

## THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF  
THE DAYTON POWER AND LIGHT  
COMPANY TO INCREASE ITS RATES FOR  
ELECTRIC DISTRIBUTION.

CASE NO. 20-1651-EL-AIR

IN THE MATTER OF THE APPLICATION OF  
THE DAYTON POWER AND LIGHT  
COMPANY FOR ACCOUNTING  
AUTHORITY.

CASE NO. 20-1652-EL-AAM

IN THE MATTER OF THE APPLICATION OF  
THE DAYTON POWER AND LIGHT  
COMPANY FOR APPROVAL OF REVISED  
TARIFFS.

CASE NO. 20-1653-EL-ATA

### ENTRY

Entered in the Journal on October 20, 2021

#### I. SUMMARY

{¶ 1} The Commission denies the motion to dismiss filed by Ohio Consumers' Counsel.

#### II. DISCUSSION

##### A. *Procedural History*

{¶ 2} The Dayton Power and Light Company (DP&L or the Company) is an electric light company and a public utility as defined in R.C. 4905.03 and R.C. 4905.02, respectively. As such, DP&L is subject to the jurisdiction of this Commission pursuant to 4905.04, 4905.05, and 4905.06.

{¶ 3} R.C. Chapter 4909 prescribes the fixation of rates for public utilities. An application for an increase in rates is governed by and must satisfy the requirements of R.C. 4909.17 to 4909.19 and R.C. 4909.42. In determining just and reasonable rates, R.C. 4909.15(C) mandates that the revenues and expenses of a utility be determined during a test period. When applying for a rate increase, a utility may propose a test period for this determination that is any 12-month period beginning not more than six months before, and

not ending more than nine months after, the date the application is filed. R.C. 4909.15. Unless otherwise ordered by the Commission, the test period shall be what is proposed by the utility. *Id.* Additionally, under R.C. 4909.15(C)(2), the date certain shall not be later than the date of filing.

{¶ 4} On October 30, 2020, pursuant to the Standard Filing Requirements set forth in Ohio Adm.Code 4901-7-01, Appendix A (Standard Filing Requirements or SFR), DP&L filed a notice of its intent to file an application to increase its rates for electric distribution service.

{¶ 5} Also on October 30, 2020, the Company filed a motion to establish a test period and date certain in accordance with R.C. 4909.15(C) and Chapter II(A)(5)(a) of the Standard Filing Requirements. DP&L proposed the twelve-month period beginning June 1, 2020, and ending May 31, 2021, as the test year and June 30, 2020, as the date certain for its forthcoming application, which it intended to file on November 30, 2020. The October 30, 2020 motion also requested waivers of certain Standard Filing Requirements pursuant to Chapter II, (A)(4)(a).

{¶ 6} On November 18, 2020, the Commission approved DP&L's motion to set the test period and date certain, as well as its motion for waiver of certain SFRs.

{¶ 7} On November 30, 2020, DP&L filed its application to increase its rates. On December 14, 2020, the Company filed direct testimony in support of its application.

{¶ 8} On April 7, 2021, the Commission accepted the application as of the filing date of November 30, 2020. As part of the same Entry, the Commission granted motions to intervene on behalf of Ohio Consumers' Counsel (OCC) and Ohio Partners for Affordable Energy (OPAE), as well as ten additional intervenors.

{¶ 9} On July 26, 2021, Staff filed its report of investigation (Staff Report).

{¶ 10} On July 30, 2021, the attorney examiner issued a procedural schedule setting forth case deadlines, including scheduling the matter for an evidentiary hearing on October 4, 2021. Pursuant to an Entry dated August 9, 2021, the attorney examiner granted a joint motion for continuance of the evidentiary hearing, resetting it for October 26, 2021.

{¶ 11} On August 5, 2021, OCC filed a motion to dismiss DP&L's application for a rate increase.

{¶ 12} On August 20, 2021, DP&L filed a memorandum in opposition to OCC's motion to dismiss.

{¶ 13} On August 27, 2021, OCC and OPAE filed separate replies in support of the motion to dismiss DP&L's application for a rate increase.

