BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF FOR CONSUMER PROTECTION
BY
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I. INTRODUCTION

DP&L gave up its ability to charge consumers for decoupling when it withdrew its third electric security plan.[1] And the PUCO has already rejected a previous attempt by DP&L to revive its defunct decoupling charge.[2] The PUCO should protect DP&L's 465,000 residential consumers and once again deny DP&L's request to defer nearly $16 million[3] in decoupling revenues for future collection from consumers.

II. REPLY

A. Contrary to DP&L's claims, the PUCO's six-factor test for deferrals is *very applicable* in this case where DP&L is requesting *deferral* authority for uncollected *revenues* and DP&L has not satisfied this test.

DP&L asserts that the PUCO's six-factor test for deferrals is not applicable to this case because there is no legal requirement that those factors be considered.[4] DP&L also asserts that it

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[1] *In re Application of DP&L for Approval of its Electric Security Plan*, Case No. 16-395-EL-SSO. ("ESP III").

[2] *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., Second Finding and Order at ¶36 (December 18, 2019) ("ESP I").

[3] Tr. at 69 ("the decoupling amount that DP&L would defer as a result of the outcome of this case as of the date March 31, 2021, is $15,929,002. And the time period for that amount starting at December 19, 2019, to March 31, 2021").

[4] DP&L Brief at 11.

should have the opportunity to charge consumers for the decoupling amounts in the future, so there is no need to require the six-factor test be met.[5] These arguments are without merit.

The PUCO's six-part deferral test is very much like the PUCO's three-part test for settlements. Although with respect to the deferral test not all factors must be met, DP&L has not met *any* of the applicable factors (as OCC demonstrated in its initial brief).[6] DP&L presented no direct evidence on the deferral test, nor did DP&L even reference this issue until it filed its initial brief.[7] Moreover, DP&L cited no legal authority for its assertion that "there is no legal requirement that those factors be considered."[8] There is also no legal authority for DP&L's assertion that it should "have the opportunity to recover the Decoupling Amounts in the future, so there is no need to require the six-factor test be met."[9]

DP&L is wrong that the PUCO's six-part test for deferrals is not applicable in this case because the PUCO is not required to use it.[10] In fact, the PUCO is required to be consistent in its decisions or provide an explanation for deviating.[11] DP&L's assertion that the six-part test isn't applicable because the "PUCO doesn't have to use it" is not a substitute for actual legal authority.

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[5] OCC Brief at 11-12.

[6] OCC Brief at 5-7.

[7] DP&L Brief at 11-14.

[8] DP&L Brief at 11.

[9] DP&L Brief at 11.

[10] DP&L Brief at 11.

[11] *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52 ("It is true that we have instructed the commission to respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law…This does not mean that the commission may never revisit a particular decision, only that if it does change course, it must explain why").

In its brief, DP&L argues that "without the deferral, [it] thus will not recover its approved costs."[12] But DP&L is not seeking to recover "costs," it is seeking to charge consumers for "lost" *revenues* as PUCO Staff explained in testimony and its brief.[13] And more importantly, the PUCO has consistently rejected formal and informal requests to defer revenue, except in very rare cases such as in response to the coronavirus pandemic.[14] This is not a very rare case and the PUCO should reject DP&L's application.

DP&L also argues that "…the problem was outside the Company's control" because its decision to withdraw ESP III was necessary after the PUCO decided that DP&L's distribution modernization charge ("DMR") must stop.[15] DP&L's argument is misleading. DP&L took the risk to revert to its ESP I. But DP&L cannot cherry pick ESP III provisions and charges to consumers to carry back into ESP I. The PUCO denied this request.[16] DP&L made a bad gamble, but one that it *chose* to make. DP&L was not *forced* to revert to ESP I—it *chose* to do so.

DP&L admits that its revenues are typical and frequent but asserts that the events giving rise to this matter are highly unusual.[17] But again, the factors that DP&L refers to (loss of the DMR, need for a financial integrity charge, DP&L's decision to terminate ESP III and revert to ESP I) were a direct result of DP&L's actions and decisions within DP&L's control. Consumers should not bear the risk for choices made by DP&L that later turned out worse than expected.

