OCC is authorized to file this second application for rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

OCC seeks rehearing on the findings of the PUCO in its Second Rehearing Entry pertaining to the Service Stability Rider ("SSR") and the Service Stability Rider Extension ("SSR-E"). Through these riders, DP&L will collect hundreds of millions of dollars from its distribution customers over the next three years.[1]

Rehearing is sought of the March 19, 2014 Second Rehearing Entry based on the following Assignments of Error:

A. The PUCO unreasonably and unlawfully erred in permitting DP&L to collect a charge from customers to maintain its financial integrity (through the Service Stability Rider and the Service Stability Rider Extension) after it divests its generating assets. Once the Utility's generating assets are divested, the factual basis for charging customers for financial stability disappears. Because there is no factual basis to support these charges being collected from customers after divestiture, the PUCO's Second Entry on Rehearing violates R.C. 4903.09.

B. Assuming that it is lawful and reasonable for DP&L to collect charges from customers to maintain its financial integrity through the Service Stability Rider Extension, the amount of the potential charge ($45.8 million) is unreasonable and unlawful because the PUCO failed to reduce the potential charge (to $36.66 million) when it shortened the period for collecting that charge by one month. The PUCO's failure to reduce the potential Service Stability Rider Extension charge to customers was a mistake, in violation of R.C. 4903.09.

C. The PUCO erred in unreasonably and unlawfully determining that the Service Stability Rider charge to customers is not a cost-based charge, and thus not a transition charge under R.C. 4928.39. The PUCO's finding violates R.C. 4903.09.

[1] The SSR, as approved, permits DP&L to collect $110 million per year from customers, for a three year period. The SSR-E, as approved, allows DP&L to seek authority to collect an additional $45.8 million from customers. See *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Opinion and Order at 25-28 (Sept. 4, 2013), amended by Entry Nunc Pro Tunc at 2 (Sept. 6, 2013).

The basis of this Second Application for Rehearing is set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claims of error, the PUCO should modify or abrogate its Second Rehearing Entry.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Under Ohio law, Ohio customers are the intended beneficiaries of DP&L's entry into a competitive market. But instead, customers will be paying above-market prices for electric service primarily because of the financial stability charges the PUCO approved for collection from customers. The financial stability charges that the PUCO approved will cost customers hundreds of millions of dollars between now and the end of the Utility's electric security plan ("ESP") (May 31, 2017). OCC seeks rehearing asking the PUCO to find that customers should not have to pay financial stability charges to support DP&L's generation assets, once those assets have been divested.

II. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty days after issuance of an order from the PUCO, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."[2] Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[3]

In considering an application for rehearing, Ohio law provides that the PUCO "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear."[4] Furthermore, if the PUCO grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same * * *."[5]

OCC meets both the statutory conditions applicable to an applicant for rehearing under R.C. 4903.10 and the requirements of the PUCO's rule on applications for

[2] R.C. 4903.10.

[3] R.C. 4903.10(B).

[4] Id.

[5] Id.

rehearing.[6] Accordingly, OCC respectfully requests that the PUCO grant rehearing on the matters specified below.

III. LAW AND ARGUMENT

ASSIGNMENT OF ERRORS:

A. The PUCO Unreasonably And Unlawfully Erred In Permitting DP&L To Collect A Charge From Customers To Maintain Its Financial Integrity (Through The Service Stability Rider And The Service Stability Rider Extension) After It Divests Its Generating Assets. Once The Utility's Generating Assets Are Divested, The Factual Basis For Charging Customers For Financial Stability Disappears. Because There Is No Factual Basis To Support These Charges Being Collected From Customers After Divestiture, The PUCO's Second Entry on Rehearing Violates R.C. 4903.09.

The PUCO's Second Rehearing Entry left intact the Service Stability Rider ("SSR") established in its earlier Opinion and Order.[7] Under the earlier PUCO Order, $110 million per year was to be collected from customers for three years ending on December 31, 2016.[8] DP&L was also authorized to request even more money from customers through a Service Stability Rider-Extension ("SSR-E") charge in the PUCO's earlier Opinion and Order. Under the PUCO's ruling, DP&L may seek to charge customers an additional $45.8 million for the last five months of the ESP Term (January through May, 2017) after the SSR has ended.[9] The PUCO's Second Entry on Rehearing

[6] See Ohio Admin. Code 4901-1-35.

