BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 08-1095-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code Section 4905.13.	)))))	Case No. 08-1096-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of its Amended Corporate Separation Plan.	))))	Case No. 08-1097-EL-UNC

APPLICATION FOR REHEARING OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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January 17, 2020

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The Office of the Ohio Consumers' Counsel ("OCC") files to protect customers who have paid plenty to DP&L over the past decade. Customers in the Dayton area – where there is financial distress and a poverty level of 35%--were required to pay hundreds of millions of dollars in stability charge subsidies to prop up DP&L uneconomic power plants and to support DP&L's credit (through a so-called "distribution modernization charge.") But even when the Ohio Supreme Court and the PUCO finally stopped the subsidies, there is no relief (or refunds) for customers. Instead, the PUCO has allowed DP&L to play a game of subsidy shuffle, where the unlawful subsidies overturned by the Court and the PUCO are replaced with more unlawful subsidies and charges.

OCC applies for rehearing of the PUCO's December 18, 2019 Second Finding and Order ("December 18 Order" or "*2019 Tariff Order*") that reinstates unlawful consumer subsidies and unauthorized charges, depriving customers of what otherwise would have been lower rates. Under R.C. 4903.10, the *2019 Tariff Order* was unjust, unreasonable, and unlawful in the following respects:

Assignment of Error 1: The PUCO erred when it continued the terms of DP&L's "electric security plan," rather than continuing the utility's "standard service offer." The PUCO violated Ohio law (R.C. 4928.143(C)(2) and Ohio rules of statutory construction and unreasonably increased rates to customers.

Assignment of Error 2: The PUCO order was unreasonable and unlawful and harmed consumers because it failed to continue the distribution rate freeze of ESP I following DP&L's withdrawal.

A. DP&L's commitment to freeze distribution rates was a provision, term or condition of the utility's most recent electric security plan.

B. The PUCO's failure to implement a distribution rate freeze for customers as part of the continued rates was unreasonable especially in light of its ruling allowing DP&L to separately collect storm costs in continued rates.

Assignment of Error 3: Charging customers for storm recovery expenses incurred in 2016, 2017 and 2018, following DP&L's withdrawal of its electric security plan, is unlawful.

A. The PUCO ruling that DP&L's storm charge to customers was a PUCO-authorized provision of the utility's most recent standard service offer under R.C. 4928.143(C)(2)(b) was mistaken and unsupported, violating R.C. 4903.09. (*Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403 (1975)).

1. The storm cost recovery rider authorized in ESP I allowed DP&L to collect $22.3 million in costs from customers for storms occurring prior to and during the term of ESP I (2009-2013), when a rate freeze was in effect.

2. The storm tariff DP&L filed to continue ESP I rates allows DP&L to collect 2017, 2018 and 2019 storm costs from customers. That rider was created in DP&L's ESP III case, not in DP&L's ESP I.

3. DP&L's storm recovery rider tariff is not a condition, term, or provision of DP&L's most recent electric security plan and should not be used to continue collecting storm costs from customers under Ohio law.

Assignment of Error 4: The PUCO unreasonably and unlawfully approved DP&L's Rate Stabilization Charge, allowing DP&L to collect tens of millions of dollars from customers for a service that it is not providing.

Assignment of Error 5: The PUCO unlawfully and unreasonably ruled that parties were precluded from re-litigating the Rate Stabilization Charge under the doctrines of *res judicata* and collateral estoppel.

A. The PUCO's holding is unreasonable because the PUCO can modify earlier orders so long as it explains the change and the new regulatory course is permissible. *In re: Application of Ohio Power Co.,* 144 Ohio St.3d 1, 2015-Ohio-2056, ¶16, 17 (citations omitted).

B. The PUCO's holding is unlawful because it is inconsistent with Ohio Supreme Court precedent.

1. The Ohio Supreme Court has held that *res judicata* in administrative proceedings should be rejected when its application would contravene and override public policy or result in manifest injustice.

2. The Ohio Supreme Court has held changed circumstances that raise a new material issue or would have been relevant to resolve material issues in the earlier action will not bar litigation of that issue in the later action.

Assignment of Error 6: The PUCO ruling allowing DP&L's revised tariffs to be effective on filing, before the PUCO conducts its final review and without making the tariffs subject to refund, was unreasonable and harmed customers.

The reasons supporting this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its Opinion and Order as requested by OCC.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING
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I INTRODUCTION

This is the second time in four years that the PUCO has permitted DP&L to withdraw from its electric security plan in response to a ruling protecting customers from paying for an unlawful charge (the so-called "distribution modernization rider.") And like the last time, DP&L used Ohio law to deprive customers of the full rate reduction they should have received. This unfortunate situation for consumers is another example of how Ohio's 2008 energy law is an obstacle to lower electric bills. Consumers would benefit from repealing the part of the law that favors electric utilities by allowing them to withdraw from an electric security plan when the plan is modified and replacing it with stricter requirements for basing utility rates on market prices.

II. ARGUMENT

Assignment of Error 1: The PUCO erred when it continued the terms of DP&L's "electric security plan," rather than continuing the utility's "standard service offer." The PUCO violated Ohio law (R.C. 4928.143(C)(2) and Ohio rules of statutory construction and unreasonably increased rates to customers.

DP&L filed to withdraw its third electric security plan on November 26, 2019, after it lost its right to collect the so-called distribution modernization rider from its customers.[1] Under that charge, DP&L was able to collect $219 million from customers without spending a penny on distribution. (And customers will not likely see a penny of

[1] *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 16-395-EL-SSO, Application at 2 (Nov. 26, 2019).

that money refunded back to them). The PUCO unlawfully accepted DP&L's withdrawal[2], despite objections from numerous parties, including OCC.

On the same day as DP&L filed its notice of withdrawal, it filed proposed tariffs to implement the provisions, terms, and conditions of its most recent electric security plan, ESP I.[3] In its filing DP&L claimed that the proposed tariffs are consistent with the tariffs the PUCO approved for its first electric security plan.[4] The electric security plan tariffs DP&L proposed included not only the standard offer generation charges, but many additional tariffs for ESP I charges to customers. Those charges included, but were not limited to, Rate Stabilization, Storm Cost Recovery, Decoupling, Reconciliation Cost Recovery, Distribution, and Uncollectibles.[5]

After noting that DP&L has properly withdrawn its electric security plan, the PUCO found that DP&L's "most recent SSO" would be "ESP I."[6] The PUCO concluded that it must restore "the provisions, terms, and conditions of ESP I."[7] The PUCO was wrong in finding that it must continue DP&L's <u>most recent electric security plan</u> instead of continuing DP&L's "<u>most recent standard service offer</u>" under R.C.

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[2] *Id.*, Finding and Order (Dec. 18, 2019) ("*2019 Withdrawal Order*").

[3] *In the Matter of the 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, Application (Nov. 26, 2019).

[4] *Id.*

[5] *Id.*

[6] *In the Matter of the 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, Second Finding and Order at ¶27 (Dec. 18, 2019) (*2019 Tariff Order*).

[7] *Id.*

4928.143(C)(2)(b). Under Ohio law, an "electric security plan" and a "standard service offer" are not the same.

R.C. 4928.143(C)(2)(b) explains what happens when a utility withdraws an electric stability plan: the PUCO "shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's *most recent standard service offer*, along with any expected increases or decreases in fuel costs from those contained in that *offer****." (emphasis added). A "standard service offer" has been defined by the General Assembly under R.C. 4928.141. R.C. 4928.141 requires electric distribution utilities to provide a "standard service offer" through either a market rate offer or an electric security plan. Specifically, the statute requires that a utility "shall provide customers, on a comparable and nondiscriminatory basis within its certified territory, a standard offer of all competitive retail electric services necessary to maintain essential electric service to customers, including a firm supply of electric generation service." That is, a "standard service offer," as defined under R.C. 4928.141, means the supply of generation, which is a competitive service in Ohio.

