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

MEMORANDUM CONTRA DP&L'S MOTION TO STRIKE OCC'S NOTICE OF ITS TERMINATION AND WITHDRAWAL FROM A 2009 SETTLEMENT OF AN ELECTRIC SECURITY PLAN

BY

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Seeking justice for DP&L (AES Ohio) consumers, the Ohio Consumers' Counsel (OCC) exercised its right to file a notice of termination and withdrawal from a 2009 Settlement of DP&L's electric security plan. As described below, DP&L is violating the terms of the Settlement by opposing OCC's right to withdraw from the Settlement.

OCC was compelled to exercise these rights for consumer protection when the PUCO, in a 16-month-delayed rehearing, failed to adopt the Settlement "in its entirety and without material modification." The PUCO allowed DP&L to cherry-pick utility-friendly provisions of the Settlement that would continue and hurt consumers in 2020 under ESP 1. Those charges include

a $76 million per year stability charge to consumers that today could likely not withstand legal challenges, based on a 2011 Ohio Supreme Court[1] ruling and PUCO rulings.[2] And yet, at the same time, the PUCO denied consumers the benefit of a distribution rate freeze promised under the Settlement. Once again, it is a win for the utility; Dayton-area consumers lose.

The lack of justice for consumers is apparent. DP&L continues to reap *its* rewards under the Settlement in the form of the Rate Stabilization Charge at consumer expense. But consumers are not receiving the benefit of *their* bargain in the form of a rate freeze. Unfortunately, such utility-oriented hypocrisy is alive and well at the PUCO.

We are filing this Memorandum Contra because, on September 30, 2021, DP&L filed a motion to strike OCC's Notice to Terminate the Settlement.[3] DP&L's Motion to Strike should be denied. Contrary to DP&L's assertions otherwise, OCC has met the conditions under the 2009 Settlement that allow it to terminate and withdraw from the Settlement. When the PUCO failed to freeze distribution rates as a continued condition of ESP I, it rejected or modified the 2009 Settlement.

On rehearing the PUCO failed to adopt the Settlement without material modification.[4] OCC negotiated in good faith with other Signatory Parties but was unable to achieve an outcome consistent with the Settlement. OCC also timely filed its notice of withdrawal and termination. Like it or not, it is now time for the PUCO to accept the notice

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[1] *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512 (2011).

[2] *In re the Ohio Power Company*, Case No. 08-917-EL-SSO, Order on Remand (Oct. 3, 2011).

[3] *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 *et al*, DP&L Motion to Strike (Sept. 30, 2021).

[4] Under the terms of the 2009 Settlement "[a]ny Signatory Party has the right, in its sole discretion, to determine what constitutes a 'material' change for the purposes of that Party withdrawing from the Stipulation." *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 *et al*, Stipulation and Recommendation at footnote 5 (Feb. 24, 2009) (Attachment A).

and move forward to allow consumers their right to be heard on a more fair, reasonable standard service offer.

I. DP&L HAS NO RIGHT TO OPPOSE OCC'S NOTICE OF TERMINATION AND WITHDRAWAL

Paragraph 33 of the Settlement is telling. Under that paragraph, the Signatory Parties declare that "This Stipulation contains the entire Agreement among the Signatory Parties." The Settlement is a contract, governed by the law of contracts. The 2009 Settlement is a clear, complete document negotiated at arms-length between capable, sophisticated parties. The Settlement should be enforced according to its explicit terms.

The PUCO should reflect upon the meticulous wording of the termination provisions contained in paragraph 37. Great detail is provided and given as to the Signatory Parties' rights, and the PUCO's duties, in the event the PUCO rejects or modifies a part of the Settlement. The parties, however, did not specify any right to challenge a notice of termination made by a Signatory Party. Under the standard cannon of contract construction, *expresio unius est exclusio alterus* (the expression of one thing implies the exclusion of the other), the PUCO should conclude that DP&L has no right to oppose OCC's notice of termination and withdrawal.

In fact, allowing DP&L to challenge OCC's right to withdrawal is contrary to the provisions of the Settlement that seek to preserve the Settlement when and if the PUCO materially modifies it. Under paragraph 37, the Settlement gives express rights to Signatory Parties to apply for rehearing if the PUCO materially modifies all or any part of the Settlement. Under this paragraph, according to footnote 5, "Any Signatory Party has the right in its sole discretion, to determine what constitutes a 'material' change for purposes of that Party withdrawing from the Stipulation." Under paragraph 36, "no Signatory Party will oppose an application for rehearing designed to defend the terms of this Stipulation." (DP&L violated this

term of the Settlement when it challenged OCC's application for rehearing objecting to the PUCO's modification of the Settlement.)

Once a Signatory Party files an application for rehearing to restore the stipulation to its original, unmodified form, and the PUCO fails to adopt the Settlement without material modification upon rehearing, then "any Signatory Party may terminate and withdraw from the Stipulation by filing a notice with the Commission." The only pre-condition to this self-executing provision is that the Signatory Party must, before filing its notice of termination, negotiate with other signatories in good faith "to achieve an outcome that substantially satisfies the intent of the Stipulation."

The Stipulation has clearly spelled out a process for an aggrieved signatory party, which OCC initiated and completed. That process is intended to carry forward the intent of the Stipulation by formulating a new agreement that "substantially satisfies the intent of the Stipulation." DP&L is clearly acting outside of the established process. The Settlement contains no such right to object to a Parties' notice of termination and the PUCO should not read that right into the Settlement. DP&L's Motion to Strike OCC's Notice of Withdrawal should be denied.

II. OCC'S NOTICE OF APPEAL DOES NOT DEPRIVE THE PUCO OF JURISDICTION TO RULE ON OCC'S NOTICE OF WITHDRAWAL

DP&L asserts that the PUCO "has no authority to act on OCC's notice because OCC filed a notice of appeal in this matter on August 27, 2021."[5] To support this assertion, DP&L cites authority that administrative agencies can *reconsider* their decision until an appeal is instituted or the time for an appeal has passed.[6] This authority, however, is clearly inapplicable on its face.

[5] DP&L's Motion to Strike at 2.

[6] *Id.* at 2-3.

In its Notice, OCC is not asking the PUCO to *reconsider* any decision. Rather, it is exercising its right under the Settlement (and the PUCO Order adopting it)[7] to withdraw from and terminate the Settlement. The Settlement is a contract like any other.[8] It is clear and unambiguous and should therefore be applied and enforced as written.[9]

There is no dispute that OCC followed the Settlement's terms for withdrawal and termination. There is nothing for the PUCO to "reconsider." The only "act" for the PUCO is to apply the Settlement's terms (and those of the Order adopting it) and proceed to "convene an evidentiary hearing" so that parties will have the opportunity to retry the proceeding "as if this Stipulation had never been executed."[10] The PUCO's duties are to be exercised independently of any matters that OCC has appealed.

Adopting DP&L's position would also lead to an absurd result, contrary to law.[11] The PUCO adopted the Settlement to establish DP&L's first electric security plan.[12] As relevant here, the PUCO restored the provisions, terms, and conditions of DP&L's first electric security plan

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[7] *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 et al, Opinion and Order at 13, first Ordering paragraph ("ORDERED, That the Stipulation presented in these proceedings be adopted.") (June 24, 2009).

[8] *See, e.g.*, R&L Carriers, Inc. v. Emergency Response & Training Sols., Inc., 2019-Ohio-3539, para. 31 (Clinton 2019) (citations omitted); U.S. Bank Nat'l. Assoc. v. Unknown, 2021-Ohio-2344, para. 12 (Harrison 2021) (citations omitted); Murman v. Hosps. Health Sys., 2017-Ohio-1282, para. 16 (Cuyahoga 2017).

[9] *See, e.g., Alexander Local Sch. Dist. Bd. of Educ. v. Albany*, 2017-Ohio-8704, para. 36 (Athens 2017); *Sutton Bank v. Progressive Polymers, L.L.C.*, 161 Ohio St. 3d 387, 392-93 (2020); *J.G. Wentworth LLC v. Christian*, 2008-Ohio-3089, para. 30 (Mahoning 2008).

[10] *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 *et al,* Settlement at para. 37 (Feb 24, 2009).

[11] *See, e.g., Bell V. City Of Union, 1998 Ohio App. Lexis 5726, *3 (Montgomery 1998); State Ex Rel. Barley V. Ohio Dep't Of Job & Family Servs., 132 Ohio St.3d 505*, 511 (2012) (Citations Omitted); Wands V. Maple Heights City Sch. Dist. Bd. Of Educ., 2000 Ohio App. LEXIS 3832, *19-20 (Cuyahoga 2000).

[12] *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 *et al*, Opinion and Order (June 24, 2009).

after DP&L withdrew its third electric security plan.[13] It would be the height of absurdity to rule that the PUCO lacks jurisdiction to monitor, regulate, and enforce DP&L's compliance with its order approving the 2009 Settlement under which DP&L charges its customers. To protect consumers, the PUCO has the authority to act, and should act, on OCC's Notice.

III. THE PUCO HAS A DUTY TO ENFORCE THE RATE FREEZE, REGARDLESS OF ANYTHING THAT OCC HAS OR HAS NOT DONE

A central theme of DP&L's motion to strike is that the PUCO should decline to enforce the rate freeze found in ESP I because, according to DP&L, OCC has done or not done various things in the last 12 years, thus causing OCC to waive the right to enforce the rate freeze.[14] What all of these arguments overlook is that (i) DP&L must follow the PUCO's orders, regardless of anything OCC does or does not do, and (ii) the PUCO must enforce its orders, regardless of anything OCC does or does not do.

Under R.C. 4905.54, every public utility, which includes DP&L, "shall comply with every order, direction, and requirement of the public utilities commission made under authority of this chapter and Chapters 4901., 4903., 4907., and 4909. of the Revised Code, so long as they remain in force." The PUCO can likewise assess a forfeiture if the utility "fails to comply with an order, direction, or requirement of the commission that was officially promulgated."[15] Thus, even if OCC had chosen to do nothing at all, DP&L had an affirmative duty to comply with the PUCO's ESP I Order by complying with the distribution rate freeze.

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[13] *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 *et al*, Second Finding and Order (December 18, 2019).

[14] *See generally* DP&L's Motion to Strike, Memorandum in Support at 6-20 (arguing that OCC has waived its right to withdraw, that OCC's withdrawal is not timely, that OCC forfeited arguments regarding the rate freeze by not making them in the past, and that OCC's motion is inconsistent with other proceedings).

[15] R.C. 4905.54.

Likewise, the PUCO has an independent duty to enforce its own rulings. Under R.C. 4903.10(B), the PUCO can "abrogate or modify" one of its orders if, after a party applies for rehearing, the PUCO "is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted." In the absence of a timely application for rehearing, there is no statute allowing the PUCO to go back and modify its prior orders—for example, to remove the rate freeze that was lawfully approved as part of ESP I.[16] Thus, whether OCC may have "waived" its right to enforce the rate freeze is irrelevant—the PUCO should be enforcing it on its own.

IV. THE PUCO MATERIALLY MODIFIED THE SETTLEMENT IN ITS DECEMBER 18, 2019 ORDER WHEN IT DID NOT ORDER DP&L TO FREEZE ITS DISTRIBUTION RATES DURING THE PERIOD ESP I WAS REINSTATED (STARTING JANUARY 1, 2020)

DP&L argues that OCC's notice to withdraw was not valid because the PUCO's December 18, 2019 Order did not modify the 2009 Settlement.[17] DP&L cites two reasons for its erroneous conclusion. First, it claims the rate freeze already terminated on December 31, 2012, because the express wording of the stipulation (¶18) states that rate freeze terminates on December 31, 2012. So, the PUCO, according to DP&L, did not modify the Settlement by failing to extend the rate freeze in its December 18, 2019 Order. Second, DP&L claims that the PUCO's 2009 Order expressly adopted the Stipulation, without modifying it.[18] And DP&L also alleges that the PUCO did not modify the ESP Settlement, but, instead under R.C. 4928.143(C)(2)(a) & (b), reinstated ESP I after DP&L terminated ESP III. DP&L declares that

[16] *See In re Ohio Edison Co.*, 2020-Ohio-5450, ¶ 20 ("The commission is a creature of statute and may act only under the authority conferred on it by the General Assembly."); R.C. Chapter 4903 (no provision allowing the PUCO to abrogate or modify a prior order in the absence of an application for rehearing).

[17] DP&L Motion to strike, Memorandum in support at 4-5.

[18] *Id.*

OCC has no rights under the Settlement to terminate in response to a PUCO order reinstating a prior ESP.

DP&L's arguments are factually incorrect, inconsistent with the PUCO orders DP&L relies on and contradict assertions DP&L itself has made in the past on these very issues. The PUCO should reject DP&L's perverse reasoning as discussed below.