[7] See Opinion and Order at 22-26 (Sept. 4, 2013); amended by Entry Nunc Pro Tunc at ¶4 (Sept. 6, 2013). OCC applied for rehearing of that Order opposing the SSR and the SSR-E on numerous grounds. OCC's application was denied in this respect.

[8] Opinion and Order at 25; amended by Entry Nunc Pro Tunc at 2.

[9] DP&L's ability to do so is contingent upon it fulfilling certain conditions specified in the PUCO's Opinion and Order. See Opinion and Order at 26-28; Entry Nunc Pro Tunc at 2.

did not change DP&L's ability to seek an additional $45.8 million charge from customers through the SSR-E.

But the PUCO's Second Rehearing Entry did change other elements of the Opinion and Order, which impact the SSR and SSR-E charges. Notably, it required DP&L to divest its generation assets *by January 1, 2016*[10]--a full seventeen months earlier than previously ordered. In doing so, the PUCO removed any justification for charging the SSR, or the SSR-E, after divestiture (at the latest January 1, 2016). After divestiture occurs, there is no basis in the record to charge customers millions of dollars in financial stability charges. The PUCO thus erred in not ending the SSR and the SSR-E with divestiture (and no later than January 1, 2016).

In its Opinion and Order, the PUCO ruled that all customers should pay the SSR charge because the SSR relates to default service and bypassability and will stabilize and provide certainty regarding retail electric service.[11] The PUCO explained that because DP&L had not structurally separated its generation assets, the financial losses in all businesses (including generation) affect DP&L as a whole, potentially jeopardizing its ability to provide retail electric service:

> Finally, the Commission believes that the SSR would have the effect of stabilizing or providing certainty regarding retail electric service. We agree with DP&L that if its financial integrity becomes further compromised, it may not be able to provide stable or certain retail electric service (DP&L Ex. 16A at 7-8, DP&L Ex. 12 at 23, DP&L Ex. 4A at 54). Although generation, transmission, and distribution rates have been unbundled, DP&L is not a structurally separated utility; thus, the financial losses in the generation, transmission, or distribution business of DP&L are financial losses for the entire utility. Therefore, if one of the businesses suffers financial losses, it may impact the entire utility,

[10] Second Rehearing Entry at ¶27 and at ¶51 (Mar. 19, 2014).

[11] Opinion and Order at 21.

> adversely affecting its ability to provide stable, reliable, or safe retail electric service. The Commission finds that the SSR will provide stable revenue to DP&L for the purpose of maintaining its financial integrity.[12]

In its Opinion and Order, as modified by its Entry *Nunc Pro Tunc*, the PUCO also required DP&L to file a "generation divestment plan that divests all of its generation assets" *by May 31, 2017*.[13] This was based on the testimony of DP&L witness Craig Jackson, who had testified that DP&L could not divest earlier than September 1, 2016.[14]

But, in its Second Entry on Rehearing, the PUCO considered conflicting information that DP&L had recently filed in a separate docket—its application to transfer and sell its generating assets.[15] That information contradicted Mr. Jackson's testimony and indicated that DP&L could divest sooner than September 1, 2016.[16] Indeed, in its filings, DP&L indicated that a potential sale of its generation assets to an unaffiliated third party could occur as early as 2014![17] In light of the new information, the PUCO ordered DP&L to divest no later than *January 1, 2016*:[18]

> Based upon new information contained in DP&L's supplemental application in Case No. 13-2420-EL-UNC, the Commission finds that the deadline for DP&L to divest its generation assets should be subject to modification by the Commission in Case No. 13-2420-EL-UNC, but in no case will such modification be later than January 1, 2016. Further, we note that any approval of an amount

[12] Id. at 21-22.

[13] Opinion and Order at 16; Entry Nunc Pro Tunc at 2 (emphasis added).

[14] DP&L Exh. 16 at 4.

[15] *In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell Its Generation Assets*, Case No. 13-2420-EL-UNC, Application at 1-2 (Dec. 30, 2013); Supplemental Application at 2 (Feb. 25, 2014).

[16] Id.

[17] Id, Supplemental Application at 2 (Feb. 25, 2014).

[18] Second Entry on Rehearing at 17-18.

> for recovery through the SSR-E will take into consideration the timing and disposition of DP&L's generation assets.[19]

As clearly set forth in the PUCO's Opinion and Order, the basis for charging customers the SSR charge was that DP&L's financial integrity could be compromised if any one of its business segments – generation, transmission, or distribution "suffers financial losses." As the PUCO stated, the losses in one business segment could "impact the entire utility, adversely affecting its ability to provide stable, reliable, or safe retail electric service."[20]

But if the business segment that is expected to cause financial losses (i.e. generation) is no longer part of DP&L's business, then the basis for charging customers millions of dollars in SSR charges disappears. And with the PUCO's order that DP&L divest by *January 1, 2016*, the business that is the source of estimated financial losses—the generation business--will be gone. Because it is only the generation business that is "subject to financial losses," divestiture of the generation business eliminates any basis for charging customers millions of dollars in charges for the SSR and the SSR-E.

Consequently, the PUCO erred in not decreasing the amount of the SSR charge that customers will have to pay by shortening the collection period for the SSR. The collection period for the SSR should end with the divestiture of the generation assets so that DP&L does not continue to collect millions of dollars in stability charges from customers after it no longer is in the generation business. The PUCO should have ordered that customers should not have to pay the SSR once DP&L divests its generation

[19] Id.

[20] Opinion and Order at 22 (Sept. 6, 2013).

assets. Similarly, there can be no basis for allowing any of the SSR-E to be charged in 2016 or 2017 because DP&L's generation business must be sold or transferred to another entity at or before January 1, 2016. The PUCO erred in not eliminating the SSR-E. Customers should be relieved of paying millions more to DP&L under a potential SSR-E charge.

There is no dispute, based on the record of the case, that it is only the generation business that is expected to sustain financial losses during the term of the ESP. Mr. Jackson testified that DP&L's financial integrity would be impaired without the SSR because of three factors: increased switching, declining wholesale prices, and declining capacity prices.[21] These factors have everything to do with generation, and nothing to do with transmission or distribution.

When questioned about the distribution business of DP&L, Mr. Jackson testified that distribution revenues were not the cause of expected financial losses:

> Q. Now, with regard to the distribution function of DP&L, you believe that distribution revenues are adequate today, right?
>
> A. Yes.
>
> Q. And you also believe that distribution revenues will be adequate over the proposed ESP period, correct?
>
> A. Yes, I believe that the distribution revenues are adequate as we have laid out in our projections.
>
> Q. And you understand that if DP&L believes its distribution revenues are inadequate, it can file a distribution rate case, correct?
>
> A. Yes, that is my understanding.

[21] See Direct Testimony of Craig L. Jackson at CLJ-1.

Q. And there is -- there's no commitment being made by DP&L as part of the ESP not to file a distribution rate case during the ESP term, correct?

A. I don't believe we have indicated anything with regard to a distribution rate case.[22]

With respect to transmission revenues, Mr. Jackson again testified that they are adequate over the term of the ESP:

Q. Now, with regard to transmission revenues, you also believe that those are adequate today, correct?

A. Well, our transmission, obviously a portion of our transmission revenues are tied to the transmission cost recovery rider that's in effect today so that moves with costs, as costs go up or down, the revenue side of that changes as well. So that, yes, I believe that, that said, the recovery that we're getting on the transmission side would be adequate.

Q. And you believe the transmission revenues would be adequate over the five-year proposed ESP period, correct?

A. That is my expectation.[23]

Mr. Jackson's testimony as to the adequacy of transmission and distribution revenues over the term of the ESP is repeated later in the record of this case.[24]

There can be little question that, in light of DP&L's own testimony, DP&L's transmission and distribution operations are on sound footing through the term of the ESP from a financial integrity standpoint. It is clear that, if DP&L's financial integrity is at issue, then the generation operations are the cause and the only basis for the SSR and SSR-E charges. Consequently, if DP&L divests its generation assets by January 1, 2016, as the PUCO required in its Second Entry on Rehearing, then all "financial integrity"

[22] Tr. Vol. I-public at 117.

