

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the Dayton)	
Power and Light Company for an Increase in)	Case No. 15-1830-EL-AIR
Electric Distribution Rates.)	

In the Matter of the Application of the Dayton)	
Power and Light Company for Approval to Change)	Case No. 15-1831-EL-AAM
Accounting Methods.)	

In the Matter of the Application of the Dayton)	Case No. 15-1832-EL-ATA
Power and Light Company for Tariff Approval.)	

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

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The settlement that was negotiated and signed by Dayton Power & Light (“DP&L”), the Office of the Ohio Consumers’ Counsel (“OCC”), the PUCO Staff, and many others should be approved particularly because it benefits Dayton-area consumers. Customers will especially benefit from the agreement to offset DP&L’s charges to reflect this year’s federal corporate income tax reduction. In Dayton, where consumers are challenged with high poverty levels,¹ this agreement to significantly reduce DP&L’s original proposed rate increase is in the public interest.

The Settlement² is a comprehensive resolution of all issues in this base rate case and satisfies the PUCO’s three-prong test for evaluating settlements. Nearly all parties to this case either support or do not oppose the Settlement.

¹ See *In re Application of Dayton Power & Light Co. to Establish a Standard Service Offer*, Case No. 16-395-EL-SSO, Opinion & Order ¶ 123 (Oct. 20, 2017) (PUCO finding that “a significant number of people in the DP&L service territory live below the poverty line”).

² Joint Ex. 1.

The Settlement was the product of serious bargaining among capable, knowledgeable, and diverse parties. That diversity includes the utility (DP&L) and the State’s statutory advocate for the utility’s residential consumers (OCC). The Settlement benefits customers and the public interest. And the Settlement is consistent with regulatory principles and practices. It passes the PUCO’s three-prong test for settlements. The PUCO should approve it without modification.

I. STANDARD OF REVIEW

In PUCO proceedings, the applicant bears the burden of proof.³ In the context of a stipulation, 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.”⁴ A settlement is a recommendation to the PUCO on behalf of the settling parties.⁵ It is not binding on the PUCO,⁶ and ultimately, the PUCO must “determine what is just and reasonable from the evidence presented at the hearing.”⁷

³ *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.”).

⁴ *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*, Case No. 14-1693-EL-SSO, Opinion & Order at 18 (Mar. 31, 2016).

⁵ *Duff v. PUCO*, 56 Ohio St. 2d 367, 379 (1978).

⁶ *Id.* See also Ohio Adm. Code 4901-1-30(E).

⁷ *Duff*, 56 Ohio St. 2d at 379.

In evaluating settlements, the ultimate issue for the PUCO's consideration is whether the agreement “is reasonable and should be adopted.”⁸ In answering this question, the PUCO has adopted the following three-prong test:⁹

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 violate any important regulatory principle or practice?

In considering the first prong, the PUCO evaluates the diversity of the signatory parties, though no threshold level of diversity is mandatory for approval.¹⁰

II. RECOMMENDATIONS

The PUCO should approve the Settlement. It satisfies the PUCO’s three-prong test.

⁸ *In re Application of Vectren Energy Delivery of Ohio, Inc. for Authority to Amend its Tariffs*, Case No. 04-571-GA-AIR, Opinion & Order at 9, (Apr. 13, 2015).

⁹ *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123, 126 (1992).

¹⁰ See *In re Application of the Dayton Power & Light Co. to Establish a Standard Serv. Offer*, Case No. 16-395-EL-SSO, Opinion & Order ¶ 21 (Oct. 20, 2017) (“Although diversity of interests among signatory parties is not *necessary* for any stipulation to meet the first prong, it is *helpful* if the signatory parties do represent a variety of interests.”) (emphasis in original); *In re Application of [FirstEnergy] for Approval of [its] Energy Efficiency & Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-743-EL-POR, Opinion & Order ¶ 61 (Nov. 21, 2017) (“While the diversity of the signatory parties may be a consideration in determining whether a settlement is a product of serious bargaining among capable, knowledgeable parties under the first prong of the Commission's test, there is no diversity requirement that the residential customers' statutory representative be a signatory party for agreements which may result in increased costs for the residential class.”); *In re Application of Ohio Power Co. to Initiate Phase 2 of its gridsmart Project*, Case No. 13-1939-EL-RDR, Opinion & Order ¶ 50 (Feb. 1, 2017) (“In determining whether a settlement is the product of serious bargaining among capable, knowledgeable parties, we consider the extent of negotiations and the diversity of the negotiating parties, but there is no requirement that any particular party be a signatory to satisfy this first prong.”).

