

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)	
Dayton Power and Light Company for)	Case No. 08-1094-EL-SSO
Approval of its Electric Security Plan.)	

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

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
Pursuant to Ohio Rev. Code Section)	
4905.13.)	

In the Matter of the Application of The)	
Dayton Power and Light Company for)	Case No. 08-1097-EL-UNC
Approval of its Amended Corporate)	
Separation Plan.)	

**MEMORANDUM CONTRA INDUSTRIAL ENERGY USER-OHIO'S
APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

On January 17, 2020, numerous parties filed applications seeking rehearing of the PUCO's December 18, 2019 Second Finding and Order ("2019 Tariff Order"). The PUCO's 2019 Tariff Order reinstates unlawful consumer subsidies and unauthorized charges, depriving DP&L's 500,000 customers of what otherwise would have been lower rates resulting from a decision of the Ohio Supreme Court. Customers have been paying these unlawful rates since December 19, 2019, with no opportunity for refunds if the rates are later determined to be unlawful.

OCC files this Memorandum Contra the Application for Rehearing filed by the Industrial Energy Users-Ohio (“IEU”), with respect to its claims that the Rate Stabilization Charge (collecting POLR¹ charges) should be “conditionally bypassable by customers who agree to return to the SSO at market-based rates.”² Translated into non-utility speech, IEU (for its members who shop) is seeking to avoid paying its fair share of POLR charges by having other non-shopping (mostly residential) customers bear the brunt of the payments.³ The PUCO should protect the many DP&L standard service offer customers from IEU’s proposal that SSO customers alone should pay a \$73 million POLR bill that will result from DP&L’s legal maneuvering. It is bad enough for consumers that DP&L has instituted this charge, without standard service offer consumers paying IEU’s share of it on top of their share.

II. IEU’S REHEARING PROPOSAL TO CHANGE THE NON-BYPASSABLE RATE STABILITY CHARGE TO A BYPASSABLE CHARGE SHOULD BE REJECTED.

IEU alleges that the 2019 Tariff Order of the PUCO is “unlawful and unreasonable” because it authorized a provider of last resort charge (POLR) that is not avoidable by shopping customers that agree to return to the SSO at market-based rates.⁴ IEU recommends that if the Rate Stabilization Charge (that collects for POLR service) is reinstated at a non-zero rate and without the economic development provisions of ESP

¹ POLR, refers to provider of last resort charges that are charges associated with the utility providing default service to all customers, including those who shop and return to the utility’s standard offer.

² IEU Application for Rehearing, Application at 2 (C.9), Memorandum in Support at 15 (Jan. 17, 2020).

³ In filing this Memorandum Contra solely addressing this part of IEU’s Application for Rehearing, OCC is not acknowledging agreement with any other issues raised in the numerous applications for rehearing filed by parties.

⁴ *Id.*

III, it “should be conditionally bypassable by customers who agree to return to the SSO at market-based rates.”⁵ (Bypassable charges are collected only from SSO customers; non-bypassable charges are collected from all electric distribution utility customers, including those that buy electricity from marketers.) IEU apparently relies upon R.C. 4928.20(J) and the PUCO’s holding in *AEP’s* first electric security plan⁶ to support its allegation that the PUCO’s Order is “unlawful and unreasonable.”⁷

IEU is wrong. First, IEU is proposing to change a provision of DP&L’s first electric security plan (ESP I) when the law (R.C. 4928.143(C)(2)) does not allow it to do so. Second, the law that IEU points to, R.C. 4928.20(J), does not support IEU’s claim. There is nothing in that section or any section of Ohio law that mandates that the Rate Stabilization Charge (POLR charge) be conditionally bypassable. Third, the PUCO’s ruling in *AEP’s* first electric security plan is not binding on the PUCO with respect to this case. Fourth, IEU’s recommendation, if implemented, would artificially inflate standard offer rates, and create escalating bill impacts on customers who continue to purchase electricity from DP&L’s standard offer.⁸ The PUCO should reject IEU’s application for

⁵ IEU Application for Rehearing, Memorandum in Support at 15.

⁶ *In the Matter of the Application of Columbus Southern Power for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO, Opinion and Order at 40 (Mar. 18, 2009).

⁷ IEU Application for Rehearing, Memorandum in Support at 15.