A. DP&L's commitment to freeze rates to its consumers was a provision term or condition of ESP I which was continued by the PUCO in 2013, just like the other provisions of ESP I were continued, like the stability charge which allowed DP&L to collect hundreds of millions of dollars from customers during ESP I.

DP&L claims that its commitment to its consumers to freeze distribution rates terminated in 2012 when ESP I was continued through 2013.[19] DP&L refers to its November 7, 2012 motion to continue where it sought an order to "continue briefly current rates" during 2013 until its ESP II was approved.[20] DP&L baselessly believes by using the term "current rates" in its motion, it was specifically not continuing other terms and provisions of its ESP I, including its commitment to freeze rates.[21] DP&L insists it did not ask to continue the rate freeze and no one asked the PUCO to continue the rate freeze. DP&L then points out that that the PUCO order granting DP&L's motion[22] made no mention of the rate freeze and the PUCO's order on rehearing[23] also did not address the rate freeze. And so, concludes DP&L, "the rate freeze thus terminated by its own terms on December 31, 2012, and was not part of the Company's standard service offer when ESP II was approved."[24]

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[19] DP&L Motion to Strike, Memorandum in Support at 6.

[20] *Id.* at 6.

[21] *Id.* at 6-7.

[22] *In the Matter of the Application of DP&L for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Entry (Dec. 19, 2012)

[23] *Id.*, Entry on Rehearing ((Feb. 19, 2013).

[24] DP&L Motion to Strike, Memorandum in Support at 7.

DP&L's arguments are misleading, specious and expose DP&L's two-faced behavior. They directly contradict DP&L's filed pleadings in Case No. 12-3266-EL-AAM where DP&L sought to collect storm rider costs –the exception to the rate freeze provision in the 2009 Settlement: In its application to collect more money from its customers, DP&L stated "The Company's current distribution rates were frozen through December 31, 2012, pursuant to paragraph 18 of the Stipulation and Recommendation in the Company's 2008 Electric Security Plan ("ESP Stipulation"), Case No. 08-1094-EL-SSO., and are being extended pursuant to the December 19, 2012 Entry in Case No. 12-426-EL-SSO."[25]

DP&L's approach is to cherry pick legal arguments that are most convenient at the time, yet discard those arguments later, when they could result in collecting less money from consumers. But, DP&L's arguments are contrary to Ohio law and inconsistent with the PUCO 2012 and 2013 Orders and Entries that continued all of the "terms and conditions" of DP&L's ESP I, at DP&L's request. Just like the stability charge was a provision, term or condition of DP&L's ESP I that continued, the rate freeze commitment was a provision, term or condition of DP&L's ESP I that continued.

In the ESP I Case, DP&L, OCC, the PUCO Staff, and others signed a settlement.[26] Under that settlement, ESP I was to be in effect until December 31, 2012.[27] As this date approached, it became clear that there would not be enough time to approve a new ESP or a market rate offer

[25] *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 at 1 (Dec. 21, 2012).

[26] *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 *et al,* Settlement (Feb. 24, 2009).

[27] *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 *et al*, Opinion at 7 ("DP&L notes that the Stipulation extends its electric security plan through December 31, 2012..."); ESP 1 Settlement at 3 ("the parties agree to extend DP&L's current rate plan through December 31, 2012, except as modified herein"), at 7 ("DP&L will file a new ESP and/or MRO case by March 31, 2012 to set SSO rates to apply for [the] period beginning January 1, 2013.").

("MRO") before December 31, 2012 to replace ESP I.[28] Thus, as DP&L notes in its motion to strike, it filed a motion to continue its "current rates" under ESP I until ESP II was approved.[29] DP&L defined its "current rates" as including the stability charge, which was a provision, term, or condition of its ESP I. Other parties to the settlement, including OCC, opposed the continuation of the stability charge.

Over the non-utility parties' objections, the PUCO granted DP&L's motion.[30] In its Entry granting DP&L's motion, the PUCO relied on R.C. 4928.141, which requires electric distribution utilities to provide a standard service offer, and 4928.143(C)(2)(b), which requires the PUCO "to continue the provisions, terms, and conditions of the utility's most recent standard service offer ... until a subsequent offer is authorized," whenever an ESP application is terminated by the utility or disapproved by the PUCO.[31] According to the PUCO, "it would be consistent with both Section 4928.141 and Section 4928.143(C)(2)(b), Revised Code, to order that *the terms and conditions of the current ESP should continue until a subsequent offer is authorized*."[32] The PUCO's ruling allowed DP&L to continue collecting its stability charge –a term and condition of its ESP I.

Despite the PUCO's ruling that the entire ESP I was continued beyond December 31, 2012, DP&L now argues that the rate freeze—which was included in the ESP I settlement—was *not* continued beyond December 31, 2012. DP&L claims that the rate freeze was not continued because "not a single party sought to extend the rate freeze along with [DP&L's] then-current

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[28] This is because DP&L filed an application for an MRO in March 2012 but then withdrew it in September 2012, thus not leaving sufficient time for the PUCO to approve a replacement for ESP I before December 31, 2012.

[29] DP&L Motion to Strike, Memorandum in Support at 6.

[30] *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case No. 08-1094-EL-SSO, Entry (Dec. 19, 2012).

[31] *Id.* at ¶5.

[32] *Id.* (emphasis added).

rates" and because OCC did not raise the rate freeze issue when it applied for rehearing regarding the PUCO's ruling.[33] Neither of these claims has any merit.

The claim that no party sought to extend the rate freeze is false. To the contrary, DP&L itself sought to extend the rate freeze by asking the PUCO to continue ESP I beyond December 31, 2012, the rate freeze being part of ESP I.[34] Because DP&L itself sought to extend ESP I, and did not propose to change its distribution rates, there was no reason for any party to make a filing separately asking that the rate freeze continue.

DP&L notes that OCC applied for rehearing regarding the PUCO's Entry but that OCC "did not seek to continue the rate freeze" in its application for rehearing.[35] But again, there was no reason for OCC to seek rehearing on the rate freeze because the PUCO continued *all* of ESP I, which included the rate freeze, when it ruled that "the terms and conditions of the current ESP should continue until a subsequent offer is authorized."[36]

DP&L's simplistic reasoning is fundamentally flawed. DP&L is grasping at straws instead of presenting cogent legal arguments. There is a reason for this behavior: DP&L lacks any cogent legal argument. The PUCO should not be fooled by DP&L's empty rhetoric.

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[33] DP&L Motion to Strike, Memorandum in Support at 6.

[34] *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan, Case No. 12-426-EL-SSO,* Motion of Applicant the Dayton Power and Light Company to Continue Briefly Current Rates until Implementation of Terms of a Commission Order (Nov. 7, 2012)(with DP&L arguing (at 15) that the ESP I was a "package "and that the PUCO "should not permit the Joint Movants to elect to take the benefits of a settlement package, but to rid themselves of the corresponding obligations. The Commission should thus continue the entire package—not just part of it—until a new ESP is approved.").

[35] DP&L Motion to Strike, Memorandum in Support at 6.

[36] *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case No. 08-1094-EL-SSO, Entry ¶ 5 (Dec. 19, 2012).

B. DP&L's commitment to freeze rates to its consumers was a provision, term or condition of ESP I which was continued by the PUCO in 2016, just like the other terms, conditions and provisions of ESP I were continued after DP&L withdrew its electric security plan in response to the Ohio Supreme Court's ruling striking its stability charge.

DP&L argues that if the rate freeze commitment was not terminated in 2012, then it was terminated in 2016 when ESP I was reinstated.[37] DP&L says that when it moved to terminate ESP II, it did not ask to reinstate a rate freeze and no party sought to reinstate the rate freeze.[38] It also argues that the PUCO Order allowing it to revert to ESP I, made no mention of the rate freeze and OCC did not seek to reinstate the rate freeze.[39] Thus, DP&L concludes that the PUCO's December 18, 2019 Order that reinstated ESP I (for a second time) could not have terminated the rate freeze because it had already been terminated in 2016.[40] Once again, DP&L is wrong.

In July 2016, DP&L did file a motion to withdraw from its second electric security plan ("ESP II") and revert to ESP I.[41] DP&L withdrew in response to the Ohio Supreme Court's ruling that the stability charge it collected from consumers was unlawful.[42] (Unfortunately, for consumers, they had already paid close to $300 million in stability charges—charges that were never refunded.) No party needed to argue over the rate freeze because DP&L did not propose to end the rate freeze when it filed its plans to withdraw from its electric security plan. Instead, DP&L's proposed tariff filing to implement its withdrawal advised that its distribution tariffs

[37] DP&L Motion to Strike, Memorandum in Support at 8.

[38] *Id*.

[39] *Id.*

[40] *Id* at 9.

[41] *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case No. 12-426-EL-SSO, Motion of the Dayton Power and Light Company to Withdraw its Application in this Matter (July 27, 2016).

[42] *In re: Application of Dayton Power & Light Co*., 147 Ohio St.3d 166, 2016-Ohio-3490.

"will not be changed from how they exist currently."[43] When the PUCO allowed DP&L's withdrawal, the PUCO ultimately approved DP&L's unchanged distribution tariffs.[44]

Under R.C. 4928.143(2)(b), "If a utility terminates an application pursuant to division (C)(2)(a) of this section ..., the commission 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...." The PUCO has interpreted this law to mean that when a utility withdraws from one ESP and reverts to a previous one, it reverts to the previous one in its entirety: "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 provisions of the ESP not to continue."[45] Thus, regardless of anything that OCC or anyone else did or said in the ESP I or ESP II case, the PUCO ruled that DP&L reverted to ESP I in its entirety—and as explained above, the rate freeze was part of ESP I.

C. DP&L's commitment to its consumers to freeze distribution rates was part of ESP I.

R.C. 4928.143(C)(2)(b) says that when a utility terminates its 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 ... until a subsequent offer is authorized." The PUCO has interpreted this law to mean that when a utility withdraws from one ESP and reverts

[43] *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case No. 08-1094-EL-SSO, DP&L Notice of Filing Proposed Tariffs at 2 (Aug. 1, 2016).

[44] *Id.,* Finding and Order (Aug. 26, 2016).

[45] *In re Application of Dayton Power & Light Co. for Approval of its Electric Security Plan,* Case No. 12-426-EL-SSO, Case No. 12-426-EL-SSO, Entry on Rehearing (Feb. 13, 2013). OCC does not concede that the law required DP&L to revert to the entire ESP, only that the utility to revert to its most recent *standard service*. It remains an open issue in Case No. 08-1094-EL-SSO, where OCC argued that the Rate Stabilization Charge was part of ESP I but not part of DP&L's standard service offer. OCC reserves all rights on that issue in that case and any related cases, including appeals.

to a previous one, it reverts to the previous one in its entirety: "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 provisions of the ESP not to continue."[46]

DP&L attempts to get around this statute by arguing that the rate freeze is not currently part of ESP I because it was, in fact, *never* part of ESP I.[47] DP&L's unsound theory is that although the rate freeze was included in a comprehensive settlement that resolved its ESP I case in its entirety, the rate freeze was not actually part of ESP I. According to DP&L, while it is true that the settlement is often referred to as the "ESP 1 Stipulation," "that does not mean that every term in that Stipulation is an ESP term. Only those terms that were authorized by the ESP statute can be ESP terms."[48]

Once again, DP&L is grasping at straws when it puts forth this argument. DP&L cites no authority for this claim because there is none. DP&L cannot point to a single case in which the PUCO has found that a term in an approved settlement in an ESP case was not part of the ESP.

To the contrary, the PUCO has consistently and repeatedly treated the terms of an ESP settlement as part of an electric security plan. The PUCO has never separated stipulation provisions into "ESP" provisions and "non-ESP" provisions. Rather, the PUCO has approached

[46] *In re Application of Dayton Power & Light Co. for Approval of its Electric Security Plan,* Case No. 12-426-EL-SSO, Entry on Rehearing (Feb. 13, 2013). OCC does not concede that the law required DP&L to revert to the entire ESP, only that the utility to revert to its most recent *standard service offer*. It remains an open issue in Case No. 08-1094-EL-SSO, where OCC argued that the Rate Stabilization Charge was part of ESP I but not part of DP&L's standard service offer. OCC reserves all rights on that issue in that case and any related cases, including appeals.

[47] DP&L Motion to Strike, Memorandum in Support at 9-12.

[48] *Id*.at 9.

ESP stipulations as a whole, adopting those stipulations in place of the utility's ESP application.[49]

The PUCO described DP&L's 2009 ESP I Stipulation this way: "On June 24, 2008, the Commission issued an Opinion and Order in Case No. 08-1094-EL-SSO, *In the matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan, et. al*, adopting the stipulation and recommendation of the parties to the case to establish an ESP."[50] The PUCO (in discussing the storm rider provision of the ESP I stipulation) explained that under the 2009 stipulation it approved, DP&L was authorized to request the rider, "therefore, the storm cost recovery rider is a provision, term or condition of ESP 1, and DP&L should be permitted to continue" it.[51] Likewise, the distribution rate freeze commitment was a provision, term or condition of the ESP I stipulation. The PUCO approved the stipulation, therefore the rate freeze is a provision, term, or condition of ESP I.

