

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The Dayton)
Power and Light Company to Establish a) Case No. 08-1094-EL-SSO
Standard Service Offer in the Form of an Electric)
Security Plan.)

In the Matter of the Application of The Dayton)
Power and Light Company for Approval of) Case No. 08-1095-EL-ATA
Revised Tariffs.)

In the Matter of the Application of The Dayton)
Power and Light Company for Approval of) Case No. 08-1096-EL-AAM
Certain Accounting Authority.)

In the Matter of the Application of The Dayton)
Power and Light Company for Waiver of Certain) Case No. 08-1097-EL-UNC
Commission Rules.)

**REPLY TO DAYTON POWER AND LIGHT COMPANY'S
MEMORANDUM CONTRA MOTION TO STAY PROCEEDINGS
PENDING A RULING FROM THE SUPREME COURT OF OHIO
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

Staying these proceedings is necessary to protect the 456,282 residential customers of Dayton Power and Light Company (“DP&L” or “Utility”) from continuing to pay \$73 million per year in stability charges that are unlawful transition charges. The stay should remain until a decision is issued by the Supreme Court of Ohio regarding the lawfulness of this latest DP&L stability charge.

The \$73 million stability charge is virtually *identical* to the \$285 million stability charge that just last summer the Court ruled was unlawful.¹ Specifically, through

¹ *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734.

DP&L's electric security plan ("ESP") approved by the Public Utilities Commission of Ohio ("PUCO") in Case No. 12-426-EL-SSO, et al., DP&L collected approximately \$285 million from customers in the Dayton area through a so-called stability charge ("Rider SSR"). The Court, however, found the so-called stability charge (Rider SSR) to constitute unlawful transition charges.² Unfortunately for the 456,282 residential customers paying those unlawful transition charges, the unlawful charges were not returned to customers.³

Given the striking similarities to Rider SSR that the Court has deemed unlawful, OCC appealed the PUCO's decision to allow DP&L to re-implement another stability charge from its first ESP, called the Rate Stabilization Charge ("RSC"). OCC reasonably anticipates that the Court will issue a consistent ruling and find that DP&L's current iteration of a stability charge (RSC) is, like the previous stability charge, an unlawful transition charge. A stay is particularly important in the instant case given that the stability charge was implemented in response to the Supreme Court ruling striking down Rider SSR, circumventing the Court's ruling.

The PUCO need merely exercise its well-established authority over managing its docket and stay these proceedings. Not doing so runs the substantial risk of an "unfair outcome" to consumers and a "windfall" to the Utility – where customers pay charges, later determined unlawful, that likely cannot be refunded to customers, unless the Court

² *In re: Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179.

³ Parties have appealed the PUCO's failure to refund payments made under the stability charge in S.Ct. Case No. 2017-241.

overrules *Keco*.⁴ To protect the public interest and avoid irreparable harm, these proceedings should be stayed.

II. RECOMMENDATIONS

A. A Stay is Proper.

Contrary to DP&L's assertions,⁵ the PUCO does have jurisdiction and authority to stay its proceedings pending the outcome of the Supreme Court appeals. The PUCO's authority to act to protect customers can be found under various statutes and case precedent.⁶

Additionally, the PUCO may exercise its discretionary power under Title 49 of the Revised Code to protect customers. It is well settled that the PUCO enjoys broad discretion in managing its docket.⁷ As part of this broad discretion, the PUCO has the power to stay its proceedings where necessary to safeguard the public interest against paying unjust or unreasonable charges.⁸

DP&L argues that, pursuant to R.C. 4903.16, a stay can only be requested from the Supreme Court of Ohio after a party has filed a notice of appeal.⁹ DP&L's Memo Contra, however, has no citation to PUCO rules that limit stays to those sought under

⁴ *In re: Columbus S. Power Co.*, 138 Ohio St. 3d 448 (2014); see also *In re: Columbus S. Power Co.*, 128 Ohio St. 3d 512 (2011).

⁵ DP&L Memo Contra at 1.

⁶ See, e.g., *In re Columbus & Southern Ohio Electric Co.*, Case No. 83-1058-EL-AIR, Entry (November 17, 1982); *In re Commission's Review of Columbus Southern Power Company's and Ohio Power Company's Independent Transmission Plan*, Case No. 02-1586-EL-CSS, Entry (February 20, 2003); *Cinnamon Lake Utilities Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 259 (1975) (Ohio Supreme Court noted that R.C. 4909.16 exists to protect the public interest as well as the interests of the public utility).

