BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company to Update its Distribution Decoupling Rider	: : : : :	Case No. 18-1605-EL-RDR

THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN OPPOSITION TO THE APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION AND SUMMARY

The Dayton Power and Light Company ("DP&L" or "Company") initiated this proceeding to update its Distribution Decoupling Rider ("Decoupling Rider") with prospective decoupling charges and a reconciliation of historic decoupling costs not previously collected that were incurred before the Company's current distribution rates went into effect.[1] There is no dispute that DP&L did not collect the full amount of lost distribution revenues ("LDR") authorized for recovery by the Commission[2] upon transferring its recovery mechanism for such revenue reductions from the Energy Efficiency Rider to the newly-created Decoupling Rider as part of the Company's third Electric Security Plan.[3] There is also no dispute that DP&L does not seek to recover LDR incurred after the Rate Case Order was issued. DP&L merely seeks to true-up the Decoupling Rider deferral balance as it transitions to a revenue-per-customer ("RPC") decoupling methodology on a going-forward basis. The Staff, which joined DP&L's Rate Case Stipulation, ESP III Stipulation, and Third Portfolio Plan Stipulation, reviewed DP&L's proposed approach and recommended its approval. Dec. 20, 2018 Review and Recommendations. That

[1] In the Matter of the Application of The Dayton Power and Light Company to Increase Its Rates for Electric Distribution, et al., Case No. 15-1830-EL-AIR, et al. ("In re DP&L Rate Case"), Sept. 26, 2018 Opinion and Order ("Rate Case Order") (adopting the June 18, 2018 Stipulation and Recommendation in that proceeding ("Rate Case Stipulation")).

[2] 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. 16-0649-EL-POR, et al. ("In re DP&L Third Portfolio Plan"), Sept. 27, 2017 Opinion and Order ("Third Portfolio Plan Order") (approving the Dec. 13, 2016 Stipulation and Recommendation in that proceeding ("Third Portfolio Plan Stipulation")).

[3] In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan, et al., Case No. 16-0395-EL-SSO, et al. ("In re DP&L ESP III"), Oct. 20, 2017 Opinion and Order ("ESP III Order") (modifying and approving the Mar. 14, 2017 Amended Stipulation and Recommendation in that proceeding ("ESP III Stipulation")).

(footnote cont'd…)

proposal was automatically implemented on January 1, 2019 pursuant to Section III.3.f of the Rate Case Stipulation.

In its Application for Rehearing,[4] The Office of the Ohio Consumers' Counsel ("OCC") erroneously argues (p. 7) that DP&L "waived" recovery of its Decoupling Rider deferral balance in the Rate Case Stipulation by agreeing that the Decoupling Rider would be set to zero before it was repopulated under the new RPC decoupling methodology. Rate Case Stipulation, § III.3.b. Not so. Indeed, the Rate Case Stipulation establishes the rate of return that DP&L would earn on its "Decoupling Rider deferral balance" (§ III.3.e), which plainly demonstrates an intent that the deferral balance be recovered. Indeed, as the Commission knows, setting a rider to zero on a going-forward basis is entirely different than eliminating a historic deferral collected under that rider. The Rate Case Stipulation did not eliminate DP&L's right to recover its Decoupling Rider deferral balance, but instead, established carrying charges at the cost of long-term debt for that balance. The deferral balance is, thus, recoverable, and the Commission should reject OCC's first assignment of error.

The Commission should also reject OCC's second assignment of error, which is merely a collateral attack on the Commission's Third Portfolio Plan Order and a request for an unlawful refund. Pursuant to R.C. 4903.15, that Order – including its authorization of LDR recovery – was "effective immediately." In arguing that the Commission should reconsider that decision in this proceeding, OCC essentially has attempted to file a second, untimely application for rehearing. R.C. 4903.10; Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300,

[4] Jan. 29, 2019 Application for Rehearing by The Office of the Ohio Consumers' Counsel ("Application for Rehearing").

2006-Ohio-5789, 856 N.E.2d 213. Moreover, OCC does not even attempt to cite authority supporting a refund, which is barred by not only statute, but also longstanding precedent of the Commission and the Supreme Court of Ohio. R.C. 4905.32; Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 141 N.E.2d 465 (1957).

