

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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. |) | |

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| In the Matter of the Application of The |) | |
| Dayton Power and Light Company for |) | Case No. 08-1095-EL-ATA |
| Approval of Revised Tariffs. |) | |

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| In the Matter of the Application of The |) | |
| Dayton Power and Light Company for |) | |
| Approval of Certain Accounting Authority |) | Case No. 08-1096-EL-AAM |
| Pursuant to Ohio Rev. Code Section |) | |
| 4905.13. |) | |

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|---|---|-------------------------|
| 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. |) | |

**REPLY IN SUPPORT OF MOTION FOR PROCEDURAL SCHEDULE PER OCC’S
WITHDRAWAL FROM SETTLEMENT AFTER ANTI-CONSUMER MODIFICATION
DENYING A RATE FREEZE
BY
OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. BACKGROUND

On September 10, 2021, the Office of the Ohio Consumers’ Counsel (“OCC”) filed to protect consumers with its notice to withdraw from and terminate a 2009 PUCO-approved Settlement that Dayton Power and Light currently uses to charge its customers. OCC exercised its withdrawal and termination rights under the Settlement after the PUCO materially modified the Settlement by failing to require DP&L to keep its rate-freeze commitment to not raise its distribution rates. Shortly thereafter, OCC asked the PUCO to carry out its duty under the

Settlement to “convene an evidentiary hearing’ so that parties will have the opportunity to retry the proceeding “as if this Stipulation had never been executed.”¹

To that end, OCC moved for the Commission to adopt the following procedural schedule:

- Discovery Response Period: 7 calendar days
- OCC testimony due: January 14, 2022
- Prehearing Conference: January 21, 2022
- Evidentiary Hearing: January 28, 2022

In its memorandum contra, DP&L asks that the PUCO hold OCC’s motion for a procedural schedule in abeyance until the PUCO rules on its motion to strike OCC’s Notice.² DP&L says that if the PUCO denies its motion to strike, the PUCO should set a date for DP&L to file supplemental testimony and deny OCC’s request that the time for responding to discovery should be reduced to seven days.³

But consumers are the aggrieved party here, not DP&L. DP&L’s Memorandum Contra should be rejected, and OCC’s motion for a procedural schedule should be granted, to protect consumers.

II. RECOMMENDATIONS

A. In the interest of consumer justice, OCC’s motion for a procedural schedule should be granted and not held in abeyance.

There is no reason to hold OCC’s motion for a procedural schedule in abeyance. That is especially so since the PUCO has not ordered DP&L to stop charging consumers under the

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, Stipulation and Recommendation at ¶37 (Feb. 24, 2009).

² *Id.*, The Dayton Power and Light Company D/B/A AES Ohio's Memorandum In Opposition To Office Of The Ohio Consumers' Counsel's Motion For A Procedural Schedule at 2 (Sept. 30, 2021).

³ *Id.*

Settlement after OCC terminated it. Without such a ruling, consumers could be made to pay rates that are null and void now that the Settlement has been terminated.⁴ DP&L has a history of charging Dayton-area consumers for hundreds of millions of dollars in fees that later were found to be unlawful (such as the infamous distribution modernization rider and nebulous charges for stability).⁵

As described in detail in OCC's Notice, the PUCO failed to adopt the 2009 Settlement in its entirety and without material modification by failing to preserve OCC's bargained-for rate freeze in that Settlement.⁶ As a result, OCC met the conditions under the 2009 Settlement to terminate and withdraw from the Settlement – and did terminate and withdraw from the Settlement.⁷ The 2009 Settlement sets forth the procedure if a signatory party withdraws from the Settlement. The Settlement's required procedure is that the PUCO “*will* convene an evidentiary hearing”⁸

In fact, there is every reason for the PUCO to adopt OCC's suggested procedural schedule. The PUCO materially modified the Settlement that OCC signed, improperly relieving DP&L of its agreement to freeze distribution rates during the electric security plan. That was a

⁴ Settlement at ¶37.

⁵ After both were declared unlawful, Consumers have been denied \$330 million in refunds in connection with DP&L's so-called “Stability Charge” and \$218 million in connection with DP&L's so-called “Distribution Modernization Rider.” *See In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166 (2016) (stability charge unlawful); *In the Matter of the Application of Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, Supplemental Opinion and Order (Nov. 21, 2109) at para. 110 (DMR unlawful).

⁶ OCC's Notice at 3-7.

⁷ *Id.* at 7-9.

