BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Energy Efficiency and Peak Demand Reduction Portfolio Plan.	))))	Case No. 16-0649-EL-POR
In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan for 2017 through 2019.	)))))	Case No. 16-1369-EL-WVR

POST-HEARING BRIEF
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POST-HEARING BRIEF BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The settlement[1] in this case would require Ohioans to pay the Dayton Power and Light Company too much for energy efficiency. Consumers pay all costs of utility-administered energy efficiency programs: program costs, utility profits (commonly called "shared savings"), and so-called "lost revenues." The 2017 Settlement seeks to charge DP&L's customers an unlimited amount of lost revenues for an unlimited number of years in the future. It also seeks to charge DP&L's customers over $20 million in lost revenues for 2016, which would double the cost of the programs to consumers. This is unreasonable.

The 2017 Settlement is also unreasonable because it would result in retroactive ratemaking. DP&L does not have an approved lost revenue mechanism for 2016. But the 2017 Settlement asks the PUCO for approval for DP&L to charge customers over $20 million for revenues that it purportedly lost in 2016 as a result of its energy efficiency

[1] Joint Ex. 1 (Dec. 13, 2016) (the "2017 Settlement").

programs. The PUCO cannot approve rates now, in 2017, that permit DP&L to recover losses from 2016. This would violate the long-standing precedent that utility rates in Ohio are prospective only.

The 2017 Settlement violates the PUCO's three-prong test for settlement approval. It does not benefit customers or the public interest because it seeks to charge customers an unreasonable amount of lost revenues for an unlimited number of years. It violates the regulatory principle that retroactive ratemaking is prohibited. And it violates the core regulatory principle embodied in R.C. 4905.22 that rates and charges to customers must be just and reasonable.

The PUCO should modify the 2017 Settlement as OCC proposes to protect customers from unreasonable energy efficiency charges.

I. BACKGROUND

A. DP&L's First and Second Energy Efficiency Portfolios

DP&L's first energy efficiency portfolio was approved in Case No. 08-1094-EL-SSO.[2] In that case, DP&L agreed that it could not charge customers more than $72 million for lost revenues over a seven-year period ending December 31, 2015.[3] In DP&L's second energy efficiency portfolio case,[4]

[2] Opinion & Order, In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan, Case No. 08-1094-EL-SSO (June 24, 2009).

[3] Id. at 7.

[4] Case No. 13-833-EL-POR.

DP&L and other parties, including OCC, signed a settlement recommending approval of DP&L's energy efficiency programs for 2013, 2014, and 2015.[5] The PUCO approved the 2013-15 Settlement.[6] The order approving DP&L's second energy efficiency portfolio retained the $72 million cap on lost revenues and confirmed that DP&L could not charge customers for any lost revenues that accrued after December 31, 2015.[7]

In 2014, the Ohio General Assembly enacted Senate Bill 310 ("SB 310"). SB 310 gave a utility two options regarding its energy efficiency portfolios. The utility could (i) continue its then-current programs, or (ii) request a modification to its portfolio for 2015 and 2016.[8] Under the first option, the utility was required to continue its energy efficiency programs, "with no amendments ... for the duration that the Public Utilities Commission originally approved."[9] If the utility's portfolio term expired before January 1, 2017, then the plan would automatically be extended through December 31, 2016, again "with no amendments to the plan."[10] DP&L chose the first option.[11] Thus, DP&L's second energy efficiency portfolio, which had been set to expire at the end of 2015, was extended to the end of 2016.

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[5] Stipulation and Recommendation, Case No. 13-833-EL-POR (Oct. 2, 2013) (the "2013-15 Settlement"), attached as Exhibit CS-7 to OCC Ex. 1 (Shutrump Direct).

[6] Opinion & Order, Case No. 13-833-EL-POR (Dec. 4, 2013).

[7] Id. at 9.

[8] SB 310 § 6(A).

[9] SB 310 § 6(A) (emphasis added).

[10] SB 310 § 6(D) (emphasis added).

[11] Joint Ex. 1 at 5.