II. BACKGROUND

For nearly a decade, DP&L has been required to maintain energy-efficiency and peak-demand reduction programs under R.C. 4928.66(A)(1)(a) and (b) in order to meet certain statutory benchmarks. Pursuant to R.C. 4928.66(D):

> "The commission may establish rules regarding the content of an application by an electric distribution utility for commission approval of a revenue decoupling mechanism . . . 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 and reasonably aligns the interests of the utility and of its customers in favor of those programs."

Id. The Commission allows electric distribution utilities to seek recovery of such revenue reductions in their applications for energy-efficiency and peak-demand-reduction programs ("Portfolio Plans") under Ohio Adm.Code 4901:1-39-07:

> "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, demand response, energy efficiency program costs, appropriate lost distribution revenues, and shared savings."

Ohio Adm.Code 4901:1-39-07(A). "Any such recovery shall be subject to annual reconciliation after issuance of the commission verification report issued pursuant to this chapter." Id. (emphasis added).

In DP&L's first Electric Security Plan ("ESP I") case, the Commission approved the Company's Energy Efficiency Rider to recover, among other costs, LDR resulting from its Portfolio Plans.[5] The Commission also ruled that DP&L's energy-efficiency and peak-demand-reduction programs approved in ESP I satisfied Ohio Adm.Code 4901:1-39-04.[6] In DP&L's second Portfolio Plan case,[7] the Commission again adopted a Stipulation and Recommendation providing that the Energy Efficiency Rider would largely "continue in its same form," with modifications not relevant here. Second Portfolio Plan Stipulation, pp. 10-11. That case had the effect of establishing DP&L's right to continue collecting LDR under the Energy Efficiency Rider.

While DP&L's Second Portfolio Plan was still in effect, the Company commenced its recent distribution rate case and ESP III case, the latter of which proposed a new decoupling methodology to replace the recovery of LDR. In re DP&L Rate Case, Nov. 30, 2015 Application; In re DP&L ESP III, Feb. 22, 2016 Application. Shortly thereafter, DP&L sought approval of its Third Portfolio Plan. In re DP&L Third Portfolio Plan, Mar. 25, 2016 Application.

[5] In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan, et al., Case No. 08-1094-EL-SSO, et al. ("In re DP&L ESP I"), June 24, 2009 Opinion and Order ("ESP I Order") (adopting the Feb. 24, 2009 Stipulation and Recommendation in that proceeding ("ESP I Stipulation")), p. 5..

[6] In the Matter of the Application of The Dayton Power and Light Company for a Finding that DP&L Has Satisfied Program Portfolio Filing Requirements, Case No. 09-1986-EL-POR ("In re DP&L First Portfolio Plan"), Apr. 27, 2011 Opinion and Order, p.5.

[7] 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 2013 through 2015, Case No. 13-0833-EL-POR, et al. ("In re DP&L Second Portfolio Plan"), Dec. 4, 2013 Opinion and Order ("Second Portfolio Plan Order") (adopting the Oct. 2, 2013 Stipulation and Recommendation in that proceeding ("Second Portfolio Plan Stipulation")).

The timing of the resolution of those cases led to the deferral balance at issue here. DP&L's Third Portfolio Plan case was resolved first. In the Third Portfolio Plan Stipulation, DP&L agreed that its Energy Efficiency Rider would "continue in its same form," with exceptions not relevant here, and that "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." Third Portfolio Plan Stipulation, p. 11. Like its Second Portfolio Plan, the Third Portfolio Plan established DP&L's right to continue to collect LDR. Indeed, the Energy Efficiency Rider tariff was to be "updated to incorporate these changes, along with updating the reconciliation portion of the rate with the most recent deferral balance, within 30 days of a Commission order approving this Stipulation." Id. The Commission adopted the Third Portfolio Plan Stipulation on September 27, 2017 in Case No. 16-0649-EL-POR.

While the Third Portfolio Plan Stipulation was pending approval, DP&L entered into the ESP III Stipulation, pursuant to which DP&L agreed to "implement the Decoupling Rider to include the lost revenues currently recovered through the Energy Efficiency Rider as agreed to in the Stipulation filed in Case No. 16-649-EL-POR on December 13, 2016." ESP III Stipulation, § VI.1.b (emphasis added). "All other matters relating to the Decoupling Rider, including but not limited to cost allocation, term and rate design, shall be addressed in the pending distribution case, Case No. 15-1830-EL-RDR or in DP&L's next Energy Efficiency Portfolio case." Id. The Commission modified and approved the ESP III Stipulation on October 20, 2017 in Case No. 16-0395-EL-SSO.

Although the ESP III Order was issued after the Third Portfolio Plan Order, due to the timing restrictions for updating the rate set forth in in the Third Portfolio Stipulation, DP&L had

not yet updated its Energy Efficiency Rider to reflect the new rates by the time the ESP III Order was implemented.[8] Thus, the "lost revenues currently recovered through the Energy Efficiency Rider" at that time were still based on the Company's Second Portfolio Plan, rather than its Third Portfolio Plan. DP&L, therefore, populated the Decoupling Rider with stale rates from the Second Portfolio Plan, resulting in an immediate under recovery of approved amounts.[9]

The Rate Case Stipulation was reached June 18, 2018 in Case No. 15-1830-EL-AIR. In addition to proposing a new decoupling methodology, that agreement provided several terms pertinent here:

> "b. The Decoupling Rider will be set to zero with the implementation of this distribution rate case; . . .
>
> d. For subsequent annual true-ups, the Decoupling Rider rate or credit will be calculated by taking the difference, whether positive or negative, between the updated Allowed Revenue Requirement (calculated by multiplying the updated number of customers by the RPC) and actual base distribution revenues for tariff classes D17, D18, and D19 in the calendar year. The Decoupling Rider will be reconciled on a calendar year basis and will be effective April 1st of each year;
>
> e. The Decoupling Rider deferral balance (whether over or under) will include carrying costs at DP&L's Stipulated Cost of Debt;
>
> f. The Decoupling Rider tariffs will be automatically implemented 60 days after the filing of the Company's Decoupling Rider filings, unless suspended by the Commission. The Decoupling Rider is subject to reconciliation or adjustment, including but not limited to, increases or refunds. Such reconciliation or adjustment shall be limited to the twelve-month period upon which the rates were calculated, if determined to be unlawful, unreasonable, or imprudent by the Commission, or the

[8] In re DP&L 2017-2019 Portfolio Case, Oct. 27, 2017 Tariff Sheets.

[9] In re DP&L ESP III, Oct. 31, 2017 Tariff Sheets.

> Supreme Court of Ohio, in the docket those rates were approved or the docket where the audit of those rates occurred; . . .
>
> h. Pursuant to the Stipulation approved by the Commission in Case No. 17-1398-EL-POR, with the implementation of this distribution rate case, DP&L shall not be entitled to double collect the same revenue reductions through lost distribution revenues and decoupling charges simultaneously."

Rate Case Stipulation § III.3 (emphasis added). This agreement was approved by the Commission on September 26, 2018, and the Decoupling Rider was set to zero. In re DP&L Rate Case, Sept. 28, 2018 Tariff Sheets for Electric Service, Fourth Revised Sheet No. D32.

DP&L thereafter initiated this proceeding to udpate the Decoupling Rider to recover prospective RPC calculations and to true-up the rider by reconciling the Company's previously incurred Decoupling Rider deferral balance. Oct. 31, 2018 Application. Upon review, the Commission's Staff recognized that DP&L had included this deferral and recommended that the proposed Decoupling Rider be approved. Dec. 20, 2018 Review and Recommendations, p. 2. The proposal was automatically implemented on January 1, 2019. Rate Case Stipulation, § III.3.f ("The Decoupling Rider tariffs will be automatically implemented 60 days after the filing of the Company's Decoupling Rider filings, unless suspended by the Commission.").

III. STANDARD OF REVIEW

Applications for rehearing following a Commission order must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." R.C. 4903.10(B). The Supreme Court of Ohio strictly construes that requirement, holding that when an appellant's grounds for rehearing fail to specifically allege in what respect the Commission's order was unreasonable or unlawful, "the requirements of R.C. 4903.10 have not been met." Discount Cellular, Inc. v. Pub. Util. Comm., 112 Ohio St.3d 360, 2007-Ohio-53, 859

N.E.2d 957, ¶ 59. Accord: City of Cincinnati v. Pub. Util. Comm., 151 Ohio St. 353, 378, 86 N.E.2d 10 (1949) ("[T]he General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant's application for rehearing used a shotgun instead of a rifle to hit that question.").