DP&L's ESP I Settlement was no different than any other agreement that sets the terms and conditions of an electric security plan.[52] The PUCO adopted the Settlement to resolve DP&L's rate plan, extending it through 2013. DP&L agreed to the rate freeze as a term of the ESP I Settlement. Thus, when the PUCO approved the ESP I Settlement, the rate freeze became, with DP&L's consent, part of ESP I. The PUCO should reject DP&L's unprecedented and unsubstantiated claim that the terms of its approved ESP settlement are not part of its ESP.

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[49] *In the Matter of the Application of Dayton Power & Light Company to Establish an ESP*, Case No. 08-1094-EL-SSO, Finding and Order at ¶26 (Aug. 26, 2016).

[50] *Id.,* Entry at ¶ 5 (Dec. 19, 2012).

[51] *Id.,* Finding and Order at ¶26 (Aug. 26, 2016).

[52] *In the Matter of the Application of Dayton Power & Light Company to Establish an ESP*, Case No. 08-1094-EL-SSO, Stipulation at ¶13 (Feb. 24, 2009) ("DP&L will support this Stipulation in part by sponsoring testimony showing that the extension of the rate plan through 2012 is reasonable because its pricing and all other terms and conditions, including any deferrals and future recovery of deferrals, is more favorable I the aggregate as compared to the expected result that would otherwise apply under Section 4928.142 Revised Code')(footnote omitted).

Additionally, DP&L's recently adopted view does not comport with how the PUCO has described DP&L's ESP I or how DP&L itself has described terms of the ESP I stipulation. For example, in a case involving DP&L's storm damage costs, the PUCO described DP&L's ESP I as including the rate freeze:

> On June 24, 2009, the Commission modified and approved an application filed by DP&L for a standard service offer (SSO) in the form of an electric security plan (ESP). *The ESP, as approved, froze DP&L's distribution base rates* through December 31, 2012, subject to DP&L's right to seek the cost of storm damage. *In re The Dayton Power and Light Co.*, Case No. 08-1094-EL-SSO, et al. (ESP I Case), Opinion and Order (June 24, 2009) at 5-6, 13.[53]

And DP&L, in pleadings defending continuation of the storm rider created under the settlement, stated as follows: "The Stipulation and Recommendation in ESP I specifically authorized a Storm Rider. Feb. 24, 2009 Stipulation and Recommendation, ¶18 b. R.C. 4928.143(C)(2)(b) provides that the provisions and terms of DP&L's prior SSO 'shall' be implemented, so a Storm Rider is permitted."[54]

As another example, in DP&L's ESP III case, DP&L signed a settlement that included, among other things, payments from DP&L's shareholders for low-income customer programs.[55] Under DP&L's theory, these shareholder payments would not be part of the ESP because nothing in the ESP statute would allow the PUCO to order DP&L's shareholders to fund programs. Yet in that case, DP&L cited these very same shareholder payments as evidence that the pricing and all other terms and conditions of its ESP were more favorable in the aggregate

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[53] *In re Application of the Dayton Power & Light Co. for Authority to Recover Certain Storm-Related Service Restoration Costs*, Case No. 12-3062-EL-RDR, Opinion & Order at 2 (Dec. 17, 2014) (emphasis added).

[54] *In the Matter of the Application of Dayton Power & Light Company to Establish an ESP*, Case No. 08-1094-EL-SSO, DP&L Memorandum in Opposition to Motion to Reject DP&L's Tariffs at 18 (Dec. 10, 2019).

[55] *In re Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Elec. Sec. Plan*, Case No. 16-395-EL-SSO, Opinion & Order ¶ 27 (Oct. 20, 2017).

than an MRO.[56] Thus, DP&L admitted that even though such payments could not be compelled by the ESP statute, they were nonetheless a "term" of the ESP because they were included in the ESP III settlement. *See, also, In re Application of Ohio Power Co. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Elec. Sec. Plan*, Case No. 16-1852-EL-SSO, Opinion & Order ¶ 268 (Apr. 25, 2018) (finding that utility shareholder contributions to a bill-payment assistance program through a settlement were part of the ESP).

In cases involving other utilities, the PUCO has also treated the terms of ESP settlements, whether explicitly provided for in the ESP statute or not, as part of the ESP. This includes rate freezes in settlements—the very topic at issue here.

In FirstEnergy's 2010 ESP case, FirstEnergy agreed, as part of a settlement, to freeze its base rates.[57] In assessing the benefits of FirstEnergy's ESP as compared to an MRO, the PUCO cited the fact that the settlement "froze base distribution rates through May 31, 2014, except for emergencies and increases in taxes."[58] Thus, the PUCO considered the stipulated rate freeze to be part of the utility's ESP.

The PUCO made a similar ruling in FirstEnergy's next two ESP cases as well. In the 2012 ESP case, once again, the PUCO assessed the benefits of the ESP for purposes of comparing it to an MRO, and it concluded that continuation of the distribution rate freeze ("stay out") was a qualitative benefit of the ESP.[59] Same in FirstEnergy's 2014 ESP case.[60]

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[56] *Id.* ¶ 86.

[57] *In re Application of [FirstEnergy] for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Sec. Plan*, Case No. 10-388-EL-SSO, Stipulation and Recommendation at 13 (Mar. 23, 2010).

[58] *Id.*, Opinion & Order at 44 (Aug. 25, 2010).

[59] *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Sec. Plan*, Case No. 12-1230-EL-SSO, Opinion & Order at 56 (July 18, 2012).

[60] *In re Application of [FirstEnergy] for Authority to Provide a Standard Service Offer Pursuant to R.C. 4928.143 in*

In this very case, the PUCO has already rejected similar legal arguments by intervenors who opposed the stability charge when DP&L sought to reinstate it in 2019. [61] The intervenors (Dayton/Honda) argued that the PUCO should approve for continuation only those provisions, terms, and conditions that are lawful for inclusion in an ESP. The PUCO rejected those arguments, noting that the "notwithstanding" clause of R.C. 4928.143(B) exempts provisions in an ESP from "any other provision of Title XLIX of the Revised Code to the contrary."[62]

Accordingly, the PUCO should reject DP&L's frivolous arguments. DP&L's arguments are contrary to numerous rulings by the PUCO on the ESP I Settlement and contrary to DP&L's past pleadings. DP&L's unsubstantiated premise does not square with how the PUCO has evaluated settlements that have been presented to resolve utilities' electric security plans. The specific terms of the "stipulation" cannot be separated from the "electric security plan."

V. OCC DID NOT WAIVE ITS RIGHT TO TERMINATE AND WITHDRAW FROM THE SETTLEMENT

DP&L argues that OCC has waived any rights it had to terminate or withdraw from the Settlement because OCC failed to assert its rights on a timely basis.[63] In this regard DP&L claims OCC failed to raise the rate freeze in the comments that it filed when DP&L filed tariffs to reinstate ESP I rates.[64] DP&L also argues that OCC failed to seek rehearing on the rate freeze issue in its January 17, 2020 application for rehearing.[65] And according to DP&L, OCC also

the Form of an Elec. Sec. Plan, Case No. 14-1297-EL-SSO, Opinion & Order at 119 (Mar. 31, 2016).

[61] *In the Matter of the Application of Dayton Power & Light Company to Establish an ESP*, Case No. 08-1094-EL-SSO, Second Finding and Order at ¶35 (Dec. 18, 2019).

[62] *Id.* at ¶33.

[63] *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 *et al*, DP&L Motion to Strike at 12-16 (Sept. 30, 2021).

[64] *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 *et al*, DP&L Motion to Strike at 12-13 (Sept. 30, 2021).

[65] *Id.* at 14-15.

failed to file its notice of termination on a timely basis.[66] DP&L argues as well that OCC failed to raise the rate freeze issue in the 2015 rate case.

DP&L's timeliness arguments should fail. OCC did not waive its rights to terminate and withdraw from the Settlement.

A. OCC did not waive its right to withdraw when it did not raise the rate freeze issues in its comments on DP&L's proposed tariffs.

DP&L argues that when the PUCO asked for comments on DP&L's termination notice, OCC should have raised the rate freeze issue.[67] Because it did not do so, DP&L urges the PUCO to conclude that OCC has no right to withdraw under the Settlement.

The words of the Settlement which govern OCC's withdrawal do not support DP&L's interpretation. OCC's notice to withdraw is premised upon action by the PUCO –rejecting or modifying part of the Settlement. There are no words in the Settlement that required OCC to raise the rate freeze issue in comments, before a PUCO decision was even rendered. The Settlement language makes clear that withdrawal occurs after the PUCO has acted in a manner inconsistent with the Settlement provisions. Comments by OCC were filed before the PUCO modified or rejected the Settlement. DP&L is conflating the legal standards associated with filing an application for rehearing with the Settlement provisions. Its arguments must be rejected as inconsistent with the governing terms of the Settlement. These governing terms are separare and distinct from any rights parties have to seek rehearing before the PUCO.

[66] *Id.*

[67] *Id*. at 13.

B. OCC sought rehearing from the PUCO's ruling that modified and rejected the distribution rate freeze as part of the continued ESP rates.

DP&L argues that OCC waived its argument that the rate freeze should be reinstated by not raising the issue in its January 17, 2020 application for rehearing.[68] Instead of examining OCC's actual rehearing application, DP&L relies heavily upon the PUCO's Entry on Rehearing that focused on two sentences in OCC's memorandum in support of its application—sentences that merely provide background to OCC's legal issues.[69] DP&L adopts the same approach as the PUCO—twisting OCC's words beyond their intended meaning.

OCC's Assignment of Errors, set forth in its application for rehearing, make it clear that OCC did seek rehearing on the PUCO's December 18, 2019 Order "because it failed to continue the distribution rate freeze of ESP I following DP&L's withdrawal."[70] OCC Assignment of Error 2 goes on to state that "[t]he PUCO's failure to implement a distribution rate freeze for customers as part of the continued rates was unreasonable***."

And in OCC's memorandum supporting its Application for Rehearing, OCC explained that the PUCO should have continued the rate freeze as part of its second reversion to ESP I:

> 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*

[68] *Id.* at 14.

[69] *Id.*

[70] *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 *et al*, OCC Application for Rehearing at 2 (Jan. 17, 2020).

> *paying DP&L's ESP I rates.*[71]
>
> * * *
>
> The ESP I distribution rate freeze ended 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 head I win, tails you lose proposition.[72]

Contrary to the DP&L's[73] (and the PUCO's assertions otherwise[74]) OCC did not seek to restore distribution rates in effect in 2009 (i.e. reversing the increase from the 2015 rate case.) Nowhere was that relief sought in OCC's Application for Rehearing. The specific relief OCC sought was, for the PUCO to "*grant rehearing and abrogate its order by incorporating a distribution rate freeze for DP&L customers while customers are paying DP&L ESP I rates*." No more and no less. DP&L's arguments should be rejected because they are contradicted by the actual wording of OCC's application for rehearing.

C. OCC filed a timely Notice of Withdrawal from the 2009 Settlement.

DP&L alternatively argues that even if OCC did properly seek rehearing of the rate freeze in its January 17, 2020 application, OCC waived its right to withdraw because it waited too long.[75] DP&L argues that the PUCO denied OCC's Application as to the rate freeze in its June 16, 2021 Fifth Entry on Rehearing –an entry issued sixteen months after OCC's rehearing

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[71] *Id.* at 8 (emphasis added).

[72] *Id*. at 9 (citation omitted) (emphasis added).

[73] DP&L Motion to Strike at 14.

[74] *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 *et al*, Fifth Entry on Rehearing at ¶19 (June 16, 2021).

[75] DP&L Motion to Strike at 15.

request. According to DP&L, OCC should have filed its notice by July 16, 2021, instead of OCC filing its notice on September 10, 2021.

DP&L arguments wrongfully elide the standards of the Settlement with the rehearing standards. As explained above, the Settlement allows a withdrawal after the PUCO does not adopt it without material modification "upon rehearing." The only way a party waives that withdrawal right is if "the withdrawal does not occur within 30 days of a PUCO's Entry on rehearing."[76] The Settlement does not provide for any other waiver.

Contrary to DP&L arguments, the Settlement does not impose a duty to withdraw at the earliest possible time. Also absent from the Settlement is wording that requires a Signatory party to give the PUCO opportunity to cure the error alleged under the withdrawal. As law students learn in Contracts 101, information that does not appear in a contract (like a Settlement) must not be analyzed or relied upon to ascertain the contract's meaning. Arguing additional conditions that amount to waiver under the Settlement is akin to using extrinsic evidence that goes far beyond the four corners of the document. It's not allowed.