⁸ *See, e.g., In the Matter of the Application of Dayton Power & Light to Establish a Standard Service Offer*, Case No. 16-395-EL-SSO, Opinion and Order at ¶63 (Oct. 20, 2017)(holding that the OVEC rider should be non-bypassable due to the potential for escalating bill impacts); Third Entry on Rehearing at ¶51 (Sept. 19, 2018) (upholding its earlier decision that a rider collecting OVEC above market costs from customers should be non-bypassable. The PUCO noted its agreement with OCC Witness Kahal that making the OVEC rider bypassable would artificially inflate the SSO and finding that the record demonstrated a risk of escalating bill impacts as shopping increases); Supplemental Opinion and Order at ¶62-63 (Nov. 21, 2019).

rehearing on this issue, just as it has recently rejected similar claims to make rider charges bypassable for those customers who shop with marketers.⁹

- A. Under R.C. 4928.143(C)(2)(b) the PUCO must continue the provisions, terms, and conditions of a DP&L’s most recent standard service offer. In DP&L’s electric security plan, the Rate Stabilization Charge was approved as a non-bypassable charge. The PUCO has no authority to change the Rate Stabilization Charge to a conditionally bypassable charge.**

The PUCO, as a creature of statute, must follow the law. The law requires all the provisions, terms and conditions of the utility’s most recent standard service offer to continue, if a utility terminates an application for an electric security plan. As explained in OCC’s application for rehearing, the PUCO has misconstrued the statute when it implemented the terms of DP&L’s electric security plan and not its standard service offer.

To the extent that the PUCO does not accept this OCC argument, and implements DP&L’s most recent electric security plan, then it must avoid committing further error in continuing the terms and conditions of DP&L’s electric security plan. In this regard, it should reject IEU’s call to change the non-bypassable Rate Stabilization Charge to a conditionally bypassable charge.

The PUCO construed R.C. 4928.143(C)(2)(b) to require it to “restore the provisions, terms and conditions of ESP I which were in effect prior to the effective date of ESP III.”¹⁰ “Restoring” the provisions of DP&L’s ESP I does not mean changing the provisions of ESP I. Yet an unlawful change is just what IEU is seeking.

⁹ *Id.*

¹⁰ *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 *et al.*, Second Finding and Order at ¶27 (Dec. 18, 2019) (“2019 Tariff Order”).

DP&L's ESP I rates were set by settlement. In that settlement, DP&L allowed government aggregation customers to avoid the Rate Stabilization Charge by agreeing to pay market rates upon return to DP&L. The settlement did not extend that same benefit to DP&L's other customers. Instead, the signatory parties agreed that other customers ("shopping customers") would pay the Rate Stabilization Charge through 2012 and those shoppers returning to DP&L would pay the standard service offer rate.¹¹ But now, IEU is asking to change, not restore, one of the provisions of DP&L's electric security plan. The PUCO has no authority to do so. Rehearing should be denied.

B. Neither R.C. 4928.20(J) nor any other provision of Ohio law requires that the Rate Stabilization Charge be conditionally bypassable for customers agreeing to return to the SSO at market rates.

IEU claims that the PUCO order continuing DP&L's Rate Stabilization Charge as a non-bypassable charge is unlawful. IEU mistakenly relies upon R.C. 4928.20(J). But neither that provision nor any other provision in Ohio law supports IEU's claim.

True, under Ohio law (4928.20(J)), government aggregation customers may elect not to receive "standby service" from an electric distribution utility. If aggregation customers elect not to receive such service and return to the utility, they must pay the utility's market price for power. But this provision only applies to aggregation customers.¹² It does not apply to the broader group of customers IEU is advocating for – all shopping customers who agree to pay market rates if they return to DP&L for standard service.

¹¹ *Id.*, Stipulation and Recommendation at ¶3 (Feb. 24, 2009).

¹² DP&L and the signatory parties, in fact, agreed in the ESP I Settlement, that governmental aggregation customers who elect not to pay the RSS will return to DP&L at a market-based rate. *See* Settlement at ¶3 (Feb. 24, 2009). There was no agreement to allow other customers that same option. Instead, the Settlement states that through 2012 shopping customers who return to DP&L shall pay the standard service offer. *Id.*

IEU cites to no other Ohio law to support its claim. That's because there is no such law. Rehearing should be denied.