B. The 2017 Settlement

DP&L filed its application in the current case seeking approval of a new portfolio for 2017, 2018, and 2019.[12] Six months later, DP&L filed the 2017 Settlement. Under the 2017 Settlement, DP&L is effectively withdrawing the 2016 Application. Rather than the new, three-year portfolio proposed in the 2016 Application, the 2017 Settlement proposes to continue DP&L's second energy efficiency portfolio, with slight modifications, for one more year (2017).[13]

Under the 2017 Settlement, DP&L is required to file a request to approve its new third energy efficiency portfolio plan (this time for 2018, 2019, and 2020) by June 2017.[14] The 2017 Settlement would allow DP&L to charge customers for lost revenues not only in 2017, but for an unlimited period of time after 2017, and retroactively for 2016.[15] The 2017 Settlement would also permit DP&L to continue its programs indefinitely after 2017 if the PUCO does not enter an order approving a new portfolio for 2018 and beyond.[16]

[12] Company Ex. 2 (the "2016 Application" dated June 15, 2016).

[13] Joint Ex. 1 § I.A.

[14] Joint Ex. 1 § IV.A.

[15] Joint Ex. 1 § II.A iv.

[16] Joint Ex. 1 § IV.A ("DP&L is authorized to continue programs and cost recovery consistent with this Stipulation until the Commission has issued an Order on DP&L's June 15, 2017 portfolio plan.").

II. BURDEN OF PROOF AND STANDARD OF REVIEW

In PUCO proceedings, the applicant bears the burden of proof.[17] In the context of a settlement, the signatory parties "bear the burden to support the stipulation" and must "demonstrate that the stipulation is reasonable and satisfies the Commission's three-part test."[18] And in electric energy efficiency cases, whether there is a settlement or not, the utility must prove that its proposed energy efficiency program portfolio is consistent with State policy under R.C. 4928.02 and satisfies the requirements of R.C. 4928.66.[19]

In PUCO proceedings, a settlement is merely a recommendation to the PUCO on behalf of the settling parties.[20] A settlement is not binding on the PUCO,[21] and the PUCO has the discretion to give each settlement the weight that the PUCO believes it deserves. Ultimately, the PUCO is a regulator that must "determine what is just and reasonable from the evidence presented at the hearing."[22]

In evaluating settlements, the ultimate issue for the PUCO's consideration is whether the agreement "is reasonable and should be adopted."[23] In answering this question, the PUCO has adopted the following three-prong test:[24]

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[17] In re Application of the Ottoville Mut. Tel. Co., Case No. 73-356-Y, 1973 Ohio PUC LEXIS 3, at *4 ("the applicant must shoulder the burden of proof in every application proceeding before the Commission"); In re Application of the Ohio Bell Tel. Co., No. 84-1435-TP-AIR, 1985 Ohio PUC LEXIS 7, at *79 (Dec. 10, 1985) ("The applicant has the burden of establishing the reasonableness of its proposals.").

[18] Opinion and Order at 18, In re Application Seeking Approval of Ohio Power Co.'s Proposal to Enter into an Affiliate Power Purchase Agmt. for Inclusion in the Power Purchase Agmt. Rider, No. 14-1693-EL-SSO, (Mar. 31, 2016).

[19] Ohio Adm. Code ("OAC") 4901:1-39-04(E).

[20] Duff v. PUCO, 56 Ohio St. 2d 367, 379 (1978).

[21] Id. See also OAC 4901-1-30(E).

[22] Duff, 56 Ohio St. 2d at 379.

[23] Opinion & Order at 9, In re Application of Vectren Energy Delivery of Ohio, Inc. for Authority to Amend its Tariffs, Case No. 04-571-GA-AIR, (Apr. 13, 2015).

[24] Consumers' Counsel v. Pub. Util. Comm., 64 Ohio St. 3d 123, 126 (1992).

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

2. Does the settlement, as a package, benefit customers and the public interest?

3. Does the settlement package violate any important regulatory principle or practice?

The PUCO has often taken into account the diversity of interests among the signatory parties, finding that diversity of interests is indicative of serious bargaining.[25]

III. RECOMMENDATIONS

As filed, the 2017 Settlement does not benefit customers or the public interest. It also violates regulatory principles and practices. It does not benefit customers because it would permit DP&L to charge customers for so-called "lost revenues" in an unlimited amount for an unlimited amount of time. It does not benefit customers because it would permit DP&L to charge customers over $20 million for revenues that DP&L purportedly lost in 2016, which is excessive. It does not benefit customers because it would permit DP&L to continue to charge customers for energy efficiency program costs, utility profits (shared savings), and lost revenues past the expiration of the program term and forever into the future. The 2017 Settlement would also result in retroactive ratemaking, which is contrary to long-standing regulatory precedent in Ohio.

