

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the)
Dayton Power and Light Company for) Case No. 18-1875-EL-GRD
Approval of its Plan to Modernize its)
Distribution Grid.)

In the Matter of the Application of the) Case No. 18-1876-EL-WVR
Dayton Power and Light Company for)
Approval of a Limited Waiver of Ohio Adm.)
Code 4901:1-18-06(A)(2).)

In the Matter of the Application of the) Case No. 18-1877-EL-AAM
Dayton Power and Light Company for)
Approval of Certain Accounting Methods.)

In the Matter of the Application of the)
Dayton Power and Light Company for) Case No. 19-1121-EL-UNC
Administration of the Significantly)
Excessive Earnings Test Under R.C.)
4928.143(F) and Ohio Adm. Code 4901:1-)
35-10 for 2018.)

In the Matter of the Application of the) Case No. 20-1041-EL-UNC
Dayton Power and Light Company for)
Administration of the Significantly)
Excessive Earnings Test Under R.C.)
4928.143(F) and Ohio Adm. Code 4901:1-)
35-10 for 2019.)

In the Matter of the Application of The) Case No. 20-680-EL-UNC
Dayton Power and Light Company for a)
Finding that its Current Electric Security)
Plan Passes the Significantly Excessive)
Earnings Test and the More Favorable in the)
Aggregate Test in R.C. 4928.143(E).)

**THIRD APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

In its June 16, 2021 Opinion and Order, the PUCO denied consumers' \$61.1 million in refunds, despite a finding that DP&L had \$61 million in significantly excessive earnings (profits).¹ For the benefit of DP&L and at consumer expense, the PUCO is nullifying even the minimal consumer protection in Ohio's 2008 energy law. OCC applied for rehearing, arguing, among other things, that this Order violated R.C. 4928.143(F) because it provided consumers with an "offset" to smart grid charges instead of a refund for significantly excessive profits.²

OCC noted in its application for rehearing that the PUCO's ruling was vague because it was not clear what it meant in using the word "offset."³ For example, a \$61.1 million offset could mean that smart grid charges are reduced by \$61.1 million. A \$61.1 million offset could mean that the capital component of DP&L's smart grid charges is reduced by \$61.1 million. Or it could mean that because DP&L's capital investments are greater than \$61.1 million, the refund is eliminated.⁴

In its recent Second Entry on Rehearing, the PUCO granted OCC's assignment of error, resolving the ambiguity regarding its use of the word "offset" in the original Order. The PUCO clarified that it meant the third option: that there would be no \$61.1 million refund to consumers, no \$61.1 million reduction in smart grid charges, and no \$61.1 million reduction in the smart grid rate base—the "offset" simply meant that the \$61.1 million refund would be wiped out completely and consumers would get nothing.⁵ This was unlawful and unreasonable.

Assignment of Error 1: The PUCO erred by denying consumers \$61.1 million in refunds of DP&L's significantly excessive profits, including by using an unlawful and unreasonable "offset" of refunds, in violation of R.C. 4928.143(F).

¹ Opinion & Order ¶ 68 (June 16, 2021) (the "Order").

² Application for Rehearing by Office of the Ohio Consumers' Counsel, Assignment of Error 6 (July 16, 2021).

³ *Id.* at 32.

⁴ *Id.*

⁵ Second Entry on Rehearing ¶ 40 (Oct. 6, 2021).

The reasons in support of this application for rehearing are set forth in the accompanying memorandum in support. Under R.C. 4903.10 and O.A.C. 4901-1-35, the PUCO should grant rehearing and abrogate or modify its Entry as requested by OCC.

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Aggregate Test in R.C. 4928.143(E).)

MEMORANDUM IN SUPPORT

The PUCO violated the law (R.C. 4928.143(F)) by denying consumers \$61.1 million in refunds resulting from DP&L's significantly excessive earnings (profits). It lacked authority to deny refunds based on a so-called "offset" of DP&L's future capital investments. On rehearing, the PUCO should modify its prior ruling and provide consumers with a \$61.1 million refund.

