

**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) Case No. 08-1096-EL-AAM
Authority 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
APPLICATION FOR REHEARING
OF THE
DAYTON POWER AND LIGHT COMPANY D/B/A/ AES OHIO
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") has asked the Public Utilities Commission of Ohio ("PUCO") to protect consumers who have paid plenty in made-up charges to the Dayton Power and Light Company ("DP&L") since the 2008 energy law and the interim period before it. In its Fifth Entry on Rehearing, the PUCO gave consumers a modicum of protection by requiring that DP&L include in its Rate

Stability Charge (“Stability Charge”) tariff language that the charge is refundable “to the extent permitted by law.”¹

But DP&L opposes even that protection for its consumers. DP&L also wants the PUCO to bolster its decision approving the \$79 million annual stability charge to consumers, alleging that the stability charge rates cannot change under R.C.

4928.143(C)(2)(a). But DP&L’s rehearing requests are inconsistent with prior PUCO precedent and would undo the minimal protection that the PUCO’s order gives to consumers. DP&L’s application for rehearing should be denied.

II. RECOMMENDATIONS

A. To protect consumers, the refund language should be included in DP&L’s tariffs; it is consistent with the balance struck by the General Assembly.

1. To protect consumers, the refund language should be included in DP&L’s tariffs.

In its Fifth Entry on Rehearing, the PUCO recognized the “potential unfairness when rates and charges are deemed unlawful, but there is no refund of the rates and charges which have been collected from ratepayers.”² And the PUCO acknowledged the “extraordinary circumstances” surrounding DP&L’s first electric security plan:³ two reinstatements of DP&L’s ESP 1 and the dismissal of OCC’s appeal challenging DP&L’s first ESP 1 reinstatement, even though the issue was capable of repetition, yet evading review.⁴

¹ *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Fifth Entry on Rehearing at ¶64 (June 16, 2021).

² *Id.* at ¶¶50, 61.

³ *Id.* at ¶¶ 61-64.

⁴ *See id.* at ¶ 62.

The PUCO advised that it does not seek to evade Supreme Court review of its decision.⁵ And so, it found under these extraordinary circumstances, DP&L must include language in its tariff that the stability charge is refundable “to the extent permitted by law.”⁶ The PUCO reasoned that the inclusion of the language should allow OCC to effectively appeal its decision.⁷

DP&L asserts that the PUCO should decide that the stability charge cannot and should not be made refundable because it was not refundable under its first electric security plan.⁸ But DP&L ignores PUCO precedent on this issue and fails to acknowledge that DP&L itself has argued against this position in the past.⁹ DP&L’s rehearing, thus, should be denied.¹⁰

DP&L sought to revert to ESP 1 in 2016, in response to the Ohio Supreme Court ruling striking down its stability charge.¹¹ In its proposed tariffs to reinstate ESP 1, DP&L proposed changes to some tariffs, but not to others.¹² DP&L proposed to change its ESP 1 standard offer generation tariffs and change its ESP 1 transmission tariff charges. Other parties challenged DP&L’s approach characterizing it as “cherry picking”

⁵ *Id.* at 64.

⁶ *Id.* at ¶ 64.

⁷ *Id.*

⁸ See DP&L’s Application for Rehearing at 1-3 (July 16, 2021).

⁹ See Case No. 08-1094-EL-SSO, Reply of the Dayton Power and Light Company in Support of Motion to Withdraw ESP II Application and Motion to Implement Previously Authorized Rates at 25 (Aug. 18, 2016).

¹⁰ DP&L is also wrong that R.C. 4928.143(C)(2)(b) requires carrying over the most recent electric security plan, rather than the most recent standard service offer. See OCC’s Application for Rehearing, Assignment of Error No. 1 (Jan. 17, 2020). This memorandum contra assumes *arguendo* that the electric security plan continues.

¹¹ Case No. 08-1094-EL-SSO, DP&L Motion and Memorandum in support of the Dayton Power and Light Company to Implement Previously Authorized Rates (July 27, 2016).