#### **B. Arguments of the Parties**

{¶ 14} In its motion to dismiss, OCC argues that the case lacks a justiciable issue because DP&L is committed to a freeze of its base rates for the duration of its operation pursuant to its first Electric Security Plan (ESP I).<sup>1</sup> *In re Application of the Dayton Power and Light Co. for Approval of its Elec. Sec. Plan*, Case No. 08-1094-EL-SSO (ESP I Case); Stipulation and Recommendation at 10 (Feb. 24, 2009) (ESP I Settlement); Opinion and Order at 5, 9 (June 24, 2009). Accordingly, OCC argues that this case should be dismissed with prejudice and that the adjudication of any rate increase should not occur so long as ESP I remains in effect.<sup>2</sup>

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<sup>1</sup> OCC describes that the rate freeze would enforce rates that were established pursuant to the Company's 2015 base rate case. *In re Application of The Dayton Power and Light Company for an Increase in its Electric Distribution Rates*, Case No. 15-1830-EL-AIR, Opinion and Order (Sep. 26, 2018) (2015 Rate Case).

<sup>2</sup> OCC's motion explains DP&L's complex electric security plan (ESP) history, which results in the Company's current operation pursuant to ESP I. While DP&L disputes the legal impact of its operation pursuant to ESP I, there is no dispute as to the fact that the Company is operating pursuant to that authority. *In re Application of The Dayton Power and Light Company*, Case No. 16-395-EL-SSO, Finding and Order (Dec. 18, 2019) (approving withdrawal from ESP III); *ESP I Case*, Case No. 08-1094-EL-SSO, Second Finding and Order (approving revised tariffs with modification by the Commission) (collectively, *ESP III Withdrawal Cases*).

{¶ 15} DP&L disputes OCC's claims on multiple bases. The Company claims that OCC's motion is (1) an impermissible collateral attack on DP&L's continuing operation pursuant to ESP I, which was adjudicated in *ESP III Withdrawal Cases* and (2) untimely, in that the motion should have been filed earlier in this proceeding. Further, the Company claims that OCC's actions in earlier cases result in the forfeiture of OCC's right to enforce any base rate freeze because (1) OCC did not seek to extend the freeze when the Commission, in its Entry dated December 19, 2012, extended the ESP I Settlement in *ESP I Case*, (2) OCC did not seek to reinstate the rate freeze when the Company re-implemented ESP I following the termination of ESP II<sup>3</sup>, (3) OCC did not seek to dismiss *2015 Rate Case*, (4) OCC did not seek to reinstate the rate freeze when the Company re-implemented ESP I following the termination of ESP III, and (5) OCC argued in support of a proposed rate increase, rather than the continuing rate freeze, during the most recent *Quadrennial Review Case*<sup>4</sup>. The Company makes further claims against enforcing the rate freeze that are independent of OCC's past litigation positions, including (1) the rate freeze was not a provision of ESP I such that it is not enforceable following the Company's return to operations pursuant to that authority, and (2) the rate freeze has been supplanted or modified by *2015 Rate Case*.

{¶ 16} In its reply in support of motion to dismiss, OCC maintains that the rate freeze was a part of ESP I. As such, OCC maintains that the rate freeze remains in effect pursuant to DP&L's reversion to ESP I<sup>5</sup> and that none of OCC's actions in subsequent cases can serve as a barrier to the Commission's obligation to enforce the rate freeze. Further, OCC defends its actions in ancillary cases claiming that they are not inconsistent with, nor a barrier to, its

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<sup>3</sup> *In re Application of The Dayton Power and Light Co. for Approval of its Elec. Sec. Plan*, Case No. 12-426-EL-SSO, Finding and Order (Aug. 26, 2016).

<sup>4</sup> *In re the Application of The Dayton Power and Light Co. for a Finding that its Current Elec. Sec. Plan Passes the Significantly Excessive Earnings Test and More Favorable in the Aggregate Test in R.C. 4928.143(E)*, Case No. 20-680-EL-UNC.

<sup>5</sup> OCC cites to four instances where the rate freeze was affirmed over the past nine years, including (1) its continuation when ESP I was extended beyond its December 31, 2012 expiration date, (2) its reinstatement when DP&L withdrew ESP II and returned to ESP I, (3) its continuation during the implementation of *2015 Rate Case*, and (4) its reinstatement when DP&L withdrew from ESP III and returned to ESP I.

position in the current case. OCC also argues that its motion to dismiss (1) is not a collateral attack on ESP I, and (2) was timely filed.

