

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)
Dayton Power and Light Company for) Case No. 20-0140-EL-AAM
Approval to Defer Distribution Decoupling)
Costs.)

**REPLY COMMENTS
OF
THE KROGER CO.**

I. INTRODUCTION.

By way of Entry dated June 8, 2020, the Public Utilities Commission of Ohio (Commission) sought comments and reply comments on The Dayton Power and Light Company (DP&L)'s January 23, 2020 Application, seeking to defer its distribution decoupling costs as a regulatory asset or liability from December 19, 2019 onward, pursuant to R.C. 4905.13.¹ Staff previously filed its Review and Recommendation on April 29, 2020, recommending that the Commission deny DP&L's Application because it did not adequately address the required accounting standards for revenue deferral.²

On July 6, 2020, Kroger and other intervenors filed initial comments on DP&L's Application explaining that DP&L withdrew its third electric security plan (ESP III) which was the sole authority for DP&L to implement revenue decoupling.³ That same day, DP&L filed initial

¹ Entry at ¶ 10 (June 8, 2020).

² Staff Review and Recommendation at 4 (April 29, 2020) (Please note that the Staff Review and Recommendation does not include page numbers. For purposes of this filing, Kroger has manually numbered the page numbers.).

³ See Comments of The Kroger Co. (July 6, 2020) (Kroger's Comments); Comments of The Ohio Manufacturers' Association Energy Group (July 6, 2020) (OMAEG's Comments); Comments for Consumer Protection by The Office of the Ohio Consumer's Counsel (July 6, 2020) (OCC's Comments).

comments in support of its Application and in response to the Staff's recommendation.⁴ In accordance with the Commission's June 8, 2020 Entry, Kroger submits the following reply comments on DP&L's Application.

II. REPLY COMMENTS.

Try as it might, DP&L cannot circumvent the plain language of the Rate Case Stipulation to which it is bound. It is well-established Ohio law that when a contract's terms are express and unambiguous, Ohio courts are bound by the four corners of the contract to determine the intent of the parties. The Supreme Court of Ohio has held that when interpreting contracts, courts should not interpret the contract's language in such a way that renders certain words unnecessary or meaningless.⁵ Parties are presumed to have expressed their intent through the plain language of a contract⁶ and when there is no ambiguity, courts must not look beyond the plain language of a contract to interpret its provisions.⁷

Here, the four corners of the Rate Case Stipulation are clear and unambiguous. As Kroger and other stakeholders explained in their initial comments, DP&L submitted its Application pursuant to that Stipulation, which only allowed DP&L to implement revenue decoupling through its "*existing Decoupling Rider*."⁸ Since the Decoupling Rider no longer exists as a valid recovery mechanism, DP&L's Application cannot be granted.

⁴ See The Dayton Power and Light Company's Comments on Staff Recommendation (July 6, 2020) (DP&L's Comments).

⁵ *Wohl v. Swinney*, 118 Ohio St.3d 277, 2008-Ohio-2334, 888 N.E.2d 1062, ¶ 22.

⁶ *Kelly v. Medical Life Ins. Co.*, 31 Ohio St.3d 130, 132, 509 N.E.2d 411 (1987).

⁷ *Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 37 (quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶11).

⁸ See Kroger's Comments at 4; OMAEG's Comments 4; OCC's Comments at 3.

While DP&L conceded that the Decoupling Rider no longer exists,⁹ it still insists that it is entitled to deferral authority. In addition to arguing that the Rate Case Stipulation authorizes DP&L's request, DP&L also argues that the Commission has permitted other utilities to implement revenue decoupling.¹⁰ None of DP&L's arguments, however, can overcome the plain language of the Rate Case Stipulation and the aforementioned Ohio law. Despite this clear precedent, DP&L nonetheless asked the Commission to ignore the plain language of the Stipulation and interpret the decoupling provision in a way that renders the words "through its existing Decoupling Rider" meaningless and unnecessary. The Commission should adhere to Supreme Court of Ohio precedent and hold DP&L to the plain language of the Stipulation to which DP&L assented. Accordingly, DP&L's Application should be denied because DP&L has no authority to implement revenue decoupling independent of its once-existing Decoupling Rider and no authority to create a deferral to recover its decoupling revenues in the future.