The PUCO should not approve the 2017 Settlement as filed. Instead, it should modify the settlement as follows to protect DP&L's customers:

[25] See, e.g., In re Application of the Dayton Power & Light Co. for Approval to Modify its Competitive Bid True-up Rider, Case No. 14-563-EL-RDR (Sep. 9, 2015); In re Application of the Columbus S. Power Co. & Ohio Power Co., Case No. 05-376- EL-UNC (Feb. 11, 2015); In re Application of Columbus S. Power Co. & Ohio Power Co., for an Increase in Electric Distrib. Rates, Case No. 11-351-EL-AIR (Dec. 14, 2011); In re Application of Ohio Edison Co., The Cleveland Elec. Illuminating Co. & The Toledo Edison Co. for Authority to Provide a Standard Serv. Offer, Case No. 14-1297-EL-SSO (Mar. 31, 2016).

- Customers should not pay any lost revenues to DP&L for 2016 or 2017. Section II.A.iv of the 2017 Settlement, which permits DP&L to charge customers for an unlimited amount of lost revenues for an unlimited amount of time (including retroactively for 2016), should be deleted.

- DP&L should not be permitted to charge customers for program costs, utility profits (shared savings), or lost revenues after the expiration of the plan term (*i.e.*, after December 31, 2017). The last sentence in section IV.A of the 2017 Settlement, which permits DP&L to continue its programs—and charge customers—for an unlimited amount of time into the future, should be deleted.

A. The 2017 Settlement does not benefit customers or the public interest.

1. The 2017 Settlement does not benefit customers or the public interest because it would require customers to pay DP&L an unlimited amount of lost revenues for an unlimited number of years, which would result in charges to consumers that are unjust and unreasonable.

The core purpose of energy efficiency is to reduce energy usage and save consumers money on their utility bills. In the context of energy efficiency, a lost revenue mechanism allows a utility to charge customers for the revenues that the utility might have received had customers not reduced their usage because of energy efficiency programs.[26]

But lost revenues should not be unlimited. Lost revenue recovery, if appropriate at all, is "meant to be a short-term solution to address a utility's revenue loss in between rate cases."[27] The PUCO came to a similar conclusion in AEP Ohio's 2009 energy efficiency portfolio case.[28] There, the utility and certain parties signed a settlement that proposed

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[26] OCC Ex. 1 (Shutrump Direct) at 5.

[27] OCC Ex. 1 (Shutrump Direct) at 12.

[28] In re Application of [AEP Ohio] for Approval of its Program Portfolio Plan, Case No. 09-1089-EL-POR.

that the utility charge customers for lost revenues for three vintage years, until rates were approved in another base rate case, or until a decoupling mechanism was implemented.[29]

Industrial Energy Users-Ohio objected to the proposed lost revenue mechanism. According to IEU, the utility "failed to demonstrate that the recovery of lost distribution revenue is necessary to allow [the utility] the opportunity to recover its cost of providing distribution service and a fair and reasonable rate of return."[30] The PUCO agreed with IEU: "the record fails to establish what revenue is necessary to provide AEP-Ohio with the opportunity to recover its costs and to earn a fair and reasonable return."[31] The PUCO was particularly concerned that the utility's "actual costs of service" were "unknown at the time" because the utility had not filed a rate case in nearly 20 years.[32] Thus, the PUCO limited the utility's recovery of lost revenues from customers to less than one year.[33]

Subsequently, PUCO commissioners proposed a complete elimination of lost revenue charges to customers. In 2011, PUCO Chairman Snitchler found with respect to FirstEnergy's lost revenue mechanism, that "the collection of lost distribution revenues resulting from energy efficiency savings and peak demand reduction mandated by Section 4928.66, Revised Code... presents a significant risk of undermining public support for the energy efficiency mandates."[34] The PUCO Chairman concluded, in a

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[29] Opinion & Order at 13, Case No. 09-1089-EL-POR (May 13, 2010).

[30] Id. at 24.

[31] Id. at 26.

[32] Id.

[33] Id.

[34] Opinion & Order, Concurring Opinion of Chairman Todd A. Snitchler at 1-2, In re Application of [FirstEnergy] for Approval of their Energy Efficiency & Peak Demand Reduction Program Portfolio Plan for 2010 through 2012, Case No. 09-1947-EL-POR (Mar. 23, 2011).

concurring opinion supported by Commissioner Roberto, that he would be "reluctant to approve any future proposals which include the collection of lost distribution revenues resulting from the statutory mandates for energy efficiency savings."[35] A year later, Commissioner Roberto echoed this sentiment in FirstEnergy's ESP case. There, she dissented and concluded that the utility's lost revenue mechanism "has out-lived its value to customers and should be permitted to expire."[36]