⁸ Settlement at ¶37.

key consumer protection against more DP&L rate increases.⁹ To protect consumers, OCC applied for rehearing from that decision.¹⁰

On December 18, 2019, the PUCO failed to adopt the rate freeze provision of the 2009 Settlement, thus rejecting or modify it by ruling that DP&L did not have to honor its distribution rate freeze while ESPI was in effect. OCC sought rehearing from the PUCO's December 18, 2019 ruling. On June 16, 2021, *sixteen long months* after OCC's rehearing request and only after OCC filed for a writ at the Supreme Court,¹¹ the PUCO belatedly issued an Entry on Rehearing. In its Fifth Entry on Rehearing, it granted in part, and denied in part, OCC's rehearing requests. The PUCO's June 16, 2021 Entry, with its new rulings, including its ruling granting rehearing (in part), modified the PUCO's December 18, 2019 ruling. Those modifications spurred additional applications for rehearing by DP&L and OCC. On August 11, 2021, the PUCO issued a final rehearing order where it disposed of both DP&L's and OCC's application for rehearing, ending the rehearing process.

After being denied access to judicial review and consumer justice by the PUCO's unreasonable and costly rehearing delay, OCC and the consumers it represents finally have an opportunity for some justice. Justice delayed is justice denied. That is especially so for consumers who must continue to pay unjust and unreasonable ESP I rates –rates which DP&L can be expected to claim are not refundable to consumers even if the Ohio Supreme Court determines the rates charged to consumers were unreasonable and unlawful. OCC's motion for a procedural schedule should not be held in abeyance.

⁹ Second Finding and Order (Dec. 18, 2019).

¹⁰ OCC Application for Rehearing (Jan. 17, 2020).

¹¹ *State ex rel Office of the Ohio Consumers' Counsel v. Jenifer French, et al.*, S.Ct. 2021-0456, Complaint in procedendo (Apr. 14, 2021). The Court denied the writ after the PUCO filed a motion to dismiss, following the PUCO's ruling on OCC's application for rehearing in the Fifth Entry on Rehearing. 2021-Ohio-2795.

B. In consumers' interest, any supplemental testimony by DP&L should be due by December 27, 2021, and the response time for discovery should be seven days.

Although DP&L says that it should be permitted to file supplemental testimony, it does not propose a date for doing so. In the interest of consumer justice and in light of the long delay described above, OCC proposes that any DP&L supplemental testimony should be due by December 27, 2021. This would give DP&L sufficient time to prepare any supplemental testimony and give OCC sufficient time under R.C. 4903.082 to conduct discovery (so long as discovery response time is reduced to seven days and consumers receive other due process).

The Attorney Examiner clearly has the authority to shorten or enlarge the time period for discovery,¹² and should do so here. A shortened discovery response time will allow the parties a fair opportunity to conduct a full investigation of the important issues involved in this proceeding.

A shortened discovery response period is not a novel concept. The PUCO has frequently shortened discovery response periods in its proceedings.¹³ Shortening discovery response time is consistent with PUCO Entries in similar cases where the time period to respond to discovery was shortened. In those Entries, the PUCO stated:

Due to the abbreviated period for the start of the hearing, response time for discovery should be shortened * * *. Discovery requests and replies shall be made by hand delivery, email or telefax. An attorney serving a discovery request shall attempt to contact the attorney upon whom the

¹² Ohio Adm. Code 4901-1-17(G).

¹³ See, e.g., *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer*, Case No. 14-1297-EL-SSO, Transcript from June 2, 2015 Conference at 96 (reducing discovery response time to seven days in light of hearing schedule); *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry (Mar. 23, 2012) (reducing discovery response time to seven days “in fairness to all the parties and to facilitate the efficient and timely consideration of the issues.”); *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates, et al.*, Case Nos. 17-32-EL-AIR, *et al.*, Entry (May 9, 2018) (reducing discovery response time to seven days).

discovery request will be served in advance to advise him or her that the request will be forthcoming. To the extent a party has difficulty responding to a discovery request * * *, counsel for the parties can discuss the problem and work out a mutually satisfactory solution.¹⁴

OCC's proposed discovery response period is necessary to permit parties time to prepare while keeping this case on-track for consumer justice.

III. CONCLUSION

Dayton-area consumers have been made to wait for justice too long. OCC's proposed procedural schedule is fair, just, and reasonable. It should be adopted.

Respectfully submitted,

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¹⁴ *In the Matter of the Applications of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period*, Case No. 03-2144-EL-ATA, et al., Entry at 5 (Oct. 28, 2003); *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for the Dayton Power and Light Company*, Case No. 02-2779-ELATA, et al., Entry at 2 (Apr. 1, 2003).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply was electronically served via electric transmission on the persons stated below this 7th day of October 2021.

/s/ Maureen R. Willis

Maureen R. Willis
Counsel of Record

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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Summary: Reply Reply in Support of Motion for Procedural Schedule per OCC's Withdrawal from Settlement after Anti-Consumer Modification Denying a Rate Freeze by Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J. Greene on behalf of Willis, Maureen R.