And what's more, even if we apply the waiver standards applicable to PUCO rehearing requests to the Settlement agreement, DP&L still loses. Its arguments are flawed and inconsistent with the rehearing process and parties' rights under the Ohio law to seek rehearing of matters determined in PUCO proceedings, and appeal final rehearing orders to the Ohio Supreme Court. And DP&L's arguments especially ring hollow given that they directly contradict the position

[76] *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 *et al*, Settlement at ¶37 (Feb. 24, 2009).

that DP&L took when it opposed IGS' notice of withdrawal less than three years ago as discussed below.

Under Ohio law (R.C. 4903.10), parties may seek rehearing of PUCO orders "with respect to any matters determined in the proceeding." The PUCO made determinations in this proceeding in its various orders and entries on rehearing. In particular, the PUCO, in its Fifth Entry on Rehearing, denied OCC's January 17, 2020 application for rehearing, but in doing so, issued a new ruling that was based on mistake of fact –where it assumed (wrongly) that OCC was seeking a retroactive rate adjustment to restore consumers' distribution rates to 2009 rate levels. (*See* argument above). The PUCO determined (for the very first time) that when OCC failed to raise the rate freeze issue during DP&L's distribution case, it forfeited its objection because it deprived the PUCO of an opportunity to cure its error when it could have done so.[77] Also, as a part of the PUCO's Fifth Entry on Rehearing, the PUCO granted rehearing on other OCC Assignments of Error, abrogating its December 18, 2019 Order. In particular, the PUCO, for the first time, directed DP&L to file new proposed tariffs providing the stability charge be refundable "to the extent permitted by law."[78]

Following the PUCO's Fifth Entry on Rehearing, *both OCC and DP&L* sought rehearing on the matters the PUCO determined, for the first time, in its Fifth Entry on Rehearing.[79] OCC's rehearing application challenged, among other things, the PUCO's new rulings from its Fifth Entry on Rehearing, including: 1) the new grounds the PUCO seized upon to deny consumers a rate freeze for the remaining period of ESP I (i.e. that OCC should have raised the issue in the

[77] *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 *et al,* Fifth Entry on Rehearing at ¶19 (June 16, 2021).

[78] *Id.* at ¶64.

[79] OCC Application for Rehearing (July 16, 2021); DP&L Application for Rehearing (July 16, 2021).

2015 rate case) and 2) the impossibility of giving OCC the retroactive rate freeze remedy (which OCC did not request).[80] DP&L challenged two of the PUCO rulings, including the PUCO's ruling that required it to insert refund language in its stability charge tariffs.[81]

On August 11, 2021, the PUCO, in its Sixth Entry on Rehearing, denied both OCC's and DP&L's applications for rehearing, bringing the rehearing process to an end, with a final rehearing order. In other words, the PUCO's Sixth Entry on Rehearing did not further determine any matters in this proceeding.

When the PUCO finally shut down all avenues of rehearing on the rate freeze in its Sixth Entry on Rehearing and did not adopt the Settlement "without material modification upon rehearing" the OCC filed its termination notice "within thirty (30) days of the Commission's Entry on Rehearing." OCC's notice on September 10, 2021, within 30 days of the PUCO's final rehearing Entry, was timely made.

While DP&L claims OCC's notice was untimely, these claims directly contradict arguments DP&L made less than three years ago when it similarly moved to strike IGS's notice of withdrawal. Then DP&L argued against IGS's notice on the basis that there had been no application "on rehearing" that triggered IGS's withdrawal rights because the rehearing process was not complete:

> First, although the Commission denied IGS's application for rehearing regarding the modification at issue, the rehearing process is not complete in light of the October 19, 2018 Third Application for Rehearing by The Office of the Ohio Consumers' Counsel. As the Supreme Court of Ohio has held, "under R.C. 4903.10, any order on rehearing may modify or even abrogate the original order." Senior Citizens Coalition v. Pub. Util. Comm., 40 Ohio st.3d 329, 332, 533 N.E.2d 353(1988) ("Thus, the statutes link all parties in the rehearing process following issuance of the

[80] OCC Application for Rehearing, Assignment of Error 4.

[81] DP&L Application for Rehearing at 2-3.

> commission's original order and, in effect, hold the original order hostage to the outcome of the final rehearing.") Thus, it cannot be said that a decision has been made 'upon rehearing' triggering a party's right to withdraw from the Stipulation. Allowing IGS to drag the parties into an evidentiary hearing to attack the Stipulation while the Commission's Opinion and Order is still subject to change would potentially waste time, energy, and resources of the Commission and the parties. The Notice of Withdrawal is, therefore, premature. Ohio Rev. Code §4903.10; Ohio Admin Code §4901-1-35; Senior Citizens, 40 Ohio St.3d at 332. [82]

Fast forward to September 30, 2021, the same utility, with the same attorneys, are arguing that OCC should have filed its notice of withdrawal before the rehearing process was complete. DP&L was correct then (2018) that a decision has not been made "upon rehearing" until the PUCO's Opinion and Order is not subject to change. Here the rehearing process was not complete until the final rehearing order was issued by the PUCO on August 11, 2021 (the PUCO's Sixth Entry on Rehearing). Any notice of withdrawal by OCC prior to a final rehearing order would, as DP&L acknowledged in 2018, "potentially waste time, energy and the resources of the Commission and the parties." DP&L was right in 2018. It is not right now, when it completely reverses its arguments to suit its need to shut down rate relief to its consumers. DP&L's arguments should be rejected.

D. OCC did not need to file a Motion in the 2015 Rate Case to preserve its right of withdrawal under the 2009 Settlement.

DP&L asserts that OCC failed to raise the rate freeze issue in the form of a motion to dismiss in DP&L's 2015 rate case.[83] That is true. DP&L states that at no point during the 14 months in which it was operating under ESP I did OCC file to enforce the rate freeze or

[82] *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, DP&L Motion to Strike Notice of Withdrawal from Amended Stipulation, Memorandum in Support at 2 (Oct. 26, 2018) (citation omitted).

[83] DP&L Motion to Strike at 16.

otherwise suspend the rate increase.[84] This is also true. DP&L then concludes, as did the PUCO, when it ruled on OCC's application for rehearing,[85] that OCC should have taken such action if it believed the rate freeze was still in effect. While arguably true, a notice of withdrawal at that time would not have been triggered under the Settlement because there was not an actionable event –a material modification of the Settlement by the PUCO (not DP&L).

Again, the early action that the PUCO and DP&L fault OCC for not taking is not required under the terms of the 2009 Settlement. There just simply are no words that impose such a requirement on a withdrawing party. Instead, the withdrawing party's right to terminate relate to a PUCO issued Entry "upon rehearing." There was no Order issued in DP&L's distribution case that rejected or materially modified the 2009 Settlement.

VI. OCC'S NOTICE IS NOT BARRED BY OCC'S CONDUCT IN OTHER PROCEEDINGS

DP&L argues that OCC signed a stipulation in 2018 to resolve DP&L's distribution rate case, where it agreed that DP&L could file a distribution rate case on or before October 31, 2021 to maintain its distribution investment rider.[86] DP&L notes that the stipulation was approved by the PUCO. DP&L concludes that the stipulation establishes that DP&L has the right to file a distribution rate case "separate and independent of any order in DP&L's standard service offer cases."[87] DP&L further argues that when OCC signed the 2015 distribution rate case stipulation it should have known that DP&L would revert to ESP I in the future.[88] DP&L concludes that OCC thus waived any right it had to enforce the rate freeze when it signed the 2015 rate

[84] *Id*.

[85] Fifth Entry on Rehearing at ¶19.

[86] DP&L Motion to Strike, Memorandum in Support at 17.

[87] *Id.*

[88] *Id*.

settlement. DP&L also cites miscellaneous instances where OCC allegedly took positions that are inconsistent with the rate freeze. Even a cursory glance at these examples demonstrates that DP&L's claims have no merit.

A. OCC's agreement that DP&L could file a rate case is not binding on this case.

First, the question the PUCO must now answer is whether ESP I, under which DP&L currently operates, includes a rate freeze. Nothing that happened in the 2015 Rate Case could possibly have modified ESP I because the PUCO lacks authority to modify an electric security plan in a distribution rate case.[89]

In fact, DP&L and the other Signatory Parties to the 2015 Rate Case understood this concept and expressly acknowledged it in the settlement: "This Stipulation is submitted for purposes of this proceeding only, and is not deemed binding in any other proceeding, expect as expressly provided herein, nor is it to be offered or relied upon in any other proceeding, except as necessary to enforce the terms of this Stipulation."[90] That settlement was found to be reasonable and was adopted by the PUCO, without modification.[91]

Further, the PUCO could not have modified the rate freeze in ESP I when it approved the 2015 Rate Case Settlement because ESP I was not in effect at that time, ESP III was. The PUCO cannot modify something that does not exist. Regardless of any action that OCC did or did not take in that case, the rate freeze must be enforced if it is a provision of ESP I—which it is.

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[89] *See In re Ohio Edison Co.*, 2020-Ohio-5450, ¶ 20 ("The commission is a creature of statute and may act only under the authority conferred on it by the General Assembly."); R.C. 4928.143 (no mention of PUCO authority to modify an electric security plan in a distribution rate case).

[90] *In re Application of the Dayton Power & Light Co. to Increase its Rates for Elec. Distribution,* Case No. 15-1830-EL-SSO (the "2015 Rate Case"), Stipulation and Recommendation at VI, ¶3, page 16 (June 18, 2018).

[91] *Id*., Opinion and Order (Sept. 26, 2018).

Even if OCC's action in the rate case were relevant, everything OCC did in that case was consistent with the rate freeze. When DP&L filed its application in the 2015 Rate Case, ESP II was in effect, not ESP I, and ESP II does not include a rate freeze.[92] Thus, there was no rate freeze for OCC to enforce at that time. When DP&L reverted to ESP I in August 2016, the rate case was pending, so DP&L claims that OCC should have moved to enforce the rate freeze at that time.[93] But any motion to enforce the rate freeze at that point would have had no practical effect on the proceeding. As of August 2016, DP&L's *ESP III* case was already pending and was headed toward resolution, with a hearing scheduled for October 2016.[94] Had OCC moved to dismiss the case at that time, at best, the PUCO could have held the rate case in abeyance for a very brief period, and then when ESP III took effect, the rate case would continue because ESP III did not include a rate freeze. As it happens, the Staff Report was not issued in the 2015 Rate Case until March 2018, at which point ESP III was effective.[95] At that point, there was no rate freeze, so it is understandable that OCC proceeded to work with parties cooperatively to achieve a reasonable settlement of the 2015 Rate Case.

In summary, the PUCO did not increase DP&L's base rates at any point when ESP I was in effect, so DP&L's rate freeze commitment was not violated. The issue was therefore preserved for the future, should there be a situation—as there is now—when the PUCO might be faced with approving a rate increase while ESP I is pending, in violation of the ESP I Settlement.

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[92] *See* Case No. 12-426-EL-SSO, Opinion & Order (Sept. 4, 2013) (approving ESP I in September 2013); Finding & Order (Aug. 26, 2016) (authorizing DP&L to withdraw from ESP and revert to ESP I).

[93] DP&L Motion to Strike, Memorandum in Support at 17..

[94] *In the Matter of the Application of DP&L for Approval of its Electric Security Plan*, Case No. 16-395-EL-SSO, Entry (Aug. 16, 2106).

[95] *In re Application of the Dayton Power & Light Co. to Increase its Rates for Elec. Distribution,* Case No. 15-1830-EL-SSO (the "2015 Rate Case"), Staff Report (Mar. 12, 2018).

B. OCC's arguments in the consolidated cases do not bar OCC's arguments here.

DP&L notes that in testimony filed in its DP&L's quadrennial review case, OCC filed the testimony of witness Matthew Kahal, where Mr. Kahal asserted that DP&L's financial projections should include the results of a distribution rate case.[96] From this, DP&L leaps to the conclusion that Mr. Kahal's expert opinion regarding financial projections is akin to OCC admitting that the rate freeze does not apply. But DP&L ignores two things about that case. First, Mr. Kahal's testimony was that DP&L would need to file a base distribution case *if it were operating under an MRO*, which would necessarily mean that ESP I ended.[97] Thus, Mr. Kahal's testimony is consistent with the rate freeze. Further, OCC's position in the quadrennial review case was that the PUCO should terminate ESP I and require DP&L to move to an MRO.[98] If ESP I were terminated and an MRO instituted, as OCC recommended, then there would be no rate freeze. So, OCC's assumption that there might be a rate case in the future is entirely consistent with OCC's recommendations in that case.