DP&L's case is analogous to AEP's 2009 portfolio case. Like AEP, DP&L's last rate case was approved over 20 years ago. And like AEP, DP&L has not provided evidence that "recovery of lost distribution revenue is necessary to allow [DP&L] the opportunity to recover its cost of providing distribution service and a fair and reasonable rate of return."[37]

Moreover, DP&L's proposed lost revenue charges in the 2017 Settlement are unlimited in both amount and duration. Under the 2017 Settlement, "DP&L will be permitted to recover lost distribution revenues incurred during 2016 and DP&L will continue to recover lost distribution revenues going forward, until incorporated in a distribution decoupling rider."[38] There is no limit on the amount that DP&L can charge customers for lost revenues. And there is no limit on the number of years that DP&L can charge customers for lost revenues. This is unfair to customers and inconsistent with PUCO precedent that provided protection to customers by limiting the amount and duration of lost revenue payments.

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[35] Id.

[36] Opinion & Order, Dissenting Opinion of Commissioner Cheryl L. Roberto at 6, In re [FirstEnergy] for Authority to Provide for a Standard Serv. Offer, Case No. 12-1230-EL-SSO (July 18, 2012).

[37] Id. at 26.

[38] 2017 Settlement § II.A iv.

The only limit in the 2017 Settlement is that DP&L must stop charging customers for lost revenues when they are "incorporated in a distribution decoupling rider."[39] But there is no guarantee that this will provide any protection for customers because there is no evidence that DP&L will actually implement a distribution decoupling rider.

In its 2016 ESP case, DP&L's application requested approval of a distribution decoupling rider.[40] The ESP application, however, does not provide details regarding the proposed rider. Instead, it states merely that the rider will be designed "to recover base distribution dollars that were not collected because of energy reductions from DP&L's energy efficiency programs" and that "the details of the Rider [will be] established in DP&L's to-be-filed Energy Efficiency Portfolio case."[41]

DP&L's "Energy Efficiency Portfolio case" is the present case. The application in this case[42] provides just as few details as the ESP application. The only details that it provides regarding the distribution decoupling rider are that it will be "updated annually" and that the "distribution decoupling costs will be based on DP&L's base distribution revenue, excluding customer charge."[43] In other words, we know virtually nothing about what such a rider might look like.

More importantly, DP&L abandoned the distribution decoupling rider altogether in the 2017 Settlement. Beyond mentioning the possibility of the rider in the context of lost revenues, the 2017 Settlement does not provide any details about any such rider and

[39] Id.

[40] OCC Ex. 1 (Shutrump Direct), Exhibit CS-6 at 9.

[41] Id.

[42] Company Ex. 2 (the "Application").

[43] Id. ¶ 17-18.

does not propose that such a rider be implemented in 2017 or any time thereafter. Instead, it proposes only a lost revenue mechanism. Whether, when, and how DP&L might eventually seek to implement a distribution decoupling rider remains unknown and uncertain. Thus, under the terms of the 2017 Settlement, consumers will continue to pay lost revenues to DP&L for a potentially unlimited number of years into the future. This does not benefit customers or the public interest and should not be allowed.

2. DP&L seeks to charge customers $20 million for lost revenues in 2016. This will nearly double the cost of DP&L's 2016 programs. Lost revenues of this magnitude do not benefit customers or the public interest and should not be approved.

In its 2009 ESP case, and as reaffirmed in its second energy efficiency portfolio case, DP&L's collection of lost revenues from customers was capped at $72 million over a seven-year period ending December 31, 2015.[44] Under this cap, consumers paid approximately $10.3 million in lost revenues to DP&L per year. In the 2017 Settlement, in contrast, DP&L seeks to charge customers $20.1 million for lost revenues in 2016—nearly double the annual average amount under the cap.[45] The average DP&L residential customer would pay nearly $3 per month in lost revenues alone to DP&L for 2016.[46] This would result in a substantial increase to consumers' electric bills.

Further, DP&L's claimed lost revenues are considerably out of line with program costs. In a 2015 study, ACEEE surveyed 32 utilities in 17 states and found that the typical utility with a lost revenue mechanism was permitted to charge customers for lost

[44] Id. at 12-13.

[45] OCC Ex. 1 (Shutrump Direct) at 6.

