THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY FOR APPROVAL OF ITS PLAN TO MODERNIZE ITS DISTRIBUTION GRID.	**CASE NO. 18-1875-EL-GRD**
IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY FOR APPROVAL OF A LIMITED WAIVER OF OHIO ADM.CODE 4901:1-18-06(A)(2).	**CASE NO. 18-1876-EL-WVR**
IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY FOR APPROVAL OF CERTAIN ACCOUNTING METHODS.	**CASE NO. 18-1877-EL-AAM**
IN THE MATTER OF THE APPLICATION OF THE 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 2018.	**CASE NO. 19-1121-EL-UNC**
IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY FOR A FINDING THAT ITS CURRENT ELECTRIC SECURITY 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**
IN THE MATTER OF THE APPLICATION OF THE 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.	**CASE NO. 20-1041-EL-UNC**

THIRD ENTRY ON REHEARING

Entered in the Journal on December 1, 2021

I. SUMMARY

{¶ 1} In this Entry on Rehearing, the Commission denies the application for rehearing filed by the Ohio Consumers' Counsel.

II. PROCEDURAL HISTORY

A. General Procedural History

{¶ 2} The Dayton Power and Light Company (DP&L or the Company) is an electric distribution utility (EDU), an electric light company, and a public utility as defined in R.C. 4928.01(A)(6), R.C. 4905.03(C), and R.C. 4905.02, respectively. As such, DP&L is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an EDU shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation service. The SSO may be either a market rate offer (MRO) in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} Pursuant to R.C. 4928.143(F), following the end of each annual period of an approved ESP, the Commission is required to evaluate if any adjustments resulted in significantly excessive earnings for the electric utility. This determination is measured by whether the earned return on common equity of the utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies (including other utilities) that face comparable business and financial risk, with adjustments for capital structure as may be appropriate.

{¶ 5} Pursuant to R.C. 4928.143(E), if a Commission-approved ESP has a term that exceeds three years from the effective date of the plan, the Commission must test the plan in the fourth year to determine whether the ESP, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan

as compared to the expected results that would otherwise apply under R.C. 4928.142, i.e., under an MRO. The Commission must also determine the prospective effect of the ESP to determine if that effect is substantially likely to provide the EDU with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with adjustments for capital structure as may be appropriate. The administration of these two tests—the more favorable in the aggregate test (MFA test) and the significantly excessive earnings test (SEET)—is referred to herein as the quadrennial review.

{¶ 6} On October 20, 2017, the Commission approved, with modifications, DP&L's application for its third ESP (ESP III) under R.C. 4928.143. *In re the Application of Dayton Power and Light Co. to Establish a Std. Serv. Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO (*ESP III Case*), Opinion and Order (Oct. 20, 2017).

{¶ 7} On November 26, 2019, DP&L filed a notice of withdrawal of its application for ESP III under R.C. 4928.143(C)(2)(a). *ESP III Case*, Notice of Withdrawal (Nov. 26, 2019). Additionally, citing to R.C. 4928.143(C)(2)(b), DP&L filed proposed revised tariffs seeking to implement its most recent SSO, which was its first ESP (ESP I). *In re Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 08-1094-EL-SSO (*ESP I Case*), Proposed Revised Tariffs (Nov. 26, 2019). On December 18, 2019, the Commission issued a Finding and Order approving DP&L's withdrawal of its application, thereby terminating ESP III. *ESP III Case*, Finding and Order (Dec. 18, 2019).

{¶ 8} On December 18, 2019, the Commission also issued a Second Finding and Order approving, with modifications, DP&L's proposed revised tariffs to continue the provisions, terms, and conditions of ESP I. *ESP I Case*, Second Finding and Order (Dec. 18, 2019). In addition to restoring ESP I, the Commission acknowledged that the term of ESP I had cumulatively exceeded three years and was thus subject to mandatory review under

R.C. 4928.143(E). Accordingly, the Commission directed DP&L to open a docket by April 1, 2020, in which the Commission would conduct the quadrennial review detailed in R.C. 4928.143(E). *ESP I Case*, Second Finding and Order (Dec. 18, 2019) at ¶ 41.