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[12] DP&L Brief at 12.

[13] Staff Brief at 1.

[14] Staff Brief at 6.

[15] DP&L Brief at 13.

[16] ESP I at ¶36.

[17] DP&L Brief at 13.

Revenue is not guaranteed to utilities.[18] And consumers should not have to make DP&L "whole" because it was unable to collect its previously approved revenue requirement because it withdrew from ESP III.

DP&L asserts that its financial integrity will be significantly and adversely affected if it cannot charge consumers for nearly $16 million[19] in "lost" revenue.[20] But as OCC argued in its initial brief, DP&L would not have chosen to withdraw from ESP III if it so desperately needed the deferred amounts.[21]

DP&L also cited two cases that it asserts the PUCO has permitted the deferral of revenue under similar circumstances.[22] However, these cases are distinguishable. First, DP&L argues that the PUCO has permitted deferrals of *bad debt* due to weather.[23] This is true, but DP&L is not seeking to defer *bad debt* due to weather. It is seeking to defer *amounts* it claims is "lost" revenue from consumer use of energy efficiency programs.[24] Indeed, DP&L cannot even decide if its deferring revenue or costs. DP&L has alternated so much between terminology and what it

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[18] *In re Duke Energy Ohio, Inc. for Approval to Change Accounting Methods*, Case No. 20-1011-GE-AAM, Finding and Order at 18 (June 17, 2020) (Finally, we emphasize that recovery is not guaranteed until the deferred amounts have been reviewed and addressed in an appropriate future proceeding, in which the question of recovery of the deferred amounts, including, but not limited to, issues such as prudence, proper computation, proper recording, reasonableness, and any potential double-recovery, will be fully considered by the Commission); ***In re Columbia*** *Gas of Ohio, Inc. for Approval to Change Accounting Methods* Case No. 20-1104-GA-AAM, Finding and Order at 10 (July 15, 2020).

[19] Tr. at 69 ("the decoupling amount that DP&L would defer as a result of the outcome of this case as of the date March 31, 2021, is $15,929,002. And the time period for that amount starting at December 19, 2019, to March 31, 2021").

[20] DP&L Brief at 13.

[21] OCC Brief at 6-7.

[22] DP&L Brief at 16-17.

[23] DP&L Brief at 17.

[24] DP&L Brief at 5 ("DP&L sought approval of a "Decoupling Rider" that would recover lost revenues associated with energy efficiency programs").

is trying to collect from consumers—revenues[25]/costs[26]/lost revenues[27]/amounts[28]—it boggles the mind.

In the second case DP&L cited, the PUCO allowed the utility to defer uncollectible amounts resulting from a PUCO moratorium on disconnections owing to a weather event.[29] This case is also distinguishable from the present case because DP&L is not seeking to defer uncollectible amounts resulting from a weather event (which was out of the utility's control). Neither of these cases resulted from the utility voluntarily withdrawing from its ESP. The PUCO simply does not approve revenue deferral except in extremely rare cases that is usually out of the utility's control. DP&L had complete control over its decision to withdraw from ESP III and revert to its ESP I, which resulted in its loss of deferral authority and revenue decoupling.

The PUCO should reject DP&L's arguments and should reject its application for deferral authority.

B. DP&L is not entitled to defer and later collect from consumers decoupling amounts it asserts as the "benefit of its bargain" under the Settlement from DP&L's distribution rate case (15-1830-EL-AIR) because DP&L withdrew from ESP III.

DP&L's contention that it should be permitted to charge consumers for "decoupling amounts" because the parties in the Rate Case Settlement, Case No. 15-1830-EL-AIR, agreed that DP&L was entitled to collect "decoupling amounts" is without merit.[30] DP&L does not have

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[25] *See* Case Nos. 08-1094-EL-SSO, et al., the Dayton Power and Light Company's Memorandum in Opposition to Motion to Reject DP&L's Tariffs at 19 (December 10, 2019).

