**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 |

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# REPLY BRIEF
# BY
# THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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The rates that Ohioans pay for electric service must be just and reasonable.[1] The settlement[2] in this case would permit Dayton Power & Light Company ("DP&L") to charge customers an unlimited amount of lost revenues for 2016, 2017, and for an unlimited number of years beyond that, resulting in consumers paying rates that are unjust and unreasonable. The Public Utilities Commission of Ohio ("PUCO") should reject the settlement.

The initial brief of the Office of the Ohio Consumers' Counsel ("OCC") showed that the 2017 Settlement does not meet the criteria that the PUCO uses to evaluate settlements. A settlement must benefit consumers and the public interest. A settlement cannot violate important regulatory principles. The 2017 Settlement does not meet either of these criteria.

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[1] R.C. 4905.22.

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

The PUCO should adopt the recommendations set forth in OCC's initial brief. 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. And 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.

## I. REPLY

### A. The Settlement would require customers to pay unjust and unreasonable lost revenue charges. The fact that a distribution decoupling rider might, at some unknown time in the future, replace the lost revenue mechanism, does not change that.

The Settlement permits DP&L to charge customers an unlimited amount of lost revenues for 2016, 2017, and for an unlimited number of years beyond that.[3] For 2016, DP&L seeks to charge customers $20 million in lost revenues.[4] In its initial brief, Ohio Partners for Affordable Energy ("OPAE") argues that the PUCO should approve the Settlement because DP&L's collection of lost revenues from customers will be short-lived.[5] According to OPAE, the lost revenues issue is "being addressed" in DP&L's pending electric security plan ("ESP") and rate cases and "should be resolved in 2017."[6] But this is sheer speculation and is not supported by the record in this proceeding.

There is nothing in this record supporting OPAE's contention that the ESP case and base rate case will be resolved in 2017. DP&L's base rate case is unlikely to be

[3] See generally OCC Initial Brief at 7-11.

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

[5] OPAE Initial Brief at 3-5.

[6] Id. at 5.

resolved before the end of the year. DP&L filed the rate case in October 2015.[7] On March 22, 2017—17 months after the case was filed—the Commission directed the PUCO Staff to issue an RFP for an independent auditor.[8] The RFP will be issued on April 5, 2017, and the auditor will not present its final report to the PUCO Staff until September 29, 2017.[9] Following the completion of the audit, the PUCO Staff will be required to file a report in accordance with R.C. 4909.19(C). Parties will then have 30 days to file objections to the report.[10] And if parties file objections, the PUCO must hold a pre-hearing conference and then schedule a hearing.[11] In light of the significant delay in the rate case, there is no reason to believe that the base rate case will be resolved before the end of the year. Likewise, there is no evidence in the record in this case regarding when the ESP case might be resolved. OPAE's claim that the ESP case and base rate case will be soon resolved is unsupported by the record.

More importantly, even if the ESP case and base rate case are soon resolved, there is nothing that *requires* DP&L to establish a decoupling rider in either case. As OCC witness Shutrump explained, DP&L, in the ESP case, is only seeking to establish a decoupling rider and to set it at zero.[12] The ESP case does not provide any details regarding a potential decoupling rider, and in fact, it explicitly defers consideration of such rider to DP&L's "to-be-filed Energy Efficiency Portfolio case."[13] And of course, if

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

[8] Entry, In re Application of the Dayton Power & Light Co. for an Increase in its Elec. Distrib. Rates, Case No. 15-1830-EL-AIR (Mar. 22, 2017).

[9] Id. at RFP Exhibit § IV.

[10] R.C. 4909.19(C).

[11] Id.

[12] OCC Ex. 1 (Shutrump Direct) at 9.

[13] Id.

DP&L's ESP case is ultimately resolved through a complete or partial settlement, then DP&L's obligations with respect to decoupling could change materially, or DP&L could abandon the concept altogether. Furthermore, DP&L has the unilateral authority to withdraw its ESP application—even after it has been approved.[14] Any reliance on the ESP case, therefore, is purely speculative.

The harm to customers caused by DP&L's unlimited collection of lost revenues for an unspecified amount of time—as provided in the 2017 Settlement—is real. The PUCO should not let this happen. The PUCO should reject and delete the lost revenue provisions of the 2017 Settlement that allow this harm to customers.

### B. DP&L is not *entitled* to charge customers for lost revenues or shared savings.

DP&L claims in its initial brief that it is "legally entitled to recover shared savings and lost distribution revenues that result from the statutorily mandated energy efficiency portfolio programs."[15] This is false. DP&L is not *entitled* to shared savings or lost revenues. DP&L *may* be *eligible* for shared savings or lost revenues, *if* the PUCO approves them prospectively.