B. Relevant Proceedings

{¶ 9} On December 21, 2018, the Company filed an application for approval of its plan to modernize its distribution grid together with a request for a limited waiver of Ohio Adm.Code 4901:1-18-06(A)(2) and for approval of certain accounting methods necessary to implement its plan. *In re Application of The Dayton Power and Light Company for Approval of Its Plan to Modernize Its Distribution Grid,* Case No. 18-1875-EL-GRD; *In re Application of The Dayton Power and Light Company for Approval of a Limited Waiver of Ohio Adm.Code 4901:1-18-06(A)(2),* Case No. 18-1876-EL-WVR; *In re Application of The Dayton Power and Light Company for Approval of Certain Accounting Methods,* Case No. 18-1877-EL-AAM (combined, *Smart Grid Case*).

{¶ 10} On May 15, 2019, DP&L filed an application and supporting documents for the administration of the SEET for calendar year 2018. *In re Application of The 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 2018,* Case No. 19-1121-EL-UNC (*2018 SEET Case*).

{¶ 11} On April 1, 2020, pursuant to the Commission's Second Finding and Order in the ESP I Case, DP&L filed an application for a finding that its current ESP passes the administration of the quadrennial review for the forecast period of 2020-2023. *In re Application of The Dayton Power and Light Company for a Finding that Its Current Electric Security 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 (*Quadrennial Review Case*).

{¶ 12} On May 15, 2020, in Case No. 20-1041-EL-UNC, DP&L filed an application and supporting documents for the administration of the SEET for calendar year 2019. *In re Application of The Dayton Power and Light Company for Administration of the Significantly*

Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm.Code R.C. 4901:1-35-10 for 2019, Case No. 20-1041-EL-UNC (*2019 SEET Case*).

{¶ 13} Throughout the procedural history of these cases, the following entities have sought and been granted intervention in the *2018 SEET Case*, *2019 SEET Case*, and/or the *Quadrennial Review Case*: the City of Dayton; Honda of America Mfg., Inc.; Industrial Energy Users-Ohio; Interstate Gas Supply, Inc. and IGS Solar, LLC; Kroger Co.; Ohio Consumers' Counsel (OCC); Ohio Energy Group; Ohio Hospital Association; Ohio Manufacturers' Association Energy Group; and University of Dayton. Further, pursuant to the attorney examiner entry issued on October 27, 2020, the following additional entities were granted intervention in the *Smart Grid Case*: Armada Power, LLC; ChargePoint, Inc.; Direct Energy Services, LLC and Direct Energy Businesses, LLC (together, Direct Energy); Environmental Law & Policy Center; IGS Solar, LLC; Mission:data Coalition; Natural Resources Defense Council; Ohio Environmental Council; Ohio Partners for Affordable Energy; Sierra Club; and The Smart Thermostat Coalition.

{¶ 14} On October 23, 2020, DP&L filed a stipulation and recommendation (Stipulation) executed by the Company, Staff, and 19 intervening parties that purports to resolve all issues raised in the *Smart Grid Case*, the *2018 SEET Case*, the *2019 SEET Case*, and the *Quadrennial Review Case*.[1]

{¶ 15} By Entry dated October 27, 2020, the attorney examiner consolidated the *Smart Grid Case*, the *2018 SEET Case*, the *2019 SEET Case*, and the *Quadrennial Review Case* for purposes of considering the Stipulation and established a procedural schedule, which included deadlines for filing testimony regarding the Stipulation.

{¶ 16} On December 1, 2020, the Supreme Court of Ohio issued an opinion in an appeal taken from the Commission's determination that Ohio Edison Company, The

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[1] There are 24 parties involved in these consolidated cases: DP&L, Staff, and 22 intervenors. Of these parties, only Direct Energy and OCC are not signatory parties to the Stipulation.

Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, FirstEnergy) did not have significantly excessive earnings under its ESP for calendar year 2017. *In re Determination of Existence of Significantly Excessive Earnings for 2017 Under the Elec. Sec. Plan for Ohio Edison Co.*, 162 Ohio St.3d 651, 166 N.E.3d 1191, 2020-Ohio-5450. In its decision, the Court determined that the Commission erred in excluding revenue resulting from FirstEnergy's Distribution Modernization Rider (DMR) in determining the company's SEET earnings. As a result, the Court reversed the Commission's orders and remanded the case for further review, instructing the Commission to "conduct a new SEET proceeding in which it includes the DMR revenue in the analysis, determines the SEET threshold, considers whether any adjustments under R.C. 4928.143(F) are appropriate, and makes any other determinations that are necessary to resolve [the] matter" on remand. *In re Ohio Edison* at ¶ 65.

{¶ 17} On December 4, 2020, in recognition of the application of the Supreme Court of Ohio's decision in *In re Ohio Edison* to the determination of both the *2018 SEET Case* and the *2019 SEET Case*, the attorney examiner modified the procedural schedule in the case, determining that the parties were permitted to submit separate, supplemental testimony regarding how the SEET test should be conducted.