[23] Tr. Vol. I-public at 118.

[24] Tr. Vol. I-public at 150, 270.

issues will no longer plague the remaining transmission and distribution utility. Thus, there is no basis to continue to charge customers millions of dollars after divestiture to ensure the financial stability of the transmission and distribution Utility.

But the PUCO failed to reverse its earlier holdings which will cause customers to bear millions of dollars in charges that are not factually supported by the record, as required by R.C. 4903.09. That section of the Revised Code mandates that the PUCO file "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." When the PUCO ordered DP&L to divest by January 1, 2016, the PUCO's rationale for permitting DP&L to charge customers the SSR and SSR-E after divestiture no longer exists. Consequently, its order that permits such charges to continue after divestiture is not based on findings of fact or supported by the record. [25]

The PUCO erred in in allowing DP&L to continue charging customers the SSR and the SSR-E after divestiture (and after January 1, 2016). The PUCO should grant rehearing on this issue and hold that customers do not have to pay stability charges once DP&L is no longer in the generation business.

[25] See *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.2d 305 (finding that because there was no factual basis to support the PUCO's finding, R.C. 4903.09 was violated).

B. Assuming That It Is Lawful And Reasonable For DP&L To Collect Charges From Customers To Maintain Its Financial Integrity Through The Service Stability Rider Extension, The Amount Of The Potential Charge ($45.8 Million) Is Unreasonable And Unlawful Because The PUCO Failed To Reduce The Potential Charge (To $36.66 Million) When It Shortened The Period For Collecting That Charge By One Month. The PUCO's Failure To Reduce The Potential Service Stability Rider Extension Charge To Customers Was A Mistake, In Violation Of R.C. 4903.09.

The PUCO allowed DP&L to request more money from customers in the last five months of its electric security plan, following the end of the SSR. The amount that DP&L can seek to collect from customers was capped at $45.8 million, for the period from January 1, 2017 through May 31, 2017. [26] That five-month cap was derived from the annual SSR amount. The SSR-E was calculated as 5/12 of the $110 million annual SSR ($110 million * (5/12) = $45.8 million) because the SSR-E was to be in effect for the last five months of the ESP.

But, in its Second Entry on Rehearing, the PUCO appropriately determined that the SSR-E should terminate after four months, on April 30, 2017 rather than May 31, 2017.[27] Given this decision, the amount of the SSR-E that can be sought from customers should also be capped to reflect only four months of collection ($110 million * (4/12) = $36.66 million). Consequently, the PUCO erred in not reducing the amount of SSR-E that may be collected from customers to $36.66 million, assuming it is lawful and reasonable to collect any amount of the SSR-E. Moreover, the PUCO failed to provide a basis for permitting the same amount of SSR-E to be sought from customers, while reducing the SSR-E period to four months. This too violated R.C. 4903.09. The PUCO

[26] Opinion and Order at 26-28; Entry Nunc Pro Tunc at 2.

[27] Second Entry on Rehearing at 16.

should grant rehearing on this issue and reduce the amount of the SSR-E charge paid by customers to no more than $36.66 million.

C. The PUCO Erred In Unreasonably And Unlawfully Determining That The Service Stability Rider Charge To Customers Is Not A Cost Based Charge, And Thus Not A Transition Charge Under R.C. 4928.39. The PUCO's Finding Is A Violation Of R.C. 4903.09.