Under the statute, the "standard service offer" means the costs of energy and capacity (generation) to serve SSO customers. For DP&L the standard service offer costs are defined through the competitive bidding process. No more and no less. DP&L's Standard Service Offer was contained in DP&L's generation tariffs G1 through G11. The Standard Service Offer is also described in part under R.C. 4928.143(B)(2)(a)) as a component of an electric security plan. That subsection allows a utility to seek "the costs of fuel used to generate the electricity supplied under the offer, the costs of purchased power supplied under the offer, including the cost of energy and capacity." These are the

costs the PUCO appropriately described as "necessary to continue to serve SSO customers."[8]

An "electric security plan," by contrast, is much broader than just the "standard service offer." An electric security plan can include all charges listed in R.C. 4928.143(B)(2): (a) standard service offer costs –the costs used to generate electricity supplied under the standard offer, including fuel and purchased power; (b) construction work in progress; (c) non-bypassable generation charges; (d) standby, backup, supplemental power service; (e) increases in the standard service offer price; (f) phase-in and securitization costs; (g) transmission costs relating to the standard service offer; (h) distribution charges; and (i) economic development, job retention and energy efficiency costs. While these types of charges can be part of an "electric security plan," they are not the same as the utility's "standard service offer." And while the utility's "standard service offer" is a necessary component of an "electric security plan," an "electric security plan" is not a component of a utility's "standard service offer."

Thus, when R.C. 4928.143(C)(2)(b) says that the PUCO must "continue the provisions, terms, and conditions of the utility's most recent standard service offer," that does not mean that the PUCO must continue the provisions, terms, and conditions of the utility's most recent electric security plan. Rather the statute requires the PUCO to continue rates that make up the standard service offer (competitive generation rates) and enforce the obligation of the utility (under R.C. 4928.141) to supply "competitive retail electric services necessary to maintain essential electric service to customers, including a firm supply of electric generation service."

[8] *2019 Tariff Order* at ¶28.

When the General Assembly provided for continuation of a utility's "standard service offer" under R.C. 4928.143(C)(2)(b), the PUCO cannot presume that the General Assembly intended to provide for continuation of a utility's "electric security plan." "It is to be presumed that each word in a statute was placed there for a purpose." *State ex rel. Bohan v. Industrial Com*, 147 Ohio St. 249, 251 (1946). Under "the basic rules of statutory construction, the words in statutes should not be construed to be redundant, nor should any words be ignored." *East Ohio Gas Co. v. Pub. Util. Comm.,* 39 Ohio St.3d 295, 299 (1988). But that is just what the PUCO did when it read R.C. 4928.1343(C)(2)(b) to require the utility's "electric security plan" to be continued and not the utility's "standard service offer."

When the General Assembly used the term "standard service offer" in R.C. 4928.143(B)(2)(c) and (elsewhere) used separate words to describe an "electric security plan," the General Assembly was acknowledging the difference between the terms. The PUCO cannot disregard the General Assembly's words. A statute may not, under guise of interpretation, be modified or altered. There is no authority, under any rule of statutory construction, to add to, enlarge, supply, expand, extend, or improve the provisions of the statute. *State ex rel Foster v. Evatt*, 144 Ohio St. 65, 106 (1944).

The PUCO erred in construing the statute to require a return to the utility's most recent "electric security plan" instead of the utility's most recent "standard service offer." Because of the PUCO's unlawful acts, customers were forced to pay higher rates than they otherwise would have paid if the standard service offer alone had been continued. Rehearing should be granted.

If the PUCO does not accept OCC's arguments here, then alternatively it should consider the following arguments that address the PUCO's implementation of the utility's most recent electric security plan.

Assignment of Error 2: The PUCO order was unreasonable and unlawful and harmed customers because it failed to continue the distribution rate freeze of ESP I following DP&L's withdrawal.

A. DP&L's commitment to freeze distribution rates was a provision term or condition of the utility's most electric security plan.

As explained in OCC's first assignment of error, the PUCO misconstrued Ohio law. The PUCO was required by law to continue the utility's most recent standard service offer, not the utility's most recent electric security plan. If the PUCO does not grant rehearing on OCC's Assignment of Error 1, it should address the errors it committed when it continued the terms and conditions of DP&L's electric security plan.

Under Ohio law, after a utility withdraws an application for an electric security plan, the PUCO "shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized***" R.C. 4928.143(C)(2)(b). The PUCO construed this language to require it to "restore the provisions, terms and conditions of ESP I which were in effect prior to the effective date of ESP III."[9]

[9] *In the Matter of the 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 *et al.,* Second Finding and Order at ¶27 (Dec. 18, 2019) ("*2019 Tariff Order").*

One of the terms of ESP I that the PUCO has overlooked in restoring ESP I is the distribution rate freeze agreed to by DP&L and the signatory parties. That commitment can be found in the PUCO-approved settlement:

> 18. DP&L's distribution base rates will be frozen through December 31, 2012. This distribution rate freeze does not limit DP&L's right to seek emergency rate relief pursuant to Section 4909.16, Revised Code, or to apply to the Commission for approval of separate rate riders to recover the following costs:
>
> a. The cost of complying with changes in tax or regulatory laws and regulation effective after the date of this Stipulation; and
>
> b. The cost of storm damage. [10]

The PUCO approved this settlement term without modification. Under this provision, DP&L agreed to freeze rates but was able to seek charges from customers during the ESP I term for storm damage costs it incurred. DP&L in fact sought PUCO approval of a separate rate rider for storm costs it incurred during the ESP I. And the PUCO allowed DP&L to charge customers (in 2015) $23.2 million in storm costs that were incurred, on or before the ESP I term.

During the ESP I term, DP&L also froze distribution rates, consistent with the PUCO-approved stipulation. But in 2018, three years after it filed to increase distribution rates to customers, the PUCO unfroze the distribution rates, increasing distribution charges to DP&L's customers. Those increased distribution rates are now part of the continued rates approved by the PUCO in the *2019 Tariff Order*. Not so for the ESP I distribution rate freeze, which the PUCO ignored.

[10] Case No. 08-1094-EL-SSO, Stipulation and Recommendation at 10-11 (Feb. 24, 2009).

But cherry-picking charges from DP&L's ESP I that increase rates to customers, while ignoring other countervailing ESP I provisions, is not allowed under Ohio law. The PUCO itself acknowledged this when ruling on DP&L's prior ESP withdrawal: "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 provision of the ESP not to continue."[11]

The PUCO, as a creature of statute, must follow that law. The law requires all the provisions, terms and conditions of the utility's most recent standard service offer to continue. The distribution rate freeze was a condition of the utility's most recent ESP I. Under the PUCO's theory of continuing the utility's most recent ESP rates, it was required to continue the distribution rate freeze. The PUCO should have ordered DP&L to freeze distribution rates until a subsequent standard service offer is approved. Because the PUCO failed to do so, when the law compelled it to, the PUCO violated the law. The PUCO should grant rehearing and abrogate its order by incorporating a distribution rate freeze for DP&L customers while customers are paying DP&L's ESP I rates.

B. The PUCO's failure to implement a distribution rate freeze for customers as part of the continued rates was unreasonable especially in light of its ruling allowing DP&L to separately collect storm costs in continued rates.

Not only did the PUCO violate the law when it failed to continue the distribution rate freeze from ESP I, but it also acted unreasonably, harming customers. The PUCO

[11] *In the Matter of the Application of the Application of Dayton Power & Light Company for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO, Entry on Rehearing at ¶10 (Feb. 19, 2013).

took away from customers their part of the bargain under PUCO-approved settlement from ESP I: a commitment by DP&L to freeze distribution rates during the ESP I term.

DP&L's rate freeze commitment was bound up with the ESP I storm charge.[12] Under the PUCO-approved ESP I settlement, DP&L committed to freeze distribution rates for the term of ESP I, but was allowed to collect storm charges from customers as an exception to the rate freeze.[13] This agreement was one of many made under the PUCO-approved stipulation. And, as the parties to the stipulation acknowledged, their agreement (sponsorship) of the stipulation was "predicated on the reasonableness of the Stipulation taken as a whole,"[14] and was "conditioned on the PUCO's adoption of the Stipulation in its entirety, without modification."[15]

The ESP I distribution rate freeze ended[16] when the PUCO approved increased distribution rates for DP&L. But under the continued ESP I rates approved in the *2019 Tariff Order* DP&L is still collecting storm costs from its customers. DP&L has not proposed to freeze its distribution rates. Instead, to the detriment of its customers, DP&L is charging customers the higher distribution rates approved by the PUCO after ESP I ended, with no rate freeze commitment, and is charging customers for storm costs under the ESP III storm rider. For DP&L this is a heads I win, tails you lose proposition.

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[12] Case No. 08-1094-EL-SSO, Stipulation and Recommendation at p. 10-11 (Feb. 24, 2009).