{¶ 18} Following the evidentiary hearing that commenced on January 11, 2021, the Commission adopted the Stipulation, which resolved all issues raised in the *Smart Grid Case*, the *2018 SEET Case*, the *2019 SEET Case*, and the *Quadrennial Review Case*. Opinion and Order (June 16, 2021). In adopting the Stipulation, the Commission identified excessive earnings of $61.1 million. However, pursuant to R.C. 4928.143(F), we determined that the earnings were not significantly excessive based on our consideration of the Company's capital requirements of future committed investments in the state.

{¶ 19} On July 16, 2021, applications for rehearing were filed separately by OCC and DP&L. Among the arguments raised by OCC was a claim that the Commission erred in (1) not ordering that DP&L's excess earnings must be returned either as customer refunds or

through the reduced recovery of future capital commitments and (2) failing to adequately explain how DP&L's excess earnings are to be offset against its future capital investments. More specifically, OCC sought to clarify whether the excess earnings would be considered as a potential reduction to DP&L's ability to recover its $249 million SGP capital commitment pursuant to its Infrastructure Investment Rider (IIR).

{¶ 20} On August 11, 2021, the Commission granted the applications for rehearing filed by OCC and DP&L for the purpose of further consideration of the matters raised in the applications for rehearing.

{¶ 21} On September 10, 2021, OCC filed a second application for rehearing, in which it contested the Commission's decision to grant the first applications for rehearing for the purpose of further consideration of the rehearing issues.

{¶ 22} On October 6, 2021, the Commission issued a Second Entry on Rehearing wherein it denied various rehearing arguments raised by OCC and DP&L except with respect to providing clarification concerning the manner of offsetting excess earnings against DP&L's future capital commitments. In affirming the offset of excess earnings against future capital commitments, the Commission clarified "that the $61.1 million in offset amounts shall not be considered in reducing the Company's right to pursue recovery of its $249 million SGP investment through its IIR, nor otherwise considered as a future limitation towards the Company's right to pursue recovery of SGP costs." Second Entry on Rehearing (Oct. 6, 2021) at ¶ 40.

{¶ 23} On November 5, 2021, OCC filed a third application for rehearing, wherein OCC asserts that the Commission erred by denying consumers $61.1 million in refunds of excess earnings by including an unlawful and unreasonable offset of refunds in violation of R.C. 4928.143(F).

III. DISCUSSION

{¶ 24} In its assignment of error, OCC claims that the Commission erred as to denying customer refunds of DP&L's excess earnings ($61.1 million), including by using an unlawful and unreasonable offset of the excess earnings in violation of R.C. 4928.143(F). OCC claims that the Commission must either issue refunds or reduce future consumer charges by the $61.1 million in order to allow for the customer recovery of the Company's excess earnings. OCC claims that the Commission's determination to offset the excess earnings against future committed capital investments, rather than ordering the return of the amounts to customers, effectively legislates the SEET out of existence, as every EDU will commit to future capital investments as a way to avoid customer refunds. Moreover, OCC claims that, according to Commission precedent, DP&L's future capital commitment can only be considered to determine (slightly increase) the proper SEET threshold. *In re the Application of Columbus Southern Power Co. & Ohio Power Co. for Administration of the Significantly Excessive Earnings Test*, Case No. 10-1261-EL-UNC (*Columbus Southern Case*), Opinion and Order (Jan. 11, 2011).

{¶ 25} DP&L argues against the rehearing application, claiming procedurally that either (1) OCC's arguments should have been raised in its first rehearing application, or (2) the Commission legally addressed OCC's arguments in the Second Entry on Rehearing such that further consideration of the claimed errors is barred. In addition to its procedural arguments, the Company reasserts that it did not have any significantly excessive earnings, refuting OCC's claims that the Commission wrongfully offset excess earnings against future capital commitments. Relying on R.C. 4928.143(F), DP&L argues that the Commission is required to consider the Company's future capital commitments and that the Commission has broad discretion under the statute as to how the commitments should be considered. Additionally, DP&L claims that the Commission's decision not to order customer refunds or reductions in future capital cost recoveries is supported by the Company's unique financial circumstance, which necessitates that the Company cannot financially support its planned capital investments if it is required to refund excess earnings or forego the future

recovery of those costs through its IIR. Further, the Company maintains that the Commission's prior treatment of this issue in the *Columbus Southern Case* is not controlling here because the Commission's determination in this case was based on a unique determination that DP&L could not implement its capital investments if it was required to issue refunds, which was not a finding in *Columbus Southern Case*.