IV. DP&L MAY RECOVER ITS DECOUPLING RIDER DEFERRAL BALANCE UNDER THE DECOUPLING RIDER

DP&L is entitled to reconcile historic approved amounts that the Company under-recovered between the ESP III Order implementing the Decoupling Rider and the Rate Case Order adopting a new revenue decoupling methodology. Indeed, pursuant to Ohio Adm.Code 4901:1-39-07(A), "[a]ny such recovery shall be subject to annual reconciliation after issuance of the commission verification report issued pursuant to this chapter." Id. (emphasis added). Accord: In the Matter of the Review of the Demand Side Management and Energy Efficiency Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, et al., Case No. 17-2277-EL-RDR, et al., June 28, 2018 Finding and Order, ¶ 10 (approving language in FirstEnergy's Rider DSE tariff that the rider is subject to reconciliation as consistent with FirstEnergy's Electric Security Plans). At no point does the Rate Case Stipulation purport to eliminate the reconciliation required by the Commission's rules, and no waiver of that rule was sought. Ohio Adm.Code 4901-1-38.

OCC reads words into the Rate Case Stipulation that do not exist in the four-corners of the document in an effort to argue that DP&L is not entitled to reconcile previously approved decoupling costs. Specifically, OCC argues that "[i]t would defeat the purpose of resetting the [decoupling] rate to zero if DP&L could subsequently charge customers for amounts that accrued prior to the date on which a rider was set to zero." Application for Rehearing, p. 6. However, as

the Commission knows, setting a rider to zero on a forward-looking basis is entirely different than eliminating a historic deferral balance that accumulated under that rider. If the signatories to the Rate Case Stipulation had intended to eliminate the Decoupling Rider deferral balance, then they would have said so. Instead, the parties agreed as to what the rate of return on that Decoupling Rider deferral balance would be (¶ III.3.e), plainly demonstrating their intent that the historic LDR would be recovered.

Moreover, setting the Decoupling Rider rate to zero gave customers temporary relief in their bills. But OCC takes an illogical leap to assume that rate setting language undid a previous Stipulation and Order that granted DP&L the right to collect lost distribution revenues from 2016 through the resetting of the Decoupling Rider in the distribution rate case. Taking OCC's erroneous argument to its necessary conclusion would mean that over recoveries, such as those in the Energy Efficiency Rider, should not be returned to customers because the rate was already set. Certainly, OCC would not make such an argument in the converse when it would result in refunds to customers.

OCC ignores other provisions in the Rate Case Stipulation that add further clarity to DP&L's right to collect the previously incurred Decoupling Rider deferral balance under the Decoupling Rider. The Rate Case Stipulation expressly contemplates the treatment of deferral balances under the Decoupling Rider (§ III.3.e), and provides for true-ups and annual reconciliations (§ III.3.d and f). This provision clearly demonstrates an intent that the deferral balance be recovered.

Finally, to further clarify the issue, DP&L agreed that it "shall not be entitled to <u>double collect</u> the <u>same revenue reductions</u> through lost distribution revenues and decoupling charges

simultaneously." Rate Case Stipulation § III.3.h (emphasis added). If the intent was – as OCC suggests – that there would be no future recovery of LDR, then the sentence would have said "there will be no future recovery of any past LDR reconciliation amounts." The fact that the sentence says there will be no "double" collection of LDR and decoupling charges demonstrates that the recovery of DP&L's historic LDR deferral balance – which does not include the "same revenue reductions" as prospective decoupling charges – was intended and is authorized. To that end, Staff recommended approval of DP&L's Decoupling Rider application.

The Commission should, therefore, reject OCC's first assignment of error and allow DP&L to reconcile and recover its Decoupling Rider deferral. Rate Case Stipulation, § III.3.e.