[13] *Id.*

[14] Stipulation and Recommendation at ¶35.

[15] *Id.* at ¶ 37.

[16] *See In the Matter of the Application of the Dayton Power and Light Company for an Increase in Distribution Rates*, Case No. 15-1830-EL-AIR, Opinion and Order (Sept. 26, 2018).

In continuing the provisions, terms, and conditions of DP&L's most recent electric security plan, the PUCO should restore the benefit of the bargain that customers were to receive under ESP I. Part of the bargain given in exchange for allowing DP&L to apply for storm cost recovery (which it did, at the cost of $22.3 million to customers) was DP&L's agreement to freeze distribution rates to customers during the term of ESP I. The distribution rate freeze was a provision, term, and condition of DP&L's most recent electric security plan. The PUCO should have required DP&L to freeze its distribution rates while ESP I rates are being collected from customers. The PUCO failed to do so to the detriment of DP&L's customers. The PUCO should grant rehearing on this issue and require DP&L to freeze distribution rates to customers while customers are paying ESP I rates.

Assignment of Error 3: Charging customers for storm recovery expenses incurred in 2016, 2017, and 2018, following DP&L's withdrawal of its electric security plan, is unlawful.

A. The PUCO ruling that DP&L's storm charge to customers was a PUCO-authorized provision of the utility's most recent standard service offer under R.C. 4928.143(C)(2)(b) was mistaken and unsupported, violating R.C. 4903.09. (*Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403 (1975)).

In the PUCO's *2019 Tariff Order* the PUCO allowed DP&L to charge its residential customers $1 per month for storm recovery. The PUCO reinstated the latest PUCO-approved storm recovery rider because the settlement in DP&L's first electric security plan "contained placeholders permitting DP&L to seek approval of a storm cost recovery rider."[17] The PUCO then concluded that the storm cost recovery rider (and the

[17] *2019 Tariff Order* ¶39. It appears that the PUCO cite to its Third Entry on Rehearing as it relates to claims about the storm rider is inaccurate as there is no such finding in that Entry.

transmission costs collected under Rider TCCR-N) are "authorized by ESP I, independent of ESP III, and should be continued," citing its Third Entry on Rehearing as additional support for continuing to charge customers for these costs. [18]

The PUCO's Order is mistaken. The storm cost recovery rider that DP&L filed to collect 2017, 2018, and 2019 storm costs from customers was not "authorized by ESP I, independent of ESP III." This mistake was the premise of the PUCO's ruling that the Storm Recovery Rider tariff should remain as part of DP&L's most recent electric security plan. Because DP&L's current storm cost rider was not a condition, term, or provision of the utility's most recent standard service offer, it should not have been continued under Ohio law (R.C. 4928.143(C)(2)(b).

When a PUCO ruling is unsupported, showing misapprehension or mistake, it can be disturbed. *Cleveland Elect. Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403 (1975); *General Motors Corp. v. Pub. Util. Comm*., 47 Ohio St.2d 58 (1976). The PUCO should rehear this issue and abrogate its order approving the Storm Recovery Rider (Ninth Revised Tarff D30), which allows DP&L to charge customers for storm costs incurred in 2017, 2018 and 2019 (years after the end of the ESP I period). Instead, the PUCO should order DP&L to stop charging customers for such storm costs, consistent with the tariffs approved by the PUCO in 2015 (Fifth Revised Tariff D30) that ended the storm charges to customers created under DP&L's ESP I. That tariff sheet reflects the fact that DP&L customers have already paid for all storm costs ($22.3 million) owed as a part of the ESP I plan.

[18] *Id.*

1. The storm cost recovery rider authorized in ESP I allowed DP&L to collect $22.3 million in costs from customers for storms occurring prior to and during the term of ESP I (2009-2013), when a rate freeze was in effect.

The ESP I case settlement gave DP&L the *opportunity* to "apply to the Commission for approval of" a separate rider to recover "the cost of storm damage."[19] The ability to seek single-issue ratemaking for storm costs was the *quid pro quo* for the distribution rate freeze. DP&L agreed to freeze rates until the end of the plan (December 31, 2013), but would be *allowed to seek* an exception to the rate freeze for certain costs, including storm damage costs.[20] But when the PUCO approved the ESP I tariffs in the *2016 Tariff Order*, there was no storm cost recovery tariff filed as a placeholder; nor was there a tariff charging customers for storm recovery.[21]

In fact, it was not until the end of 2012 that DP&L applied to collect ESP I storm costs from customers.[22] DP&L asked to charge customers not only for storm costs

[19] Case No. 08-1094-EL-SSO *et al.,* Stipulation and Recommendation at ¶18 b (Feb. 24, 2009).

[20] Case No. 08-1094-EL-SSO *et al*., Testimony of Dona R. Seger-Lawson in Support of the Stipulation and Recommendation at 7 (Feb. 24, 2009) (describing the principal terms of the stipulation to include "DP&L's distribution rates will be frozen through December 31, 2012, subject to limited exceptions. Stipulation, ¶ 18").

[21] *Id., see* Attachments A-E, Stipulation and Recommendation; Revised Tariff Filing (June 29, 2009).

[22] *See, In the Matter of the Application of The Dayton Power and Light Company for Authority to Recover Certain Storm-Related Service Restoration Costs*, Case No. 12-3062-EL-RDR, Application (Dec. 21, 2012).

incurred during 2008,[23] 2011, and 2012 (when the ESP I rate freeze was in effect), but also sought PUCO authority to collect major storm costs from customers on a going forward basis.[24] The PUCO allowed DP&L to collect $22.3 million in storm costs from customers for the discrete years of 2008, 2011, and 2012, as some parties in the case agreed to (but not OCC).[25] In that case, the PUCO did not approve DP&L's request for collecting major storm costs from customers on a going forward basis. DP&L filed (and the PUCO approved) a storm recovery rider tariff, the Fourth Revised Sheet No. D30, to collect the 2008, 2011, and 2012 storm costs from customers. *See* Attachment A.

Under DP&L's Fourth Revised Sheet Tariff No. D30, DP&L collected storm costs from customers starting January 1, 2015. At year-end 2015, DP&L had collected $22.3 million from customers for storm costs, including the ESP I storm costs. DP&L then filed a revised tariff setting the storm charges to customers at zero.[26] (Fifth Revised Sheet No. D30, Attachment B). Notably, the tariff language did not change, but remained with the description being "The Storm Cost Recovery Rider is intended to compensate DP&L for certain costs related to restoring service and repairing distribution

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[23] There was a rate freeze in effect in 2008, prior to the rate freeze imposed under the ESP I case. *See,* Case No. 05-276-EL-AIR, Stipulation and Recommendation at 4 (Nov. 3, 2005), adopted by the PUCO by Opinion and Order (Dec. 28, 2005); *see In the Matter of the Application of The Dayton Power and Light Company for Authority to Recover Certain Storm-Related Service Restoration Costs*, Case No. 12-3062-EL-RDR, Testimony of Dona Seger Lawson in Support of Stipulation at 2 (May 1, 2014) (describing the various rate freezes).

[24] *In the Matter of the Application of The Dayton Power and Light Company for Authority to Recover Certain Storm-Related Service Restoration Costs*, Case No. 12-3062-EL-RDR, Opinion and Order at 3-4 (Dec. 17, 2014) (describing DP&L's application).

[25] *Id.* at 13.

[26] *In the Matter of the Application of The Dayton Power and Light Company for Authority to Recover Certain Storm-Related Service Restoration Costs*, Case No. 12-3062-EL-RDR, Revised Tariff (Dec. 28, 2015).

facilities as a result of severe storms that the Company experienced in 2008, 2011, and 2012." In other words the Fourth and Fifth Sheet Tariffs for storm cost recovery were created to carry out the settlement provisions in DP&L's ESP I -- that DP&L could apply to collect storm costs (increasing rates to customers) even when there was a freeze on distribution rate increases to customers during the ESP I term (2009-2013).

2. The storm tariff DP&L filed to continue ESP I rates allows DP&L to collect 2017, 2018 and 2019 storm costs from customers. That rider was created in DP&L's ESP III case, not in DP&L's ESP I.