[46] Id. at 6-7.

revenues equal to about 25% of program costs.[47] Among those surveyed, just one charged customers for lost revenues that were more than 60% of program costs.[48] DP&L's asserted lost revenues are **75%** of program costs for 2014, **75%** of program costs for 2015, and at least **90%** of program costs for 2016.[49] The lost revenues that DP&L would collect under the 2017 Settlement for 2016, therefore, would be one of the highest in the entire country, if not *the* highest—and by a wide margin.[50]

This is unreasonable under any circumstances. But it is especially unreasonable given that the poverty rate in the City of Dayton is over 35%.[51]

This situation is likely to get worse because of the "pancake effect" described by OCC witness Shutrump.[52] The "pancake effect" occurs when a utility has had a lost revenue mechanism in place for multiple years without filing a general rate case. Absent frequent rate cases, balances in the lost revenue account can accumulate. This is because each year, the utility is capturing the revenue lost not just from measures implemented in that year, but also from measures installed since the last time base rates were set, which for DP&L was more than 20 years ago.[53] When this occurs, there is the potential to over-compensate the utility for lost revenues.

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[47] Id. at 11.

[48] Id. at 11.

[49] Id. at 6-7.

[50] OCC Ex. 1 (Shutrump Direct) at 10.

[51] Id., citing The Ohio Poverty Report. 2016, Table A6 (available at https://www.development.ohio.gov/files/research/p7005.pdf).

[52] Id. at 8.

[53] Prior to its pending general rate case, DP&L had not filed a general rate case since 1991. *See* PUCO Case No. 91-414-EL-AIR.

The pancake effect can be cured by adjusting the charges consumers pay for lost revenues through frequent rate cases. This helps to ensure that the charges consumers pay are based on the most recent data regarding the utility's costs and revenues.[54] Lost revenues are also controlled by limiting the amount and duration of any lost revenue charges to customers.

OCC witness Shutrump testified that the pancake effect is evident in the mechanism to collect DP&L's lost revenues from consumers. Customers have been paying lost revenues for at least seven years, and they will likely continue to pay them for an undetermined number of years in the future. The uncapped collection of lost revenues will continue until they are incorporated in a distribution decoupling rider.[55] But as discussed above, it is unclear when—if ever—lost revenues will be incorporated into a decoupling rider. And it is unclear what form that rider might take or whether it will benefit customers.

The 2017 Settlement would require DP&L's consumers to pay an exorbitant amount of lost revenues, uncapped, for an undetermined amount of time. This does not benefit consumers or the public interest. The 2017 Settlement fails the second prong of the PUCO's test for approving settlements and thus should be rejected.

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[54] See id., citing Valuing Efficiency: A Review of Lost Revenue Adjustment Mechanisms at 12 (2015) (available at http://aceee.org/sites/default/files/publications/researchreports/u1503.pdf).

[55] Joint Ex. 1 at 11.

3. The 2017 Settlement does not benefit customers because it permits DP&L to continue its energy efficiency programs, and charge customers for those programs, for an unlimited number of years in the future without further PUCO approval.

The 2017 Settlement seeks approval of programs for 2017 and requires DP&L to file a new three-year portfolio plan for 2018-2010.[56] But it also seeks authority for DP&L "to continue programs and cost recovery consistent with this Stipulation until the Commission has issued an Order on DP&L's" 2018-2020 portfolio.[57] In other words, if the PUCO does not approve a new portfolio for 2018 or beyond, then DP&L can continue its 2017 programs indefinitely, and can continue to charge customers for program costs, utility profits, and lost revenues for an unlimited amount of time in the future. This does not benefit customers.

The PUCO should not authorize DP&L to continue its 2017 programs after 2017 simply because the PUCO has not yet approved a new portfolio for 2018, 2019, and 2020. The PUCO has always approved energy efficiency portfolios for a discrete number of years.[58] In fact, the PUCO's rules require electric utilities to file periodic energy efficiency portfolio cases for approval.[59]

Customers benefit from periodic review of a utility's portfolio because the PUCO has an opportunity to reassess the utility's performance, its programs, and the charges that

[56] Joint Ex. 1 § IV.A.

[57] Id.

[58] See, e.g., Opinion & Order, Case No. 11-5568-EL-POR (Mar. 21, 2012) (3-year plan for AEP Ohio); Opinion & Order, Case No. 12-2190-EL-POR (Mar. 20, 2013) (3-year plan for FirstEnergy); Opinion & Order, Case No. 13-833-EL-POR (Dec. 4, 2013) (3-year plan for DP&L); Opinion & Order, Case No. 13-431-EL-POR (Dec. 4, 2013) (3-year plan for Duke); Opinion & Order, Case No. 16-574-EL-POR (Jan. 18, 2017) (4-year plan for AEP Ohio).