Second, DP&L notes that under the 2015 Rate Case Settlement, DP&L's distribution investment rider would be reset to zero if DP&L did not file a base rate case before October 31, 2022.[99] This is true. But DP&L then argues that OCC did not assert in that case that the distribution rate case could or would be barred by an ESP I rate freeze, which is yet another

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[96] DP&L Motion to Strike, Memorandum in Support at 18.

[97] *In re Application of the Dayton Power & Light Co. for a Finding that its Current Elec. Sec. Plan Passes the Significantly Excessive Earnings Test & More Favorable in the Aggregate Test in R.C. 4928.143(E)*, Case No. 20-680-EL-UNC, Supplemental Direct Testimony of Matthew I. Kahal on Behalf of the Office of the Ohio Consumers' Counsel at 30-31 (Dec. 17, 2020).

[98] *Id.*, Initial Brief for Consumer Protection by Office of the Ohio Consumers' Counsel at 18-20 (Feb. 12, 2021).

[99] DP&L Motion to Strike, Memorandum in Support at 17 (*See In re Application of the Dayton Power & Light Co. to Increase its Rates for Elec. Distribution*, Case No. 15-1830-EL-AIR, Stipulation and Recommendation at 7 (June 18, 2018) (the "2015 Rate Case Settlement").

waiver of the issue by OCC. There is no such waiver here. The 2015 Rate Case Settlement does not *require* DP&L to file a base rate case at all; it simply says that in the absence of a base rate case, a certain rider would be set to zero. DP&L was given a choice not a requirement. OCC was under no obligation to warn DP&L that the rate freeze might prevent DP&L from obtaining a rate increase, thus making it likely that the distribution investment rider would be set to zero.

Further, at the time of the 2015 Rate Case settlement, ESP I had already been terminated and replaced by ESP III. DP&L cannot possibly suggest that OCC waived the right to enforce a provision of an ESP that was not even in effect at the time. Additionally, the 2015 Rate Case Settlement explicitly says that it was "submitted for purposes of this proceeding only, and is not deemed binding in any other proceeding, ... nor is it to be offered or relied upon in any other proceedings, except as necessary to enforce the terms of the Stipulation."[100] DP&L is therefore barred from using the settlement against OCC. The entire point of signing a settlement is that parties are choosing not to litigate each and every issue, in the interest of compromise. If such compromise is later used as a sword, causing parties to waive arguments on any issues resolved in the settlement, parties will be reluctant to settle any case for concern that their hands will be tied in the future when similar issues arise.

Finally, DP&L points to comments that OCC recently submitted to the PUCO for its Cost of Capital Forum.[101] DP&L claims that these comments somehow caused OCC to waive the rate freeze issue. As a threshold matter, the PUCO's Cost of Capital Forum was just that—a forum—not a formal PUCO proceeding with a formal docket. OCC certainly cannot be deemed to have waived substantive rights in PUCO proceedings by sharing its opinion through open dialogue

[100] 2015 Rate Case Settlement at 15-16.

[101] DP&L Motion to Strike, Memorandum in Support at 19-20.

with the PUCO in a forum. If the PUCO were to rule that parties' positions in forums and workshops can be used against them to bar arguments in PUCO proceedings, it would substantially chill any future participation by stakeholders in these informal PUCO settings.

Further, in those comments, one of OCC's primary points was that many Ohio utilities have a stale cost of capital (rate of return, cost of debt, and capital structure) because they do not file base rate cases very often. OCC's concern with lack of rate cases is that (i) they are being avoided because of excessive single-issue ratemaking, which favors utilities, and (ii) the PUCO has consistently used the cost of capital from the last rate case for purposes of riders, even when the last rate case took place long ago. These positions have nothing at all to do with DP&L's rate freeze, and they certainly do not amount to OCC's endorsement of a base rate increase for DP&L.

VII. THE RELIEF OCC SEEKS IS LAWFUL

DP&L argues that its most recent standard service offer was ESP I and the PUCO was required to implement it following DP&L's withdrawal.[102] Since ESP I includes the stability charge, the storm rider and the infrastructure investment rider, DP&L insists that the PUCO was required to reinstate those riders. DP&L is wrong.

DP&L is right that the PUCO is required under law to continue the provisions, terms, and conditions of the utility's most recent "standard service offer" (not most recent "electric security plan") following a utility terminating its application for a standard service offer. But here, it is not the utility terminating its application. Rather it is OCC lawfully terminating the Settlement

[102] DP&L Motion to Strike, Memorandum in Support at 20.

under which the standard service offer was established. Ohio law does not directly address what happens in such an instance.

Under the terms of the 2009 Settlement, OCC's notice of termination and withdrawal is effective immediately, and the Settlement is thus null and void.[103] Because the 2009 Settlement resolved DP&L's application for a standard service offer, and the Settlement is now rendered null and void, the terms of DP&L's ESP I are also rendered null and void. That means that the collection of the stability charge from consumers must stop.

OCC offered a reasonable solution to the issue that the PUCO should adopt: To maintain the integrity of competitive wholesale and retail markets in this state, the PUCO should honor existing contracts with competitive bidding process suppliers and maintain current PJM obligations for all suppliers. That would be consistent with the PUCO's approach to DP&L's last ESP withdrawal, as outlined in its Second Finding and Order in these cases.[104] And it would allow for the continuation of DP&L's "standard service offer" as defined under R.C. 4928.141—a supply of generation to consumers.

VIII. CONCLUSION

Consistent with the plain language of the settlement in these cases,[105] and for the protection of 500,000 DP&L consumers, the PUCO should acknowledge OCC's Notice of Termination and Withdrawal. The PUCO should establish a procedural schedule allowing Signatory Parties, like OCC, the due process they are guaranteed under the PUCO-approved 2009 Settlement.

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[103] *Id*.

[104] *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 ¶ 28 (Dec. 18, 2019).

[105] The PUCO should apply the settlement's plain language. *See generally Alexander Local Sch. Dist. Bd. of Educ. v. Albany*, 2017-Ohio-8704, para. 36 (Athens 2017).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra DP&L's Motion to Strike was electronically served via electric transmission on the persons stated below this 15th day of October 2021.

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

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FILE

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

STIPULATION AND RECOMMENDATION

Ohio Administrative Code Rule 4901-1-30 provides that any two or more parties to a proceeding may enter into a written stipulation covering the issues presented in that proceeding. This Stipulation and Recommendation ("Stipulation") sets forth the understanding of the parties that have signed below (the "Signatory Parties"). The Signatory Parties recommend that the Public Utilities Commission of Ohio ("Commission") approve and adopt, as part of its Opinion and Order, this Stipulation which will resolve all of the issues in the above-captioned proceeding.

This Stipulation is a product of lengthy, serious, arm's-length bargaining among the Signatory Parties (who are capable, knowledgeable parties) with the participation of the

Commission's Staff,[1] which negotiations were undertaken by the Signatory Parties to settle this proceeding. This Stipulation was negotiated among all parties to the proceedings and no party was excluded from negotiations. This Stipulation is supported by adequate data and information; as a package, the Stipulation benefits customers and the public interest; promotes effective competition and the development of a competitive marketplace; represents a just and reasonable resolution of all issues in this proceeding; violates no regulatory principle or practice; and complies with and promotes the policies and requirements of Chapter 4928, Revised Code. While this Stipulation is not binding on the Commission, it is entitled to careful consideration by the Commission, where, as here, it is sponsored by parties representing a wide range of interests;

WHEREAS, in 2005, DP&L filed an application to implement a Rate Stabilization Surcharge ("RSS") (Case No. 05-276-EL-AIR) to allow DP&L to recover certain increases in costs, and certain parties to that proceeding entered into a Stipulation and Recommendation ("2005 RSP Stipulation") designed to provide stable rates and prevent rate shock by extending DP&L's RSP through 2010. On December 28, 2005, the Commission modified and approved the 2005 RSP Stipulation, making the 2005 RSP Stipulation DP&L's current rate plan;

WHEREAS, in 2008, the Ohio General Assembly passed Substitute Senate Bill 221 ("SB 221"), which includes new Section 4928.143(D), Revised Code, the effect of which is that DP&L's current rate plan would remain in effect until 2010 as scheduled, and that DP&L would be permitted to apply to recover or defer the incremental costs of providing a

[1] Staff will be considered a party for the purpose of entering into this Stipulation. Rule 4901-1-10(c), Ohio Admin. Code.

standard service offer not being recovered under the rate plan, and of complying with SB 221's energy efficiency, peak demand reduction and alternative energy targets;

WHEREAS, in order to comply with SB 221, DP&L filed an Application and Supporting Testimony, Chapters, Schedules and Workpapers in this proceeding;

WHEREAS, DP&L's Application in this matter includes plans and programs designed to achieve SB 221's energy efficiency, peak demand reduction, and alternative energy targets;

WHEREAS, it is in the best interest of DP&L and its customers to enter into an agreement that will provide stable rates through 2012 and will permit DP&L to implement energy efficiency, peak demand reduction and alternative energy programs, and to recover the costs of those programs; and

WHEREAS, the terms and conditions of this Stipulation satisfy the policies of the State of Ohio as set forth in Section 4928.02, Revised Code.

Now, therefore, for the purposes of resolving all issues raised in this proceeding, the Signatory Parties stipulate, agree and recommend as follows:

1. To assist in maintaining rate certainty, the parties agree to extend DP&L's current rate plan through December 31, 2012, except as expressly modified herein.

2. DP&L will implement a bypassable fuel recovery rider to recover retail fuel and purchased power costs, based on least cost fuel and purchased power being allocated to retail customers. To calculate the rider, jurisdictional emission allowance proceeds and twenty-

five percent of jurisdictional coal sales gains will be netted against the fuel and purchased power costs. Retail customers for the purpose of this calculation include DP&L as well as DPL Energy Resource customers. The rider will initially be established at 1.97¢ per kWh, which amount will be subtracted from DP&L's residual generation rates. No later than November 1, 2009, DP&L will make a filing at the Commission to establish the fuel rider to become effective January 1, 2010. Thereafter, the Company shall file quarterly adjustments for recovery of the cost of fuel and purchased power. The Company's annual filing will be submitted during the first quarter of each year, beginning in 2011, and will be subject to due process, including audits and hearings (unless no signatory party objects to foregoing the hearing) for the twelve-month periods ending December 31, 2010 and 2011. The Company's annual filing shall include but not be limited to details substantiating all costs included in the fuel recovery rider during the prior calendar year so that Staff and interested parties can evaluate the methodology, account balances, forecasts, and substantiating support. Such audit shall be conducted by an independent third party auditor or Staff, at the Commission's discretion. If conducted by a third party: (a) the third party will be engaged by and report to staff; and (b) DP&L will fund the audit and may seek cost recovery through the fuel recovery rider. DP&L will withdraw its request for deferral of fuel costs for 2009-2010.

3. The current RSS charge will continue as a nonbypassable charge through December 31, 2012. Through December 31, 2012, shopping customers who return to DP&L shall pay the Standard Service Offer ("SSO") rate under the applicable tariff. In 2011 and 2012, governmental aggregation customers who elect not to pay the RSS will return to DP&L at a market-based rate. DP&L will develop and file for approval a market-based rate calculated consistent with Section 4928.20(J), Revised Code, by July 1, 2010.

4. Advanced Metering Infrastructure and Smart Grid

a. DP&L will develop independent business cases for both its AMI and Smart Grid proposals, which include accompanying billing, communications and information technology infrastructure. Both the AMI and Smart Grid business cases shall address rollouts that encompass the Company's entire service territory. Energy Efficiency and Peak Demand Reduction programs that are not dependent upon AMI will not be included in the Company's business case analyses and will go forward immediately. This would include their costs and benefits as well.

b. The AMI and Smart Grid business cases that demonstrate a positive benefit cost analysis will be filed in this docket no later than September 1, 2009. The analysis shall include projected reliability impacts that will result from full Smart Grid deployment. Prior to September 1, 2009, DP&L shall consult with interested Signatory Parties to seek their advice with regard to the costs and benefits of the Company's AMI and Smart Grid business cases.

c. DP&L will delay implementation of the Infrastructure Investment Rider (IIR) until reviewed by the Commission's Staff and approved by the Commission. Staff will endeavor to complete its review in the fourth quarter of 2009 so that the rider may be implemented January 1, 2010. This IIR rate will recover any prudently incurred costs related solely to the Company's AMI and/or Smart Grid approved plans. Prudently incurred costs and IIR revenues will be trued up on a two-year basis and the levelized IIR rate design will be eliminated. The Company will be entitled to recover those prudently incurred AMI and/or Smart Grid costs net of the Company's capital and operational savings solely due to their investment.

d. Should renewable energy projects be added to the grid that cause verifiable voltage fluctuations on DP&L's distribution system, any Smart Grid or switching costs incurred to address this issue will be included in the IIR.

e. As the delay in implementing AMI and Smart Grid may affect the Company's ability to meet the SB 221 targets, the Company may file an application with the Commission to amend the Company's annual energy efficiency and peak demand reduction benchmarks due to a delay in approving or denial of the Company's revised AMI or Smart Grid business cases.