{¶ 17} In its reply in support of motion to dismiss, OP&E joins OCC in claiming that the motion is timely because it was filed before any responsive pleading was due in this case. Further, OP&E argues that OCC's motion is not a collateral attack on *ESP I Case* because OCC, as a party to the stipulation in that case, has a continuing right to act to enforce the terms of the stipulation that has been resuscitated by DP&L's actions to revert to ESP I. OP&E further claims that the rate freeze was a term in ESP I that remains in effect regardless of the intervening *2015 Rate Case*.

### C. Discussion

{¶ 18} The Commission denies OCC's motion to dismiss, finding that DP&L's application to increase rates presents a justiciable issue. The Commission further finds that the arguments raised in the motion to dismiss relating to DP&L's ability to implement any rate increase should be adjudicated, rather than dismissed, in this case.

{¶ 19} Initially, the Commission appreciates the need for OCC to file the motion to dismiss in this proceeding in order to preclude any potential waiver of the issues raised in the motion. *City of Parma v. Pub. Util. Comm.*, 86 Ohio St. 3d 144, 148, 712 N.E.2d 724 (1999) ("By failing to raise an objection until the filing of an application for rehearing, Parma deprived the commission of an opportunity to redress any injury or prejudice that may have occurred"). See also *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St.3d 524, 941 N.E.2d 757, 2010-Ohio-6239 at ¶ 18 (Failure to challenge allegedly defective public notice at an earlier juncture constituted a forfeiture of the objection because it deprived the Commission of an opportunity to cure any error when it reasonably could have.).

{¶ 20} Nevertheless, the Commission finds that the motion to dismiss should be denied. Assuming, without deciding, that OCC is correct that DP&L's distribution rates should be frozen at current rates as a term, condition or charge of ESP I, we find that DP&L

is not precluded from filing an application for an increase in rates according to the plain language of the ESP I Settlement, which provides that “DP&L’s distribution base rates will be frozen through December 31, 2012.” The ESP I Settlement does not bar DP&L from filing a distribution rate case in order to prepare for implementing the rates at the conclusion of the rate freeze. Obviously, judicial economy would disfavor the Commission’s consideration of a rate application that is grossly premature. But here, we conclude that the timing of the application is such that consideration of the Company’s rates is now reasonable, specifically noting that the application was, by the terms of the stipulation in *2015 Rate Case*, required to be filed by October 31, 2022. *2015 Rate Case*, Stipulation and Recommendation (June 18, 2018) at 7. Accordingly, we conclude that this case is ripe for consideration in spite of the fact that implementation of any rate changes in the case may, subject to the remaining outstanding legal arguments of the parties, be stayed as part of our determination in this case.

{¶ 21} In further support of our determination, we also note that this outcome is consistent with the statutory directive concerning the adjudication of rate case applications. R.C. 4909.19 sets forth in detail the process to be followed in adjudicating a rate application, including requiring the filing of objections within 30 days after the filing of a Staff Report. The statute provides for the adjudication of only issues that are raised in objections to the Staff Report. We find that the prescriptive statutory language is instructive as to our consideration of a motion to dismiss a rate case, noting that (1) the filing of the Staff Report is a significant threshold in the case, which occurs after substantial resources have been invested in the detailed review and consideration of the technical aspects of the rate application, and (2) allowing consideration of filings other than Staff Report objections could allow a party to evade the statutory deadline for objections by raising new issues in the motion that were not contained in the objections. Here, the Staff Report was filed in this case on July 26, 2021, and the motion to dismiss was filed on August 5, 2021. Accordingly, we find that a motion to dismiss is improper and should be denied.

{¶ 22} Therefore, assuming, without deciding, that OCC is correct that DP&L's distribution rates should be frozen at current rates, dismissal of the application would not be the appropriate remedy. DP&L is still entitled, pursuant to the terms of the ESP I Settlement, to file and prosecute the distribution rate case. DP&L may not be able to implement the rates established in this proceeding during ESP I, but we need not address that question at this point in the proceeding.

### III. ORDER

{¶ 23} It is, therefore,

{¶ 24} ORDERED, That the motion to dismiss filed by OCC be denied. It is, further,

{¶ 25} ORDERED, That a copy of this Entry be served upon all parties of record.

COMMISSIONERS:

*Approving:*

Jenifer French, Chair  
M. Beth Trombold  
Lawrence K. Friedeman  
Daniel R. Conway  
Dennis P. Deters

MLW/hac

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Summary: Entry denying the motion to dismiss filed by Ohio Consumers' Counsel.  
electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio