

In the Matter of the Application of The Dayton Power and Light Company for Approval to Defer Distribution Decoupling Costs.)
) Case No. 20-140-EL-AAM
)
)

I. INTRODUCTION

Now DP&L wants to have it both ways, seeking to use the anti-consumer mechanism of a so-called “deferral” for the very same decoupling charges that it walked away from. Combining the utility-friendly ratemaking for deferrals and decoupling would be a double whammy for Dayton consumers.

¹ Larry Pearl, *FirstEnergy nears proposal to decouple Ohio utility revenues, electricity consumption: CEO*, Utility Dive (Nov. 5, 2019).

³ OCC Ex. 9 (ESP III, Notice of Withdrawal (Nov. 26, 2019)).

utility doesn't like the PUCO's order.⁴ (It's an odd statute that essentially allows the regulated utility to overrule the regulator.) DP&L exercised that case withdrawal right (to its benefit, of course), and cannot now be heard to complain that it wants even more from consumers.

Indeed, the PUCO already has rejected DP&L's attempt to game the system with a revival of its defunct decoupling charge.⁵ DP&L's new application is more of the same maneuvering, this time with a decoupling charge masquerading as a deferral.

Of course, deferrals (which utilities like to describe as mere accounting) are the gateway to rate increases (that are not mere accounting for consumers). That's why DP&L would make its deferrals proposal. Indeed, the Ohio Supreme Court overturned a PUCO decision regarding an OCC intervention. There, the PUCO was mistakenly in denial of the fact that, according to the Court, "deferrals are a prelude to possible rate increases for the companies' customers...."⁶

The PUCO should require DP&L to live with the consequences of its choice (under the already-favorable 2008 law) to withdraw from its ESP III. The PUCO lacks the authority to legislate to make the law even more favorable to DP&L.

As background, *decoupling* allows a utility to be made whole (unfortunately guaranteed at consumer expense) if its sales decline. In theory, decoupling can be a charge to consumers (if the utility's revenues are lower than expected) or a credit (if the utility's revenues are higher than expected). (The PUCO should be skeptical about utility claims that consumers could receive credits under decoupling.) *Deferrals* enable a utility to hold costs (that it could not yet charge to consumers) in an account for potential future collection from customers, if allowed by the

⁴ R.C. 4928.143(C)(2)(b).

⁵ PUCO Case No. 08-1094-EL-SSO, Second Finding and Order (Dec. 18, 2019); OCC Ex. 13 (Testimony of OCC Witness Willis) (March 12, 2021).

⁶ See [*Ohio Consumers' Counsel v. PUC*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 38](#) ("...**deferrals** are a prelude to possible rate increases for the companies' customers...").

PUCO. (Once deferrals are allowed, the PUCO unfortunately tends to later say “yes” to charging consumers.) But despite DP&L’s preference for decoupling, its current electric security plan, ESP I, does not include decoupling or authority to defer decoupling.⁷ DP&L’s application should be denied.

II. RECOMMENDATIONS

- A. **To protect consumers the PUCO should reject DP&L’s request for decoupling deferral authority.**
and
- B. **DP&L’s Application in this case cannot be heard and must be denied by the PUCO because the Application is, in reality, an untimely application for rehearing under R.C. 4903.10 that the PUCO has no jurisdiction to entertain at this late date.**

The PUCO should adopt OCC’s arguments A and B. Ohio law provides that if a “...utility terminates an application [for an electric security plan]...or if the commission disapproves an application...the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility’s most recent standard service offer...until a subsequent” PUCO authorization.⁸ The PUCO previously authorized DP&L to implement a revenue decoupling mechanism through its Distribution Decoupling Rider (“Decoupling Rider”) in ESP III.⁹ But DP&L voluntarily withdrew from ESP III (and the Decoupling Rider with it) and the PUCO approved DP&L’s reversion to ESP I.

