

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**JOINT MOTION FOR A STAY TO PREVENT DP&L FROM CHARGING
CUSTOMERS THE SERVICE STABILITY RIDER WHILE APPEALS
ARE PENDING OR, IN THE ALTERNATIVE,
MOTION TO MAKE DP&L'S RATES FOR CHARGING THE SERVICE
STABILITY RIDER COSTS TO CUSTOMERS SUBJECT TO REFUND
PENDING THE OUTCOME OF REHEARING AND ANY APPEALS
BY
INDUSTRIAL ENERGY USERS-OHIO,
OFFICE OF THE OHIO CONSUMERS' COUNSEL,
OHIO ENERGY GROUP
AND
OHIO PARTNERS FOR AFFORDABLE ENERGY**

For the purpose of protecting DP&L's approximately 500,000 electric customers, Industrial Energy Users-Ohio ("IEU"), the Office of the Ohio Consumers' Counsel ("OCC"), Ohio Energy Group ("OEG") and Ohio Partners for Affordable

Energy (“OPAE”), (collectively “Joint Movants”), respectively move for a Stay of the September 4, 2013 Opinion and Order (“September 4, 2013 Order” or “Order”) of the Public Utilities Commission of Ohio (“Commission” or “PUCO”). The Stay is requested with regard to the PUCO’s authorization for Dayton Power & Light Company (“DP&L” or “Utility”) to collect more money from its customers for their electric service through the Service Stability Rider (“SSR”). A Stay is necessary in order to prevent irreparable harm to the Utility’s customers during the pendency of the appeal(s) of the Order. In the alternative, Joint Movants request that the PUCO order that the rates paid by customers for DP&L’s Service Stability Rider be collected subject to refund to customers.

The reasons for granting this Motion are further set forth in the attached Memorandum in Support.

Respectfully submitted,

/s/ Samuel C. Randazzo

Samuel C. Randazzo
(Counsel of Record)

Frank P. Darr

Matthew R. Pritchard

McNees Wallace & Nurick LLC

21 East State Street, 17th Floor

Columbus, OH 43215-4228

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Maureen R. Grady
Melissa R. Yost, Counsel of Record
Maureen R. Grady
Tad Berger
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (614) 466-1291 - Yost
Telephone: (614) 466-9567 - Grady
Telephone: (614) 466-1292 – Berger
Melissa.yost@occ.ohio.gov
Maureen.grady@occ.ohio.gov
Edmund.berger@occ.ohio.gov

/s/ David F. Boehm
David F. Boehm
Michael L. Kurtz
Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Ph: (513) 421-2255 - Fax: (513) 421-2764
Dboehm@BKLawfirm.com
Mkurtz@BKLawfirm.com
Jkylercohn@BKLawfirm.com

Attorneys for Ohio Energy Group

/s/ Colleen L. Mooney
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839-1793
Telephone: (419) 425-8860
cmooney@ohiopartners.org

Attorney for Ohio Partners for Affordable
Energy

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On September 4, 2013, the PUCO issued its Opinion and Order in the above captioned matter, authorizing DP&L to collect from customers \$330 million¹ in stability charges through a mechanism called the Service Stability Rider (“SSR”). In reaching its decision that DP&L’s customers should pay for these costs, the PUCO’s ruling violates, inter alia, R.C. 4928.38, 4928.03, and 4928.02(H).

¹ Duke’s Compliance Tariff Filing at Exhibit 1 (November 27, 2013).

These laws prohibit subsidies of a utility's competitive generation service by its distribution customers. The Service Stability Rider is a subsidy, directed solely at ensuring the revenues or the "financial integrity" of DP&L's generation business.

If the stability charge (not subject to refund) is permitted to be collected from customers before the lawfulness of that charge is decided by the Supreme Court of Ohio, then customers will be irreparably harmed as discussed below. The PUCO should, therefore, issue a stay of its September 3, 2013 Order in regard to the Service Stability Rider to prevent such harm from occurring.

II. STANDARD OF REVIEW

The PUCO has noted that there is no controlling precedent in Ohio setting forth the conditions under which it will stay one of its own orders.² The PUCO, however, has favored the four-factor test governing a stay that was supported in a dissenting opinion by Justice Douglas,³ and which has been deemed appropriate by courts when determining whether to stay an administrative order pending judicial review.⁴ This test involves examining:

- (a) Whether there has been a strong showing that movant is likely to prevail on the merits;
- (b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
- (c) Whether the stay would cause substantial harm to other parties;
and

² See *In the Matter of the Commission's Investigation Into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing (February 20, 2003) ("Access Charge Decision") at 5.

³ See *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 31 Ohio St.3d 604. See also *In the Matter of the Complaint of Northeast Ohio Public Energy Council*, Case No. 09-423-EL-CSS Entry at 2 (July 8, 2009) Motion for Stay Granted.