[59] Ohio Adm. Code 4901:1-39-04(A) (requiring each electric utility to file a portfolio plan every three years).

customers pay for energy efficiency program costs, utility profits, and lost revenues.[60] The PUCO should review DP&L's proposed 2018-2020 portfolio when it is filed. The PUCO can then decide whether to approve that portfolio. If the PUCO does not approve a portfolio for 2018, then DP&L should not be permitted to sidestep the PUCO's decision by continuing its 2017 programs. The PUCO should modify the 2017 Settlement to delete the last sentence in section IV.A of the settlement.

B. The 2017 Settlement violates regulatory principles and practices.

1. The Ohio Supreme Court precedent against retroactive ratemaking prohibits the PUCO from authorizing DP&L to charge customers for 2016 lost revenues.

The PUCO cannot authorize a utility to charge higher future rates to make up for past losses. This rule is fundamental to utilities regulation and has been recognized in the State of Ohio for decades, including by the Ohio Supreme Court in *Keco*[61] in 1957, *Lucas County*[62] in 1997, and more recently in 2011 in *Columbus Southern.*[63] But here, the Signatory Parties ask the PUCO to allow DP&L to charge customers higher future rates through DP&L's energy efficiency rider to make up for alleged "lost revenues" from 2016.[64] This is textbook retroactive ratemaking, which the PUCO cannot allow.

In Ohio, after the PUCO approves a rate, that rate is the "only rate which the utility may lawfully charge."[65] This means that "a utility may not increase, decrease, or

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[60] See generally Ohio Adm. Code 4901:1-39-03 (providing program planning requirements for energy efficiency portfolios).

[61] Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 259 (1957).

[62] Lucas Cnty. Comm'rs v. PUCO, 80 Ohio St. 3d 344, 347-48 (1997).

[63] In re Columbus S. Power Co., 128 Ohio St. 3d 512, 514-15 (2011).

[64] Joint Ex. 1 § II.A ("DP&L will be permitted to recover lost distribution revenues incurred during 2016").

[65] Cleveland Elec. Illuminating Co. v. PUCO, 46 Ohio St. 2d 105, 115 (1976).

change its tariff rates without commission approval."[66] If a utility seeks to change its rates, it must obtain PUCO approval for the change. And when a utility seeks a rate change, the change applies only to future rates—the PUCO cannot change rates retroactively.[67] As the Ohio Supreme Court succinctly concluded in *Lucas County*, "retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme."[68]

Consistent with *Keco* and its progeny, a utility cannot recover past losses through future rates. In *Columbus Southern*, the utility sought a rate increase effective January 2009, but the PUCO did not issue an order granting the increase until mid-March of that year.[69] The PUCO, however, permitted the utility to recover the full amount of the increase as though the higher rates had been in effect as of January 1, 2009. It accomplished this by setting the utility's rates at a level that would allow it to recover 12 months of rate increases (*i.e.* January through December 2009) in a 9-month period (April through December 2009).[70]

The Ohio Supreme Court ruled that this was retroactive ratemaking.[71] As the Court explained, the PUCO effectively permitted the utility to recover losses from January, February, and March 2009—that is, losses the utility suffered *before* the PUCO's order approving the rate increase.[72] This violated *Keco* and the fundamental rule against

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[66] Lucas Cnty., 80 Ohio St. 3d at 347.

[67] Lucas Cnty., 80 Ohio St. 3d at 348 ("[U]tility ratemaking by the Public Utilities Commission is prospective only.").

[68] Id.

[69] 67 Ohio St. 3d at 514.

[70] Id.

[71] Id.

[72] Id. at 515.

retroactive ratemaking.[73] The Ohio Supreme Court has established clear precedent: a utility cannot charge customers for losses that the utility incurred prior to the entry of the order approving the rate increase.

The 2017 Settlement violates this precedent. It asks the PUCO to authorize DP&L to charge customers for distribution revenues that DP&L purportedly lost as a result of its energy efficiency programs in 2016.[74] But the 2017 Settlement was not even filed until December 13, 2016, and the PUCO has not yet entered an order approving the 2017 Settlement. Any order approving the 2017 Settlement would occur, at the earliest, in 2017. An order issued in 2017 cannot authorize DP&L to increase customer rates based on losses that occurred from January through December 2016. This is contrary to the rule set forth in *Columbus Southern* and the clear prohibition on retroactive ratemaking established in *Keco* and *Lucas County*.

The PUCO must follow Ohio Supreme Court precedent. It must rule that DP&L cannot charge customers higher future rates to recover past "lost revenues" from 2016.

