

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The Dayton)	
Power and Light Company to Increase)	Case No. 20-1651-EL-AIR
Its Rates for Electric Distribution.)	
)	
In the Matter of the Application of The Dayton)	
Power and Light Company for Accounting)	Case No. 20-1652-EL-AAM
Authority.)	
)	
In the Matter of the Application of The Dayton)	
Power and Light Company for Approval)	Case No. 20-1653-EL-ATA
Of Revised Tariffs.)	

**REPLY IN SUPPORT OF THE OFFICE OF THE
OHIO CONSUMERS' COUNSEL'S
MOTION TO DISMISS
BY OHIO PARTNERS FOR AFFORDABLE ENERGY**

I. Introduction

On August 5, 2021, the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Dismiss ("Motion") the Dayton Power and Light Company's d/b/a AES Ohio ("DP&L") Application for a Rate Increase ("Application"). In a twelve page Memorandum in Support of the Motion, OCC succinctly and correctly explained why DP&L's Application is barred by the terms of DP&L's ESP I. DP&L responded on August 20, 2021, with twenty pages of contradictory arguments in which DP&L attempts to justify why DP&L is entitled to the benefits of ESP I without being subject to its restrictions. The Public Utilities Commission of Ohio ("Commission") should reject DP&L's attempts to avoid the terms of its commitment in ESP I.

Ohio Partners for Affordable Energy ("OPAE") files this Reply in Support of OCC's Motion to ask the Commission to hold DP&L to the agreement it bargained for in ESP I and which DP&L has reverted to on August 26, 2016, and again on December 19, 2019.

II. Law and Argument

A. OCC's Motion is Timely.

DP&L requests that the Commission deny OCC's Motion claiming it is not timely pursuant to Ohio. R. of Civ. Pro. 12(A)(2). DP&L's reliance on Civ. R. 12(A)(2) is misplaced. Civil Rule 12(A)(2) governs when parties served with cross-claims must file an answer. That provision of Civ. R. 12 is not applicable to this proceeding. Instead, Civ. R. 12(B) states, in relevant part,

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

DP&L equates OCC's Motion to a motion pursuant to Civ. R. 12(B)(6).¹ Pursuant to the plain language of the Rule above, a defense made pursuant to Rule 12(B)(6) may be made by Motion prior to filing any required pleading. Pursuant to the July 30, 2021 Entry establishing a procedural schedule in this case, the first required pleading would be Objections to the Staff Report which were due August 25, 2021. OCC filed its Motion on August 9, 2021 within the bound of the rule prescribed above.

B. OCC's Motion is not a Collateral Attack on a Prior Commission Decision Because it is OCC's Right, as a Signatory Party to the ESP I Stipulation, to Enforce its Unexpired Terms.

DP&L repeatedly attempts to cast the OCC's arguments as the equivalent of a collateral attack on the Commission's prior decisions.² However this argument fails to acknowledge that

¹ DP&L's Memorandum Contra ("Memo") to OCC's Motion at p. 6.

² DP&L Memo at pp. 2, 4, 5, 6, 7, 16.

DP&L's repeated and continued reliance on the terms of ESP I, almost ten years after it was intended to end, supports OCC's ability to challenge any action DP&L takes in violation of the terms of ESP I. OCC's Motion is not attacking a prior decision, it is challenging DP&L's rights *in this case* to violate the terms of a prior Stipulation which *DP&L continually revives and is currently bound by*.

In the Fifth and Sixth Entries on Rehearing in this matter, the Commission held OCC's arguments be to an attempt to force retroactive ratemaking by reverting to the rates approved at the time of ESP I after the Commission approved new rates in 2015.³ DP&L argues that OCC's Motion should be regarded on a collateral attack on the Commission decision in those Entries.⁴ That is a patent mischaracterization of OCC's Motion.

OCC's Motion does not seek to reinstate previous distribution rates. Rather OCC challenges DP&L's ability to request new rates until a new ESP is in place under the terms of ESP I.⁵ OCC's Motion is not a collateral attack on any prior decision of the Commission. OCC's Motion is simply the exercise of its rights as a signatory party to enforce the terms of a Stipulation which DP&L agreed to and the Commission approved - a Stipulation DP&L unilaterally chose to reinstate not once, but twice since it was originally intended to expire on December 31, 2012.