I. ASSIGNMENT OF ERROR

Assignment of Error 1: The PUCO erred by denying consumers \$61.1 million in refunds of DP&L's significantly excessive profits, including by using an unlawful and unreasonable "offset" of refunds, in violation of R.C. 4928.143(F).

The PUCO Staff's witness testified that DP&L had significantly excessive earnings (profits) in the amount of \$61.1 million.⁶ Despite this, he recommended no refund to consumers.⁷

The PUCO likewise ruled that consumers would get no refund. According to the PUCO:

[W]e agree with Staff as to the conclusion that customer refunds are not necessary (or appropriate), notwithstanding the earnings amounts above the SEET threshold calculations, due to DP&L's commitment to make substantial capital expenditures as part of its \$267.6 million SGP [smart grid plan] Phase 1 expenditures over the next four years.... Given the magnitude of the committed investment, the Commission finds that it is appropriate to offset, dollar-for-dollar, the excessive earnings against the future committed investment. Therefore, we will offset \$3.7 million for 2018 and \$57.4 million for 2019 for a total of \$61.1 million of the capital expenditures included within the \$267.6 million of SGP Phase 1 expenditures.⁸

The word "offset" is a transitive verb, meaning you must have two things for there to be an offset. That is, you "offset" one thing against another. For example, if your mortgage

⁶ Testimony in Support of the Stipulation of Joseph P. Buckley at 8 (Jan. 4, 2021) (\$3.7 million in 2018 and \$57.4 million in 2019).

⁷ *Id.* at 11.

⁸ Opinion & Order ¶ 68.

increases by \$100 a month, you might try to *offset* that increase by lowering your spending on clothing by \$100, thus breaking even.

So in its Order, when the PUCO said that it would “offset, dollar-for-dollar, the excessive earnings against the future committed investment,” one would think that the \$61.1 million in excessive earnings would be used to benefit consumers by *reducing* charges to consumers for the “future committed investment,” *i.e.*, charges to consumers under DP&L’s smart grid rider.

In its Second Entry on Rehearing, however, the PUCO ruled that this is not the case. The PUCO is not ordering DP&L to reduce its smart grid charges by \$61.1 million or by any other amount. There is no “offset” to the charges that would provide consumers a comparable benefit to a \$61.1 million refund. Rather, the PUCO has now clarified that when it used the word “offset,” it meant the following: because smart grid investments are greater than \$61.1 million, the \$61.1 million in refunds that consumers would otherwise get as a result of DP&L’s significantly excessive profits are simply erased.

Denying consumers’ refunds in this manner is unlawful under R.C. 4928.143(F).

Under R.C. 4928.143(F), the PUCO is required each year to determine whether an electric utility had “significantly excessive earnings.” In determine whether a utility’s profits were significantly excessive, the PUCO “shall consider” the utility’s earned return on common equity compared to the “return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate.”⁹ In comparing the utility’s return on equity to that of other comparable companies, “[c]onsideration also shall be given to

⁹ R.C. 4928.143(F).

the capital requirements of future committed investments in this state.”¹⁰ If the utility’s profits were significantly excessive, then the PUCO “*shall* require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments.”¹¹

Here, the PUCO found that the utility’s profits were *above* the profits threshold by more than \$60 million. Yet it still reached a utility-friendly result: no refunds for consumers. To accomplish this result, the PUCO relied on language in R.C. 4928.143(F) that “[c]onsideration also shall be given to the capital requirements of future committed investments in this state.”¹²

The PUCO has essentially interpreted this language to mean that the PUCO has absolute authority to wipe out consumer refunds whenever the utility commits to making future capital investments in Ohio. But the PUCO’s interpretation in this regard is unreasonable and unlawful.

First, if a utility’s commitment to future capital investments can erase refunds for consumers under the significantly excessive earnings test, then the PUCO would effectively be legislating the earnings test, which was put into place by the General Assembly in 2008, out of existence. The PUCO, as a creature of statute, is required to follow the letter of the law and cannot overrule the General Assembly.¹³ Electric utilities are capital-intensive businesses; their very existence (and profitability) relies on large-scale, constant capital investments. It will *always* be the case that an electric utility expects to make future capital investments in Ohio, so there will never be a situation where the PUCO would be unable to deny refunds to consumers

¹⁰ R.C. 4928.143(F).