5. DP&L will implement an Energy Efficiency Rider (EER) on April 1, 2009 to recover actual costs incurred through December 31, 2008 solely related to DP&L's programs to achieve compliance with the energy efficiency and peak demand reduction targets established in SB 221, plus the estimated costs to be incurred through March 31, 2011 for those programs that do not require AMI infrastructure to be in place for implementation. The first true-up filing will be made April 30, 2011 for costs incurred through March 31, 2011. DP&L will use a third party to verify program savings; the costs of third party verification will be recovered in the EER. Costs and revenues will be trued up on a two-year basis. Shopping customers may participate in all programs. Taking Standard Service Offer generation shall not be a condition for participation in any of the programs. Lost revenues will not include generation revenue, and will be capped at $72 million over the seven-year period ending December 31, 2015, or when new distribution rates go into effect, whichever is earlier. Lost revenues will not be recovered on existing mercantile customer programs. Cost allocation and lost revenue among customer classes will be based upon the cost of programs for the respective customer classes.

6. DP&L will implement an avoidable Alternative Energy Rider (AER) as filed in the Application, subject to annual true up of actual costs incurred. Annual true up will take place no later than June 1 each year by filing an ATA filing. DP&L will make a filing at the Commission to seek Commission approval if DP&L seeks a nonbypassable AER charge in the future.

7. For the IIR in ¶ 4, the EER in ¶ 5, and the AER in ¶ 6, DP&L will file its cost and revenue reconciliation on the dates shown in those paragraphs. Carrying charges will be applied to any over-recovery or any under-recovery at DP&L's cost of debt approved by the Commission in DP&L's most recent proceeding.

8. The weighted average cost of capital shall be as filed in DP&L's Book II Schedule D-1. The carrying cost rate for deferrals shall be 5.86%, which is the interest rate on long-term debt reflected in the capital structure on Schedule D-1.

9. DP&L will file a new ESP and/or MRO case by March 31, 2012 to set SSO rates to apply for period beginning January 1, 2013. At least 120 days prior to March 31, 2012, DP&L will consult with interested Signatory Parties to discuss the filing.

10. DP&L will implement an Economic Development Rider on April 1, 2009 that will initially be set at zero. Recovery (if any) of delta revenues associated with economic development contracts and other reasonable or unique arrangements will be subject to Commission rules.

11. Energy Efficiency Collaborative

a. Upon approval of this Stipulation, DP&L will establish a residential (including low-income) collaborative and a manufacturing and business collaborative, to advise and consult with the Company in developing and implementing specific energy efficiency and demand response programs that benefit the customers and interests represented by members of the collaborative. All Signatory Parties will be eligible for membership in the collaboratives. Non-signatories, including entities that are not participants in this proceeding, may become members of the collaboratives with the consent of DP&L, such consent not to be unreasonably withheld; provided, however, that no governmental entity shall be precluded from membership in the collaborative. In determining whether to include a non-signatory in the collaboratives, DP&L shall give due consideration to the nature of the party's interest, the expertise it will bring to bear on the collaborative process, and whether the party's interest is adequately represented by existing members of the collaboratives.

b. DP&L will work with all of the collaborative groups referenced above to explore, educate and advise on the development of future pricing programs, for implementation, that take into consideration

the respective collaborative customer groups in the DP&L service territory.

c. If DP&L achieves energy efficiency savings and demand reductions that are greater than the statutory benchmarks and baseline for energy efficiency set pursuant to Ohio Rev. Code § 4928.66, then DP&L shall be entitled to carry over the increment above the current year benchmark to meet subsequent years' benchmarks.

d. The intervening Signatory Parties will not to oppose a request by DP&L to amend statutory benchmarks due to force majeure events.

12. Mercantile Customer Opt Out Exemption:

a. Mercantile customers that commit all or some of the results from their demand-response, energy efficiency, or other customer-sited capabilities, whether existing or new, for use by DP&L to achieve targets contained in SB 221, may apply to the Commission for a total exemption from DP&L's EER designed to recover the costs of its programs created to meet the energy savings and peak demand reduction benchmarks set forth in Section 4928.66(A)(1)(a) and (b), Revised Code. DP&L will work cooperatively with those mercantile customers to develop all of the necessary details to include in the applications and to file the joint applications with the Commission seeking approval of the exemption. DP&L will also work with mercantile customers on opportunities to reduce their energy intensity per unit produced, retaining and expanding jobs and facilitating their efforts to be competitive in the global economy.

b. Mercantile customers may receive their electric supply from DP&L or a CRES provider and still qualify for an exemption.

c. To qualify for an exemption, an applicant customer must demonstrate to the Commission that it has undertaken or will undertake self-directed energy efficiency and/or demand reduction programs that have produced or will produce annual percentage energy savings and/or peak demand reductions equal to or greater than the applicable annual percentage statutory energy savings and/or peak demand reduction benchmarks to which DP&L is subject.

d. The energy savings and demand reductions resulting from the customer's self-directed program shall be calculated using the same methodology used to calculate DP&L's energy savings and demand reductions for purposes of determining compliance with

the statutory benchmarks, including normalization adjustments to the baseline, where appropriate.

e. As part of the application, an applicant customer shall provide a calculation of the customer baseline and independent measurement and verification of the level of energy savings and demand reduction achieved or anticipated, and, to retain the exemption, shall, thereafter, on an annual basis, make a filing with the Commission demonstrating that it remains eligible for the exemption under the criteria set forth herein.

f. The parties recognize that there may be customers that have previously implemented effective self-directed energy efficiency and demand reduction programs and that such existing programs may severely limit the ability of such customers to achieve additional savings and reductions. The parties further recognize that such existing customer programs also affect DP&L's ability to comply with the applicable statutory benchmarks by limiting the potential for savings and reductions that can be achieved under its own programs. Such a customer seeking exemption from rider EER based on savings and or demand reductions under an existing self-directed program shall demonstrate in its application that (1) such program was tailored to the particular energy consumption characteristics of the customer's equipment and/or facilities and (2) that the savings and/or reductions that have been achieved under its existing self-directed program have limited its ability to achieve meaningful additional cost-effective savings and/or reductions through participation in DP&L's programs.

g. Applicant customers may seek confidential treatment of materials provided in support of the application, including, but not limited to, customer names, price, and trade secret(s).

13. DP&L will support this Stipulation in part by sponsoring testimony showing that the extension of the rate plan through 2012 is reasonable because its pricing and all other terms and conditions, including any deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.[2]

[2] Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc. and Dominion Retail, Inc. take no position regarding whether the market-rate-option test is satisfied by the Stipulation.

14. DP&L will convene a meeting no less frequently than annually with interested Competitive Retail Electric Service ("CRES") providers and other interested parties to discuss customer choice issues and related tariff provisions. DP&L will have appropriate CRES supplier support personnel at such meeting. DP&L agrees to post a supplier hotline telephone number on its website. In addition, DP&L will designate an individual to serve as the primary contact for CRES providers for resolving operational and other CRES issues.

15. Reasonable or unique arrangements are not prohibited by this Stipulation, but signatory parties retain all rights to contest proposals for such arrangements. Reasonable and unique arrangements shall be filed with the Commission for approval.

16. If DP&L intends to transfer its ownership interest in OVEC or its ownership of any generating assets before December 31, 2012, then DP&L will file a separate application to initiate the proceeding to address such a transfer.

17. DP&L will withdraw its Application in this matter to provide behind-the-meter services. DP&L may file a separate Application for Tariff Approval to provide such services. Although other parties may move to intervene, DP&L will not oppose OCC's intervention in such a proceeding.

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 regulations effective after the date of this Stipulation; and

b. The cost of storm damage.

Although other parties may move to intervene, DP&L will not oppose OCC's intervention in any of the above proceedings referenced in this Stipulation including with regard to this paragraph.

19. DP&L may apply to the Commission for approval of separate rate riders to recover:

a. The cost of complying with new environmental legislation or regulation related to climate changes or carbon-related emissions or storage;

b. Environmental costs required to keep the Hutchings Generating Station in operation and available to customers to the extent such costs are cost effective;

c. TCRR costs; and

d. RTO costs not recovered in the TCRR.

Although other parties may move to intervene, DP&L will not oppose OCC's intervention in any of the above proceedings referenced in this Stipulation including with regard to this paragraph..

20. Given the concessions made by DP&L in this Stipulation, and the extension of DP&L's current rate plan through 2012, the earnings test of Section 4928.143(F), Revised Code, shall not be applicable to DP&L for the years 2009 - 2011 (i.e., could first be applied to DP&L in 2013 for 2012).

21. DP&L will comply with the Commission's rules with regard to the programs and other provisions discussed in this Stipulation.

22. DP&L will implement the rates and riders shown on Attachments A through E to this Stipulation. DP&L will endeavor to adjust the recovery mechanisms established in this Stipulation if necessary to access state or federal energy efficiency and/or

potential future Smart Grid technology demonstration project funds or to comply with related state or federal requirements.

23. City of Dayton.

a. DP&L agrees to work cooperatively with the City of Dayton to study the electric usage characteristics of buildings and facilities in the City and to make recommendations for ways they can further control demand and energy usage through increased demand response, energy efficiency or other capabilities.

b. DP&L agrees that the aggregated load of all City of Dayton facilities served by DP&L qualifies the City as a mercantile customer. DP&L will work cooperatively with the City to develop all of the necessary details to include in the applications and to file joint applications with the Commission seeking approval of exemptions from the EER.

c. Upon approval of the Stipulation, DP&L agrees to provide the City of Dayton an unrecoverable financial contribution of $350,000 per year in funding for a period of four (4) years to assist in establishing, promoting and maintaining an energy efficiency audit and implementation program.

d. When the necessary technology and infrastructure has been approved by the Commission and been deployed by DP&L, DP&L agrees to work with the City of Dayton to explore, educate and advise the City of Dayton on the development of future pricing programs for City of Dayton buildings and facilities.

e. DP&L agrees to consult with the City of Dayton on reliability issues as those issues arise and as the City of Dayton requests such consultation.

24. Honda.

a. DP&L will work with Honda of America Mfg., Inc. to structure a demand response and MWh reduction program utilizing Honda's conservation assets and on site generation facilities. DP&L shall meet with the Honda engineering group as soon as practical following the approval of this Stipulation and provide the necessary utility technical assistance and expertise to permit Honda to make a Section 4928.66, Revised Code mercantile opt out application to the Commission on or before June 22, 2009.

25. IEU-Ohio.

a. DP&L shall work proactively with IEU-Ohio's mercantile customers to identify, develop and facilitate customer-sited capabilities that can assist DP&L in meeting its portfolio obligations in Sections 4928.64 and 4928.66, Revised Code and, as appropriate, to enable such customer-sited capabilities through a reasonable arrangement to be submitted to the Commission pursuant to Section 4905.31, Revised Code. The focus of DP&L's commitment to work with IEU-Ohio's mercantile customers shall be on opportunities to reduce their energy intensity per unit produced, retaining and expanding jobs and facilitating their efforts to be competitive in the global economy. Nothing in this commitment shall be construed or applied to negatively affect the development or implementation of programs that may apply to non-mercantile customers.

b. The Commission should:

i. Designate PJM's GATS as the nonexclusive registry to handle issuance, transfer and other functions that need to be undertaken by the REC registry required by SB 221.

ii. Designate PJM's GATS as the nonexclusive registry to handle issuance, transfer and other functions that need to be performed to facilitate compliance with energy efficiency and demand response requirements of SB 221.

26. Kroger.

a. DP&L agrees that the aggregated load of all The Kroger Company stores served by DP&L qualifies them as mercantile customers. DP&L will work cooperatively with the Kroger Company to develop all of the necessary details to include in the applications and to file the joint applications with the Commission seeking approval of the exemptions from the EER.

b. DP&L agrees to work cooperatively with the Kroger Company to study the electric usage characteristics of its stores served by DP&L and to make recommendations for ways they can further control their demand and energy usage through increased demand response, energy efficiency or other store-sited capabilities.

c. When the necessary technology and infrastructure has been approved by the Commission and been deployed by DP&L, DP&L agrees to work cooperatively with the Kroger Company in order to structure a pilot program, to be implemented as AMI metering

capability is available to Kroger Company member stores, that provides Kroger's the capability for EDI billing and payment services. In conjunction with the pilot, a pulse connection from the AMI metering will be made available to Kroger's.