{¶ 26} We find that OCC's third application for rehearing is not well-taken. Initially, we find that OCC's claimed error was raised and rejected in regard to OCC's first application for rehearing. Second Entry on Rehearing (Oct. 6, 2021) at ¶¶ 35-40. As we described, DP&L's financial condition supported that excess earnings should be offset[2] against future capital expenditures, rather than returned as customer refunds or recovered via reducing future capital recoveries, in order to promote the Company's substantial further capital investments. Second Entry on Rehearing, at ¶ 40. As we indicated, the Company's future capital commitment is both highly beneficial to its customers and could not occur if the Company is required to forgo the full recovery of the investment through its IIR. Accordingly, we expressly determined, consistent with our **obligation** to consider the capital requirements of future committed investments in the state, as described in R.C. 4928.143(F), that the Company's capital investments should not be reduced as a result of the SEET. OCC's third application for rehearing does not describe any arguments that were not raised and addressed by the Commission in response to its first application for rehearing. Accordingly, we find that OCC's assignment of error is improper, as OCC seeks rehearing of a denial of rehearing on the same issue. As we have consistently held, R.C. 4903.10 does not allow persons who have entered appearances to file for rehearing upon the denial of rehearing on the same issue. *In re the Complaint of Ormet Primary Aluminum Corp. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CSS, Second Entry on Rehearing

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2 OCC argues that our use of the term "offset" requires an outcome that bars DP&L's future capital recovery of the excess earnings amounts. We disagree, noting that R.C. 4928.143(F) requires only the "consideration" of future capital investments when determining whether excessive earnings are "significantly excessive" to the degree that customer refunds should occur. Our use of the term "offset" was intended to describe that the Company's future committed capital was much greater than the excess earnings that we deemed not to be "significantly excessive" for purposes of requiring customer refunds.

(Sept. 13, 2006) at 3-4 (citing *In re The East Ohio Gas Co. and Columbia Gas Co.*, Case Nos. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at 3). *See also In re Ohio Power Co. and Columbus S. Power Co.*, Case No. 10-2929-EL-UNC, Entry on Rehearing (Jan. 30, 2013) at 4-5.

{¶ 27} Moreover, we again stress our disagreement with OCC's claim that the Commission is mandated to return excess earnings to customers either via refunds or reductions in the recoveries of future capital expenses. As we previously indicated, the consideration of SEET amount offsets is unique to each EDU. In this case, DP&L's financial condition is such that ordering customer refunds or limiting the recovery of capital expenses would impair the Company's ability to fund its grid modernization project, as well as its ability to maintain its distribution and transmission systems. Second Entry on Rehearing, at ¶ 40. This circumstance is unique to DP&L, and the facts in this case are distinct from those in the *Columbus Southern Case*, where the EDU presented no evidence of impairment of its ability for future capital investments as associated with the treatment of its excess earnings.[3] Accordingly, based on our assessment of the financial circumstances unique to DP&L, we conclude that the Company's excess earnings are not subject to either customer refunds or any reduction in the Company's ability to recover the costs of its future capital improvements.

IV. ORDER

{¶ 28} It is, therefore,

{¶ 29} ORDERED, That the third application for rehearing filed by OCC be denied. It is, further,

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3 For comparison purposes, in the *Columbus Southern Case*, the Commission required the EDU to commit to an additional capital investment of $20 million for a solar project that benefitted the state's energy efficiency and economic development policies. *Columbus Southern Case*, Opinion and Order (Jan. 11, 2011) at 26, 27, 31-33; Entry on Rehearing (Mar. 9, 2011) at ¶¶ 32-33. Whereas, the capital investment required of DP&L ($249 million) is substantially higher, especially given the relative sizes of these two EDUs.

{¶ 30} ORDERED, That a copy of this Third Entry on Rehearing be served upon each party of record.

COMMISSIONERS:
Approving:
Jenifer French, Chair
M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway

MLW/hac

Case No(s). 18-1875-EL-GRD, 18-1876-EL-WVR, 18-1877-EL-AAM, 19-1121-EL-UNC, 20-0680-EL-UNC, 20-1041-EL-UNC

Summary: Entry denying the application for rehearing filed by the Ohio Consumers' Counsel. electronically filed by Kelli C. King on behalf of The Public Utilities Commission of Ohio