On December 20, 2019, DP&L filed its tariffs to reimplement ESP I rates, after the PUCO allowed it to withdraw its ESP III. In DP&L's tariff filing, DP&L proposed that customers pay for storm recovery costs though a Storm Recovery rider that was approved recently by the PUCO in Case No. 19-662-EL-RDR.[27] That Rider, the Ninth Revised Storm Recovery Rider, allows DP&L to collect from its customers storm costs incurred in 2016, 2017, and 2018. (Attachment F). But the origin of the Ninth Revised Storm Recovery Rider was ESP III—not ESP I. And DP&L's Ninth Revised Storm charge was not independent of ESP III, as the PUCO claimed in its December 18 Order. These are errors OCC requests rehearing on.

In DP&L's distribution case (that ended the ESP I rate freeze)[28] and ESP III case, DP&L sought to implement a storm cost recovery rider that differed from the ESP I storm rider. DP&L asked for a fundamental change to the ESP I storm rider that would allow it (for the first time) broad authority to collect storm costs on going forward basis

[27] Case No. 08-1094-EL-SSO, Revised Tariff Sheets (Dec. 19, 2019).

[28] *In the Matter of the Application of the Dayton Power and Light Company for An Increase in its Distribution Rates,* Case No. 15-1830-EL-AIR, Opinion and Order (Sept. 26, 2018).

"for storms that are determined to be 'Major Events' as defined in Ohio Administrative Code 4901:1-10-01." *See* Sixth Revised Sheet No. D30 (Attachment C).

The changes DP&L sought to the ESP I storm rider changed the focus and structure of the rider. No longer would the rider be collecting storm costs incurred during the term of ESP I. Instead the rider would allow DP&L to collect from customers generic future storm costs DP&L might incur beginning in 2016. And in a filed settlement in ESP III there were also numerous additional conditions placed on the reformulated storm rider –conditions absent from the ESP I storm rider: No storm expenses will be included in DP&L's base rates; mutual assistance revenues will be deducted from rider requests; capital assets related to storms will be addressed in another rider (Distribution Investment Rider); carrying charges will be allowed; deferrals will be allowed; DP&L will be required to file yearly for the rider, subject to a PUCO Staff audit; costs will be allocated to customers based on distribution revenue responsibility; and if DP&L's rate case was not approved, future recovery will be offset by a three-year average of major storm expenses until a future case decides the storm expenses considered in base rates. [29]

The PUCO in DP&L's ESP III, approved the settlement with the newly structured Storm Cost Recovery Rider that DP&L had requested, along with the numerous conditions for the rider that were agreed to under the settlement.[30] Under the new storm cost recovery rider, the PUCO changed the purpose of the rider as DP&L requested, and created a "placeholder tariff." The PUCO ruled that DP&L could file future applications

[29] *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 16-395-EL-SSO, Stipulation at page 18, VI.1e i-iii.

[30] *Id.*, Opinion and Order (Oct. 20, 2017).

if it sought to charge customers for major storm events.[31] The actual tariff change, showing a zero charge to customers for storm recovery costs, was then filed in DP&L's distribution case as the Sixth Revised Sheet No. D30. (Attachment C).

Subsequently, DP&L filed applications to replace the ESP III approved placeholder storm recovery rider with riders charging customers for storm recovery costs incurred from 2016 to 2019: In a February 2, 2018 Application, DP&L sought to collect 2016 storm costs from customers.[32] A month later, on March 30, 2018, DP&L filed to collect its 2017 storm costs from customers.[33] And on April 12, 2019, DP&L sought authority to collect 2018 and 2019 storm costs.[34]

Notably, in each of the applications seeking to charge customers for storm recovery costs, DP&L confirmed that it was seeking to collect the storm costs "[p]ursuant to the Stipulation and the ESP III Opinion."[35] And the PUCO, in the rulings approving each of DP&L's storm recovery rider applications, described the derivation of the Storm

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[31] *In the Matter of the Application of the Dayton Power and Light Company To Establish a Standard Service Offer In the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, Opinion and Order at 13, describing the Amended Stipulation at 18, Section VI 1e (Oct. 20, 2017).

[32] *In the Matter of the Dayton Power and Light Company for Authority to Recover Certain Storm-Related Service Restoration Costs*, Case No. 18-77-EL-RDR, Application (Feb. 2, 2018).

[33] *In the Matter of the Dayton Power and Light Company for Authority to Recover Certain Storm-Related Service Restoration Costs,* Case No. 18-381-EL-RDR, Application (Mar. 30, 2018).

[34] *In the Matter of the Dayton Power and Light Company for Authority to Recover Certain Storm-Related Service Restoration Costs*, Case No. 19-662-EL-RDR, Application (Apr. 1, 2019).

[35] Case No. 18-77-EL-RDR, Application at 1 (Feb. 2, 2018); Case No. 18-381-EL-RDR, Application at 1 (Mar. 30, 2018); Case No. 19-662-EL-RDR, Application at 1 (Apr. 1, 2019).

Cost Recovery Rider as its Order in DP&L's ESP III case. [36] *See, also, In the Matter of the Dayton Power and Light Company for Authority to Recover Certain Storm-Related Service Restoration Costs*, Case No. 18-77-EL-RDR, Opinion and Order at ¶11 (Dec. 19, 2018) (where the PUCO expressly ruled that DP&L's application to recover storm expenses was "consistent with our ESP III Order.").

The PUCO rulings in the three storm recovery rider cases replaced the placeholder rider (Fifth Revised Storm Recovery Riders) approved in ESP I. Instead of a recognizing that customers had paid all of ESP I storm costs, the new ESP III placeholder rider (Sixth Revised Storm Recovery Rider) allowed DP&L to charge millions of dollars more to DP&L customers for storm recovery costs incurred during 2016 through 2019. The ESP III tariff changes requested and approved by the PUCO, allowing storm cost charges to DP&L customers, were accomplished through the filings of DP&L's Sixth, Seventh, Eighth and Ninth Revised Tariff Sheets. (Attachments C, D, E, and F).

3. DP&L's storm recovery rider tariff is not a condition, term, or provision of DP&L's most recent electric security plan and should not be used to continue collecting storm costs from customers under Ohio law.

DP&L's ESP III allowed it to collect 2016 through 2019 storm costs (and potentially more) from customers. The ESP III storm costs rider was far different than the ESP I storm rider. The ESP I storm rider enabled DP&L to seek and collect storm costs incurred prior to and during the limited term of ESP I (including 2008, 2011 and 2013). And the ESP I storm rider was approved as a limited exception to the ESP I

[36] Case No. 18-77-EL-RDR, Opinion and Order at ¶4 (Dec. 19, 2018); Case No. 18-381-EL-RDR, Opinion and Order at ¶3 (Sept. 26, 2019); and Case No. 19-662-EL-RDR, Opinion and Order at ¶4 (Oct. 23, 2019).

distribution rate freeze over the term of the plan. The ESP I storm rider ended on December 28, 2015, after DP&L had collected over $20 million in storm costs from its customers. And the rate freeze that was part of the benefit of the bargain for customers ended as well.

DP&L's move to place the ESP III storm rider (the Revised Ninth Tariff) in effect, to allow it to collect costs from customers for 2016 through 2019 storms (which happened many years after the ESP I ended in 2013), should have been rejected by the PUCO. That Storm Cost Recovery Rider is not a condition, term, or provision of DP&L's most recent electric security plan. Instead the Revised Ninth Tariff that DP&L filed emanated from DP&L's ESP III proceeding. There DP&L was first given the broad authority to collect storm costs on going forward basis, instead of collecting discrete storm costs incurred during ESP I.

Both PUCO and DP&L acknowledge that the latest storm charges to customers (Revised Sheets six through nine) are derived from ESP III, and not ESP I.[37] And the PUCO found that DP&L's ESP I is the most recent standard service offer that must be reinstated under R.C. 4928.143(C)(2)(b), following DP&L's withdrawal.[38] Consistent with the PUCO's conclusion that riders created in DP&L's ESP III should not be continued[39] under DP&L's withdrawal, the PUCO should have rejected DP&L's ESP III Storm Recovery Charge to customers.

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[37] *See* footnotes 35, 36.

[38] *2019 Tariff Order* at ¶27; but see OCC Assignment of Error 1.

[39] *Id.* at ¶37.

It failed to do so, based on a mistaken and unsupported premise that DP&L's ESP III Storm rider was "authorized by ESP I, independent of ESP III." As a result, the PUCO misapplied the law (R.C. 4929.143(C)(2)(b)) that requires the PUCO to issue an order that continues the "provisions, terms, and conditions of the utility's most recent standard service offer." The Storm Rider DP&L filed was not a provision, term, or condition of DP&L's most recent standard service offer. OCC seeks rehearing on the PUCO's unlawful order.

Assignment of Error 4: The PUCO unreasonably and unlawfully approved DP&L's Rate Stabilization Charge, allowing DP&L to collect tens of millions of dollars from customers for a service that it is not providing.

The PUCO previously ruled that the Rate Stabilization Charge from ESP 1 is a non-bypassable provider of last resort charge (POLR) to allow DP&L to fulfill its POLR obligations.[40] When the Rate Stabilization Charge was originally authorized,[41] DP&L owned power plants that were providing power to DP&L customers. Because DP&L owned the power plants and the power generated by the power plants, it was able to provide POLR service to customers. The POLR service provided allowed customers to buy power from marketers and then switch back to DP&L if they wanted to or if the marketer defaulted. DP&L was paid well for this service –it collected from customers approximately $76 million per year for its POLR responsibilities.[42]

[40] Case Nos. 08-1094-EL-SSO *et al*., Finding and Order at ¶23 (Aug. 26, 2016).

[41] *In the Matter of the Application of the Dayton Power & Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order (Dec. 28, 2005).

[42] *Id.* at 11.

In DP&L's ESP I, parties agreed that customers would continue to pay DP&L a POLR charge (rate stabilization charge) that was based on 11% of DP&L's own generation rate for power. The power produced by DP&L's plants was the tool enabling DP&L to provide POLR service to customers.

Under DP&L's next electric security plan, ESP II, however, the PUCO approved significant changes that dramatically decreased and eventually eliminated DP&L's POLR obligations.[43] Under DP&L's ESP II plan, POLR obligations were shifted to the marketers who bid in competitive auctions to supply the standard service offer to DP&L's consumers. Since January 1, 2014, DP&L has procured 100% of the power for standard service through various rounds of competitive auctions. Under the latest DP&L competitive auctions, held in March 2018, winning generation suppliers have contracted to supply the standard service offer through May 31, 2022.[44] Those winning bids have set the standard service offer rate to DP&L customers who do not buy power directly from a marketer.

DP&L's standard service offer rate no longer has any relationship to DP&L's power plants (which it no longer owns) or its generation rate (it has no generation, and hence has no generation rate). And DP&L currently does not provide POLR service for customers. The PUCO acknowledged this when it ruled in DP&L's first ESP withdrawal

[43] *In re Application of DP&L for Approval of its Security Plan*, Case No. 12-426-EL-SSO *et al.*, Opinion and Order at 15-17 (Sept. 4, 2013).

[44] *In the Matter of the Procurement of Standard Service Offer Generation for Customers of the Dayton Power and Light Company*, Case No. 17-957-EL-UNC.

that "POLR service is currently provided by competitive bidding process auction participants."[45]

Yet, under the continued ESP I rates the PUCO approved in the *2019 Tariff Order*, customers will be forced to pay DP&L $76 million in annual POLR charges. The PUCO is unreasonably ignoring the drastic change in facts and circumstances. When the POLR charge was originally authorized, DP&L was generating power used to provide public utility service as part of the standard service offer. DP&L divested its power plants – they are no longer used and useful in providing utility service. DP&L stopped providing the POLR utility service to its customers. Therefore, while the POLR charge was a provision, term, and condition of ESP I, the power plants that facilitated the POLR service are no longer used and useful in rendering public utility service to customers. And the POLR service is no longer being provided by DP&L as a utility service to its customers.

Under these changed facts, the PUCO should have approved the POLR charge as a provision, term, or condition of ESP I, but should have set the charge to zero. Doing so would have been consistent with how the PUCO treated the environmental investment rider that was a provision of ESP I and was reinstated in continued rates but appropriately set to zero in DP&L's earlier ESP withdrawal.[46]

The PUCO's ruling charging customers for POLR service DP&L is not providing is unlawful and unreasonable. Ohio law requires all services provided by utilities to be just and reasonable in all respects. *See* R.C. 4905.22. And Ohio law and policy create a

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[45] *In the Matter of DP&L's Application*, Case No. 08-1094-EL-SSO, Finding and Order at ¶23 (Aug. 26, 2016).

[46] *2016 Tariff Order* ¶22 (Aug. 26, 2016).

duty on the PUCO to assure reasonably priced electricity service (R.C. 4928.02(A). The PUCO itself noted state policy that recognizes the need for "flexible regulatory treatment" to, among other things, "protect the public interest" and "maintain reasonable rates."[47] Under these laws, it is not lawful for the PUCO to charge DP&L customers for a service that DP&L is not providing. Nor is it reasonable.

Last time around, the PUCO tried to justify the Rate Stabilization Charge to customers by claiming "DP&L retains its obligation, over the long term, to serve as provider of last resort."[48] It appears that the PUCO relied upon the notion that, at the time of its *2016 Tariff Order*, there were no further competitive auctions scheduled to procure the standard service offer after May 31, 2017 (the end of DP&L's ESP II). It noted that DP&L "maintains a long-term obligation to serve as provider of last resort, even while POLR services are being provided by competitive bidding auctions in the short term." But that justification is no longer true today.

Since the PUCO's 2016 ruling, DP&L has held auctions procuring 100% of its standard service offer to cover service to customers through May 31, 2022.[49] Under the auction over the next two and a half years, the successful auction bidders (marketers) will again provide POLR service. DP&L will not be providing POLR service for customers "in the long-term." Any claim that DP&L has long-term obligations for POLR would only be true, at the soonest, starting after May 31, 2022, if at all. And that is way beyond the current replacement rates that customers began paying on December 19, 2019.

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[47] *2019 Tariff Order* ¶28.

[48] *2016 Tariff Order* ¶23.

[49] *In the Matter of the Procurement of Standard Service Offer Generation for Customers of the Dayton Power and Light Company*, Case No. 17-957-EL-UNC.

Whether DP&L customers should be charged now for long-term POLR obligations that the utility may (or may not) have beyond May 31, 2022, is a subject for future cases, not the present case.

The PUCO's Order charging customers for a service that DP&L is not providing is unjust and unreasonable. The PUCO should grant rehearing on this issue and abrogate its order to include the POLR charge as part of continued rates but set to zero.

Assignment of Error 5: The PUCO unlawfully and unreasonably ruled that parties were precluded from re-litigating the Rate Stabilization Charge under the doctrines of *res judicata* and collateral estoppel.

A. The PUCO's holding is unreasonable because the PUCO can modify earlier orders so long as it explains the change and the new regulatory course is permissible. *In re: Application of Ohio Power Co.,* 144 Ohio St.3d 1, 2015-Ohio-2056, ¶16, 17 (citations omitted).

The PUCO ruled that the parties' various arguments against the Rate Stabilization Charge are barred by doctrines of *res judicata* and collateral estoppel.[50] The PUCO found its 2012 decision (affirming the settlement with a rate stability charge) and its later *2016 Tariff Order* (allowing the rate stability charge to customers to continue) should remain intact. The PUCO concluded that it "will respect our precedents in order to assure the predictability which is essential in administrative law."[51] Specifically, the PUCO determined that it would not revisit its decision that the RSC is a provision term or condition of ESP I.[52] It also ruled that it would not review its decision on whether the Rate Stabilization Charge was properly extended.[53] The PUCO similarly refused to

[50] *2019 Tariff Order* at ¶¶ 29-34.

[51] *Id.*,¶29.

[52] *Id.*

[53] *Id.*, ¶31.

reconsider whether the Rate Stabilization Charge is an unlawful transition charge.[54] And the PUCO also found that that parties cannot raise new facts or other issues to challenge the lawfulness of the Rate Stabilization Charge.[55] The PUCO was wrong.

The PUCO unreasonably failed to exercise its discretion to reconsider its prior holding, when it should have, given the changed circumstances. These changed circumstances now render its prior decision unjust and unreasonable. Rehearing should be granted.

The PUCO has the discretion to change or alter its prior decisions.[56] The Ohio Supreme Court has on a number of occasions explained that the PUCO *can r*evisit a particular decision, but must, if it changes course, explain why.[57] The PUCO's power to change course is not limitless; it must explain why and the new course must be substantively reasonable and lawful.[58]

The changes in facts and circumstances were reasonable grounds for the PUCO to revisit its decision approving the Rate Stabilization Charge to DP&L customers. When the Rate Stabilization Charge was originally approved it was a charge to allow DP&L to

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[54] *Id.*, ¶34.