A. The Settlement is the product of serious bargaining among capable, knowledgeable parties.

No party introduced evidence suggesting that the Settlement violates the first prong of the PUCO's three-prong test. OCC witness Willis testified that the first prong of the test is met. He stated that (i) the parties to this proceeding have participated in numerous proceedings before the PUCO, (ii) the signatory parties were represented by experienced and competent counsel, (iii) the parties are diverse,¹¹ (iv) the parties participated in negotiations that required numerous meetings for many hours, and (v) the settlement negotiations resulted in concessions.¹² Mr. Willis noted the diversity brought to the Settlement by OCC, "which represents DP&L's 460,000 residential consumers."¹³

DP&L witness Schroder similarly testified that the Settlement meets the first prong of the PUCO's settlement test. Her testimony included that the parties to the Settlement represent a "wide spectrum of diverse interests."¹⁴

Witnesses for energy marketers RESA and IGS—the only parties opposing the Settlement—said nothing about the first prong. And neither Ms. Schroder nor Mr. Willis were cross-examined regarding the first prong.¹⁵ Thus, the testimony of DP&L witness

¹¹ The parties to the Settlement are DP&L, OCC, the Kroger Company, the PUCO Staff, Ohio Energy Group, Wal-Mart Stores East, LP, Sam's East, Inc., Ohio Hospital Association, Ohio Environmental Council, Environmental Defense Fund, Natural Resources Defense Council, Environmental Law & Policy Center, Edgemont Neighborhood Coalition, Ohio Partners for Affordable Energy, and the City of Dayton. The non-opposing parties are Industrial Energy Users-Ohio, Ohio Manufacturers' Association Energy Group, Buckeye Power, Inc., and One Energy Enterprises, LLC. *See* Joint Ex. 1 at 17-18; DP&L/City of Dayton Ex. 1 at 4. The only parties opposing the Settlement are the Retail Energy Supply Association ("RESA") and Interstate Gas Supply, Inc. ("IGS").

¹² OCC Ex. 1 at 4-5 (Direct Testimony of Wm. Ross Willis in Support of the Stipulation and Recommendation) (the "Willis Testimony").

¹³ *Id.* at 4.

¹⁴ DP&L Ex. 1 at 5-6 (Testimony of Sharon R. Schroder in Support of the Stipulation and Recommendation).

¹⁵ *See generally* Tr. Vol. I-II.

Schroder and OCC witness Willis is un rebutted, and the PUCO should find that the Settlement meets the first prong of the PUCO's test.

B. The Settlement benefits customers and the public interest.

OCC witness Ross Willis described the numerous benefits to customers under the Settlement:

- “The annual increase to the base distribution revenue requirement that customers will pay is reduced from DP&L’s proposed \$65.8 million increase to a \$29.7 million increase.”¹⁶
- “DP&L’s new base rates to be charged to customers will reflect a reduction in its federal income tax expense to recognize the lowering of the federal income tax rate from 35% to 21%” resulting from the Tax Cut and Jobs Act (“TCJA” or “federal tax cut”) effective January 1, 2018.¹⁷
- “The gross revenue conversion factor reflects the lowering of the federal income tax rate from 35% to 21%, which reduces the base distribution rates charged to customers.”¹⁸
- “DP&L will promptly return to customers all excess accumulated deferred income taxes (‘ADIT’) resulting from the Tax Cuts and Jobs Act [] and the full balance of the regulatory liability ordered by the PUCO effective January 1, 2018 in Case No. 18-47-AU-COI (the ‘Tax Investigation Case’).”¹⁹
- “Regarding the eligible unprotected portion of the excess ADIT [] and the regulatory liability relating to the January 10, 2018 PUCO Order in the Tax Investigation Case, customers will receive a minimum \$20 million in tax savings over five years, with the remainder (if any) to be returned over the next five years which reduces the base distribution rates charged to consumers.”²⁰

¹⁶ Willis Testimony at 5. *See also* Staff Ex. 6 at 4 (Prepared Testimony of David Liphtratt, Rates and Analysis Department, Research and Policy Division, Public Utilities Commission of Ohio).

