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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. 08-1094-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 08-1095-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code Section 4905.13.	))))	Case No. 08-1096-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of its Amended Corporate Separation Plan.	))))	Case No. 08-1097-EL-UNC
In the Matter of the Application of The Dayton Power and Light Company for Approval of its Market rate Offer.	)))	Case No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power & Light Company of 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 The 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

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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

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August 11, 2016

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MEMORANDUM CONTRA

I. INTRODUCTION

At a time when 500,000 customers of Dayton Power and Light Company ("DP&L" or "Utility") should be receiving long overdue rate decreases, DP&L wants to increase monthly rates. The PUCO should follow the mandate of the Ohio Supreme Court to reduce DP&L's monthly charges by $9.86 per customer (on average[1]) to eliminate its so-called service stability charge ("Rider SSR"). And the PUCO should reject DP&L's new scheme to reinstate select portions of three-year old rates that continue to collect unlawful subsidies from customers.

Since January 1, 2014, DP&L has taken approximately $285 million in subsidies from customers in the Dayton area--where there is financial distress and a poverty level of 35%--through the inaptly named service stability charge ("Rider SSR"). But now the Supreme Court has ordered the PUCO to carry out its judgment that Rider SSR is an unlawful transition charge that customers should not be paying.[2] OCC and the Industrial Energy Users filed a motion that is still pending, asking the PUCO to stop the Utility from charging consumers per the Ohio Supreme Court's decision.[3] The PUCO has not ruled on the motion. Meanwhile, Dayton-area consumers continue to pay nearly $10 per month for charges the Court rejected.

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[1] Based on consumption of 1000 kWh per month.

[2] See *In the Matter of the Application of the Dayton Power & Light Company for Approval of its Market Rate Offer,* Case No. 12-426-EL-SSO et al., Supreme Court mandate (July 19, 2016).

[3] See *In the Matter of the Application of the Dayton Power & Light Company for Approval of its Market Rate Offer,* Case No. 12-426-EL-SSO, Joint Motion of Industrial Energy Users-Ohio and the Office of the Ohio Consumers Counsel for an Order Vacating the Authorization of the Service Stability Rider (June 21, 2016); Joint Motion of Industrial Energy Users-Ohio and the Office of the Ohio Consumers' Counsel for an Order Requiring that the Service Stability Rider Be Collected Subject to Refund (May 17, 2016).

On July 27, 2016, DP&L filed a plan that defies the Court's ruling and would allow it to continue collecting unlawful above-market transition charges from customers. DP&L seeks to withdraw and terminate its three-year old application (under R.C. 4928.143(C)(2)(b)). DP&L filed a Motion to Withdraw Its Application, and a Motion to Implement Previously Authorized Rates ("Motions"). DP&L has also filed tariffs to implement its prior rates.[4]

II. RECOMMENDATIONS

A. DP&L seeks to defy the Court's decision and deprive consumers of lower rates.

DP&L argues that a version of its standard service offer rates from 2013 must be put back into effect (pending a PUCO ruling that approves a new standard service offer ("SSO")). Under those previous rates, DP&L's idea would be to increase rates to customers and to charge customers a $6.05 monthly rate stabilization charge that collects the very sort of transition charges the Supreme Court just rejected. Included as part of the rate increase to customers is an $11.87 monthly charge for an Environmental Investment Rider, a charge that is also an unlawful transition charge.

But implementing DP&L's previous standard service offer is not the right, reasonable, or lawful answer to the Court's decision. The Court protected customers from paying transition charge subsidies, by ordering rates customers pay to DP&L to be reduced through December 31, 2016. The PUCO should be very wary of DP&L's proposed work-around for maintaining subsidies in the face of a mandate to eliminate utility transition subsidies from Ohioans' monthly electric bills. DP&L's proposed above-market rates feature a replacement for the transition charge that the Court rejected, which

[4] By PUCO Entry, parties will be permitted to file comments on the tariffs on August 12, 2016.

will allow DP&L to collect increased rates from customers that include a $6.05 per month transition charge.[5]

Allowing DP&L to withdraw and terminate its application in response to an unfavorable court decision would also be unreasonable. Under the rules of statutory construction in Ohio, in enacting a statute, it is presumed that, inter alia, a just and reasonable result is intended.[6] What is unreasonable here is that parties would be deprived of the remedy the Ohio Supreme Court ordered –reduced rates where DP&L's customers do not have to pay monthly stability charges. Under DP&L's approach, customers would be denied the lower rates mandated by the Court. The Court's decision would be thwarted. And the Ohio General Assembly's statute would be thwarted. The PUCO should deny DP&L's Motions.

B. Ohio law does not permit DP&L to withdraw and terminate its electric security plan application at this late time.

DP&L nonetheless believes it has a right to implement what it interprets as prior rates (rates that would cost customers more) because the PUCO modified and approved its application three years ago in September 2013. In this latest twist on using Senate Bill 221 (Ohio's 2008 energy law) to cost Ohio consumers their money, DP&L claims it can withdraw and terminate its ESP application filed in 2013, now 32 months into that 36-month plan. DP&L advances this argument despite having accepted and enjoyed the benefits of the 2013 plan for nearly three years. During those three years DP&L charged Dayton-area consumers more than a quarter-billion dollars just for the stability charge (among other charges).