The Commission has repeatedly held that DP&L has a right pursuant to R.C. 4928.143(C)(2)(b) to withdraw an application for a standard service offer and revert back to the utility's most recent standard service offer.⁶ The Commission also stated, "[a]ccording to the

³ ESP I Case, Sixth Entry on Rehearing (Aug. 11, 2021) at ¶ 39.

⁴ Id at p. 5.

⁵ OCC' Motion at p. 1.

⁶ Pub. Util. Comm. Case No. 08-1094-EL-SSO ("ESP I"), Second Entry on Rehearing at ¶27 (December 18, 2019); Sixth Entry on Rehearing at ¶22 (August 11, 2021).

plain language of the statute, the Commission must restore the provisions, terms and conditions of ESP I which were in effect prior to the effective date of ESP III.”⁷ The ESP I Stipulation contained a condition that “DP&L’s distribution base rates will be frozen through December 31, 2012.”⁸ The Commission previously recognized that the rate freeze in the approved ESP I Stipulation constituted a provision, term, and condition of ESP I.⁹

The rate freeze was originally intended to expire on December 31, 2012, and DP&L actually argues¹⁰ that the rate freeze did expire on that date by its terms, despite making the exact opposite argument previously in support of the RSC.¹¹ The Commission already ruled on this issue when it came to the Rate Stabilization Charge (“RSC”). The RSC had the same expiration date as the rate freeze which coincided with the ESP I termination. The Commission held that though the RSC was intended to expire on December 31, 2012, upon the termination of ESP I, once ESP I was extended the Commission “cannot arbitrarily choose some of the various provisions of the ESP to continue after the termination date of the ESP and choose other provisions of the ESP not to continue.”¹²

Therefore, DP&L is currently operating under ESP I, per Commission approval, and ESP I contains a condition which states DP&L’s distribution rates will be frozen for what the Commission has interpreted is the term of ESP I. DP&L does not have the power to raise its distribution rates and the Commission must grant OCC’s Motion to enforce the rate freeze as a Commission recognized unexpired condition of DP&L’s active ESP.

⁷ Id. Second Entry on Rehearing at ¶27.

⁸ ESP 1 Settlement at 10.

⁹ ESP I, Fifth Entry on Rehearing at ¶19 (June 16, 2021).

¹⁰ DP&L’s Memo at p. 7.

¹¹ ESP I Entry on Rehearing at ¶10 (February 19, 2013).

¹² Id.

OPAE respectfully requests that the Commission grant OCC's Motion and enforce the terms of ESP I consistent with prior Commission precedent.

C. The Rate Freeze is a Term or Condition of ESP I which was Extended Each Time DP&L Reverted Back to ESP I.

DP&L claims that the rate freeze provision was not a provision, term, or condition of ESP I.¹³ Specifically, DP&L states that though the rate freeze was a provision of the approved ESP I Stipulation “that does not mean that every term in that Stipulation is an ESP term. Only those terms that were authorized by the ESP statute can be ESP terms.”¹⁴ DP&L posits that nothing in the ESP statute authorizes the Commission to order a distribution rate freeze and the only reason it was included was because DP&L consented to it.¹⁵ According to DP&L, there is no legal basis for the rate freeze absent DP&L's consent and therefore it cannot be a term of the ESP.

This argument is both disingenuous and meritless. Initially, it should be noted, DP&L's arguments focus solely on whether a rate freeze can be a “term” of an ESP under the statute. The argument fails to address entirely if the rate freeze is a condition or provision of the ESP I Stipulation. Both of which were also extended each time DP&L reverted back to ESP I. As the Commission stated, “[a]ccording to the plain language of the statute, the Commission must restore the provisions, terms and conditions of ESP I which were in effect prior to the effective date of ESP III.”¹⁶ Since DP&L rejected ESP II and reinstated ESP I while ESP III was pending the provisions, terms, and conditions of ESP I, including the rate freeze were and remain

¹³ DP&L Memo at p. 13.

¹⁴ Id.

¹⁵ Id. at p. 14.

¹⁶ ESP I Second Entry on Rehearing at ¶27.

effective. When DP&L rejected the modified ESP III in favor of the benefits of ESP I they also accepted all of its conditions and provisions. These conditions include the rate freeze.

