

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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.)	Case No. 08-1094-EL-SSO
In The Matter of The Application of The Dayton Power and Light Company For Approval of Revised Tariffs.)	Case No. 08-1095-EL-ATA
In The Matter of The Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.)	Case No. 08-1096-EL-AAM
In The Matter of The Application of The Dayton Power and Light Company for Waiver Of Certain Commission Rules.)	Case No. 08-1097-EL-UNC

COMMENTS OF THE OHIO HOSPITAL ASSOCIATION

I. INTRODUCTION & BACKGROUND

The Ohio Hospital Association (“OHA”) respectfully submits these Comments pursuant to the Public Utilities Commission of Ohio’s (“Commission” or “PUCO”) November 27, 2019 Entry providing parties an opportunity to respond to The Dayton Power and Light Company’s (“DP&L” or the “Company”) November 26, 2019 notice of withdrawal of its third electric security plan (“ESP III”).

A. The Ohio Hospital Association

OHA is a private, nonprofit trade association with 236 hospitals and 14 health care systems. Approximately 152 OHA members are served by Ohio’s electric distribution utilities (“EDUs”). Collectively, OHA members annually spend well in excess of \$150 million for

electric services. OHA's mission is to be a membership-driven organization that provides proactive leadership to create an environment in which Ohio hospitals are successful in serving their communities.

B. The Return of the RSC – Part Deux

DP&L's Notice of Withdrawal takes the position that the reversion to its first electric security plan ("ESP I") also includes the implementation of the Rate Stabilization Charge ("RSC") approved in that case.¹ This move of reverting back to the RSC after a financial integrity payment has been determined to be unlawful will be familiar to many parties in this proceeding.

The RSC was first authorized by the Commission nearly fourteen years ago to pay DP&L for costs associated with its provider of last resort obligations as part of a rate plan.² In a later case, DP&L's ESP I, after comprehensive negotiations, DP&L and multiple parties filed a stipulation and recommendation resolving the issues of ESP I, including the extension of the RSC, which was then approved by the Commission.³

In September 2013, the Commission approved DP&L's proposal for a second electric security plan ("ESP II") with certain modifications.⁴ Included in ESP II was a service stability rider ("SSR") for DP&L's financial integrity; the RSC was not part of ESP II. Several parties challenged the legalist of the SSR, and on June 20, 2016, the Ohio Supreme Court issued an opinion reversing the Commission's decision approving the SSR as part of ESP II.⁵ Subsequently, on July 19, 2016, a mandate from the Supreme Court of Ohio was filed in the ESP

¹ DP&L's Notice of Withdrawal of its Application in Case No. 16-395-EL-SSO Pursuant to 4928.143(C)(2)(a) at p. 2.

² Opinion and Order, Case No. 05 276-EL-AIR (Dec. 28, 2005).

³ Opinion and Order, Case No. 08-1094-EL-SSO (June 24, 2009).

⁴ Opinion and Order, Case No. 12-0426-EL-SSO (Sept. 4, 2013).

⁵ *In re Application of Dayton Power & Light Co.*, 2016-Ohio-3490.

II case requiring the Commission to modify its order or issue a new order. On July 27, 2016, DP&L filed a motion and memorandum in support to withdraw its application for ESP II and to revert back to ESP I, including the RSC. By Order issued on August 26, 2016, the Commission granted DP&L's application to implement its most recent SSO, ESP I.⁶ Additionally, the Commission directed DP&L to file tariffs to implement ESP I. On September 23 and 26, 2016, a number of parties filed applications for rehearing on a variety of issues including issues concerning the reimplementation of RSC. On December 14, 2016, the Commission rejected these applications for rehearing.

A number of parties then filed appeals to the Ohio Supreme Court, including multiple assignments of error concerning the reimplementation of RSC.⁷ During the appeal period, DP&L filed its third electric security plan ("ESP III"). Through rigorous negotiations and concessions, a number of parties joined DP&L on a stipulation and recommendation that was approved by the Commission on October 20, 2017 (the "ESP III Amended Stipulation"). This application included the Distribution Modernization Rider ("DMR"), which was designed to provide support for the financial integrity of DP&L. The RSC was not part of ESP III.