⁴ Access Charge Decision at 5.

(d) Where lies the public interest.⁵

As discussed below, on balance the Joint Movants meet this test.

With regard to the alternative of making the collection of the stability charge subject to refund, the PUCO has, in the past, required refunds to protect customers, as discussed below in Section IV.E. If the PUCO does not stay its September 3, 2013 Order as requested herein, then the PUCO should order that the rates paid under the SSR are subject to refund.

III. THE PUCO SHOULD GRANT A STAY TO PROTECT DP&L'S CUSTOMERS DURING ANY APPEALS.

A. There Is A Strong Likelihood That Joint Movants Will Prevail On The Merits And Protect Ohio Customers From Subsidizing DP&L's Generation Operations Through The Service Stability Rider.

There is a strong likelihood that Joint Movants will prevail on the merits in an appeal of the lawfulness of the SSR to the Supreme Court of Ohio. The Utility has been authorized to collect from all distribution customers a stability charge through the SSR. That stability charge was set at a level that provides DP&L with the opportunity to achieve a return on equity target of 7 to 11%.⁶ That stability charge is a government-guarantee of \$330 million of revenue for DP&L. The stability charge will assist DP&L in maintaining the financial security of, inter alia, its generation assets. In other words the SSR subsidizes DP&L's generation service. And it is paid for by DP&L's distribution customers. This subsidy is unlawful for a number of reasons.

DP&L's generation service was declared a competitive service under R.C. 4928.03, and as a competitive service it was "deregulated" under S.B. 221. In other

⁵ Id.

⁶ Opinion and Order at 25.

words competitive generation service is no longer subject to traditional cost-based regulation.⁷ But, through the SSR, the PUCO re-introduces regulatory protection for the generation portion of DP&L's business that has been deregulated.⁸ Thus, it is contrary to the entire premise of S.B. 221.

Specifically, under R.C. 4928.38, utilities are to be fully on their own in the competitive market after the market development period. The PUCO is precluded from authorizing a utility to receive transition revenues or "any equivalent revenues" after the market development period. The market development period for DP&L ended on December 31, 2005. Thus, the PUCO cannot authorize a utility to collect transition revenues or "any equivalent revenues." Yet it did just that.

Additionally, by authorizing DP&L to collect revenues from distribution customers to support DP&L's generation business, the PUCO also violated R.C. 4928.02(H). That statute prohibits anti-competitive subsidies between competitive and non-competitive retail services.

The PUCO, however, is a creature of statute. It may only exercise the authority given to it by the General Assembly.⁹ It cannot authorize DP&L to collect any revenues equivalent to transition revenues after the end of the market development period. It cannot reregulate a utility's generation business. It cannot order a utility's distribution customers to subsidize the utility's generation business. The PUCO's Order approving a \$330 million SSR is unlawful.

⁷ Direct Testimony of Daniel J. Duann at 5.

⁸ Direct Testimony of Kenneth Rose at 5.

⁹ *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 620 N.E.2d 835.

B. DP&L's Collection Of The Stability Charge From Customers Is Likely To Cause Irreparable Harm To Customers.

Harm is irreparable “when there could be no plain, adequate and complete remedy at law for its occurrence and when any attempt at monetary restitution would be ‘impossible, difficult, or incomplete.’”¹⁰ In the context of judicial orders, the Supreme Court of Ohio traditionally looks to whether there is an effective legal remedy if the order takes effect, to determine whether to stay the proceedings.¹¹

In *Tilberry v. Body*, the Ohio Supreme Court found that the effect of a court order calling for the dissolution of a business partnership would cause “irreparable harm” to the partners because “a reversal ... on appeal would require the trial court to undo the entire accounting and to return all of the asset distributions” -- a set of circumstances that would be “virtually impossible to accomplish.”¹² In *Sinnott v. Aqua-Chem, Inc.*, the Ohio Supreme Court found that a lower court’s pre-trial findings could be appealed at the point they were issued because the findings allowed the case to proceed to trial.¹³ The majority reasoned that “the incurrence of unnecessary trial expenses is an injury that cannot be remedied by an appeal from a final judgment,”¹⁴ and so concluded that “[i]n some instances, ‘[t]he proverbial bell cannot be unrung and an appeal after final * * * judgment on the merits will not rectify the damage’ suffered by the appealing party.”¹⁵ Here, the

¹⁰ *FOP v. City of Cleveland* (8th Dist. 2001), 141 Ohio App. 3d 63, 81, citing *Cleveland v. Cleveland Elec. Illuminating Co.* (8th Dist. 1996), 115 Ohio App. 3d 1, 12, appeal dismissed, 78 Ohio St. 3d 1419 (1997).

¹¹ See, e.g., *Tilberry v. Body* (1986), 24 Ohio St. 3d 117; *Sinnott v. Aqua-Chem, Inc.* (2007), 116 Ohio St. 3d 158, 161.