2. The PUCO has not authorized DP&L to charge customers for 2016 lost revenues.

In DP&L's second energy efficiency portfolio case,[75] the PUCO approved a settlement[76] that authorized DP&L to charge customers a maximum of $72 million in lost revenues through December 31, 2015.[77] The 2013-15 Settlement did not authorize any

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[73] Id.

[74] Joint Ex. 1 § II.A.

[75] Case No. 13-833-EL-POR.

[76] Stipulation and Recommendation, Case No. 13-833-EL-POR (Oct. 2, 2013) (the "2013-15 Settlement") (emphasis added), attached as Exhibit CS-7 to OCC Ex. 1 (Shutrump Direct).

[77] Opinion & Order at 9, Case No. 13-833-EL-POR (Dec. 4, 2013) (the "2013-2015 Portfolio Order").

lost revenues in 2016, 2017, or any other time after December 31, 2015.[78] DP&L agreed that the recovery of any lost revenues after December 31, 2015 would need to be approved by the PUCO:

> If the Commission does not authorize collection of lost distribution revenues from customers relating to DP&L's First Energy Efficiency Portfolio (approved in Case No. 08-1094, et al.) or Second Energy Efficiency Portfolio (Case No. 13-833-EL-POR) after a hearing held for DP&L's Third Energy Efficiency Portfolio Application, the Signatory Parties agree that DP&L shall not collect lost distribution revenues related to its First Energy Efficiency Portfolio or Second Energy Efficiency Portfolio beyond December 31, 2015.[79]

DP&L's "Third Energy Efficiency Portfolio Application" was the application filed in this case.[80] The PUCO has not issued any order in this current energy efficiency case authorizing lost revenues beyond December 31, 2015. Consistent with the 2013-15 Settlement, therefore, DP&L is not authorized to charge customers for revenues it may have lost in 2016 as a result of its energy efficiency programs.

3. DP&L's 2013-2015 energy efficiency portfolio was continued in 2016 with no modifications under Senate Bill 310. Thus, Senate Bill 310 did not authorize DP&L to charge customers for 2016 lost revenues.

DP&L's authority to charge customers for lost revenues is found in the order approving DP&L's second energy efficiency portfolio.[81] That order authorized lost revenues only through December 31, 2015.[82] It authorized a maximum of $72 million in lost revenues.[83] And it required DP&L to obtain further PUCO approval for any lost

[78] 2013-15 Settlement § II.G-H.

[79] 2013-15 Settlement § II.H.

[80] Company Ex. 2.

[81] 2013-2015 Portfolio Order at 9.

[82] Id.

[83] Id.

revenues that might have accrued after that date.[84] DP&L may argue that it did not need PUCO approval to charge customers for 2016 lost revenues because its energy efficiency portfolio was extended through 2016 under SB 310. The PUCO should reject this argument. SB 310 did not authorize recovery of 2016 lost revenues.

When SB 310 froze Ohio's energy efficiency mandates for 2015 and 2016, the General Assembly gave each utility two options. If a utility had an energy efficiency portfolio plan in place as of the effective date of SB 310, it could (1) continue its then-current programs, or (2) request a modification to its portfolio for 2015 and 2016.[85]

Under the first option, the utility was required to continue its energy efficiency programs, "with no amendments . . . for the duration that the Public Utilities Commission originally approved."[86] If the utility's portfolio term expired before 2017, then the plan would automatically be extended through December 31, 2016, again "with no amendments to the plan."[87] Under the second option, the utility could file an application with the PUCO seeking to amend its portfolio plan.[88] DP&L chose the first option.[89]

At the time SB 310 became effective, DP&L's energy efficiency portfolio plan was approved through the end of 2015.[90] Thus, because DP&L chose not to modify its plan, its programs were automatically extended through December 31, 2016. This does not mean, however, that DP&L's authority to charge customers for lost revenues was

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[84] Id. See also 2013-15 Settlement § II.H.

[85] SB 310 § 6(A).

[86] SB 310 § 6(A).

[87] SB 310 § 6(D).

[88] SB 310 § 6(B)(1).

[89] Joint Ex. 1 at 5.

[90] See 2013-2015 Portfolio Order (approving DP&L's second portfolio from 2013 to 2015).

extended through the end of 2016. Nor does it mean that DP&L could charge customers more than $72 million for lost revenues.