V. THE COMMISSION SHOULD REJECT OCC'S COLLATERAL ATTACK AGAINST THE THIRD PORTFOLIO PLAN ORDER AND ITS REQUEST FOR AN UNLAWFUL REFUND

In its Application for Rehearing, OCC also impermissibly launches a collateral attack on the Commission's Third Portfolio Plan Order, which is subject to a pending application for rehearing by OCC. In re DP&L Third Portfolio Plan, Nov. 21, 2017 Entry on Rehearing (granting OCC's Oct. 27, 2017 Application for Rehearing for further consideration). Pursuant to R.C. 4903.10, an application for rehearing may be filed only within 30 days of a Commission Order. Any issue not set forth specifically in a party's first application for rehearing is waived. Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213. Since the Third Portfolio Plan Order was issued on September 27, 2017 in Case No. 16-0649-EL-POR, OCC's attack on that Order in this proceeding is nothing more than an untimely application for rehearing and an improper collateral attack. DP&L cannot be faulted for following that Order, which became "effective immediately." R.C. 4903.15. Moreover, the Commission's Order in that case was correct for the reasons stated in DP&L's November 6, 2017

Memorandum in Opposition to OCC's Application for Rehearing in that case, which are incorporated by reference here.

In addition, the Commission should not grant a refund of LDR collected under the Company's Third Portfolio Plan, particularly in this proceeding. Such refunds are first barred by statute. Pursuant to R.C. 4905.32,

> "No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service."

Refunds are also barred by long-standing precedent of the Commission and the Supreme Court of Ohio. Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 141 N.E.2d 465 (1957), paragraph two of the syllabus ("Where the charges collected by a public utility are based upon rates which have been established by an order of the Public Utilities Commission of Ohio, the fact that such order is subsequently found to be unreasonable or unlawful on appeal to the Supreme Court of Ohio, in the absence of a statute providing therefor, affords no right of action for restitution of the increase in charges collected during the pendency of the appeal."). Accord: id. at 257 ("Under [R.C. 4905.32] a utility has no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so collected."). Any refund would violate the well-settled principle that "retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme." Lucas Cty. Commrs. v. Pub. Util. Comm., 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997). OCC does not even attempt to argue otherwise.

VI. MISCELLANEOUS ISSUES

In addition to its assignments of error, OCC raises two miscellaneous issues in its Application for Rehearing. First, OCC erroneously claims (pp. 2-3) that DP&L violated a $72 million cap on LDR set in its Second Portfolio Plan in Case No. 13-0833-EL-POR. The Commission has already rejected this very same argument in the 16-649-EL-POR case. *See*, Sept. 27, 2017 Third Portfolio Plan Order at ¶ 51-52. Moreover, as DP&L demonstrated in its November 6, 2017 Memorandum in Opposition to OCC's Application for Rehearing and DP&L's Reply Brief in Support of The December 13, 2016 Stipulation and Recommendation in Case No. 16-0649-EL-POR (both of which are incorporated by reference here), that cap was specifically limited to the portfolio for the years of 2013-2015. Accord: Dec. 4, 2013 Second Portfolio Plan Order, p. 9 ("DP&L will collect no more than $72 million dollars total of lost distribution revenues related to its EE/PDR program portfolio plans through December 31, 2015.") (emphasis added). Thus, OCC's complaints about this expired cap are without merit.

Second, OCC complains about (pp. 1-2, 6-9) the "automatic" approval of DP&L's proposal in this case. However, OCC ignores the fact that the Commission's Staff reviewed DP&L's proposal and recommended its adoption before implementation. Dec. 20, 2018 Review and Recommendations. More importantly, OCC agreed to the automatic-approval mechanism in DP&L's distribution rate case. Rate Case Stipulation, § III.3.f ("The Decoupling Rider tariffs will be automatically implemented 60 days after the filing of the Company's Decoupling Rider filings, unless suspended by the Commission.") (emphasis added). The Commission should, therefore, disregard OCC's complaints about automatic approval.

VII. CONCLUSION

For these reasons, the Commission should deny OCC's Application for Rehearing, and both continue to allow DP&L to reconcile and recover its deferral for under-recovered Decoupling Rider costs that accrued between the ESP III Order and the Rate Case Order through the Decoupling Rider, and reject OCC's improper attack on the Third Portfolio Plan Order and request for an unlawful refund.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 8th day of February, 2019, a copy of The Dayton Power and Light Company's Memorandum in Opposition to the Application for Rehearing by The Office of the Ohio Consumers' Counsel was served on the persons stated below via electronic transmission:

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Summary: Memorandum in Opposition to the Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Mr. Alan M. O'Meara on behalf of The Dayton Power and Light Company