In its Application for Rehearing of the PUCO's September 4, 2013 Order, OCC (and others) challenged the PUCO's ruling permitting DP&L to charge customers a Service Stability Rider of $110 million per year for three years. The PUCO had authorized the Utility to charge customers hundreds of millions of dollars to maintain its financial integrity as the provider of generation, transmission, and distribution services.[28] OCC argued that these financial stability charges to customers are unlawful, inter alia, because the PUCO is precluded from giving DP&L additional transition revenues or "any equivalent revenues" by statute after a utility's market development period. That statute, R.C. 4928.38, requires that at the end of the market development period, "the utility shall be fully on its own in the competitive market." DP&L's market development period ended December 31, 2005.[29]

In its Second Entry on Rehearing, the PUCO addressed arguments that the Service Stability Rider is an unlawful transition charge. The PUCO reiterated its finding (in the original Order) that the SSR is not a transition charge.[30] However, the PUCO also presented a new rationale to support its Order. This time the PUCO found that under

[28] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Opinion and Order at 21 (Sept. 4, 2013).

[29] Direct Testimony of OCC witness Kenneth Rose at 12.

[30] Second Entry on Rehearing at ¶13 (Mar. 19, 2014).

R.C. 4928.39, transition charges are "cost-based charges," which must relate to a cost that the utility will incur.[31] It then found that the SSR is not a cost-based charge, but rather a charge to provide the Utility stable revenues to maintain its financial integrity.

But the SSR is a cost-based charge, as the Utility's own calculations of SSR revenue requirements show. The SSR produces *revenues* that allow the Utility to maintain its financial integrity by enabling it to pay calculated *costs* as well as its *cost* of capital.[32]

Although financial stability is defined and measured by the earnings (or profits) of the Utility, the earnings (or profits) are determined by the revenues and the costs (or expenses) of providing electric services. Consequently, in the ESP proceeding, DP&L's SSR charge does relate specifically to the *costs* the utility will incur, or estimates that it will incur in providing electric services, contrary to the PUCO's conclusions otherwise.

A review of DP&L's calculations shows that the SSR is cost-based. Specifically, DP&L developed a projected net income based on estimated revenues and costs (expenses).[33] Then DP&L calculated a projected return on equity (ROE) based on its projected net income and estimated shareholder equity. These projected net incomes and resulting ROEs reflect the difference between estimated revenues and estimated costs, as can be seen on DP&L witness Jackson's Second Revised Exhibit CLJ-2, line 31. The projected ROEs (in the absence of an SSR charge) are shown in Second Revised Exhibit CLJ-2, line 45. DP&L then argued that the projected ROE (in the absence of an SSR

[31] Id.

[32] See Direct Testimony of DP&L witness Chambers at 3-4; 42-44; WJC-4, DP&L witness Craig L. Jackson Direct Testimony at 3.

[33] See Direct Testimony of DP&L witness Chambers at WJC 1-5.

charge) produced an insufficient return for it. Thus, DP&L testified that it needed a stability charge (in the form of an SSR) so it could charge customers its estimated costs plus allow it to earn a reasonable return on equity.[34]

DP&L witness William J. Chambers then utilized Mr. Jackson's cost-based numbers to present his recommendations for the SSR charge in Second Revised WJC-2 through WJC-5. It is clear that any SSR charge approved by the PUCO is based on DP&L's projected costs and is designed to collect those costs of providing electric services.

To rule that the SSR is not a cost-based charge is incorrect. The PUCO's finding is not supported by the record and is in error. The PUCO violated R.C. 4903.09 in this respect. *Elyria Foundry Co. v. Pub. Util. Comm.,* 2007-164-4164, 114 Ohio St.3d 305, 871 N.E.2d 1176. For these reasons, rehearing should be granted.

IV. CONCLUSION

To protect consumers from having to pay millions more in charges that have no basis in the record, the PUCO should grant OCC' Second Application for Rehearing on the assignments of error raised here.

[34] See Direct Testimony of DP&L witness Chambers at 3-4; 42-44; WJC-4, DP&L witness Craig L. Jackson Direct Testimony at 3.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Second** Application for Rehearing by the Office of the Ohio Consumers' Counsel was served via electronic transmission, to the persons listed below, on this 18th day of April, 2014.

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Case No(s). 12-0426-EL-SSO, 12-0427-EL-ATA, 12-0428-EL-AAM, 12-0429-EL-WVR, 12-0672-EL-RDR

Summary: Application Second Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.