¹¹ R.C. 4928.143(F) (emphasis added).

¹² R.C. 4928.143(F); Order ¶ 68 (citing R.C. 4928.143(F)).

¹³ *In re Ohio Edison Co.*, 162 Ohio St.3d 651, 656 (2020).

under this justification.¹⁴ The statement that “[c]onsideration also shall be given to the capital requirements of future committed investments in this state” cannot reasonably be interpreted as giving the PUCO such broad and possibly unlimited authority to undermine the entire intent of the significantly excessive earnings test.

Further, the PUCO’s statutory interpretation contradicts PUCO precedent. In *In re Application of Columbus Southern Power Co. & Ohio Power Co. for Administration of the Significantly Excessive Earnings Test*,¹⁵ the PUCO addressed the statutory language in R.C. 4928.143(F) that “[c]onsideration also shall be given to the capital requirements of future committed investments in this state.”¹⁶ The PUCO took into account the utility’s future capital investments only for purposes of determining the proper SEET *threshold*.¹⁷ The PUCO ruled that because the utility had committed to making future capital investments, it was appropriate to use a slightly higher SEET threshold.¹⁸ This interpretation follows the words and placement of the “future committed investment” language. The future committed investment sentence immediately follows the comparable analysis language and links back to the analysis by reiterating that the PUCO must “also” consider future committed investment in its comparable analysis. The placement of the language was intentional. The language does not allow the PUCO to consider future committed investment by denying refunds after it has already found that the utility had significantly excessive earnings.

¹⁴ See OCC Ex. 2 (Kahal Supplemental) at 12 (“If capital requirements of future committed investments in the state can be used to completely deny SEET refunds to customers, then the protection that the statute provides to customers would be undermined. Every utility could avoid ever paying a SEET refund to customers by simply declaring that they intend to make capital investments in the future.”).

¹⁵ Case No. 10-1261-EL-UNC.

¹⁶ *Id.*, Opinion & Order (Jan. 11, 2011).

¹⁷ *Id.* at 25-27.

¹⁸ *Id.* at 26-27.

The PUCO abandoned that precedent in the current case. Had it followed that precedent, it could have slightly increased, within reason and based on the evidence in the record, the SEET threshold to account for DP&L’s future capital investments. But it did not do that. Instead, it ruled that all refunds would be wiped out simply because DP&L has “committed” to invest \$249 million in capital expenditures for smart grid.¹⁹ This result is particularly confusing, given that in *Ohio Power*, the utility’s commitment to capital investments was substantially larger: nearly \$1.7 billion.²⁰ It is not clear how the PUCO could conclude that a \$249 million investment by DP&L warrants complete elimination of refunds, when a \$1.7 billion investment by Ohio Power still resulted in refunds for consumers.

On rehearing, the PUCO should modify the Order to provide refunds to consumers in the amount of \$61.1 million—the amount that the PUCO Staff’s witness calculated as being significantly excessive. Or at a minimum, it should rule that “offset” actually means “offset” such that consumers’ charges under DP&L’s smart grid rider are reduced by \$61.1 million. Either way, consumers are entitled to a \$61.1 million benefit under R.C. 4928.143(F), but instead, the PUCO has unlawfully determined their benefit to be \$0. The PUCO should abrogate or modify its order to restore this \$61.1 million benefit for consumers.

III. CONCLUSION

To protect consumers from unjust and unreasonable charges, the PUCO should grant rehearing and abrogate or modify its October 5, 2021 Second Entry on Rehearing, consistent with this application for rehearing.

¹⁹ Order ¶ 68.

²⁰ Case No. 10-1261-EL-UNC, Opinion & Order at 25-27.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was electronically served via electric transmission on the persons stated below this 5th day of November 2021.

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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: App for Rehearing Third Application for Rehearing by Office of The Ohio
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