¹² *Tilberry*, 24 Ohio St. 3d at 121.

¹³ *Sinnott*, 116 Ohio St. 3d at 164.

¹⁴ *Id.* at 163.

¹⁵ *Id.* at 162 (quoting *Gibson-Myers & Assocs. v. Pearce* (9th Dist.), 1999 Ohio App. LEXIS 5010, *7-*8 (compelled disclosure of a trade secret would “surely cause irreparable harm”).

bell is ringing loudly that DP&L's customers need the PUCO to protect their interest in a refund.

Although, as Justice Rehnquist observed, "the temporary loss of income, **ultimately to be recovered**, does not usually constitute irreparable injury,"¹⁶ *Tilberry* and *Sinnott* illustrate that economic harm does become irreparable where the loss cannot be recovered. Here, if DP&L's customers pay a stability charge and later that charge is found to be unlawful, those customers are unlikely to get a refund of the charges paid. The PUCO should protect the Utility's customers from this harm. The PUCO should stay the collection of the SSR until all appeals are exhausted.

C. The Stay That Is Needed To Protect Customers During The Appeal Could Be Structured So Not To Cause Substantial Harm To DP&L.

DP&L will likely assert that there is no mechanism under Ohio law that permits the retroactive refund of over-collections from customers, where such payments are not made subject to refund.¹⁷ But a stay, while protecting DP&L's customers, could be structured so as to not harm the Utility. In order to protect the Utility from harm arising from a stay -- and the delay in collection of the stability charge from customers, the PUCO could authorize DP&L to accrue reasonable carrying charges during the pendency of the stay. Those carrying charges would then be collected from customers only if the SSR was upheld by the Supreme Court.

¹⁶ *Sampson v. Murray* (1974), 415 U.S. 61, 90 (emphasis added).

¹⁷ See, e.g., *Lucas County Commissioners v. Pub. Util. Comm.* (1997), 80 Ohio St. 3d 344; *Keco*, 166 Ohio St. 254, ¶ 2 of the syllabus.

D. A Stay To Prevent DP&L From Collecting The Stability Charge From Customers Pending An Appeal To The Supreme Court Would Further The Public Interest.

In the dissent in the Supreme Court case in which Justice Douglas recommended standards for a stay of a PUCO decision, he noted that PUCO Orders “have effect on everyone in this state -- individuals, business and industry.”¹⁸ That effect on customers is all the more pronounced in these difficult economic times when customers can ill afford unjustified increases in essential services. It thus was fitting that Justice Douglas, in articulating a standard for stays, emphasized that the most important consideration is “above all in these types of cases, where lies the interest of the public” and that “the public interest is the ultimate important consideration for this court in these types of cases.”¹⁹

As discussed above, the stay sought by Joint Movants would prevent irreparable harm to DP&L’s customers -- in this case, residential, commercial and industrial, with a proposal to assure no substantial harm to the Utility. In addition, the stay would provide some relief to customers who are already burdened by the fragile state of the economy. The public interest; therefore, would be furthered by a stay of the collection of the SSR charge.

E. In The Alternative, The PUCO Should Make The Amount Collected By The Service Stability Rider Subject To Refund.

An alternative approach to protecting customers is for the PUCO to make DP&L’s collection of SSR charge subject to refund. The PUCO has, in the past, ordered

¹⁸ *MCI*, 31 Ohio St.3d at 606.

¹⁹ *Id.*

that utility rates should be subject to refund.²⁰ In 1983, the PUCO determined that, with regard to an AEP Ohio Company, a portion of the allowance related to Columbus & Southern Ohio Electric Company's construction work in progress for the Zimmer plant would be collected subject to refund to customers.²¹ After the PUCO's action was upheld on appeal,²² the PUCO ordered the Company to refund approximately \$4.5 million to its customers.²³

In that case, the PUCO ordered the refund to protect customers in the event of a later decision that the utility was collecting more from customers than warranted by law, rule or reason. In this case, if the PUCO does not stay the collection of the stability charge, then the PUCO should follow its past-precedent and make the collection of the stability charge subject to refund to protect Ohio customers.

IV. CONCLUSION

In order to avoid unjust and irreparable harm to DP&L's customers, the PUCO should grant the stay sought in this Motion. A properly structured stay of the collection of the stability charge would protect DP&L's residential customers without harming DP&L. In the alternative, the PUCO could protect customers by ruling that the collection of the stability charge is subject to refund.

²⁰ See, e.g., *In the Matter of the Application of Columbus Southern Power company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 09-917-EL-SSO, Entry (May 25, 2011) (ordering POLR-Rider and environmental carrying charges to be collected subject to refund, until the PUCO issued its decision on remand).