⁷ *In re the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, *et al.* (Dec. 18, 2019) (“ESP I”).

⁸ R.C. 4928.142(C)(2)(b).

⁹ ESP III, Opinion and Order (Oct. 20, 2017).

DP&L asked the PUCO to let it keep the decoupling charge when it withdrew ESP III.¹⁰ But the PUCO ruled that because the charge was not part of DP&L’s ESP I—the current effective ESP—it should not be continued.¹¹ During the hearing in this case, Staff verified that “the PUCO does not generally approve deferrals without having a rider attached to the deferral for collection.”¹²

And OCC witness Mr. Willis discussed this fact in his testimony, citing the PUCO’s Order: “ESP I did not include riders such as the DIR, the reconciliation rider, the decoupling rider, the RCR, and the uncollectible rider, and that these riders should not be charged to consumers with the withdrawal of ESP III.”¹³ Accordingly, the PUCO directed DP&L to file revised tariffs to implement ESP I, removing the decoupling provisions.¹⁴

Indeed, the PUCO already has rejected DP&L’s attempt to game the system with a revival of its defunct decoupling charge.¹⁵ DP&L’s new application is more of the same maneuvering, this time with a decoupling charge masquerading as a deferral.

DP&L chose, with all associated risks, to *withdraw* ESP III.¹⁶ This choice resulted in DP&L reverting to the rates of ESP I.¹⁷ And unfortunately for DP&L, those rates do not include

¹⁰ ESP I, Second Finding and Order at ¶36 (Dec. 18, 2019).

¹¹ ESP I, Second Finding and Order at ¶36 (Dec. 18, 2019).

¹² Tr. at 234.

¹³ OCC Ex. 13 at 5.

¹⁴ Case No. 08-1094-EL-SSO, Second Finding and Order (December 18, 2019).

¹⁵ PUCO Case No. 08-1094-EL-SSO Second Finding and Order (Dec. 18, 2019); OCC Ex. 13 (Testimony of OCC Witness Willis) at 7 (March 12, 2021).

¹⁶ OCC Ex. 9; DP&L withdrew ESP III after the PUCO stopped DP&L from further collecting its distribution modernization rider (in response to a Supreme Court of Ohio ruling that First Energy’s distribution modernization rider was unlawful). *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401.

¹⁷ *Id.*

decoupling.¹⁸ Now DP&L is asking the PUCO for deferral authority of the same charges the PUCO rejected. The PUCO should again reject DP&L's request.

Notably, DP&L did not seek rehearing of the PUCO's Order rejecting the decoupling charge.¹⁹ Therefore, DP&L's Application in this case cannot be heard and must be denied by the PUCO. That is because the Application, in reality, is an untimely application for rehearing under R.C. 4903.10. The PUCO has no jurisdiction to entertain this untimely application for rehearing.

Moreover, DP&L's Application is barred by legal doctrines. DP&L is barred by the doctrines of collateral estoppel and res judicata from having this issue reheard.

C. DP&L's application fails to comply with the PUCO's standards for approving deferrals and should be denied for consumer protection.

The PUCO generally employs a modified six-part test ("Test") to determine whether it should permit a public utility to defer revenue for later collection from consumers and accrue expenses for later recovery as a regulatory asset.²⁰ The components of the Test are generally:²¹

- Whether the utility's current rates or revenues are sufficient to cover the costs associated with the requested deferral;
- Whether the costs requested to be deferred are material in nature;
- Whether the problem was outside of the Company's control;
- Whether the expenditures are atypical and infrequent;
- Whether the financial integrity of the utility will be significantly and adversely affected; and
- Whether the Commission could encourage the utility to do something it would not otherwise do through the granting of the deferral authority

DP&L's Application does not even acknowledge that the Test exists, let alone attempt to demonstrate the Test is satisfied. DP&L's Application should be denied.

¹⁸ OCC Ex. 13 at 7.