[26] Application at ¶ 1.

[27] *See 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 Nos. 08-1094-EL-SSO, Second Finding and Order at ¶ 24 (Dec. 18, 2019).

[28] *See*, *e.g.,* AES Ohio Exhibit 2 at 2 (Direct Testimony of Tyler A. Teuscher (March 5, 2021)).

[29] DP&L Brief at 17.

[30] DP&L Brief at 10.

deferral authority and does not have a decoupling mechanism because it voluntarily withdrew from ESP III as it was in DP&L's own words: "best for the Company."[31]

OCC agrees with both Kroger and the Ohio Manufacturers' Association Energy Group ("OMAEG") that DP&L should not benefit from a bargain it no longer honors and that no longer exists.[32] DP&L lost the opportunity to receive its so-called "benefit of its bargain" when it withdrew from ESP III and failed to seek rehearing of the PUCO's decision to deny decoupling in ESP I.[33] Nevertheless, DP&L claims that it should still receive the "benefit of its bargain."[34] But there is no longer a bargain because DP&L *voluntarily* withdrew from the ESP III Settlement (where the "bargain" was established), and any bargain that existed ceased upon DP&L's withdrawal. DP&L cannot now claim some "benefit" while the other parties, including Ohio consumers, are left with nothing. This argument is without merit and the PUCO should reject it.

DP&L admits that it did not contact any of the Signatory parties to determine if they agreed that allowing DP&L to defer the decoupling amounts was consistent with the bargain struck in the settlement.[35] The Signatory parties reasonably relied on the incentives and benefits they negotiated for in the Settlement, as did DP&L. The PUCO should not allow DP&L to "reap the benefits" of the settlement agreement while denying the other signatory parties the same opportunity.

[31] DP&L Brief at 11.

[32] OMAEG Brief at 15; Kroger Brief at 8.

[33] OCC Brief at 4-5.

[34] DP&L Brief at 9.

[35] Tr. at 124.

DP&L chose, with all applicable risks, to *withdraw* ESP III.[36] This choice resulted in DP&L reverting to the rates of ESP I.[37] And unfortunately for DP&L, those rates do not include decoupling.[38] Accordingly, the PUCO should not permit DP&L to unilaterally "reap the benefits" of an agreement that it terminated. Doing otherwise would harm consumers and deteriorate the credibility of settlement agreements at the PUCO. This is both unfair and bad public policy.

C. To protect consumers, DP&L's argument that the distinction between revenues and costs in this proceeding is irrelevant should be rejected.

DP&L argues in its brief that the distinction between revenue and costs is irrelevant to this proceeding because its costs and revenues are "exactly equal."[39] But this cannot be true if DP&L is seeking nearly $16 million in revenue deferrals.[40]

Although DP&L did not identify any costs or revenues in its application or in pre-filed testimony, DP&L Witness Teuscher asserted that the amount of the deferral is nearly $16 million.[41] But DP&L provided no calculations or support for this number. And DP&L Witness Nyhuis admitted that that her testimony "did not list any [costs] out," and that DP&L did not list any costs out in its application. DP&L Witness Nyhuis merely claimed that "the distinction

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[36] 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.

[37] *Id.*

[38] OCC Ex. 13 at 7.

[39] DP&L Brief at 15.

[40] Tr. at 69 ("the decoupling amount that DP&L would defer as a result of the outcome of this case as of the date March 31, 2021, is $15,929,002. And the time period for that amount starting at December 19, 2019, to March 31, 2021").