¹² Case No. 08-1094-EL-SSO, Notice of Filing Proposed Tariffs (Aug. 1, 2016).

the favorable rates, terms and conditions of ESP 1 and ESP II.¹³ DP&L urged the PUCO to reject arguments “that rates should be implemented exactly as they existed in 2013 [ESP1], as doing so would disrupt the market, existing supplier and customer contracts, and would actually lead to higher rates.”¹⁴

Agreeing with DP&L, the PUCO ruled that certain of the ESP 1 tariffs should be changed, while other provisions of DP&L’s ESP 1 tariffs should not. For instance, the PUCO ordered DP&L to change its environmental investment rider tariffs, dropping the charge to zero. The PUCO concluded that the plant supported by the charge was no longer used and useful in rendering public utility service to consumers.¹⁵ And the PUCO did not return to DP&L’s ESP 1 bypassable transmission charge. Instead, it approved DP&L’s ESP 2 non-bypassable transmission charges, with a two-part structure.¹⁶

The PUCO found that the statutes provided it with flexibility “to protect the public interest, maintain reasonable rates, ensure the integrity of existing contracts, and otherwise protect Ohio's competitive bid process***.”¹⁷ In denying rehearing arguments seeking to retain the transmission charges from ESP 1, the PUCO noted its obligations extended to carrying out the policies set forth in R.C.4928.02, including subsection (G).¹⁸

The PUCO also found authority for changing DP&L’s ESP 1 transmission tariffs in the words of the 2009 settlement. The PUCO concluded that the 2009 ESP 1 settlement

¹³ Case No. 08-1094-EL-SSO, IEU Memorandum in Opposition at 8 (Aug. 11, 2016).

¹⁴ *See* Case No. 08-1094-EL-SSO, Reply of the Dayton Power and Light Company in Support of Motion to Withdraw ESP II Application and Motion to Implement Previously Authorized Rates at 25 (Aug. 18, 2016) (underline in original).

¹⁵ Case No. 08-1094-EL-SSO, Finding and Order at ¶22 (Aug. 26, 2016).

¹⁶ *Id.* at ¶24.

¹⁷ Case No. 08-1094-EL-SSO, Third Entry on Rehearing at ¶18; ¶22, and ¶23.

¹⁸ *Id.* at ¶22 and ¶23.

provisions pertaining to the transmission charges did not *prohibit* a non-bypassable transmission charge (such as what was implemented in ESP 2.)¹⁹ And the PUCO also noted that the ESP 1 settlement did not address the structure of the charge -- whether it was bypassable or non-bypassable.²⁰ It concluded that DP&L's non-bypassable ESP 2 transmission charge was authorized by the settlement in DP&L's ESP 1.²¹

This PUCO precedent cannot be simply ignored. And DP&L's prior arguments (that rates and terms can be changed when reverting to a prior ESP) are inconsistent with its current stance that the PUCO cannot change the stability charge tariffs to make them refundable.

Just like it did in 2016, the PUCO can rely on the law and policy and the 2009 ESP 1 Settlement (which did not prohibit a refundable stability charge, nor address the structure of the charge) to support making the stability charges subject to refund. Here state policy and the terms of the 2009 settlement favor retaining the language that the stability charge is refundable "to the extent permitted by law."

R.C. 4928.02(A), (L) provide for reasonable rates and protecting at-risk populations. Making rates refundable facilitates these state policies.

Moreover, it would be a miscarriage of justice if the PUCO did *not* require DP&L's tariff to include language that the charge is refundable "to the extent permitted by law." As the PUCO acknowledged, without such language, "OCC may not be able to

¹⁹ Third Entry on Rehearing at ¶22.

²⁰ *Id.*

²¹ *Id.*

effectively appeal our rulings that we lack the discretion to make the RSC [Stability Charge] refundable***.”²²

The PUCO has opened up a potential path for some justice for consumers that should not be closed. To protect consumers, DP&L’s application for rehearing should be denied.

2. The consumer protection language that the PUCO directed DP&L to include in its tariff is consistent with the balance struck by the General Assembly.