²¹ *In the Matter of the Application of Columbus & Southern Ohio Electric Company for Authority to Amend and Increase Certain of its Rates and Charges for Electric Service, Amend Certain Terms and Conditions of Service and Revise Its Depreciation Accrual Rates and Reserves*, Case No. 81-1058-EL-AIR, Entry (November 17, 1982).

²² *Columbus & Southern Ohio Electric Co. v. Public Util. Comm.* (1984), 10 Ohio St.3d 12.

²³ Case No. 81-1058-EL-AIR, Order on Rehearing (May 1, 1984).

Respectfully submitted,

/s/ Samuel C. Randazzo

Samuel C. Randazzo

(Counsel of Record)

Frank P. Darr

Matthew R. Pritchard

McNees Wallace & Nurick LLC

21 East State Street, 17th Floor

Columbus, OH 43215-4228

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

BRUCE J. WESTON

OHIO CONSUMERS' COUNSEL

/s/ Maureen R. Grady

Melissa R. Yost, Counsel of Record

Maureen R. Grady

Tad Berger

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Oh 43215-3485

Telephone: (614) 466-1291 - Yost

Telephone: (614) 466-9567 - Grady

Telephone: (614) 466-1292 - Berger

Melissa.yost@occ.ohio.gov

Maureen.grady@occ.ohio.gov

Edmund.berger@occ.ohio.gov

/s/ David F. Boehm

David F. Boehm

Michael L. Kurtz

Jody Kyler Cohn

Boehm, Kurtz & Lowry

36 East Seventh Street, Suite 1510

Cincinnati, OH 45202

Ph: (513) 421-2255 - Fax: (513) 421-2764

Dboehm@BKLawfirm.com

Mkurtz@BKLawfirm.com

Jkylercohn@BKLawfirm.com

Attorneys for Ohio Energy Group

/s/ Colleen L. Mooney

Colleen L. Mooney

Ohio Partners for Affordable Energy

231 West Lima Street

Findlay, OH 45839-1793

Telephone: (419) 425-8860

cmooney@ohiopartners.org

Attorney for Ohio Partners for Affordable
Energy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Joint Motion* has been served upon the below-named persons via electronic transmittal this 30th day of July 2014.

/s/ Maureen R. Grady

Maureen R. Grady

Assistant Consumers' Counsel

SERVICE LIST

Thomas.mcnamee@puc.state.oh.us
Devin.parram@puc.state.oh.us
Judi.sobecki@dplinc.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
Amy.spiller@duke-energy.com
Jeanne.kingery@duke-energy.com
BMcMahon@emh-law.com
Elizabeth.watts@duke-energy.com
Rocco.DAscenzo@duke-energy.com
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
jkylercohn@BKLawfirm.com
myurick@taftlaw.com
zkravitz@taftlaw.com
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
mhpetricoff@vorys.com
smhoward@vorys.com
ssherman@kdlegal.com
jhague@kdlegal.com
Stephanie.Chmiel@ThompsonHine.com
Philip.Sineneng@ThompsonHine.com
Michael.Dillard@ThompsonHine.com
matt@matthewcoxlaw.com
Bojko@carpenterlipps.com
Sechler@carpenterlipps.com
mohler@carpenterlipps.com
bill.wells@wpafb.af.mil
chris.thompson.2@tyndall.af.mil
gmeyer@consultbai.com

cfaruki@ficlaw.com
jsharkey@ficlaw.com
mwarnock@bricker.com
tsiwo@bricker.com
tony_long@ham.honda.com
asim_haque@ham.honda.com
haydenm@firstenergycorp.com
jang@calfee.com
talexander@calfee.com
jejadwin@aep.com
gpoulos@enernoc.com
ricks@ohanet.org
cmooney2@columbus.rr.com
tobrien@bricker.com
vparisi@igsenergy.com
mswhite@igsenergy.com
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Chris.michael@icemiller.com
trent@theoec.org
cathy@theoec.org
joseph.clark@directenergy.com
dakutik@jonesday.com
aehaedt@jonesday.com
ejacobs@ablelaw.org
mjsatterwhite@aep.com
stnourse@aep.com
ssolberg@eimerstahl.com
stephen.bennett@exeloncorp.com
Cynthia.Brady@Constellation.com
mchristensen@columbuslaw.org
Bryce.mckenney@puc.state.oh.us
gregory.price@puc.state.oh.us

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Summary: Motion Joint Motion for a Stay to Prevent DP&L from Charging Customers the Service Stability Rider While Appeals are Pending or, in the Alternative, Motion to Make DP&L's Rates for Charging the Service Stability Rider Costs to Customers Subject to Refund Pending the Outcome of Rehearing and any Appeals by Industrial Energy Users-Ohio, Office of the Ohio Consumers' Counsel, Ohio Energy Group and Ohio Partners for Affordable Energy electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.