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[5] *In the Matter of the Application of the Dayton Power & Light Company for an Electric Security Plan,* Case No. 08-1094-EL-SSO et al., Tariff filing (Aug. 1, 2016).

[6] R.C. 1.47(C).

Having accepted the 2013 plan and having charged consumers plenty for that acceptance, DP&L should be precluded from withdrawing in response to the Court's directive. DP&L has reaped the benefits of increased revenues under the plan. Now at a time when the Ohio Supreme Court determined customers deserve a break in rates, DP&L seeks to terminate the plan, rather than provide customers the reduced rates ordered by the Ohio Supreme Court. DP&L's interpretation of the statute is wrong.

Under DP&L's interpretation of R.C. 4928.143(C)(2(b), customers over the next four months will pay increased rates (going back three years) and then be hit with a third set of rates under a new ESP filing. If DP&L's scheme is adopted, stability and continuity of rates for customers under the 2013 electric security plans is undermined. The PUCO should deny DP&L's request.

C. The law allows a utility to withdraw and terminate an electric security plan if the PUCO modifies and approves the plan, but not if the plan is modified by the Court.

Another insurmountable hurdle for DP&L is that the modification that it complains of (rejection of its retail stability charge) is a modification by the Court, not the PUCO. That matters under R.C. 4928.143(C)(2)(a) which is about commission action, not Court action:, "[i]f the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code." Any alleged right DP&L may possess to withdraw and terminate its application is keyed to a modification of an ESP application by the "commission."[7] There is no right to terminate

[7] R.C. 4928.143(C)(2)(a).

and withdraw an ESP application that has been changed due to a modification by the Court. [8] Those words aren't there. Words would also have to be added to R.C. 4928.143(C)(2)(b), tying the continuation of existing rates to action by the Court. DP&L cannot rewrite the law. Neither can the PUCO.[9] Therefore, the PUCO should deny DP&L's Motions.

D. DP&L's proposal to withdraw and terminate its electric security plan and return to prior rates is impossible.

The right to withdraw an ESP application is not unlimited. The PUCO itself has recognized this when in the past it has determined that the filing of tariffs consistent with its Opinion and Order (modifying the ESP) is to be deemed as acceptance of the Order (thereby precluding later withdrawal).[10].

In this case, the return to prior rates is impossible. Under R.C. 4928.143(C)(2)(b), if the utility withdraws an application or if the PUCO disapproves the application, then the provisions, terms, and conditions of the utility's recent standard service offer must be continued. Because DP&L's withdrawal is so late into the term of the electric security plan, it is impossible to go back to the most recent standard service offer. For DP&L that would mean (among other things) going back to a standard service offer that is priced based on DP&L supplying the power, instead of the auction-based standard service. But DP&L has procured power for standard service through May 31, 2017 by way of auctions

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[8] Id.

[9] *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608, par. 49 ("[I]n construing a statute, we may not add or delete words."), citing *State ex rel. Cincinnati Bell Tel. Co.* v. *Pub. Util. Comm.*, 105 Ohio St.3d 177, 2005-Ohio-1150, 824 N.E.2d 68, ¶32.

[10] See *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider,* Case No. 14-1693-EL-RDR, Opinion and Order at 106 (Mar. 31, 2016); *In the Matter of the Application 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 R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order at 86 (Mar. 31, 2016).

held much earlier. Those auctions cannot be undone. And DP&L in its tariff filing to implement the proposed rates has not proposed undoing the auctions to get back to the most recent standard service offer. Thus, even DP&L understands that its argument under the statute is flawed.

Reinstating the utility's most recent standard service offer rates (after a utility withdraws 32 months later) is not feasible of execution, as can be seen here. If DP&L is correct (but it's not) that it can withdraw its application in month 32 of a 36-month term, then one would have to assume that the General Assembly enacted laws that are not feasible of being executed. This is contrary to the Ohio rules of statutory construction.[11] The only way the most recent standard service rates can be reinstated is if the right to *withdraw is exercised within a relatively short period of time after a PUCO modification.* DP&L exercised its right to terminate way too late.

III. CONCLUSION

The PUCO should deny DP&L's requests. And the PUCO should comply now with the Supreme Court's mandate. The PUCO should order DP&L to stop collecting the unlawful and unwarranted $9.86 monthly Service Stability charge from Dayton-area consumers.

[11] See R.C. 1.47(D) stating that in enacting a statute, inter alia, a result feasible of execution is intended.

Respectfully submitted,

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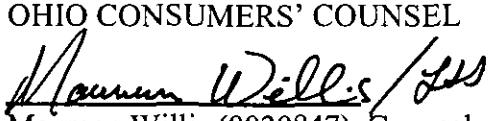

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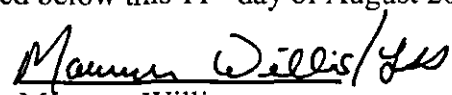
CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was electronically served via electric transmission on the persons stated below this 11th day of August 2016.



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