[55] *Id.*, ¶35.

[56] *See, e.g.*, *In re: Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶16, 17 (citations omitted)(affirming that the PUCO can modify earlier Orders so long as the PUCO explains the change and the new regulatory course is permissible).

[57] *In re: Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, ¶52. citing, *e.g.*, *Util. Serv. Partners Inc. v. Public Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764; *Ohio Consumers Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51 (1985).

[58] *Id.; see also Fed. Communications Comm. v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009), (an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." [emphasis deleted].

fulfill its POLR obligations. But since 2014, DP&L's POLR obligations have been eliminated. DP&L's POLR obligations were shifted to the competitive generation providers who supply the standard service offer, formerly supplied by DP&L. With no POLR obligation, DP&L has no reason to collect POLR charges from customers.

The PUCO should have recognized the change in circumstances and reconsidered its orders which were based on wholly different circumstances and rationale. The PUCO should have reexamined the Rate Stabilization Charge in light of changed facts –facts which were not known or contemplated in the 2012 PUCO-approved settlement. The PUCO should have concluded that it is no longer lawful or reasonable for DP&L to charge its customers $76 million annually for a service that DP&L is no longer providing. The PUCO had the discretion to change its orders, in a reasonable and lawful way, but chose not to do so. It was unreasonable for the PUCO to fail to act in this regard, to the detriment of DP&L's 500,000 plus customers.

B. The PUCO's holding is unlawful because it is inconsistent with Ohio Supreme Court precedent.

1. The Ohio Supreme Court has held that *res judicata* in <u>administrative proceedings</u> should be rejected when its application would contravene and override public policy or result in manifest injustice.

The PUCO strictly applied the doctrine of *res judicata* to bar the various claims parties made against the Rate Stabilization Charge. In doing so the PUCO ignored the Ohio Supreme Courts admonishment that when *res judicata* does apply to <u>administrative proceedings</u>, it should be applied with flexibility, not rigidity. *Jacobs v. Teledyne*, *Inc.*, 39 Ohio St.3d 168, 171 (1988).

And the PUCO retreated from an earlier, well-founded ruling where it appropriately conceded the need for it to be flexible in applying *res judicata:* "[*Res*

judicata] is not always applied in the same manner in administrative proceedings as in the courts, given the nature of ongoing regulatory responsibility of administrative agencies and their need to take into account *changes in facts and circumstances* in determining what is in the public interest at a particular point in time." *In the Matter of the Complaint of Union Rural Electric Cooperative Inc. v. DP&L*, Case No. 88-947-EL-CSS, 1988 Ohio PUC LEXIS 776, at 7 (Aug.16, 1988) (emphasis added).

Consistent with the need to apply *res judicata* flexibly in administrative proceedings, the Court has ruled that the doctrine of *res judicata* in administrative proceedings "should be qualified or rejected when its application would contravene an overriding public policy or result in manifest injustice." *Jacobs v. Teledyne*, 39 Ohio St.3d at 171.

Here if *res judicata* were strictly applied, as the PUCO has proposed, it would contravene public policy. It is not in the public interest to require Ohio utility customers to pay for a service that they are not receiving. *See* R.C. 4905.22; 4928.02(A). Additionally, shopping customers could be paying double for POLR service, once through the standard service offer rate paid to marketers and once through the Rate Stabilization Charge. It would be manifestly unjust to double charge customers and make customers pay DP&L for a service it is not providing. Consistent with the Ohio Supreme Court's holding in *Jacobs v. Teledyne*, and the PUCO's own precedent, the PUCO should not apply *res judicata* to bar claims against the Rate Stabilization Charge. Otherwise the PUCO fails to protect the public interest in assuring just and reasonable utility rates for all Ohioans.

2. The Ohio Supreme Court has held changed circumstances that raise a new material issue or would have been relevant to resolve material issues in the earlier action will not bar litigation of that issue in the later action.

The Ohio Supreme Court has also found that in administrative proceedings, there is a "changed circumstance" exception that allows parties to raise issues that would otherwise be considered res judicata. In *State ex rel Westchester Estates, Inc. v. Bacon*, 61 Ohio St.2d 42, 45 (1980), the Ohio Supreme Court ruled that if there has been a change in facts which either 1) raises a new material issue or 2) which would have been relevant to the resolution of a material issue in the earlier action, *res judicata* will not bar litigation of that issue in a later action.

Here, there are changed circumstances that raise a new material issue: The changed facts include that DP&L no longer owns generation and no longer provides the service which was the basis for the Rate Stabilization Charge. These changed circumstances obliterate the justification for charging customers the Rate Stabilization Charge. The changed circumstances create a new material issue that the PUCO should address, an issue not present in the PUCO's 2012 decision: Is it just and reasonable for customers to continue to pay a utility for a service that the utility is no longer providing? The answer must be no, regardless of what transpired in the past. On a going forward basis there is no rationale that supports DP&L charging its customers for a service it does not provide.

The PUCO should reverse its ruling and recognize the change in facts that no longer make it reasonable and lawful to rely on the principle of *res judicata* as a bar to OCC's claims. Rehearing should be granted.

Assignment of Error 6: The PUCO ruling allowing DP&L's revised tariffs to be effective on filing, before the PUCO conducts its final review and without making the tariffs subject to refund, was unreasonable and harmed customers.

The PUCO approved revised tariffs for DP&L that are effective on filing, subject to final review.[59] Within a few days DP&L filed its revised tariff sheet, including tariff sheets reimplementing the Rate Stabilization Charge and continuing a Storm Recovery Rider, charging customers for 2016, 2017, and 2018 storm costs. According to DP&L's filings, its customers were charged the new continued electric rates starting December 19, 2019. To date the PUCO Staff has not filed its final review of DP&L's tariffs to ensure compliance with the PUCO's *2019 Tariff Order*.

The PUCO's rush to allow DP&L to begin charging customers new rates, without further review, was unreasonable and unlawful. The PUCO failed to fulfill one of its primary duties to customers: to ensure that rates are just and reasonable in all respects, under R.C. 4905.22. Without conducting a review of the tariffs, there was no way the PUCO could know if the rates complied with its *2019 Tariff Order*. And the PUCO could not know that the rates are just and reasonable in all respects. The PUCO should have instead made the effective date of the rates (when new rates can be charged to customers) after it had a chance to review them, not before.

Additionally, and most important, the PUCO failed to protect customers by ordering the rates to be collected subject to refund. The PUCO should have ordered the rates to be collected, subject to refund, pending the outcome of any final decision by it or the Ohio Supreme Court.

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[59] *2019 Tariff Order* at ¶46.

The PUCO has the authority to make rates subject to refund. It has done so in the past. The PUCO has acted to prevent harm from occurring by ordering utilities, on an ongoing basis, to collect an existing rate increase subject to refund and subject to appropriate interest charges. The PUCO has used this approach to permit it to explore the reasonableness of rates in light of events that occurred after the issuance of its orders. For instance, the PUCO granted rehearing and ordered rates to be collected subject to refund in a rate case filed by the Columbus & Southern Ohio Electric Company.[60] In that rate case, one week after the issuance of the PUCO's rate order, the Nuclear Regulatory Commission issued an Order that suspended construction at the Zimmer Nuclear Power Plant ("Zimmer"). The original Opinion and Order included a rate base allowance for construction work in progress ("CWIP") for Zimmer.[61]

In its order setting the rehearing, the PUCO approved the utility's filed tariffs but expressly found the portion of the increase granted attributable to Zimmer CWIP "should be made subject to refund, pending a rehearing on the CWIP issue."[62] A rehearing was held and the PUCO ordered that all of the Zimmer costs should be excluded from CWIP. The PUCO ordered the utility to file tariffs reducing the total revenue requirements by approximately $13 million.[63] The utility appealed and sought a stay of the PUCO's Order on Rehearing from the Supreme Court of Ohio. The Court granted the stay but

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[60] *In re Columbus & Southern Ohio Electric Co.*, Case No. 83-1058-EL-AIR, Entry (November 17, 1982).

[61] *Id.,* Opinion and Order at 8-14 (November 5, 1982).

[62] *Id.*, Entry at 1 (November 17, 1982).