DP&L asserts that requiring it to include language in its tariff that the stability charge is refundable “to the extent permitted by law” contravenes the balance struck by the General Assembly as explained by the Supreme Court in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957).²³ DP&L’s view is wrong because it ignores the Court’s later rulings which better defined the parameters of retroactive ratemaking and define conditions that allow refunds for consumers.²⁴

In short, the Court has construed the words of the General Assembly as creating an exception to *Keco*, backed up by the words of R.C. 4905.32, the statute on which *Keco* is based. As OCC explained at length in its July 16, 2021 application for rehearing, both the applicable statute (R.C. 4905.32) and Supreme Court precedent (*e.g., In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, ¶23) permit

²² Fifth Entry on Rehearing at ¶63.

²³ DP&L’s Application for Rehearing at 3 (July 16, 2021).

²⁴ See, *e.g., In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, ¶23; *In re: Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, ¶15-20.

refunds to consumers if a utility's tariff provides for them.²⁵ This *is* part of the balance that the General Assembly created.

DP&L's application for rehearing should be denied.

B. To protect consumers, DP&L's request that the PUCO adopt an additional reason to support the amount of the stability charge should be rejected.

DP&L asserts that the PUCO in its Fifth Entry on Rehearing "correctly concluded that the RSC [Stability Charge] was lawful."²⁶ Yet DP&L still seeks rehearing. DP&L asks the PUCO to add support to its decision to continue the \$79 million annual stability charge to consumers by relying on R.C. 4928.143(C)(2)(b).²⁷ DP&L argues that the stability charge is lawful because when DP&L withdrew from ESP III, the PUCO had to continue the terms of DP&L's most recent standard service offer – "the rates in effect in ESP I pursuant to its August 26, 2016 Finding and Order issued in this case."²⁸ DP&L concludes that the PUCO was required to reinstitute the stability charge "as it existed when ESP III was terminated."²⁹ DP&L's rehearing request should be denied.

At the outset, OCC disputes the merits of DP&L's premise. As noted in OCC's earlier application for rehearing,³⁰ the law provides for the continuation of the utility's "most recent standard service offer," not the utility's most recent electric security plan. The standard service offer, as defined under R.C. 4928.41, means the supply of

²⁵ Case No. 08-1094-EL-SSO, OCC's Application for Rehearing at 13-17 (July 16, 2021).

²⁶ DP&L's Application for Rehearing at 3 (July 16, 2021).

²⁷ *See Id.* at 3-5.

²⁸ *Id.* at 5.

²⁹ *Id.*

³⁰ OCC Application for Rehearing (Jan. 17, 2020).

generation. For DP&L this means the cost of energy and capacity as obtained through the competitive bidding process. No more and no less.

DP&L appears to be angling for an argument against the PUCO reducing the \$79 million annual stability charge to consumers (which the PUCO declined to do).³¹ But as OCC explained in its application for rehearing, the PUCO is under no obligation to reestablish DP&L's POLR/stability rate from its 2009 electric security plan.³² Ohio law merely directs the PUCO to continue the provisions, terms, and condition of the previous SSO (not the rates). The PUCO should decline to adopt DP&L's interpretation of the law as it is inconsistent with its own findings and reads into the law words that are not there.

Instead of granting DP&L's rehearing in this regard, the PUCO should find that the \$79 million annual stability charge to consumers is without record support. And it should not reimplement the charge at any level until and unless DP&L can provide record support for it.

III. CONCLUSION

DP&L wants the PUCO to rescind what little consumer protection the PUCO put in place in its Fifth Entry on Rehearing. The PUCO should not do so. DP&L's consumers deserve better. The PUCO should reject DP&L's application for rehearing.

³¹ Fifth Entry on Rehearing at ¶29, 40.

³² Case No. 08-1094-EL-SSO, Finding and Order at ¶27 (Aug. 26, 2016).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was electronically served via electric transmission on the persons stated below this 30th day of July 2021.

/s/ Maureen R. Willis

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Summary: Memorandum Memorandum Contra Application for Rehearing of the Dayton Power and Light Company D/B/A AES Ohio by Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of Willis, Maureen R.