⁷ *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 46, 2011-Ohio-2383, ¶ 34, citing *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560 (1982); see also R.C. 4901.13.

⁸ R.C. 4905.22.

⁹ DP&L Memo Contra at 1-2, 4-6.

R.C. 4903.16 after an appeal has been filed. The opportunity for a stay is not exclusively available at the Supreme Court of Ohio.

The PUCO has specifically recognized the ability of parties in PUCO proceedings to request stays and has asserted jurisdiction over such stay requests.¹⁰ The PUCO has granted requests for a stay pending the results of an appeal. In *In re COI of Ameritech Relative to Minimum Telephone Service Standards*, Case No. 99-938-TP-COI, the PUCO granted Ameritech's June 26, 2002, motion to stay portions of the June 20, 2002 Entry on Rehearing.¹¹ Ameritech contended that it would challenge the marketing provisions of the PUCO's orders on appeal and believed that it was inappropriate to begin the process of changing current practices until its concerns were addressed through judicial review.¹² The PUCO ordered that the marketing provisions would not become effective until the completion of Ameritech's appeal.¹³

The PUCO should take similar action in this proceeding pending judicial review. This would allow OCC's legal challenges to be addressed through judicial review before DP&L collects additional monies (millions of dollars) from its customers that DP&L will later argue cannot be refunded if OCC's legal challenges are successful.

The PUCO has also stayed proceedings on its own volition under circumstances where additional review was contemplated. In *In re Commission's Review of Columbus Southern Power Company's and Ohio Power Company's Independent Transmission*

¹⁰ 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 at 5-6 (February 20, 2003) ("Access Charge Decision").

¹¹ *In re COI of Ameritech Relative to Minimum Telephone Service Standards*, Case No. 99-938-TP-COI, Entry at ¶11 (July 18, 2002).

¹² *Id.* at ¶4.

¹³ *Id.* at ¶11.

Plan, Case Nos. 02-1586-EL-CSS, et al., the PUCO implemented a stay pending a ruling from the Federal Energy Regulatory Commission (“FERC”).¹⁴ In that case, the PUCO stated: “The Commission recognizes through its participation in several FERC dockets that there remains many unresolved issues * * *. Therefore, we believe that all further activity, including discovery, * * * should be stayed until more clarity is achieved regarding matters pending at FERC and elsewhere.”¹⁵ There are equally compelling reasons for the PUCO to grant a stay in this proceeding.

Further, the PUCO has adopted the recognized four-factor test governing a stay that was supported by Justice Douglas in his dissenting opinion in *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 31 Ohio St.3d 604 (1987).¹⁶ The PUCO stated that the standard has been deemed appropriate by courts when determining whether to stay an administrative order pending judicial review.¹⁷ The criteria of the four-factor test include:

- (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) Where the public interest lies; and
- (d) Whether the stay would cause substantial harm to other parties.¹⁸

¹⁴ *In re Commission’s Review of Columbus Southern Power Company’s and Ohio Power Company’s Independent Transmission Plan*, Case Nos. 02-1586-EL-CSS, et al., Entry at ¶9 (Feb. 20, 2003).

¹⁵ *Id.*

¹⁶ Access Charge Decision at 5.

¹⁷ *Id.*

¹⁸ *Id.*

As discussed in its motion and again below, OCC satisfies the four-part test to warrant a stay.

In its memorandum contra, DP&L appears to confuse modifying a PUCO order and staying a PUCO order when it incorrectly asserts that OCC is asking the PUCO to modify its prior order.¹⁹ OCC is not. Rather, OCC is requesting that the PUCO stay the proceeding until the Supreme Court of Ohio issues a decision regarding the lawfulness of DP&L's stability charge that results in customers continuing to pay approximately \$73 million per year in subsidies to DP&L.

DP&L also incorrectly argues that a stay conflicts with R.C. 4903.15. As noted by DP&L, R.C. 4903.15 explicitly affords the PUCO with the discretion to specify a different time when an order (or charge contained therein) will become effective: "Unless a different time is specified therein or by law."²⁰

B. A Stay is Necessary to Protect Customers.

As explained previously in its Motion for a Stay, OCC satisfies the four-factor test for issuing a stay.