Even after discounting the Rate Case Stipulation's plain language, DP&L still failed to meet its burden of proof in establishing why the Commission should grant its Application. As Kroger explained in its initial comments, DP&L's authority to implement revenue decoupling originally derived from a settlement agreement that the Commission approved in Case Nos. 16-0395-EL-SSO, et al. (ESP III Case).¹¹ Since then, DP&L voluntarily withdrew its ESP III¹² and the Commission ordered the Decoupling Rider to be eliminated.¹³ Given that the Decoupling Rider

⁹ DP&L's Comments at 2.

¹⁰ *Id.* at 3-4.

¹¹ See Kroger's Comments at 3 (referencing ESP III Case, Opinion and Order at ¶¶ 14, 130 (October 20, 2017)).

¹² ESP III Case, Notice at 1 (November 26, 2019).

¹³ *In the Matter of the Application The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 08-1094-EL-SSO, et al., Second Finding and Order at ¶ 36 (December 18, 2019) (ESP I Case) (ordering the Decoupling Rider to be eliminated after the termination of ESP III).

has been eliminated, the provision in the Rate Case Stipulation can no longer be relied on as a source of authority for DP&L. Consequently, the Commission should deny DP&L's Application.

DP&L then argued that the Commission should permit DP&L deferral authority for decoupling revenues because the Commission allowed other utilities to implement revenue decoupling.¹⁴ Kroger agrees with OCC's explanation of why DP&L's purported authority is distinguishable from the authority granted to the other utilities.¹⁵ The Commission granted Duke Energy Ohio, Inc.'s (Duke) authority to implement revenue decoupling pursuant to a settlement agreement associated with the utility's 2011 ESP.¹⁶ The settlement agreement explicitly permitted Duke to file "for Commission approval of a distribution revenue decoupling mechanism."¹⁷ Unlike DP&L, Duke never withdrew its ESP and can point to clear language in its settlement agreement granting it authority to establish a new decoupling mechanism whereas DP&L was limited to recovery through its then-existing Decoupling Rider.¹⁸

DP&L also cited to Ohio Edison's decoupling mechanism under HB 6 for support that DP&L should be entitled to revenue decoupling.¹⁹ DP&L, however, is not making its deferral request pursuant to HB 6 so the statutory authority on which Ohio Edison relies is irrelevant to DP&L's deferral request.²⁰ Moreover, DP&L attempted to assimilate its decoupling request with the authority granted to AEP Ohio. But, AEP Ohio's settlement agreement in its last base rate

¹⁴ DP&L's Comments at 4.

¹⁵ See OCC's Comments at 5.

¹⁶ *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, Opinion and Order at ¶ 9 (November 22, 2011).

¹⁷ *Id.*

¹⁸ See OCC's Comments at 5.

¹⁹ See DP&L's Comments at 4, n. 15.

²⁰ OCC's Comments at 5.

case explicitly allowed AEP Ohio to execute a revenue decoupling pilot program for calendar years 2012, 2013, and 2014,²¹ whereas DP&L's settlement agreement only permitted it to implement revenue decoupling through its now defunct Decoupling Rider. Therefore, the Commission should reject DP&L's Application because it has not identified any legal authority that it can rely on to implement revenue decoupling.