¹⁹ Case No. PUCO Case No. 08-1094-EL-SSO, Second Finding and Order (Dec. 18, 2019).

²⁰ Staff Ex. 1 at 3. The modified test for revenue deferral is based on the PUCO's six-part test for cost deferral.

²¹ Staff Ex. 1 at 3.

PUCO Staff filed testimony on March 19, 2021 and Staff determined that DP&L's Application should be denied for the following reasons.²² First, withdrawing from ESP III and losing revenues associated with the termination of the decoupling rider was entirely within the Utility's control.²³ Second, the decoupling revenues are not atypical and infrequent, and Staff has significant concerns about encouraging cherry-picking components of ESPs and discouraging rate cases to address revenue requirement shortfalls.²⁴ Third, although the amount of revenues the DP&L requested deferral authority for is material, the appropriate solution is a rate case proceeding.²⁵ And finally, the PUCO would discourage an action rather than encourage an action in this case.²⁶

Staff has consistently rejected formal and informal requests to defer revenues.²⁷ And although revenue deferral is sometimes permitted, it is only in unique and unprecedented situations.²⁸ In fact, DP&L's request is not unique or unprecedented. It *chose* to withdraw its ESP III and it *failed* to apply for rehearing of the PUCO's decision that decoupling authority is absent in ESP I. And Staff agrees: "The loss of decoupling rider was within the Company's control. The decoupling rider was approved as part of the Company's ESP III application. When

²² Any omission of one of the factors does not indicate that OCC nor Staff believes DP&L met it. The focus here is on the most important factors in this case. Staff found that the first factor is irrelevant because DP&L is seeking to defer revenues, not expenses. Staff also found that DP&L's financial integrity will not be significantly and adversely affected if the deferral of revenues is not granted.

²³ Staff Ex. 1 at 6.

²⁴ Staff Ex. 1 at 6.

²⁵ Staff Ex. 1 at 6.

²⁶ Staff Ex. 1 at 6.

²⁷ Staff Ex. 1 at 6.

²⁸ Staff Ex. 1 at 6.

the Company affirmatively made the decision to withdraw its ESP III application, it also terminated the decoupling rider that was intended to collect the revenues.”²⁹

The PUCO should also adopt Staff’s recommendation to deny this deferral because of concerns that approval of this application could encourage a utility to withdraw from an ESP while continuing to claim entitlement to certain parts of it.³⁰ And it could also encourage a utility to circumvent a rate case by requesting deferral authority for revenue deficiencies that should be addressed in a rate case proceeding.³¹ Staff’s conclusion that granting DP&L’s deferral authority request could “create a pathway for other utilities to file similar applications that request to defer what amounts to shortfalls in the revenue requirement” hits the nail on the head.³²

DP&L bears the burden of proof to demonstrate that it fully satisfies the Test before it should be permitted to defer foregone revenue and seek later collection of the revenue from consumers. In this case, DP&L made no effort to meet that burden. Staff confirmed that DP&L indeed has not met that burden. Because DP&L did not show that its deferral request complies with the PUCO standards, its request should be denied. DP&L does not deserve a pass on the standards involving consumer protection. The deferral standards must be met. They are not met here.

As Staff noted, DP&L has not provided justification for approval to defer its “lost” revenue.³³ DP&L’s application should be denied.

²⁹ Staff Ex. 1 at 4.

³⁰ Staff Ex. 1 at 6.

³¹ Staff Ex. 1 at 6.

³² Staff Ex. 1 at 5.

³³ Staff Ex. 1 at 3-5.

III. CONCLUSION

DP&L withdrew its electric security plan. When it did so, it lost the ability to charge its customers “lost” revenues through a decoupling mechanism. To protect DP&L’s 465,000 customers, and in the interest of Ohio law and good public policy, the PUCO should deny DP&L’s request to defer decoupling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Initial Brief was served on the persons stated below via electronic transmission, this 21st day of June 2021.

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