In support of its claim, DP&L cites Ohio Adm. Code 4901:1-30-07. But this section does not provide a legal entitlement to shared savings or lost revenues; it merely permits a utility to ask the PUCO for these things. The rule provides: "With the filing of its proposed program portfolio plan, the electric utility may submit a request for recovery of an approved rate adjustment mechanism, commencing after approval of the electric utility's program portfolio plan, of costs due to electric utility peak-demand reduction,

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

[15] DP&L Brief at 9.

demand response, energy efficiency program costs, appropriate lost distribution revenues, and shared savings."[16] Nothing in this rule requires the PUCO to approve lost revenues or shared savings. The rule is procedural: it allows the utility to include certain requests in its application. The rule does not create an entitlement to shared savings or lost revenues.

The rule also clarifies that the PUCO can only approve *appropriate* lost revenues. To determine what is appropriate, the PUCO should look to the Ohio Revised Code and Ohio Supreme Court precedent. First, as OCC explained in detail in its initial brief, the Settlement would result in retroactive approval of 2016 lost revenues.[17] This retroactive ratemaking is illegal.[18] Illegal charges are not "appropriate" for purposes of Ohio Adm. Code 4901:1-30-07(A).

Second, under R.C. 4928.66(D), the PUCO can approve a "revenue decoupling mechanism [that] provides for the recovery of revenue that otherwise may be forgone by the utility as a result of or in connection with the implementation by the electric distribution utility of any energy efficiency or energy conservation programs."[19] But any such provision must "align[] the interests of the utility and of its customers in favor of those programs."[20] A collection mechanism that allows unlimited collection of lost revenues in perpetuity does not "reasonably align" customer interests with utility interests.

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[16] Ohio Adm. Code 4901:1-39-07(A).

[17] OCC Initial Brief at 15-21.

[18] Id. For the same reasons, any lost revenues approved for 2017 should only be incurred in 2017 after a PUCO order is entered. DP&L cannot charge customers for 2017 lost revenues that are incurred before approval of a 2017 portfolio.

[19] R.C. 4928.66(D).

[20] Id.

Furthermore, the rule states that any rate adjustment mechanism that includes shared savings or lost revenues does not commence until "after approval of the electric utility's program portfolio plan."[21] DP&L's settlement includes a request for lost revenues from 2016. Any lost revenues from 2016 were necessarily not incurred "after approval of the electric utility's [2017] program portfolio plan" that is the subject of the 2017 Settlement. This further supports the conclusion that DP&L is not permitted to retroactively charge customers for past lost revenues.[22]

### C. There is no evidence that customers will benefit from DP&L's programs in 2017.

Both DP&L and the PUCO Staff list the various programs in the 2017 Settlement as benefits to consumers.[23] The mere existence of programs, however, does not constitute a benefit to customers for purposes of the PUCO's three-prong test.

First, DP&L is required, by law, to implement energy efficiency programs for the benefit of customers and to reduce customer energy usage and demand.[24] This is true whether DP&L signed a settlement or not. Thus, the 2017 Settlement simply authorizes DP&L to administer programs that it would be required to administer in the absence of the settlement. DP&L cannot claim the existence of programs, therefore, as an added benefit to customers.

Second, and perhaps more importantly, there is no evidence in the record that the programs will benefit customers. The PUCO's rules require an electric utility's energy

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[21] Id.

[22] See generally OCC Initial Brief at 15-21.

[23] DP&L Brief at 7-8; PUCO Staff Brief at 7-8.

[24] R.C. 4928.66(A)(1).

efficiency programs to be cost-effective on a portfolio basis.[25] The rules also require each program to be cost-effective unless the program provides "substantial nonenergy benefits."[26] By definition, therefore, programs must be cost-effective to provide benefits to customers.[27] But the record in this case contains no information about the cost-effectiveness of the programs proposed for 2017. The 2017 Settlement does not provide any cost-effectiveness calculations for the 2017 portfolio of programs. DP&L's only witness in this case, Tyler Teuscher, did not provide any cost-effectiveness calculations for 2017.[28] Nor did PUCO Staff witness Braun.[29] The record contains no evidence whatsoever that DP&L's programs will be cost-effective in 2017. Without this evidence, the PUCO cannot conclude that the programs will benefit customers.

Furthermore, for the various programs funded through the 2017 Settlement, only one—communicating energy efficiency programs to manufacturers—uses shareholder dollars.[30] The others use funds paid for by customers. The Residential Low Income Affordability Program money allocated to OPAE is paid for by customers. The $75,000 for hospital energy audits comes from DP&L's business programs budget that is funded by customers. The $200,000 for weatherization programs by People Working Cooperatively comes from DP&L's 2017 Pilot Program, which is funded by customers. The $250,000 for the Combined Heat and Power and the Waste Energy and Recovery

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[25] Ohio Adm. Code 4901:1-39-04(B).