[41] Tr. at 22 (Cross Examination of Nyhuis); Tr. at 69 ("the decoupling amount that DP&L would defer as a result of the outcome of this case as of the date March 31, 2021, is $15,929,002. And the time period for that amount starting at December 19, 2019, to March 31, 2021").

between revenues and costs is not significant" without any support or evidence.[42] She then argued that since costs of service "are part of leading up to the revenue requirement," then the distinction between costs and revenues "is more of a presentation or timing difference."[43]

DP&L's witnesses seem to contradict each other, but If DP&L Witness Teuscher is correct that the deferred revenue is nearly $16 million dollars, then there is no way that revenues and costs are equal, as Ms. Nyhuis argued. Indeed, if the difference between revenues and costs were truly irrelevant, as DP&L asserts, then DP&L would not have filed this case to seek an untimely application for rehearing of the PUCO's decision in ESP I to disallow deferral of these "lost" decoupling revenues.[44]

As previously explained in OCC initial brief, DP&L's deferral request seeks to "circumvent a rate case by requesting deferral authority for revenue deficiencies that should otherwise be addressed in a rate case proceeding."[45] Although the cost of service is one component of setting a revenue requirement in a ratemaking proceeding, revenue decoupling collects the difference between authorized revenue and actual revenue.[46] This does not mean that the difference in revenues collected versus revenues authorized is a cost to the utility.[47] To the extent that these revenues are "costs" in the sense that they are calculated based on DP&L's cost of service, a difference in collection represents a revenue shortfall that should be recovered in a new rate case.[48]

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[42] Tr. at 22 (Cross Examination of Nyhuis).

[43] Tr. at 22 (Cross Examination of Nyhuis).

[44] *See* OCC Brief at 3-4.

[45] OCC Brief at 7.

[46] OCC Brief at 7.

[47] OCC Brief at 7.

[48] OCC Brief at 7.

The PUCO should reject DP&L's argument that there is no difference between costs and revenues for the purposes of its requested deferral.

D. To protect consumers, DP&L's argument that because decoupling is not limited to energy efficiency, the expiration of energy efficiency mandates does not apply, should be rejected.

DP&L argues in its brief that the decoupling amounts it requested deferral authority for are not limited to energy efficiency so parties' arguments that the deferral should be rejected after the repeal of the mandates should be rejected.[49] DP&L also argues that OCC witness Willis conceded that "Decoupling Amounts would change based upon changes in weather, energy efficiency or consumer usage patterns, and thus Decoupling Amounts are not limited to energy efficiency."[50] But DP&L takes Mr. Willis's comment out of context.

In *general,* decoupling amounts *could* change based upon changes in weather, energy efficiency, or consumer usage patterns. However, in DP&L's application seeking approval of the "Decoupling Rider," it stated the purpose was to "recover lost revenues associated with energy efficiency programs," and DP&L directly states this in its brief.[51] Moreover, when approving the Rate Case Stipulation, the PUCO tied DP&L's Decoupling Rider to energy efficiency programs, noting that allowing DP&L to implement revenue decoupling through the existing Decoupling Rider would "promote energy efficiency efforts."[52]

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[49] DP&L Brief at 19.

[50] DP&L Brief at 18.

[51] DP&L Brief at 5.

[52] *See* 2015 Rate Case, Opinion and Order at ¶ 66 (September 26, 2018).

DP&L specifically requested deferral authority for revenues lost due to energy efficiency by consumers.[53] Therefore, DP&L specifically limited decoupling amounts in this case to energy efficiency. DP&L's attempt to misconstrue Mr. Willis's testimony should not be permitted.

The PUCO should reject DP&L's application for deferral authority for lost revenues.

III. CONCLUSION

DP&L has not shown that it complies with the PUCO's six-factor test for deferral of revenues. DP&L voluntarily withdrew its third electric security plan to revert to its ESP I. When it did so, it lost the ability to charge its consumers "lost" revenues through a decoupling mechanism. Now it seeks to "defer" these revenues for later collection from consumers. To protect DP&L's 465,000 consumers, and in the interest of Ohio law and good public policy, the PUCO should deny DP&L's request to defer decoupling revenues.

Respectfully submitted,

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[53] DP&L Brief at 5.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply Brief was served on the persons stated below via electronic transmission, this 9th day of July 2021.

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