1. DP&L unreasonably relies upon the PUCO proceeding as evidence of the likelihood of success at the Court.

DP&L recites the PUCO order as evidence of the likelihood of success that OCC will have at the Court.²¹ DP&L's success at the PUCO, however, does not necessarily translate into success before the Supreme Court of Ohio where an appeal currently is pending.

¹⁹ DP&L Memo Contra at 1, 3-4.

²⁰ R.C. 4903.15.

²¹ DP&L Memo Contra at 6-.

It is unreasonable for DP&L to gauge the likelihood of its success on what has transpired at the PUCO in this proceeding, particularly in light of the recent DP&L decision where the Court struck down DP&L's so called "stability" charge on June 20, 2016.²² Taken to its extreme, DP&L's arguments would mean that no stay of a PUCO case could ever be granted because the PUCO Order is controlling with respect to the likely outcome on appeal. DP&L's interpretation makes no sense, and should be disregarded.

Importantly, DP&L's subsequently implemented stability charge (RSC) that was authorized by the PUCO is virtually identical to the earlier stability charge the Court struck down; it is also an unlawful transition charge prohibited by Ohio law. OCC has demonstrated that the RSC permits DP&L to collect an unlawful transition charge or equivalent revenues in violation of R.C. 4928.38, 4928.39, and 4928.40. By the clear language of the statute, after the market development period, DP&L is supposed to be "fully on its own in the competitive market" and there should be no more subsidies paid by customers to support generation in Ohio. The Court's recent decisions in this regard confirm that the PUCO is prohibited from approving the collection of transition revenues or "any equivalent revenues."²³ Accordingly, there is a substantial likelihood of success

²² *In re: Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179.

²³ *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, ¶ 25 ("In sum, we find that the commission erred in focusing solely on whether AEP had expressly sought to receive transition revenues rather than looking at the nature of the costs recovered through the RSR. R.C. 4928.38 bars the '[sic] receipt of transition revenues or any equivalent revenues by an electric utility.' Based on the record before us, we find that the RSR in this case recovers the equivalent of transition revenue and the commission erred when it found otherwise.") (emphasis in original); *In re: Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179 ("The decision of the Public Utilities Commission is reversed on the authority of *In re Application of Columbus S. Power Co.*, ___ Ohio St.3d ___, 2016-Ohio-1608, ___ N.E.3d ___.")

that the Supreme Court of Ohio will act consistently with its recent prior rulings and conclude that DP&L's RSC is another unlawful transition charge.

Additionally, the Court has "complete and independent power of review as to all questions of law" in appeals from the PUCO." *Elyria Foundry Co. v. Pub.Util. Comm.*, 118 Ohio St.3d 269, 2008-Ohio-2230, 888 N.E.2d 1055, ¶ 13 (quoting *Ohio Edison Co. v. Pub.Util. Comm.*, 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1997)). A PUCO order must be reversed, modified, or vacated if the Court finds it unlawful or unreasonable. "R.C. 4903.13 provides that a [PUCO] order shall be reversed, vacated, or modified by this court * * * when, upon consideration of the record, the court finds the order to be unlawful or unreasonable." *Constellation New Energy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, N.E.2d 885, ¶ 50; *Office of Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110, 388 N.E.2d 1370 (1979); *see also* R.C. 4903.13.

Accordingly, it would be unreasonable for DP&L to assume it will succeed on the merits at the Court on the basis that OCC's arguments have not prevailed at the PUCO.

2. DP&L unreasonably argues that OCC will not suffer irreparable harm absent a stay.

DP&L incorrectly argues that not only will OCC and the customers it represents not suffer irreparable harm absent a stay, but its customers will suffer significant irreparable harm if the PUCO issues a stay and DP&L does not continue to collect \$73 million per year from customers through the RSC.²⁴ DP&L argues that irreparable harm will occur because if they don't continue to receive revenues from the stability charge,

²⁴ DP&L's Memo Contra at 16.

their financial integrity and their ability to provide safe and stable service would be jeopardized.²⁵ DP&L's arguments are without merit and should be rejected.