[63] *Id.,* Order on Rehearing (March 16, 1983).

subsequently affirmed the PUCO's denial of a CWIP allowance.[64] After the PUCO's action was upheld on appeal,[65] the PUCO ordered the utility to refund approximately $4.5 million to its customers.[66] The PUCO ordered the collection, subject to refund, to protect customers in the event of a later decision that the utility was collecting more from customers than warranted by law, rule, or reason.

Another example where the PUCO has collected rates subject to refund involved the Ohio Utilities Company.[67] After a rate order was issued,[68] legislation was enacted that changed Ohio's ratemaking formula. The PUCO opened an investigation to determine if the previously-established rates were still reasonable in light of the new law.[69] The PUCO determined that the rates were excessive, taking into account the new law, and ordered the utility to withdraw its tariffs and file new lower rates consistent with the PUCO's findings.[70] The utility sought a stay of the PUCO's order, pending further

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[64] *Columbus & Southern Ohio Electric Co. v. Pub. Util. Comm.*, (1984), 10 Ohio St.3d 12.

[65] *Id.*

[66] *In re Columbus & Southern Ohio Electric Co*., Case No. 81-1058-EL-AIR, Order on Rehearing (May 1, 1984).

[67] *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company,* Case No. 77-1073-WS-COI, Entry at 2 (June 7, 1978).

[68] *In the Matter of the Ohio Utilities Co. Application for an Increase in Rates,* Case No. 79-529-WS-AIR, Opinion and Order (January 18, 1977).

[69] *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company,* Case No. 77-1073-WS-COI, Entry (September 7, 1977).

[70] *Id.,* Opinion and Order (May 18, 1978).

review, which was granted with the condition that the utility was required to collect rates subject to refund.[71]

And in a case involving AEP's Rate Stability Rider ("RSR"), the PUCO ordered that the RSR be collected subject to refund after the case was remanded by the Court.[72] The PUCO "direct[ed] AEP Ohio to file revised tariffs that provide that the RSR is being collected subject to refund" in order to protect consumers from irreparable harm – continuing to pay the RSR without the potential of getting a refund.[73]

The PUCO has the discretion to order rates collected from customers to be refundable. It should have acted within its discretion and required these replacement rates to be collected subject to refund. It should have avoided the travesty of justice for consumers that has become all too familiar when utilities charges are overturned by the Court and yet no refunds are available to customers.

The Court most recently has opined on this travesty of justice which could be avoided if the PUCO makes rates refundable. In a recent opinion, where it sided with FirstEnergy's claim that the PUCO could not make FirstEnergy refund $43 million to

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[71] *Id.,* Entry (June 7, 1978). The utility was also required to file an "undertaking" consisting of a promise to refund any amount collected for service rendered after the date of the Entry by a method later determined by the Commission (either cash refund or as a credit to future bills). The undertaking was required to be under oath by an officer of the company and was to include a promise to include interest. The amount ordered for refund was the amount collected for service in excess of those rates ultimately determined to be lawful. *Id.*

[72] *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 *et. al*. (May 18, 2016).

[73] *Id.* at 4.

consumers for renewable energy overcharges,[74] the Court found that the PUCO was barred from ordering refunds because it had not made FirstEnergy's tariffs subject to refund.[75] In another recent denial of refunds, the Court found unlawful the PUCO's allowance of a so-called distribution modernization rider (subsidy charge) for FirstEnergy. There, the Court denied half a billion dollars in refunds to two million consumers (where the PUCO had not protected consumers by making the charge subject to refund).[76] (In that case, the PUCO had rejected making the charge subject to refund).[77] The PUCO had rejected a motion by OCC and the Ohio Manufacturers' Association, in 2016, to make FirstEnergy's subsidy charge subject to refund.[78]

Ohio Supreme Court Justice Pfeifer highlighted the extreme injustice to Ohio consumers when they are denied refunds for charges later found to be unlawful:

> [T]he PUCO asserted that a refund under the circumstances would be tantamount to retroactive ratemaking, something it is not authorized to engage in.
>
> It is unconscionable that a public utility should be able to retain $368 million that it collected from customers based on assumptions that are unjustified. The problem stems from this court's 1957 decision [in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*] Clearly the time has come to overturn this case.

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[74] *In re Alternative Energy Rider Contained in the Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, ¶¶ 15-20.

[75] *Id.*

[76] *In re Application of Ohio Edison Co.,* 157 Ohio St.3d 73, 2019-Ohio-2401, ¶ 23 ("despite our finding that the DMR is unlawful, no refund is available to ratepayers for money already recovered under the rider").

[77] *Id.*

[78] *In re Application of Ohio Edison Co., the Cleveland Electric Illuminating Co., & the Toledo Edison Co.*, Case No. 14-1297-EL-SSO, Finding & Order ¶ 16 (Dec. 21, 2016).

> ...
>
> [I]t boggles the mind that this court would ever countenance such a proposition: that a public utility should be allowed to fatten itself on the backs of Ohio residents by collecting unjustified charges.
>
> ...
>
> Allowing AEP to retain the $368 million that it collected based on charges that were not justified is unconscionable. Doing so because of a 50-year-old case that is not supported by the statute on which it is based is ridiculous. The ratepayers of Ohio deserve better. [79]

Just since the advent of the 2008 energy law that favors electric utilities in ratemaking, Ohioans have lost $1.2 billion in denied refunds for electric charges after Supreme Court reversals of PUCO orders.[80]

The PUCO should have acted in its *2019 Tariff Order* to protect consumers by ordering the continued rates to be collected subject to refund. There was no reason not to. The PUCO erred. Rehearing should be granted.

III. CONCLUSION

There are many troubling aspects of the PUCO's *2019 Tariff Order*. Under the PUCO's order customers are paying higher rates to continue DP&L's electric security plan, rather than lower rates for continuing the more limited, generation rates that are DP&L's "standard service offer." Under the continued electric security plan, customers are also getting charged for service DP&L is not providing to them. Additionally,

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[79] *In re Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶¶ 61-67.

[80] *See In re Columbus S. Power Co*., 128 Ohio St.3d 512, ¶ 17-20 ($63 million); *In re: Columbus S. Power Co.,* 138 Ohio St.3d 448, ¶ 56 ($368 million); *In re Application of Dayton Power & Light Co.,* 147 Ohio St.3d 166 ($330 million); *In re Application of Ohio Edison Co*., 2019-Ohio-2401, ¶ 23 ($456 million collected through June 2019).

customers will be paying for storm charges that were not part of the provisions, terms and conditions of the utility's most recent standard service offer, violating R.C. 4928.143(C)(2). And, under the PUCO's Order, customers lose out because the PUCO has failed to hold DP&L to its ESP I commitment to freeze distribution rates. The PUCO's Order unreasonably and unlawfully deprives customers of the full rate reductions they should have received when the PUCO stopped DP&L from collecting further DMR charges from customers.

To make matters worse, the PUCO did not protect customers from the travesty of justice that has become all too common for utility customers in Ohio. Utility customers in Ohio cannot get refunds for millions of dollars paid, that are later found to be unlawful or unreasonable by the PUCO or the Court.

DP&L customers have been particularly hard hit by the no-refund rule. Customers of DP&L paid over $218 million to DP&L in so-called distribution modernization charges that the PUCO determined to be unlawful. That $218 million was pocketed by DP&L and will never make its way back to the hands of DP&L customers. And earlier under DP&L's second electric security plan, DP&L customers paid over $300 million in stability charges that the Court ultimately found were unlawful.[81] That overcharge was not refunded to customers. The PUCO should have stopped the snowballing injustice DP&L customers have endured. The PUCO should act now and order the collection of continued rates to DP&L customers to be refundable.

[81] *In re Application of Dayton Power & Light Co.,* 147 Ohio St.3d 166.

The PUCO should reconsider its decision and correct the errors that have led to unjust and unreasonable rates for DP&L's customers. The injustice should end now.

Respectfully submitted,

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Ohio Consumers' Counsel

/s/ Maureen R. Willis
Maureen R. Willis (0020847)
Counsel of Record
Assistant Consumers' Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was electronically served via electric transmission on the persons stated below this 17th day of January 2020.

/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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THE DAYTON POWER AND LIGHT COMPANY
MacGregor Park
1065 Woodman Drive
Dayton, Ohio 45432

P.U.C.O. No. 17
ELECTRIC DISTRIBUTION SERVICE
STORM COST RECOVERY RIDER

DESCRIPTION:

The Storm Cost Recovery Rider is intended to compensate DP&L for certain costs related to restoring service and repairing distribution facilities as a result of severe storms that the Company experienced in 2008, 2011, and 2012.