Furthermore, the Commission should accept Staff and stakeholders' recommendations²² and reject DP&L's Application for its failure to address the proper accounting conditions necessary for a utility to recognize revenues. In its comments, DP&L responded that it is not required to follow GAAP standards in its request to defer revenues because GAAP merely addresses when a utility can recognize revenues.²³ This logic is circular because the only reason DP&L is requesting deferral authority for decoupled revenues is so that it can later recognize such revenues. DP&L also argued that its deferral request should be granted because the Commission approved utilities' emergency plans related to the pandemic which requested deferral authority for later recovery of forgone revenues.²⁴ DP&L failed to mention that the Commission approved both DP&L and AEP Ohio's emergency plans subject to following the GAAP standards.²⁵ Kroger requests that the

²¹ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually and, if Their Proposed Merger is Approved, as a Merged Company (collectively, AEP Ohio) for an Increase in Electric Distribution Rates*, Case Nos. 11-351-EL-AIR, et al., Opinion and Order at 7 (December 14, 2011).

²² See Staff Review and Recommendation at 4; Kroger's Comments at 5; OMAEG's Comments at 8; OCC's Comments at 6.

²³ See DP&L's Comments at 5.

²⁴ *Id.* at 8.

²⁵ *In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority*, Case No. 20-650-EL-AAM, Opinion and Order at ¶ 1 (May 20, 2020) (DP&L COVID-19 Plan); *In the Matter of the Application the Ohio Power Company for Approval of its Temporary Plan for Addressing the COVID-19 Emergency*, Case No. 20-602-EL-UNC, Finding and Order at ¶ 1 (May 6, 2020) (AEP Ohio COVID-19 Plan).

Commission deny DP&L's Application for its failure to address the necessary accounting standards.

Even if DP&L is not required to adhere to GAAP standards, DP&L's remaining arguments do not establish why its Application should be granted. In a last ditch attempt to save its decoupling authority, DP&L cited a Commission Order from 1992 which permits utilities to request deferral authority for lost revenues associated with their Pilot DSM Programs.²⁶ DP&L seemed to argue that this Order is evidence that the Commission intended that utilities are entitled to collect lost revenues. It should be noted, however, that at the time there was no law allowing utilities to recoup lost revenues associated with Pilot DSM Programs and the Commission merely permitted utilities to request deferral authority and did not find that utilities are guaranteed such revenues.²⁷ In the Order, the Commission also emphasized that it would evaluate requests to defer lost revenues on a case-by-case basis.²⁸ Since DP&L has not adequately explained why its Application in this proceeding should be granted, Kroger recommends that the Commission reject DP&L's request.

III. CONCLUSION.

As set forth above, DP&L unlawfully requests that the Commission grant it deferral authority for decoupling revenues. The plain language of the Stipulation to which DP&L cited requires DP&L to implement revenue decoupling through the Decoupling Rider, which the

²⁶ DP&L's Comments at 8, n. 20 (quoting *In the Matter of the Commission's Investigation into the Impacts of Demand-Side Management Programs and Power Purchase on the Profitability of Electric Utilities*, Case No. 90-723-EL-COI, Finding and Order at ¶ 14 (Oct. 1, 1992)).

²⁷ See *In the Matter of the Commission's Investigation into the Impacts of Demand-Side Management Programs and Power Purchase on the Profitability of Electric Utilities*, Case No. 90-723-EL-COI, Finding and Order at ¶ 1) (Oct. 1, 1992) (finding that the lack of ability to recover DSM-related lost distribution revenues, shared savings, and expenditures deterred EDUs from implementing more aggressive DSM programs.).

²⁸ *Id.* at ¶ 14 (stating that, "the Proposal has been modified to allow recovery of lost revenues on a case by case basis, for those pilot programs that are sufficiently well defined to allow a meaningful cost/benefit analysis and estimation of associated lost revenues.").

Commission has since ordered to be eliminated. Likewise, DP&L cannot cite to any other authority that empowers it to implement revenue decoupling or a deferral. Lastly, DP&L's Application also should also be rejected for its failure to address the necessary accounting standards.

For the foregoing reasons, Kroger requests that the Commission adopt the recommendations set forth in its comments and reply comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on July 20, 2020 upon the parties listed below.

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