Contrary to DP&L's arguments or threats concerning its ability to provide reliable service to customers as required by Ohio law, the continued collection of \$73 million from customers through an unlawful charge causes 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.'"²⁶ In *Tilberry v. Body*, the Court held that economic harm does become irreparable where the loss cannot be recovered. If the RSC is found to be an unlawful transition charge consistent with Court precedent, Ohio customers, who have been and will be paying the RSC, will be confronted with arguments that they cannot recover charges that have already been collected regardless of a ruling by the Supreme Court of Ohio that it is unlawful.

In the instant case, the harm to customers is even more egregious given that Ohio customers previously paid approximately \$285 million to DP&L under Rider SSR before it was found to be an unlawful transition charge. None of those charges were refunded to Ohioans. Instead, they now are being required to pay an additional \$73 million per year for a nearly identical stability charge, the RSC. If these proceedings and the collection of the RSC are not stayed, Ohioans will be irreparably harmed as it is likely that, under the current state of the law, the payments of those unlawful transition charges will not be refunded to customers unless the Court overturns *Keco*.

²⁵ *Id.*

²⁶ *FOP v. City of Cleveland*, 141 Ohio App.3d 63, 81 (Cuyahoga 2001) (citation omitted).

3. A stay would further the public interest, and any arguments to the contrary are without merit.

Simply put, staying the collection of \$73 million from customers in unjustified and unreasonable charges would benefit the public interest. Justice Douglas's dissent that recommended standards for a stay of a PUCO decision, stated that PUCO Orders "have effect on everyone in this state – individuals, business and industry."²⁷ That effect on customers is all the more pronounced in these times when customers can ill afford increases in what they pay for an essential service – electricity. 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."²⁸

As discussed herein, the stay that OCC seeks would prevent irreparable harm to DP&L's customers, with no substantial harm to the utility. Additionally, the stay would provide some relief to customers who are already burdened by the state of the economy. The public interest, therefore, would be furthered by a stay of the PUCO's proceeding and collection of the RSC charge.

4. DP&L unreasonably argues that a stay would cause it irreparable harm.

In claiming that DP&L's financial integrity and its ability to provide safe and stable services would be jeopardized without the continued collection of \$73 million, DP&L references its own testimony from a pending application, which states if DP&L

²⁷*MCI*, 31 Ohio St.3d at 606.

²⁸*Id.*

failed to maintain its financial integrity, it would affect its ability to provide stable and certain utility service.²⁹ The testimony is vague and undefined as to the terms “stable and certain utility service” and “maintain its financial integrity.” Further, it is outside the record of this proceeding, has not been tested in cross examination in this proceeding, has not been successfully adopted by a PUCO order, and improperly references DP&L’s parent company. DP&L should not be permitted to rely on such information/evidence that is not part of the proceeding at issue.

Moreover, based upon the Court’s prior decision on June 20, 2016 finding Rider SSR to be an unlawful transition charge, it can hardly be unexpected or unforeseeable that the Court will likewise find the nearly identical RSC to be unlawful.

Nonetheless, whatever harm that DP&L would claim is clearly offset by the approximately \$285 million already wrongfully collected by DP&L under the Rider SSR. As such, substantial harm will not come to DP&L by staying these proceedings, but the continued collection of the RSC from Ohioans will cause irreparable harm.³⁰

For the foregoing reasons, the PUCO should stay this proceeding until the Court issues a decision on the pending appeals.

III. CONCLUSION

A stay is needed to avoid what the Supreme Court of Ohio has previously recognized as an “unfair outcome” to customers and a “windfall” to the Utility. Under its prior ESP, DP&L was permitted to keep approximately \$285 million of Ohioans’ money

²⁹ DP&L’s Memo Contra at 16.

³⁰ As the PUCO is aware, in its most recent ESP, Case No. 16-0395-EL-SSO, et al., DP&L has entered into a Stipulation with various parties and Staff, which is being considered by the PUCO at this time. If the Stipulation is approved, then the RSC is no longer applicable. As such, DP&L already is making plans for the RSC charge to no longer be collected and cannot claim substantial harm for such collections to be stayed pending the appeals.

after the Court overturned a PUCO decision approving an unlawful charge that was collected from customers during the pendency of the appeal. In order to prevent a potential, similar, unjust windfall to DP&L at the expense of consumers, the PUCO should exercise its powers to stay the continued collection of the current stability charge (RSC) during the pendency of the appeals at the Supreme Court of Ohio. It is clearly in the public interest to grant a stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply was served on the persons stated below via electronic transmission, this 18th day of May 2017.

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