[26] Id.

[27] Ohio Adm. Code 4901:1-39-04(B) (requiring the utility's entire portfolio to be cost effective and for each program to be individually cost-effective, unless the program provides substantial nonenergy benefits).

[28] See generally DP&L Ex. 3 (Teuscher Direct).

[29] See generally PUCO Staff Ex. 1 (Braun Direct).

[30] 2917 Settlement at 7.

programs comes from DP&L's Custom Rebate Program budget that is paid for by customers. The same is true for the expanded Government Audit program. The LED lighting incentive will come from the Residential Lighting Program, which is funded by customers. And the $600,000 for marketing and customer incentives regarding smart thermostats will be paid for by customers. This money is already budgeted to benefit customers. Thus, there is no additional benefit to customers from these programs in the 2017 Settlement.

### D. Any energy efficiency portfolio settlement that the PUCO approves should include an annual limit on charges to customers for energy efficiency program costs and utility profits.

Although the 2017 Settlement as a package does not benefit customers or the public interest (for the reasons set forth herein and in OCC's initial brief), the Settlement does include one important customer protection: it limits the annual amount that customers can be charged for energy efficiency program costs and shared savings.[31] Under the settlement, for 2017, DP&L cannot charge customers more than 4% of its 2015 revenues for program costs and shared savings.[32]

In its initial brief, ELPC "urges the Commission not to reach the broad question of the general merits of a cost cap."[33] ELPC admits that the cost cap "does not prevent the Stipulation as a whole from benefitting ratepayers in 2017."[34] But it claims that the record "provides no basis for determining that a cost cap would be good policy beyond the

[31] Joint Ex. 1 § I.A.

[32] Id.

[33] Initial Brief of ELPC at 2 (Mar. 10, 2017).

[34] Id.

specific context of this particular settlement package."[35] To the contrary, the record contains expert witness testimony regarding the benefits of an annual limit on charges to customers for energy efficiency.

PUCO Staff witness Kristin Braun testified that an annual cost cap "benefits ratepayers and the public interest by providing cost control, certainty, and stability, as well as price assurances to customers."[36] ELPC may disagree with this statement, but ELPC did not submit any testimony in this case. Indeed, Ms. Braun's testimony regarding the benefits of a cost cap was unrebutted. No party to this case even chose to cross-examine Ms. Braun.[37] Ms. Braun's testimony, including the language quoted above, was admitted into the record.[38] The PUCO can rely on Ms. Braun's testimony in determining that an annual cost cap is sound regulatory policy.

### E. The 2017 Settlement violates regulatory principles and practices.

Both DP&L and the PUCO Staff contend that the 2017 Settlement does not violate any important regulatory principles or practices. Both are wrong.

The PUCO Staff lists three state policies that it asserts are furthered by the 2017 Settlement.[39] The PUCO Staff, however, ignores a key state policy that is thwarted by the 2017 Settlement.

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[35] Id.

[36] PUCO Staff Ex. 1 (Braun Direct) at 5:73-75.

[37] Tr. at 8-10.

[38] Id. at 9-10. The PUCO Staff did agree to remove a different sentence from lines 71-73 of Ms. Braun's testimony. Id. at 9.

[39] PUCO Staff Brief at 10.

State policy under R.C. 4928.02(A) is to ensure "the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and *reasonably priced* retail electric service."[40] As discussed above and in OCC's initial brief,[41] the collection of lost revenues provided in the 2017 Settlement would make the rates charged to consumers unjust and unreasonable.

Further, the 2017 Settlement violates the prohibition against retroactive ratemaking, as discussed in OCC's initial brief.[42] The 2017 Settlement 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.[43] 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 clear prohibition on retroactive ratemaking established in case law.

The 2017 Settlement violates several regulatory principles and practices. It thus fails the PUCO's three-prong test for approving stipulations. The PUCO should reject the 2017 Settlement.

## II. CONCLUSION

The arguments for the 2017 Settlement are without merit. The PUCO should not approve any settlement that allows a utility to collect unlimited lost revenues for an

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[40] See also R.C. 4905.22, which requires that all charges for utility service must be just and reasonable.

[41] OCC Brief at 22.

[42] Id. at 15-17.

[43] Joint Ex. 1 § II.A.

unspecified amount of time and without a lawful collection mechanism in place. OCC has shown that the 2017 Settlement would harm consumers by allowing DP&L to collect unjust and unreasonable rates. To protect consumers, 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 Reply Brief was served on the persons stated below via electronic transmission this 24th day of March 2017.

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