27. OCC.

a. DP&L has valued OCC's suggestions regarding energy efficiency programs in the past, and looks forward to OCC's participation in the collaborative. The energy efficiency and demand response collaborative will discuss and consider all of OCC's ideas and suggestions, including:

i. OCC's concerns regarding the home performance program

ii. A cost-effective residential and small commercial (100 kW or less) REC purchase program, which OCC requests be made available by April 30, 2009;

iii. The proposed benchmark that marketing, education and administration costs should be equal to or less than 25% of total program costs unless modified by the collaborative;

iv. Cost-justified "white tag" programs.

b. DP&L will work with OCC to explore and consider opportunities to request state or federal funds for AMI, Smart Grid, and energy efficiency and demand response programs. Funds that are reasonably unencumbered by state or federal mandates will be used to reduce the costs of such programs to DP&L's customers.

c. As necessary, DP&L will revise its Corporate Separation Plan to comply with Commission rules. DP&L's Code of Conduct will apply to DP&L employees and representatives. DP&L's employees and representatives shall not have the discretion to act in a manner that is inconsistent with the Commission's Corporate Separation rules or DP&L's Corporate Separation Plan.

d. DP&L's alternative energy purchases will comply with the Commission's final rules stemming from Case No. 08-888-EL-ORD.

28. OHA.

a. DP&L agrees to work with the Ohio Hospital Association ("OHA") member hospitals served by DP&L to establish a net metering program for those hospitals seeking to net meter their on site generation resources. This program will seek to structure a

program whereby the member hospitals may receive technical and operational assistance with the installation, maintenance and operation of their emergency generation facilities. Further this program will include provisions for making such facilities available for a DP&L/OHA member hospital peak load reduction program. Participating hospitals will have to make a firm commitment of the amount of capacity from its on-site generation it intends to make available to this program for a minimum period of three years.

b. Upon approval of this settlement DP&L agrees to provide an unrecoverable financial contribution of $150,000 per year in funding to the OHA for a period of four years to establish a hospital-specific energy efficiency audit program and for development of specific energy efficiency programs for the hospitals served by DP&L.

c. DP&L agrees to work with the OHA member hospitals served by DP&L to structure an arrangement with the member hospitals in order for the hospitals to receive redundant distribution electric service billed on a demand basis.

d. When the necessary technology and infrastructure has been approved by the Commission and been deployed by DP&L, DP&L agrees to form a DP&L/OHA member hospital collaborative to explore, educate and advise on the development of future pricing programs for member hospitals served by DP&L that take into consideration member hospitals emergency generation facilities usage as a means of reducing costs to the hospitals.

29. OMA.

a. DP&L agrees to work with the Ohio Manufacturers' Association ("OMA") members served by DP&L to establish a net metering program for those manufacturing members seeking to net meter their on site generation resources. This program will seek to structure a program whereby the manufacturing members may receive technical and operational assistance with the installation, maintenance and operation of their emergency generation facilities. Further this program will include provisions for making such facilities available for a DP&L/OMA manufacturing members peak load reduction program. A participating manufacturing member will have to make a firm commitment of the amount of capacity from its on-site generation that it intends to make available to this program for a minimum period of three years.

b. The parties agree that DP&L shall, with the assistance of OMA, establish an energy efficiency, manufacturing collaborative (Manufacturing Collaborative) to develop and implement programs for manufacturers in DP&L's certified territory that benefit both participants and the State of Ohio consistent with SB 221. OMA and other participating statewide non-profit manufacturing advocacy organizations with manufacturing membership may participate in the Manufacturing Collaborative and provide volunteers to participate in program design, development and implementation working with DP&L. DP&L shall provide the Manufacturing Collaborative with an unrecoverable financial contribution of up to $100,000 per year during the ESP period, for research and development of energy efficiency programs for manufacturers. DP&L further agrees to provide its expertise, in association with participating manufacturers and Staff, in developing energy efficiency programs targeted toward manufacturers in DP&L's service territory. The Manufacturing Collaborative shall recommend cost-effective, energy efficiency programs to the Commission for adoption and recovery through the EER. DP&L also agrees to participate in a statewide energy efficiency, manufacturing collaborative or similar organization if appropriate resources are available and if such a Manufacturing Collaborative or organization is formed.

c. DP&L agrees to work with the OMA manufacturing members served by DP&L to structure an arrangement with the manufacturing members in order for the members to receive redundant distribution electric service billed on a demand basis.

d. When the necessary technology and infrastructure has been approved by the Commission and been deployed by DP&L, DP&L agrees to work with manufacturing members to explore, educate and advise on the development of future pricing programs for manufacturing members served by DP&L that take into consideration manufacturing members emergency generation facilities usage as a means of reducing costs to the manufacturing members.

30. OPAE and The Edgemont Neighborhood Coalition

a. Due to the current adverse economic conditions, effective February 1, 2009, and continuing through December 31, 2012, DP&L shall contribute an unrecoverable total of $ 400,000 annually to benefit electric consumers at or below 200% of the federal poverty line or consumers who demonstrate they are at-risk of losing electric service. The contribution shall be made directly to Ohio Partners for Affordable Energy, as a Section 501(c)(3)

entity, which will handle the distribution of funds to Community Action Partnership of the Greater Dayton Area, SOURCES Community Network Services, Tri-County Community Action Commission of Champaign/Logan/Shelby Counties, Community Action Organization of Delaware/Madison/Union Counties, Inc., Community Action Organization of Delaware/Madison/ Union Counties, Inc., Clinton County Community Action Program, and, the Community Action Commission of Fayette County. The agencies shall receive an administrative fee of 5% of the amount allocated, to be taken out of the total of $400,000.[3] The allocations and program operating guidelines shall be developed and implemented by the agencies working in concert with DP&L, Staff of the Public Utilities Commission of Ohio, OCC, Edgemont Neighborhood Coalition, and the Ohio Department of Development.

31. Sierra Club.

a. Pursuant to the August 7, 2008 Consent Decree issued by the United States District Court for the Southern District of Ohio, Civil Action No.: 2:04-CV-905, the Sierra Club is not bound by Stipulation ¶¶ 4.e and 11.d.

32. Signatory Parties City of Dayton, IEU-Ohio, Kroger, OCC, OHA, OMA, OPAE, The Edgemont Neighborhood Coalition, and Sierra Club agree that they support or do not oppose DP&L's Application in this proceeding, including all requested relief and urge Commission approval. The establishment of the net metering, demand response, energy efficiency, AMI metering programs set forth in paragraphs 23 through 31 are not conditioned on the aforementioned parties taking Standard Service Offer generation service from DP&L.

33. In arm's-length bargaining, the Signatory Parties have negotiated terms and conditions that are embodied in this Stipulation. This Agreement involves a variety of difficult, complicated issues that would otherwise be resolved only through expensive, complex,

[3] OCC notes its objection to the 5% administrative fee. OCC believes the $20,000 administrative fee is excessive and should be used to serve at-risk customers. The administrative fee allowed in this Stipulation has no precedential value.

protracted litigation. This Stipulation contains the entire Agreement among the Signatory Parties, and embodies a complete settlement of all claims, defenses, issues and objections in these proceedings. The Signatory Parties agree that this Stipulation is in the best interests of the public and of all parties, and urge the Commission to adopt it.

34. All Signatory Parties, other than DP&L, will withdraw without prejudice, their filed testimony. DP&L offers its testimony and exhibits as further evidentiary support for this Stipulation, and will file supplemental testimony in support of this Stipulation. Except as modified by this Stipulation, DP&L's Application in these matters, including all supporting chapters, schedules, workpapers, and testimony, is approved.

35. This Stipulation is a consensus among the Signatory Parties of an overall approach to rates. It is submitted for the purposes of this case alone and should not be understood to reflect the positions that an individual Signatory Party may take as to any individual provision of the Stipulation standing alone, nor the position a Signatory Party may have taken if all of the issues in this proceeding had been litigated. Nothing in this Stipulation shall be used or construed for any purpose to imply, suggest or otherwise indicate that the results produced through the compromise reflected herein represent fully the objectives of any Signatory Party. This Stipulation is submitted for purposes of this proceeding only, and is not deemed binding in any other proceeding, except as expressly provided herein, nor is it to be offered or relied upon in any other proceedings, except as necessary to enforce the terms of this Stipulation. As with such Stipulations reviewed by the Commission, the willingness of Signatory Parties to sponsor this document currently is predicated on the reasonableness of the Stipulation taken as a whole.

36. The Signatory Parties will support the Stipulation if the Stipulation is contested, and no Signatory Party will oppose an application for rehearing designed to defend the terms of this Stipulation. The Parties recommend that the Commission find that extending DP&L's rate plan through December 31, 2012 is reasonable because the rate plan's pricing and all other terms and conditions, including any deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.[4]

37. This Stipulation is conditioned upon adoption of the Stipulation by the Commission in its entirety and without material modification.[5] If the Commission rejects or modifies all or any part of this Stipulation, any Signatory Party shall have the right to apply for rehearing. If the Commission does not adopt the Stipulation without material modification upon rehearing, then within thirty (30) days of the Commission's Entry on Rehearing: (a) any Signatory Party may terminate and withdraw from the Stipulation by filing a notice with the Commission; or (b) DP&L may terminate and withdraw from the Stipulation by filing a notice pursuant to Section 4928.143(C)(2)(a)&(b), Revised Code. Upon the filing of such notice, the Stipulation shall immediately become null and void; provided, however, that the filing of such a notice by DP&L shall not be deemed to terminate paragraphs 4-6 and 10 of the Stipulation if said paragraphs were approved by the Commission without material modification. No Signatory Party shall file a notice of termination and withdrawal without first negotiating in good faith with the other Signatory Parties to achieve an outcome that substantially satisfies the intent of the

[4] Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc. and Dominion Retail, Inc. take no position regarding whether the market-rate-option test is satisfied by the Stipulation.

[5] Any Signatory Party has the right, in its sole discretion, to determine what constitutes a "material" change for the purposes of that Party withdrawing from the Stipulation.

Stipulation. If a new agreement is reached, the Signatory Parties will file the new agreement for Commission review and approval. If the discussions to achieve an outcome that substantially satisfies the intent of the Stipulation are unsuccessful, the Commission will convene an evidentiary hearing to afford the Signatory Parties the opportunity to present evidence through witnesses, to cross-examine witnesses, to present rebuttal testimony, and to brief all issues that the Commission shall decide based upon the record and briefs as if this Stipulation had never been executed. If the discussions to achieve an outcome that substantially satisfies the intent of the Stipulation are successful, some, or all, of the Signatory Parties shall submit the amended Stipulation to the Commission for approval after a hearing if necessary.

IN WITNESS THEREOF, the undersigned parties agree to this Stipulation and Recommendation as of this 24th day of February, 2009. The undersigned parties respectfully request the Commission to issue its Opinion and Order approving and adopting this Stipulation.

THE DAYTON POWER AND LIGHT COMPANY

By _____
Charles J. Faruki

INDUSTRIAL ENERGY USERS-OHIO

By _____
Lisa G. McAlister

THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

By _____
Thomas G. Lindgren
Staff takes no position on IP20

THE KROGER COMPANY

By _____
John W. Bentine
per e-mail authorization 8/24/01

OHIO PARTNERS FOR AFFORDABLE ENERGY

By _____
David C. Rinebolt
by Charles J. Faruki per e-mail authorization

OFFICE OF THE OHIO CONSUMERS' COUNSEL

By _____
Jacqueline L. Roberts

THE OHIO ENVIRONMENTAL COUNCIL

By _____
Barth E. Royer

OHIO MANUFACTURERS' ASSOCIATION

By _____
Thomas J. O'Brien

DOMINION RETAIL, INC.

By _____
Barth E. Royer

CARGILL, INCORPORATED

By _____
Craig I. Smith

CONSTELLATION NEWENERGY INC.
AND CONSTELLATION ENERGY
COMMODITIES GROUP, INC.

By _____
M. Howard Petricoff

OHIO FARM BUREAU FEDERATION

By _____
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By _____
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Richard L. Sites

HONDA OF AMERICA MFG., INC.

By _____
M. Howard Petricoff

CITY OF DAYTON

By _____
~~Andre T. Porter~~
CHRISTOPHER L. MILLER

SIERRA CLUB

By _____
Robert S. Ukeiley
Faxed per email authorization

THE EDGEMONT NEIGHBORHOOD
COALITION

By _____
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Stipulation and Recommendation has been served via electronic mail upon the following counsel of record, this 24th day of February, 2009:

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Office of the Ohio Attorney General

Charles J. Faruki

202133.1

Attachment A

Case No. 08-1094-EL-SSO
Residual Generation Rates, December 31, 2009 - 2012

Description: This is a bypassable charge associated with the costs of providing retail standard offer generation service to customers. This rate results from subtracting $.01970 per kWh (base fuel) from the residual generation rates that were in effect February 2009.