APPLICABLE:

This rider will be assessed per tariff class at the rates stated below on a bills rendered basis beginning January 1, 2015.

CHARGES:

Residential	$2.72	/ month
Residential Heating	$2.72	/ month
Secondary	$10.42	/ month
Primary	$10.42	/ month
Primary Substation	$10.42	/ month
High Voltage	$10.42	/ month
Private Outdoor Lighting	$0.72	/ lamp / month
School	$10.42	/ month
Street Lighting	$10.42	/ month

TERMS AND CONDITIONS:

The Storm Cost Recovery Rider shall be assessed for approximately one year until the Company's costs are fully recovered.

Filed pursuant to the Opinion and Order in Case No. 12-3062-EL-RDR dated December 17, 2014 of the Public Utilities Commission of Ohio.

Issued December 30, 2014 Effective January 1, 2015

Issued by
DEREK A. PORTER, President and Chief Executive Officer

THE DAYTON POWER AND LIGHT COMPANY
MacGregor Park
1065 Woodman Drive
Dayton, Ohio 45432

Fifth Revised Sheet No. D30
Cancels
Fourth Revised Sheet No. D30
Page 1 of 1

P.U.C.O. No. 17
ELECTRIC DISTRIBUTION SERVICE
STORM COST RECOVERY RIDER

DESCRIPTION:

The Storm Cost Recovery Rider is intended to compensate DP&L for certain costs related to restoring service and repairing distribution facilities as a result of severe storms that the Company experienced in 2008, 2011, and 2012.

APPLICABLE:

This rider will be assessed per tariff class at the rates stated below on a bills rendered basis beginning January 1, 2016.

CHARGES:

Residential	$0.00	/ month
Residential Heating	$0.00	/ month
Secondary	$0.00	/ month
Primary	$0.00	/ month
Primary Substation	$0.00	/ month
High Voltage	$0.00	/ month
Private Outdoor Lighting	$0.00	/ lamp / month
School	$0.00	/ month
Street Lighting	$0.00	/ month

TERMS AND CONDITIONS:

The Storm Cost Recovery Rider shall be assessed for approximately one year until the Company's costs are fully recovered.

Filed pursuant to the Opinion and Order in Case No. 12-3062-EL-RDR dated December 17, 2014 of the Public Utilities Commission of Ohio.

Issued December 28, 2015 Effective January 1, 2016

Issued by
THOMAS A. RAGA, President and Chief Executive Officer

THE DAYTON POWER AND LIGHT COMPANY
MacGregor Park
1065 Woodman Drive
Dayton, Ohio 45432

Sixth Revised Sheet No. D30
Cancels
Fifth Revised Sheet No. D30
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P.U.C.O. No. 17
ELECTRIC DISTRIBUTION SERVICE
STORM COST RECOVERY RIDER

DESCRIPTION:

The Storm Cost Recovery Rider is intended to compensate DP&L for Operating and Maintenance (O&M) expenses incurred for storms that are determined to be "Major Events," as defined in Ohio Administrative Code 4901:1-10-01.

APPLICABLE:

This rider will be assessed per tariff class at the rates stated below on a bills rendered basis beginning January 1, 2016.

CHARGES:

Residential	$0.00	/ month
Residential Heating	$0.00	/ month
Secondary	$0.00	/ month
Primary	$0.00	/ month
Primary Substation	$0.00	/ month
High Voltage	$0.00	/ month
Private Outdoor Lighting	$0.00	/ lamp / month
Street Lighting	$0.00	/ month

TERMS AND CONDITIONS:

The Storm Cost Recovery Rider shall be assessed for approximately one year until the Company's costs are fully recovered. This Rider is subject to reconciliation, including but not limited to, refunds to customers, based upon the results of audits as approved and ordered by the Commission.

Filed pursuant to the Opinion and Order in Case No. 15-1830-EL-AIR dated September 26, 2018 of the Public Utilities Commission of Ohio.

Issued September 28, 2018 Effective October 1, 2018

Issued by
CRAIG L. JACKSON, President and Chief Executive Officer

THE DAYTON POWER AND LIGHT COMPANY
MacGregor Park
1065 Woodman Drive
Dayton, Ohio 45432

P.U.C.O. No. 17
ELECTRIC DISTRIBUTION SERVICE
STORM COST RECOVERY RIDER

DESCRIPTION:

The Storm Cost Recovery Rider is intended to compensate DP&L for certain costs related to restoring service and repairing distribution facilities as a result of severe storms that the Company experienced in 2016.

APPLICABLE:

This rider will be assessed per tariff class at the rates stated below on a bills rendered basis beginning January 1, 2019.

CHARGES:

Residential	$0.20	/ month
Residential Heating	$0.20	/ month
Secondary	$0.81	/ month
Primary	$0.81	/ month
Primary Substation	$0.81	/ month
High Voltage	$0.81	/ month
Private Outdoor Lighting	$0.06	/ lamp / month
School	$0.81	/ month
Street Lighting	$0.81	/ month

TERMS AND CONDITIONS:

The Storm Cost Recovery Rider shall be assessed for approximately one year until the Company's costs are fully recovered.

Filed pursuant to the Opinion and Order in Case No. 18-0077-EL-RDR dated December 19, 2018 of the Public Utilities Commission of Ohio.

Issued December 21, 2018 Effective January 1, 2019

Issued by
JUDI L. SOBECKI, Vice President

THE DAYTON POWER AND LIGHT COMPANY
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Dayton, Ohio 45432

Eighth Revised Sheet No. D30
Cancels
Seventh Revised Sheet No. D30
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P.U.C.O. No. 17
ELECTRIC DISTRIBUTION SERVICE
STORM COST RECOVERY RIDER

DESCRIPTION:

The Storm Cost Recovery Rider is intended to compensate DP&L for certain costs related to restoring service and repairing distribution facilities as a result of severe storms that the Company experienced in 2016 and 2017.

APPLICABLE:

This rider will be assessed per tariff class at the rates stated below on a bills rendered basis beginning October 1, 2019.

CHARGES:

Residential	$0.38	/ month
Residential Heating	$0.38	/ month
Secondary	$1.31	/ month
Primary	$1.31	/ month
Primary Substation	$1.31	/ month
High Voltage	$1.31	/ month
Private Outdoor Lighting	$0.08	/ lamp / month
Street Lighting	$1.31	/ month

TERMS AND CONDITIONS:

The Storm Cost Recovery Rider shall be assessed for approximately one year until the Company's costs are fully recovered.

Filed pursuant to the Opinion and Order in Case No. 18-0381-EL-RDR dated September 26, 2019 of the Public Utilities Commission of Ohio.

Issued September 30, 2019 Effective October 1, 2019

Issued by
VINCE PARISI, President and Chief Executive Officer

THE DAYTON POWER AND LIGHT COMPANY
MacGregor Park
1065 Woodman Drive
Dayton, Ohio 45432

Ninth Revised Sheet No. D30
Cancels
Eighth Revised Sheet No. D30
Page 1 of 1

P.U.C.O. No. 17
ELECTRIC DISTRIBUTION SERVICE
STORM COST RECOVERY RIDER

DESCRIPTION:

The Storm Cost Recovery Rider is intended to compensate DP&L for certain costs related to restoring service and repairing distribution facilities as a result of severe storms that the Company experienced in 2016, 2017 and 2018.

APPLICABLE:

This rider will be assessed per tariff class at the rates stated below on a bills rendered basis beginning November 1, 2019.

CHARGES:

Residential	$1.01	/ month
Residential Heating	$1.01	/ month
Secondary	$3.48	/ month
Primary	$3.48	/ month
Primary Substation	$3.48	/ month
High Voltage	$3.48	/ month
Private Outdoor Lighting	$0.21	/ lamp / month
Street Lighting	$3.48	/ month

TERMS AND CONDITIONS:

The Storm Cost Recovery Rider shall be assessed for approximately one year until the Company's costs are fully recovered.

Filed pursuant to the Opinion and Order in Case No. 19-0662-EL-RDR dated October 23, 2019 of the Public Utilities Commission of Ohio.

Issued October 31, 2019

Effective November 1, 2019

Issued by
VINCE PARISI, President and Chief Executive Officer

Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.