¹⁷ Willis Testimony at 5-6. *See also* Staff Ex. 6 at 4-5.

¹⁸ Willis Testimony at 6. *See also* Staff Ex. 6 at 4-5.

¹⁹ Willis Testimony at 6.

²⁰ *Id.*

- “The distribution-related eligible protected excess ADIT will be returned to customers consistent with federal law.”²¹
- The Settlement prohibits DP&L from opposing the return of tax savings to customers in the PUCO’s Tax Investigation Case and in other proceedings.²²
- The Settlement includes a 7.27% rate of return. This is lower than the 7.86% rate of return that DP&L proposed in its application. It is lower than even the low end of the PUCO Staff’s recommended range of 7.33% to 7.82% from the Staff Report.²³ As OCC witness Willis explained: “This reduces the amount that customers will pay in base rates.”²⁴
- DP&L will work with OCC and the PUCO Staff to develop an annual plan to improve reliability of electric service for Dayton-area customers.²⁵
- “If DP&L fails to meet certain [service] reliability metrics, . . . then the maximum amount of charges to customers under DP&L’s Distribution Investment Rider will decrease by \$2.0 million per year.”²⁶
- “Once new base distribution rates go into effect, DP&L will no longer charge customers for so-called ‘lost revenues’ resulting from its energy efficiency programs.”²⁷
- The residential customer charge will be \$7.00, which is lower than DP&L’s proposed \$13.73 charge, and lower than the PUCO Staff’s recommended \$7.88 customer charge.²⁸

²¹ *Id.* at 7.

²² *Id.*

²³ See Staff Report (Mar. 12, 2018) at 18.

²⁴ Willis Testimony at 7. See also Staff Ex. 6 at 5.

²⁵ Willis Testimony at 7.

²⁶ *Id.* at 7-8.

²⁷ *Id.* at 8.

²⁸ *Id.*; Staff Ex. 6 at 5.

- The Settlement protects the benefit of DP&L’s competitively-bid standard offer for consumers, which is an important option that consumers have for electric generation service. The PUCO Staff’s original proposal that DP&L might collect its PUCO and OCC assessment fees only from standard offer customers—which would have raised the price of the standard offer compared to marketer offers—has thankfully been withdrawn.²⁹
- The Settlement also is commendable for protecting the benefit of DP&L’s competitively bid standard offer for consumers by avoiding an allocation of distribution costs only to customers who use DP&L’s standard service offer. The reallocation approach would have harmed customers by increasing the price of the standard offer for consumers. As OCC witness Willis testified: “These results are important for the public interest and for preserving for consumers the benefit of the competitively bid standard service offer.”³⁰
- One of the best points of the Settlement is that it avoids efforts, such as by marketers IGS and RESA, to artificially increase the competitively-bid price of DP&L’s standard offer. What the marketers recommend—increasing the standard offer price relative to their prices³¹—is one of the worst things that could be done to consumers. For consumers on the standard offer, it gives them the benefit of a competitively-bid service for their electric generation. For consumers considering a switch to a marketer, the standard offer gives them a good comparison point for analyzing marketer offers. The marketers’ efforts to increase consumer prices for the standard offer should be rejected to protect consumers and the public interest.

In light of these benefits to customers and the public interest, the Settlement satisfies the second prong of the PUCO’s test.

C. The Settlement does not violate any regulatory principles or practices.

As OCC witness Willis explained, because of the downward adjustments for the federal tax cut, rate of return, and the lower customer charge, among other things,

²⁹ Tr. Vol. II at 307:6-309:22 (PUCO Staff witness Smith explaining that Staff has withdrawn its recommendation to allocate PUCO and OCC assessments only to standard service offer customers); Tr. Vol. I at 100:8-17 (OCC witness Willis explaining that this proposal is not part of the Settlement);

³⁰ Willis Testimony at 8.