		Tariff Charges 12/31/2009 - 2012
Residential		
Energy Charge (0-750 kWh)	Per kWh	$0.04102
Energy Charge (over 750kWh)	Per kWh	$0.02982
Residential Heating - Rate A		
Energy Charge (0-750 kWh)	Per kWh	$0.04102
Energy Charge (over 750 kWh) Summer	Per kWh	$0.02982
Energy Charge (over 750 kWh) Winter	Per kWh	$0.00997
Residential Heating - Rate B		
Energy Charge (0-750 kWh)	Per kWh	$0.04102
Energy Charge (over 750 kWh) Summer	Per kWh	$0.02982
Energy Charge (over 750 kWh but less than the first 150 kWh per kW of Billing Demand) Winter	Per kWh	$0.02982
Energy Charge (all kWh over 150 kWh per kW of Billing Demand) Winter	Per kWh	$0.00000
Secondary		
Billed Demand (over 5 kW)	Per kW	$7.38595
Energy Charge (0-1,500 kWh)	Per kWh	$0.04220
Energy Charge (1,501-125,000 kWh)	Per kWh	$0.00752
Energy Charge (over 125,000 kWh)	Per kWh	$0.00337
Max Charge ^1	Per kWh	$0.12456
Primary		
Billed Demand	Per kW	$9.11019
Energy Charge	Per kWh	$0.00206
Max Charge ^1	Per kWh	$0.13258
Primary-Substation		
Billed Demand	Per kW	$9.63121
Energy Charge	Per kWh	$0.00102
High Voltage		
Billed Demand	Per kW	$9.40715
Energy Charge	Per kWh	$0.00078
Private Outdoor Lighting		
7,000 Lumens Mercury	Per lamp, Per month	$0.45859
21,000 Lumens Mercury	Per lamp, Per month	$0.56656
2,500 Lumens Incandescent	Per lamp, Per month	$1.13026
7,000 Lumens Fluorescent	Per lamp, Per month	$2.06996
4,000 Lumens PT Mercury	Per lamp, Per month	$4.53346
School		
Energy Charge	Per kWh	$0.03431
Street Lighting		
Energy Charge	Per kWh	$0.00487

Notes: ^1 DP&L's Max Charge provision for Secondary and Primary Tariff Classes is a bundled rate. This charge reflects only the generation portion of the Max Charge.

Attachment B

Case No. 08-1094-EL-SSO
Retail Fuel and Purchase Power, December 31, 2009

Description: This charge is a bypassable retail fuel and purchase power rider. The rider will initially be established at $0.01970 per kWh, which amount is subtracted from DP&L's residual generation rates that were in effect February 2009, to establish the residual generation rate in effect December 31, 2009. No later than November 1, 2009, DP&L will make a filing at the Commission to establish the 2010 fuel rider, which may include quarterly seasonal adjustments.

		Tariff Charges 12/31/2009
Residential		
Energy Charge (0-750 kWh)	Per kWh	$0.01970
Energy Charge (over 750kWh)	Per kWh	$0.01970
Residential Heating - Rate A		
Energy Charge (0-750 kWh)	Per kWh	$0.01970
Energy Charge (over 750 kWh) Summer	Per kWh	$0.01970
Energy Charge (over 750 kWh) Winter	Per kWh	$0.01970
Residential Heating - Rate B		
Energy Charge (0-750 kWh)	Per kWh	$0.01970
Energy Charge (over 750 kWh) Summer	Per kWh	$0.01970
Energy Charge (over 750 kWh but less than the first 150 kWh per kW of Billing Demand) Winter	Per kWh	$0.01970
Energy Charge (all kWh over 150 kWh per kW of Billing Demand) Winter	Per kWh	$0.01970
Secondary		
Energy Charge (0-1,500 kWh)	Per kWh	$0.01970
Energy Charge (1,501-125,000 kWh)	Per kWh	$0.01970
Energy Charge (over 125,000 kWh)	Per kWh	$0.01970
Max Charge ^1	Per kWh	$0.01970
Primary		
Energy Charge	Per kWh	$0.01970
Max Charge ^1	Per kWh	$0.01970
Primary-Substation		
Energy Charge	Per kWh	$0.01970
High Voltage		
Energy Charge	Per kWh	$0.01970
Private Outdoor Lighting		
7,000 Lumens Mercury	Per lamp, Per month	$1.47750
21,000 Lumens Mercury	Per lamp, Per month	$3.03380
2,500 Lumens Incandescent	Per lamp, Per month	$1.26080
7,000 Lumens Fluorescent	Per lamp, Per month	$1.30020
4,000 Lumens PT Mercury	Per lamp, Per month	$0.84710
School		
Energy Charge	Per kWh	$0.01970
Street Lighting		
Energy Charge	Per kWh	$0.01970

Notes: ^1 DP&L's Max Charge provision for Secondary and Primary Tariff Classes is a bundled rate. This charge reflects only the fuel and purchased power portion of the Max Charge.

Attachment C

Case No. 08-1094-EL-SSO
Alternative Energy Rider, 2009-2010

Description: This charge is a bypassable charge intended to recover costs associated with meeting the renewable energy portfolio standards prescribed by Section 4928.64 of the Ohio Revised Code.

		Tariff Charges	
		2009	2010^1
Residential			
Energy Charge (0-750 kWh)	Per kWh	$0.0001146	$0.0001323
Energy Charge (over 750kWh)	Per kWh	$0.0001146	$0.0001323
Residential Heating - Rate A			
Energy Charge (0-750 kWh)	Per kWh	$0.0001146	$0.0001323
Energy Charge (over 750 kWh) Summer	Per kWh	$0.0001146	$0.0001323
Energy Charge (over 750 kWh) Winter	Per kWh	$0.0001146	$0.0001323
Residential Heating - Rate B			
Energy Charge (0-750 kWh)	Per kWh	$0.0001146	$0.0001323
Energy Charge (over 750 kWh) Summer	Per kWh	$0.0001146	$0.0001323
Energy Charge (over 750 kWh but less than the first 150 kWh per kW of Billing Demand) Winter	Per kWh	$0.0001146	$0.0001323
Energy Charge (all kWh over 150 kWh per kW of Billing Demand) Winter	Per kWh	$0.0001146	$0.0001323
Secondary			
Energy Charge (0-1,500 kWh)	Per kWh	$0.0001146	$0.0001323
Energy Charge (1,501-125,000 kWh)	Per kWh	$0.0001146	$0.0001323
Energy Charge (over 125,000 kWh)	Per kWh	$0.0001146	$0.0001323
Primary			
Energy Charge	Per kWh	$0.0001146	$0.0001323
Primary-Substation			
Energy Charge	Per kWh	$0.0001146	$0.0001323
High Voltage			
Energy Charge	Per kWh	$0.0001146	$0.0001323
Private Outdoor Lighting			
7,000 Lumens Mercury	Per lamp, Per month	$0.0085950	$0.0099225
21,000 Lumens Mercury	Per lamp, Per month	$0.0176484	$0.0203742
2,500 Lumens Incandescent	Per lamp, Per month	$0.0073344	$0.0084672
7,000 Lumens Fluorescent	Per lamp, Per month	$0.0075636	$0.0087318
4,000 Lumens PT Mercury	Per lamp, Per month	$0.0049278	$0.0056889
School			
Energy Charge	Per kWh	$0.0001146	$0.0001323
Street Lighting			
Energy Charge	Per kWh	$0.0001146	$0.0001323

Notes: ^1 2010 AER will reflect actual costs, trued up costs and recovery from 2009.

Attachment D

Case No. 08-1094-EL-SSO
Energy Efficiency Rider, 2009-2010

Description: This is a non-bypassable charge (except if the customer qualifies for a mercantile opt out exemption) intended to recover the costs associated with meeting the energy efficiency and peak demand reduction targets set forth in Section 4928.66 of the Ohio Revised Code.

		Tariff Charges 2009	2010
Residential			
Energy Charge (0-750 kWh)	Per kWh	$0.0019710	$0.0020875
Energy Charge (over 750kWh)	Per kWh	$0.0019710	$0.0020875
Residential Heating - Rate A			
Energy Charge (0-750 kWh)	Per kWh	$0.0019710	$0.0020875
Energy Charge (over 750 kWh) Summer	Per kWh	$0.0019710	$0.0020875
Energy Charge (over 750 kWh) Winter	Per kWh	$0.0019710	$0.0020875
Residential Heating - Rate B			
Energy Charge (0-750 kWh)	Per kWh	$0.0019710	$0.0020875
Energy Charge (over 750 kWh) Summer	Per kWh	$0.0019710	$0.0020875
Energy Charge (over 750 kWh but less than the first 150 kWh per kW of Billing Demand) Winter	Per kWh	$0.0019710	$0.0020875
Energy Charge (all kWh over 150 kWh per kW of Billing Demand) Winter	Per kWh	$0.0019710	$0.0020875
Secondary			
Energy Charge (0-1,500 kWh)	Per kWh	$0.0004761	$0.0006284
Energy Charge (1,501-125,000 kWh)	Per kWh	$0.0004761	$0.0006284
Energy Charge (over 125,000 kWh)	Per kWh	$0.0004761	$0.0006284
Primary			
Energy Charge	Per kWh	$0.0004761	$0.0006284
Primary-Substation			
Energy Charge	Per kWh	$0.0004761	$0.0006284
High Voltage			
Energy Charge	Per kWh	$0.0004761	$0.0006284
Private Outdoor Lighting			
7,000 Lumens Mercury	Per lamp, Per month	$0.0357075	$0.0471300
21,000 Lumens Mercury	Per lamp, Per month	$0.0733194	$0.0967736
2,500 Lumens Incandescent	Per lamp, Per month	$0.0304704	$0.0402176
7,000 Lumens Fluorescent	Per lamp, Per month	$0.0314226	$0.0414744
4,000 Lumens PT Mercury	Per lamp, Per month	$0.0204723	$0.0270212
School			
Energy Charge	Per kWh	$0.0004761	$0.0006284
Street Lighting			
Energy Charge	Per kWh	$0.0004761	$0.0006284

Attachment E

Case No. 08-1094-EL-SSO
Economic Development Rider, 2009-2010

Description: This is a non-bypassable charge intended to recover delta revenue associated with economic development, unique, or reasonable arrangements. This rate is initially established at zero unless or until such time that an economic development, unique or reasonable arrangement is approved by the PUCO and implemented by the Company.

		Tariff Charges 2009	2010
Residential			
Energy Charge (0-750 kWh)	Per kWh	$0.0000000	$0.0000000
Energy Charge (over 750kWh)	Per kWh	$0.0000000	$0.0000000
Residential Heating - Rate A			
Energy Charge (0-750 kWh)	Per kWh	$0.0000000	$0.0000000
Energy Charge (over 750 kWh) Summer	Per kWh	$0.0000000	$0.0000000
Energy Charge (over 750 kWh) Winter	Per kWh	$0.0000000	$0.0000000
Residential Heating - Rate B			
Energy Charge (0-750 kWh)	Per kWh	$0.0000000	$0.0000000
Energy Charge (over 750 kWh) Summer	Per kWh	$0.0000000	$0.0000000
Energy Charge (over 750 kWh but less than the first 150 kWh per kW of Billing Demand) Winter	Per kWh	$0.0000000	$0.0000000
Energy Charge (all kWh over 150 kWh per kW of Billing Demand) Winter	Per kWh	$0.0000000	$0.0000000
Secondary			
Energy Charge (0-1,500 kWh)	Per kWh	$0.0000000	$0.0000000
Energy Charge (1,501-125,000 kWh)	Per kWh	$0.0000000	$0.0000000
Energy Charge (over 125,000 kWh)	Per kWh	$0.0000000	$0.0000000
Primary			
Energy Charge	Per kWh	$0.0000000	$0.0000000
Primary-Substation			
Energy Charge	Per kWh	$0.0000000	$0.0000000
High Voltage			
Energy Charge	Per kWh	$0.0000000	$0.0000000
Private Outdoor Lighting			
7,000 Lumens Mercury	Per lamp, Per month	$0.0000000	$0.0000000
21,000 Lumens Mercury	Per lamp, Per month	$0.0000000	$0.0000000
2,500 Lumens Incandescent	Per lamp, Per month	$0.0000000	$0.0000000
7,000 Lumens Fluorescent	Per lamp, Per month	$0.0000000	$0.0000000
4,000 Lumens PT Mercury	Per lamp, Per month	$0.0000000	$0.0000000
School			
Energy Charge	Per kWh	$0.0000000	$0.0000000
Street Lighting			
Energy Charge	Per kWh	$0.0000000	$0.0000000

Summary: Memorandum Memorandum Contra DP&L's Motion to Strike OCC's Notice of its Termination and Withdrawal from a 2009 Settlement of an Electric Security Plan by Office of the Ohio Consumer's Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.