As a result of the Commission's approval of ESP III, the Ohio Supreme Court solicited supplemental briefs to determine whether the ongoing appeals of the reversion to ESP I was moot.⁸ On November 28, 2018, the Ohio Supreme Court dismissed the appeals, including issues involving the legality of the RSC, as moot.⁹

⁶ Case No. 12-0426-EL-SSO.

⁷ *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*, 2017-Ohio-0204. Appellants included the Ohio Consumers' Counsel ("OCC"), the Ohio Manufacturers' Association ("OMA"), the Kroger Company ("Kroger"), and the Industrial Energy Users of Ohio ("IEU-Ohio").

⁸ See, Order, *sua sponte*, announced October 27, 2017 in 2017-Ohio-8338.

⁹ Dismissal, announced in 2018-Ohio-4732.

Less than a year later, however, the Ohio Supreme Court reversed the Commission's approval of FirstEnergy's Distribution Modernization Rider incentive.¹⁰ The Commission then modified the ESP III Amended Stipulation to eliminate the DMR provisions.¹¹ In response, DP&L filed the Notice of Withdrawal, followed by a Notice of Filing Proposed Tariffs to reestablish certain riders and tariffs from DP&L's most recent standard service offer "as they existed in 2017 before the Commission decision in ESP III."¹² This includes the reestablishment of the RSC.

II. COMMENTS

The Commission and consumers once again find themselves in a situation where, when the law denies DP&L its latest vehicle for financial integrity, whether the SSR or DMR, the RSC appears to act as a sort of perpetual backstop for the Company.

When challenging the last reversion back to ESP I, appellants urged the Ohio Supreme Court not to dismiss the appeals as moot due to the approval of ESP III. IEU-Ohio argued that it "IEU-Ohio can reasonably expect to face a situation where an EDU's rates are reversed on appeal and the EDU subsequently moves to withdraw its ESP and establish temporary successor ESP rates under R.C. 4928.143(C)(2)(b)" and "DP&L's and the Commission's assertion that there is a remote likelihood that R.C. 4928.143(C)(2)(b) (Appx. at 107) will be invoked again is without merit."¹³ The OMA and Kroger argued that:

Circumstances could arise where DP&L may withdraw its ESP III application, resulting in the re-implementation of the Blended ESP I/II. Because the Blended ESP I/II is unreasonable and unlawful for the reasons set forth in Joint Appellants' merit brief, and because it is possible that the

¹⁰ *In re Application of Ohio Edison Co.*, 2019-Ohio-2401.

¹¹ Supplemental Opinion and Order, Case No. 16-395-EL-SSO (Nov. 21, 2019).

¹² DP&L's Notice of Filing Proposed Tariffs, Case No. 08-1094-EL-SSO (Nov. 26, 2019) at 1.

¹³ Supplemental Reply Brief of Appellant IEU-Ohio, 2017-Ohio -0204 (Nov. 9, 2017), at pp. 8-9.

Blended ESP I/II may be re-instated, Appellants retain a legally cognizable interest in the outcome of this appeal and the ESP II Appeal.¹⁴

OCC further noted and predicted the following:

DP&L asserts that Appellants rely on generic claims of repetition, involving other utilities (DP&L Supplemental Brief at 9), that do not satisfy the mootness exception. But DP&L overlooks its own recently approved electric security plan, which is likely to be appealed. That plan contains alleged unlawful transition charges as well as a distribution modernization rider charge and a reconciliation rider charge. In re Dayton Power and Light Co., Pub. Util. Comm. 19 Case No. 16-395-EL-SSO. This is the “what’s next” event that Chief Justice O’Connor asked about in the oral arguments in In re Application of DP&L, 147 Ohio St.3d 166. More unlawful subsidies. DP&L (and the other utilities) are likely to find themselves once again, with their electric security plans reversed on appeal, and with the opportunity to establish replacement rates (after withdrawal.) And so the saga is likely to repeat itself.¹⁵

The appellants were prescient in their concerns.¹⁶

Whether the RSC is a phoenix arising from the DMR’s ashes to save DP&L in its time of need or whether the RSC is a zombie from the grave that just won’t die, the RSC carries with it significant outstanding legal questions that warrant further consideration by the Commission.

The RSC related issues left unresolved by the Ohio Supreme Court remain relevant. These include whether the RSC expired on December 31, 2012 pursuant to the terms of a negotiated settlement, whether it was appropriate of the Commission to “resurrect” the RSC, and whether the RSC is an unlawful transition charge.¹⁷ As the Commission noted in its Supplemental Opinion and Order removing the DMR from the ESP III, “[t]he line of cases from *Columbus S. Power Co.*, 2011-Ohio-1788, to *Ohio Edison*, demonstrates that nonbypassable

¹⁴ Supplemental Brief of Appellants Kroger and OMA, 2017-Ohio-0204 (Nov. 1, 2017), at pp. 2-3.

¹⁵ Supplemental Reply Brief of Appellant OCC, 2017-Ohio-0204 (Nov. 9, 2017), at p. 18-19.

¹⁶ DP&L urged dismissal by the Ohio Supreme Court, arguing that “[t]here is thus no benefit to the public from the Court issuing an advisory opinion on an issue that has not come up in the past and likely will not come up again in the future” (referring to a utility’s implementation of its prior rates under R.C. 4928.143(C)(2)(b) after a withdraw following a Court modification). See, Supplemental Merit Brief of DP&L (Nov. 6, 2017), at p. 9.

¹⁷ See, Merit Brief of Appellants Kroger and OMA, 2017-Ohio-0204 (May 15, 2017), at pp. 22-26. See also, Merit Brief by Appellant OCC, 2017-Ohio-0204 (May 15, 2017), at pp. 9-21.

riders, established to promote the financial integrity of EDUs, are unlawful and not authorized by R.C. 4928.143.”¹⁸ On the other hand, the Commission noted that “the Court has consistently upheld provisions of ESPs which provide for the recovery of identified, specific costs, even where the cost recovery mechanism was nonbypassable.”¹⁹

DP&L, in its Notice of Withdrawal, makes it a point to state that “the Ohio Supreme Court has twice held that the RSC is lawful.”²⁰ Subsequent to the decisions cited by DP&L, the Ohio Supreme Court issued a series of decisions on the issue of improper financial stability charges.²¹ Parties appealing DP&L’s first reversion back to ESP I argued that the RSC constituted an illegal transition charge in light of this additional case law before the appeals were dismissed due to the Commission’s approval of ESP III.²² Even after the dismissal, the Supreme Court issued yet another ruling on improper utility charges when reversing the Commission’s approval of FirstEnergy’s DMR.²³

The Commission should ensure that the RSC’s legality is fully analyzed through the lens of all the recent case law and make a determination that the RSC is in fact, after fourteen years, a charge that provides for the recovery of identified, specific costs. To the extent necessary, the Commission should consider additional hearings and/or briefing on these issues.

Parties are entitled to this rigorous examination before becoming subject to the RSC once again. OHA, like a number of other parties, supported the ESP I stipulation approving the RSC as an overall negotiated package. For the OHA, the trade-off for supporting the stipulation with

¹⁸ Supplemental Opinion and Order, Case No. 16-395-EL-SSO (Nov. 21, 2019), at p. 45.

¹⁹ *Id.*

²⁰ DP&L Notice of Withdrawal, at p. 4, citing *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 2007-Ohio-4276 and *Constellation New Energy v. Pub. Util. Comm.*, 2007-Ohio-4276.

²¹ *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608; *In re Application of Dayton Power & Light Co.*, 2016-Ohio-3490.

²² See, *supra* FN 17.

²³ *In re Application of Ohio Edison Co.*, 2019-Ohio-2401.

the RSC included provisions equipping hospitals with opportunities to better manage their energy demand. Other parties to the stipulation made similar concessions and considerations. The OHA took a similar approach when supporting the ESP III Amended Stipulation, which included the DMR. Now OHA faces the prospect of the RSC charges essentially replacing the DMR charges, but without any of the accompanying tools to support hospitals in managing their energy demand and costs.

IV. CONCLUSION

OHA respectfully requests that the Commission consider these Comments before issuing an Order in this case.

Respectfully submitted on behalf of
THE OHIO HOSPITAL ASSOCIATION



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the parties of record listed below this 4th day of December 2019 *via* electronic service.



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Summary: Comments of The Ohio Hospital Association electronically filed by Teresa Orahood
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