The plain language of SB 310 is unambiguous: when a utility decided to continue its energy efficiency programs under its then-current portfolio plan, there would be "no amendments to the plan."[91] The plain language of DP&L's 2013-2015 plan is similarly unambiguous: DP&L was not authorized to charge customers for lost revenues after December 31, 2015, without commission approval, and DP&L was not authorized to charge customers more than $72 million in lost revenues.[92]

Approval of the 2017 Settlement would permit DP&L to charge customers for lost revenues beyond December 31, 2015. This would constitute an amendment to DP&L's 2013-2015 portfolio plan in violation of SB 310. Approval of the 2017 Settlement would permit DP&L to charge customers over $92 million for lost revenues over an eight-year period. This, too, would constitute an amendment to DP&L's 2013-2015 portfolio plan in violation of SB 310.

DP&L has already charged customers the full $72 million in lost revenues from 2009 through 2015.[93] Thus, even if SB 310 extended the December 31, 2015 lost revenues expiration date to December 31, 2016, DP&L would still not be permitted to recover more lost revenues from customers for 2016 because that would require an increase to the $72 million lost revenues cap, and SB 310 did not authorize such modification.

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[91] SB 310 § 6(A)(1); § 6(D) (emphasis added).

[92] 2013-15 Settlement § II.G, II.H.

[93] See OCC Ex. 1 (Shutrump Direct), Ex. 5, WPB-3, WPB-4.

There is no way to interpret SB 310 to permit DP&L to charge customers for lost revenues that accrued in 2016. SB 310 extended the term of DP&L's programs, but it does not follow that every date found in DP&L's 2013-15 Settlement was also extended to December 31, 2016. And even if the PUCO does conclude that SB 310 extended the expiration date for lost revenues to December 31, 2016 (which it shouldn't), then the PUCO should nonetheless conclude that the $72 million cap extends through December 31, 2016. This would prohibit DP&L from charging customers any lost revenues for 2016 because it reached the $72 million cap in 2015.

4. DP&L had a right to seek amendment to its 2013-2015 energy efficiency portfolio plan, so it cannot claim prejudice as a result of the continuation of its programs under SB 310.

As explained above, DP&L was given two choices under SB 310: continue its then-current programs without modification, or ask the PUCO to amend its portfolio. DP&L chose the first option, along with all the consequences that follow from that decision. Those consequences include forfeiting the right to charge customers for lost revenues that accrued in 2016.

DP&L could have asked the PUCO to modify its portfolio plan.[94] In an application to modify its plan, DP&L could have asked the PUCO to authorize DP&L to charge customers for lost revenues in 2016. Or it could have asked the PUCO to increase the cap on lost revenues above $72 million. DP&L did none of those things. Instead, it decided to continue its portfolio without modification. DP&L cannot claim that it is

[94] SB 310 § 6(A)(2), (B).

unfairly prejudiced by the continuation of its programs under SB 310 because DP&L was responsible for that result.

5. The 2017 Settlement violates the regulatory principle that rates must be just and reasonable.

Under Ohio law, utility rates must be just and reasonable.[95] For the reasons described above, customers will pay excessive amounts of lost revenues to DP&L under the 2017 Settlement. This will result in rates that are neither just nor reasonable. Thus, the 2017 Settlement violates the regulatory principle that all rates are required to be just and reasonable.

IV. CONCLUSION

The 2017 Settlement fails the PUCO's three-prong test for settlement approval. It does not benefit customers because it would cause customers to pay excessive "lost distribution" revenues to DP&L. Under the settlement, customers would pay an unlimited amount of lost revenues in 2017 and for an unlimited number of years thereafter. Customers would pay over $20 million for lost revenues in 2016, which is (a) twice as much as they paid per year from 2009 to 2015, (b) one of the highest rates in the country by a wide margin, (c) nearly four times as high as the typical utility nationwide, and (d) nearly as much as the entire cost of DP&L's energy efficiency programs. These rates are neither just nor reasonable.

The 2017 Settlement also results in retroactive ratemaking. Under the settlement, customers would be required to retroactively reimburse DP&L for up to $20 million in

[95] R.C. 4905.22. See also R.C. 4909.15 (determinations the PUCO must make when fixing just and reasonable rates); R.C. 4928.02(A) (State policy is to ensure that consumers have "reasonably priced retail electric service").

losses that it purportedly incurred in 2016. The PUCO never approved lost revenues for DP&L for 2016; it cannot do so now, after the fact.

Without OCC's proposed modifications, the 2017 Settlement does not benefit customers or the public interest, and it violates regulatory principles and practices. The PUCO should reject the 2017 Settlement as filed and should modify it as OCC proposes.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Post-Hearing Brief was served on the persons stated below via electronic transmission this 10th day of March 2017.

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