Further, the Commission previously rejected this exact argument that only those terms and conditions which are lawful for inclusion in the ESP should be extended in the Second Finding and Order in this case.¹⁷ The Commission stated,

We are not persuaded by Dayton/Honda's reliance on R.C. 4905.22 in support of their argument that the Commission should approve only those provisions, terms, and conditions that are lawful for inclusion in an ESP. As noted above, the "notwithstanding" clause in R.C. 4928.143(B) exempts provisions in an ESP from "any other provision of Title XLIX of the Revised Code to the contrary" (with certain limited exceptions which are not relevant here). R.C. 4928.143(B).

* * *

The Stipulation adopted by the Commission in these proceedings states, in no uncertain terms, "[t]his Stipulation contains the entire Agreement among the Signatory Parties, and embodies a complete settlement of all claims, defenses, issues and objects in these proceedings." Third Entry on Rehearing at ¶ 31 (quoting Stipulation (Feb. 24, 2009) at 17-18). The lawfulness of the provisions, terms, and conditions of ESP I was determined by the Commission in the Opinion and Order, which adopted the Stipulation among the parties in this case.¹⁸

The Commission expressly recognized all the provisions, terms, and conditions of ESP I have already been deemed lawful and are all necessarily extended by DP&L's decision to revert back to ESP I.

Finally, DP&L's argument misunderstands the legal standard the Commission applied in ESP I. The Commission approved the ESP I Stipulation pursuant to the standard of review for considering the reasonableness of a stipulation.¹⁹ This standard of review, often referred to as the three-part test, asks the Commission to consider:

- 1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- 2) Does the settlement, as a package, benefit ratepayers and the public interest?

¹⁷ Id. at ¶35.

¹⁸ Id.

¹⁹ ESP I Opinion and Order at pp. 6-7.

- 3) Does the settlement package violate any important regulatory principle or practice?²⁰

The practical effect of the filing of a stipulation is to modify the standard by which the Commission must determine the case. Former Commission Chairman Haque noted this distinction and compared the Commission's decisions in two different cases stating,

The key difference here, legally, is that AEP (and FirstEnergy) filed a settlement stipulation with the Commission. As a result, while the legal standard of review still requires that the utilities bear the burden of proof, the true test for legality in these cases is the three-part stipulation test established by this Commission and upheld by the Supreme Court of Ohio.²¹

This change in standard does not mean statutory standards can be violated but rather that the factors that control the Commission's review in a fully litigated application are eased and replaced by the considerations of the three part test when the Commission is considering whether to approve a stipulation.²²

Therefore, DP&L's reliance on R.C. 4928.143, is misplaced because ESP I was the product of a stipulation. Part of the ESP I Stipulation was an agreement to freeze distribution rates. DP&L's assertion that the rate freeze is only lawful because DP&L consented to it is inconsequential now that is part of an approved Stipulation. DP&L's bargained for the terms and conditions of the ESP I Stipulation and those terms and conditions included a rate freeze. As discussed at length above, those terms and conditions were revived each time DP&L reverted to ESP I. DP&L does not have the power to invalidate them by simply claiming it no longer consents to those conditions. The conditions are now part of a Commission approved and fully enforceable stipulation.

²⁰ Id.

²¹ Pub. Util. Comm. Case No. 14-1693-EL-RDR Opinion and Order, Concurrence of Chairman Haque at pp. 1-2 (March 31, 2016).

²² Id. at p. 7.

DP&L's remedy to avoid the rate freeze limitation would have been to accept either the terms of ESP II or ESP III. Alternatively, if DP&L has a new ESP approved, ESP I would be terminated and DP&L would no longer be subject to the rate freeze.

OPAE respectfully requests that the Commission reject DP&L's misinterpretation of Commission precedent and grant OCC's Motion thereby holding DP&L to the commitments and benefits it bargained for in ESP I.

D. OCC Has Not Forfeited its Rights to Enforce the Stipulation.

DP&L ignores and, at times misstates, Commission precedent repeatedly over seven pages as it argues that OCC forfeited its right to enforce the rate freeze from the ESP I Stipulation.²³ DP&L argues that the rate freeze expired on December 31, 2012, an argument the Commission has already objected as discussed above. DP&L's remaining arguments regarding the alleged forfeiture are grounded in the DP&L's misinterpretation that the rate freeze is not a term or condition of ESP I. Instead, DP&L argues that OCC needed to affirmatively seek to extend or reinstate the rate freeze provision of the Stipulation. As explained above, the rate freeze is a condition of ESP I and the Commission has already recognized it has no authority to pick and choose which terms, conditions, and provisions to enforce and which to ignore.²⁴

Terms and conditions which, per the ESP I Stipulation, were negotiated in arms-length bargaining and represent the entire agreement between the parties; an agreement meant to avoid expensive, complex, protracted litigation.²⁵ Those same parties also expressly recognized each party's right to enforce the terms of the Stipulation in other proceedings.²⁶ The rate freeze was and is a term and condition of the Stipulation. A contractual right held by each Signatory Party

²³ DP&L Memo at pp. 7-13.