³¹ RESA/IGS Ex. 2.

DP&L's base distribution rates will be lower under the Settlement than as proposed in DP&L's application.³² This will result in more just and reasonable rates for consumers, which is consistent with regulatory principles and practices.³³

The Settlement is also consistent with binding Ohio Supreme Court precedent, which requires the PUCO to account for changes to tax rates under the federal tax cut in this base rate case. In *East Ohio Gas Co. v. PUCO*,³⁴ the PUCO knew that tax rates changed from the time of the test period to the time that new rates would actually be in effect.³⁵ The Court found that "[i]t was the duty of the commission to consider not only the taxes actually assessed during the test period, but to compute what they would be after the test period in view of the change in laws"³⁶ Because the PUCO knew about the change in tax rate at the time of its order, it was required to set new rates based on the new tax rate.³⁷

The PUCO has in past cases followed the Court's dictate and made adjustments that reflect post-test year changes in the actual taxes a utility is liable for. In *In re Application of Ohio Power Co. to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*,³⁸ for example, the PUCO cited *East Ohio Gas* and concluded, quite plainly: "Ohio law requires that all known changes in the tax laws after

³² Willis Testimony at 9.

³³ *Id.*

³⁴ 133 Ohio St. 212 (1938).

³⁵ *Id.* at 226.

³⁶ *Id.*

³⁷ *Id.* See also *Gen. Tel. Co. v. PUCO*, 174 Ohio St. 575, 576-80 (1963) (citing *East Ohio Gas* and concluding that the PUCO is required to set rates based on the actual federal taxes that a utility will pay).

³⁸ PUCO Case No. 78-676-EL-AIR, 1979 Ohio PUC LEXIS 2 (Apr. 16, 1979).

the test year must be recognized in setting rates.”³⁹ Accordingly, the PUCO approved rates based on a new tax rate that went into effect after the test period ended.⁴⁰

Similarly, in *In re Application of the Cleveland Electric Illuminating Co. for Authority to Amend and Increase its Filed Schedules Fixing Rates and Charges for Electric Service*,⁴¹ the PUCO adjusted tax allowances to reflect the lower tax liability of utilities in response to the Tax Reform Act of 1986. There, the PUCO rejected the utility’s argument that a higher tax allowance should be approved.⁴² Parties argued that allowing any rate higher than the actual tax rate would cause customers to overpay for utility service and that known and measurable tax changes should be recognized.⁴³ The PUCO agreed and found that allowing the utility to charge customers utility rates based on outdated, higher tax rates “would, without a doubt, overstate [federal income tax] expense for the period [the utility’s] rates approved in this case will be in effect.”⁴⁴

The binding precedent of the Ohio Supreme Court is unambiguous: when the PUCO has actual knowledge of the tax rate that a utility will be assessed after the test year, the PUCO must account for the actual tax liability when setting rates. Here, the Settlement complies with Supreme Court precedent because it (i) adjusts the test year tax expense to reflect the lower 21% federal income tax rate that became effective January 1, 2018, and (ii) calculates the gross revenue conversion factor using the current 21%

³⁹ *Id.* at *41.

⁴⁰ *Id.*

⁴¹ Case No. 86-2025-EL-AIR, 1987 Ohio PUC LEXIS 28 (Dec. 16, 1987).

⁴² *Id.* at *194-200.

⁴³ *Id.* at *194-96.

⁴⁴ *Id.* at *197 (citing *Ohio Power*, Case No. 78-676-EL-AIR (Apr. 16, 1979)).

federal income tax rate instead of the old 35% rate.⁴⁵ Thus, for these additional reasons, the Settlement is consistent with regulatory principles and practices.

III. CONCLUSION

The PUCO should approve the Settlement without modification. The Settlement provides significant benefits to Dayton-area consumers, is just and reasonable, and satisfies each of the PUCO's three prongs for approval.

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⁴⁵ Willis Testimony at 5-6.

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 17th day of August 2018.

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