C. The 2009 AEP decision is not binding on the PUCO in this case.

IEU claims that a 2009 holding in AEP's first electric security plan case makes the PUCO's Order in this case unlawful and unreasonable. IEU is relying upon the PUCO decision which allowed AEP customers that switch to a marketer for service to avoid paying the POLR charge if they agreed to return and pay market price.¹³ IEU fails to recognize however, that the PUCO's ruling is not precedent in this case where the only issue is how to continue the provisions of the most recent standard service offer, which were set in DP&L's ESP I 2009 settlement.

In this regard, when the PUCO approved DP&L's ESP I settlement, it expressly addressed these same arguments, though they were made by a different party, Cargill. Cargill argued that all shopping customers should be able to avoid the Rate Stabilization Charge in 2011 and 2012 if they agree to return to POLR service at market-based rates.¹⁴ Cargill claimed that settlement (that did not allow them to do so) was inconsistent with the PUCO's 2009 AEP decision. The PUCO rejected Cargill's argument, finding that its decision in AEP "is not binding upon the Commission with respect to this case."¹⁵

The PUCO was right. Its holding in the AEP-Ohio case was not binding then and is not binding today. Rehearing should be denied.

¹³ *In the Matter of the Application of Columbus Southern Power for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO, Opinion and Order at 40 (Mar. 18, 2009).

¹⁴ *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 *et al.*, Opinion and Order at 10 (June 24, 2009).

¹⁵ *Id.*

Additionally, it bears noting that AEP tariffs -- which implemented a bypassable POLR charge like IEU is seeking now -- were ordered by the PUCO to be withdrawn in 2011.¹⁶ Thus, there are no current utility tariffs (AEP or any other utility) that allow for a bypassable POLR charge to customers. Nor should there be.

D. IEU's recommendation -- to artificially increase the standard service offer price for consumers -- is not fair, reasonable or in the public interest.

As explained above, there are many reasons to deny IEU's request on rehearing to significantly change the Rate Stabilization Charge from what was agreed to in the PUCO-approved DP&L ESP I settlement. But there is more.

Under IEU's recommendation to make the POLR rider bypassable, the standard service offer will be artificially increased. Inflating the standard service offer causes problems for customers and the competitive market that customers rely upon. As the PUCO has recognized, making charges bypassable creates the risk that there will be escalating costs for standard service offer customers,¹⁷ who are typically small businesses and residential customers. Not only does this result in unwarranted SSO price increases

¹⁶ *In the Matter of the Application of Columbus Southern Power for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO, Remand Order at 22 (Oct. 3, 2011).

¹⁷ *See, e.g., In the Matter of the Application of Dayton Power & Light to Establish a Standard Service Offer*, Case No. 16-395-EL-SSO, Opinion and Order at ¶63 (Oct. 20, 2017) (holding that the OVEC rider should be non-bypassable due to the potential for escalating bill impacts); Third Entry on Rehearing at ¶51 (Sept. 19, 2018) (upholding its earlier decision that a rider collecting OVEC above market costs from customers should be non-bypassable. The PUCO noted its agreement with OCC Witness Kahal that making the OVEC rider bypassable would artificially inflate the SSO and finding that the record demonstrated a risk of escalating bill impacts as shopping increases); Supplemental Opinion and Order at ¶62-63 (Nov. 21, 2019).

for customers, but it can also result in higher charges from competitors, which is not in the public interest.¹⁸ This is another reason to reject IEU's application for rehearing.

III. CONCLUSION

The PUCO should not grant IEU's application to change the Rate Stabilization Charge from a non-bypassable charge to a bypassable charge, which would improperly shed charges for IEU members and leave such charges to be paid by others. IEU has not shown that the PUCO's Order to continue the charge as non-bypassable, to be paid by all customers, is in any respect unjust or unreasonable.

Respectfully submitted,

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¹⁸ See, e.g., *In the Matter of the Application of Dayton Power & Light to Establish a Standard Service Offer*, Case No. 16-395-EL-SSO, Supplemental Testimony of OCC Witness Kahal at 38 (Mar. 29, 2017) (testifying against making DP&L's OVEC rider bypassable).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra IEU's Application for Rehearing was electronically served via electric transmission on the persons stated below this 3rd day of February 2020.

/s/ Maureen R. Willis

Maureen R. Willis
Senior Counsel

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Summary: Memorandum Memorandum Contra Industrial Energy User-Ohio's Application for Rehearing by The Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of Willis, Maureen R.