²⁴ ESP I Entry on Rehearing at ¶10 (February 19, 2013).

²⁵ ESP I Stipulation at ¶33 (February 24, 2009).

²⁶ Id. at ¶35.

and given force of law through Commission adoption and approval. OCC had no duty to affirmatively do anything to maintain the right to the ESP I rate freeze.

Further, OCC did not waive its right to enforce the rate freeze in this proceeding. OCC filed its Motion prior to hearing and is actively seeking to enforce its rights. Whether OCC was successful in timely enforcing its rights in a prior proceeding has no bearing on whether OCC is able to enforce its rights in this case with different facts and a different procedural schedule. DP&L's decision to maintain ESP I has extended OCC's right to enforce the terms of the ESP I Stipulation in every relevant proceeding until DP&L gains approval for a new electric security plan.

E. The 2015 Rate Case Did Not Modify the Rate Freeze Because the Stipulation is Broadly Worded and its Terms have Been Reinstated by DP&L's Decision to Withdraw ESP III.

DP&L claims that the distribution rate case in 2015 supersedes the rate freeze in ESP I.²⁷ DP&L argues that since this 2015 rate case decision came 9 years after the ESP I decision it establishes that the Company has the right to file a distribution case "separate and independent of any order in the Company's standard service offer cases."²⁸ DP&L, then doubles down and puts the onus on OCC stating that OCC knew or should have known that DP&L could revert to ESP I in the future and therefore waived any right it may have had to enforce the rate freeze by signing the 2015 rate case Stipulation.²⁹

However, under DP&L's own logic DP&L would have waived its right under the 2015 rate case Stipulation to file a distribution rate case on or before October 31, 2022. The 2015 rate case Stipulation was approved by the Commission on September 26, 2018. Over a year later, on

²⁷ DP&L's Memo at pp. 19-20.

²⁸ Id.

²⁹ I. at p. 20.

November 25, 2019, (accepted by docketing on November 26, 2019) DP&L filed a withdrawal of ESP III and exercised its statutory right to revert to ESP I. On December 18, 2021, the Commission accepted DP&L's withdrawal and reinstituted the ESP I provisions, terms, and conditions.³⁰ Therefore, the most recently approved Commission decision was the reversion to the ESP I provisions, terms, conditions. DP&L knew or should have known that those provisions, terms, and conditions contained a general commitment that DP&L's distribution rates would be frozen. A condition the Commission previously established was extended for the duration of however long ESP I is in place.

F. The Language of the Approved ESP I Stipulation is the Best Evidence of the Parties' Intentions and the Language Includes a Distribution Rate Freeze.

DP&L claims that there is no indication in the ESP I Stipulation that the Signatory Parties intended to have the freeze apply to any future distribution rates.³¹ Similarly, there is no indication the Signatory Parties intended ESP I to last into the year 2021, yet DP&L has continually reverted back to ESP I. The Commission has already rejected ex post facto proclamations of what other parties' intentions may or may not have been in 2009.³² The clearest indicator of the parties' intention is the language in the Stipulation. The Stipulation contains a condition freezing distribution rates. The Commission should reject DP&L's attempts to reap the benefits of ESP I without also being subject to the bargained for conditions on those benefits.

III. Conclusion

For the foregoing reasons, OPAE respectfully requests that the Commission grant OCC's Motion to Dismiss DP&L's Application to Increase Rates. DP&L has continually reaped the

³⁰ ESP I Second Finding and Order (December 18, 2019).

³¹ DP&L Memo at p. 3.

³² ESP I Entry on Rehearing at ¶10 (February 19, 2013).

benefits of ESP I and the Commission must ensure that those benefits are subject to the conditions that all the other Signatory Parties bargained for in agreeing to the ESP I Stipulation.

/s/Robert Dove

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/s/ Robert Dove
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Summary: Reply in Support of the Office of the Ohio Consumers' Counsel' Motion to the Dismiss Dayton Power and Light Company's Application to Increase Rates electronically filed by Mr. Robert Dove on behalf of Ohio Partners for Affordable Energy