**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of the Dayton Power and Light Company to Increase Its Rates for Electric Distribution.In the Matter of the Application of the Dayton Power and Light Company for Accounting Authority.In the Matter of the Application of Dayton Power and Light Company for Approval of Revised Tariffs. | )))))))))) | Case No. 20-1651-EL-AIRCase No. 20-1652-EL-AAMCase No. 20-1653-EL-ATA |

**APPLICATION FOR REHEARING**

**BY**

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January 13, 2023 (willing to accept service by e-mail)

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Energy prices, inflation and unemployment are soaring.[[1]](#footnote-2) The stock market is crashing.[[2]](#footnote-3) A recession is looming.[[3]](#footnote-4) The Dayton Power and Light Company (“DP&L”) wants to “pile on” to consumers’ economic woes by increasing its rates by $120.8 million, or nearly 50%.[[4]](#footnote-5)

Public Utilities Commission of Ohio (“PUCO”) Staff recommended a rate hike of $64.3 to $69.8 million, for a 26% to 29% increase.[[5]](#footnote-6) The Office of the Ohio Consumers’ Counsel (“OCC”) determined that the increase should be no greater than $43.3 million, or a 17.6% increase.[[6]](#footnote-7) The PUCO approved a rate increase of $75.6 million, or a 30.8% increase.[[7]](#footnote-8) The PUCO-approved increase is nearly double OCC’s recommendation and is well above the PUCO Staff’s own recommendation.

An important issue was when the rate increase would take effect. DP&L wanted an immediate rate increase. OCC argued that DP&L was operating under ESP I, which provided for a rate freeze; therefore, the rate increase could not take effect until the PUCO approved a new ESP. OCC commends the PUCO for correctly deciding that DP&L “is precluded from implementing an increase in rates during the period of its rate freeze…”[[8]](#footnote-9) Nevertheless, the PUCO should address the issues below on rehearing.

OCC applies for rehearing of the PUCO’s Order issued on December 14, 2022. OCC submits that the PUCO’s Order is unreasonable and unlawful in the following particulars:

ASSIGNMENT OF ERROR NO. 1: The PUCO erred by failing to remove from plant-in-service and depreciation reserve, DP&L’s earnings-based incentive compensation and $16.8 million in improper capitalized storm costs, in violation of the FERC Uniform System of Accounts, which DP&L must follow under R.C. 4905.13 and O.A.C. 4901:1-9-05. Additionally, the PUCO’s ruling is contrary to past precedent, and the PUCO failed to show how its new course is “substantively reasonable and lawful.”[[9]](#footnote-10)

ASSIGNMENT OF ERROR NO. 2: The PUCO erred by violating R.C. 4903.09 and R.C. 4909.15 by allowing DP&L to collect up to $20 million in base rates for vegetation management, and approving additional deferral authority up to $7.5 million, without any evidentiary support and based on estimates of future costs occurring outside the test year. The PUCO also acted unreasonably by not requiring DP&L to update its vegetation management plan to reflect changes it proposed regarding the cycle-based tree trimming program as well as maintenance of vegetation inside and outside the right-of-way.

ASSIGNMENT OF ERROR NO. 3: The PUCO erred by violating R.C. 4903.09 by approving a return on equity at the upper quartile of PUCO Staff’s recommended range. The PUCO ruling was based on a perception of heightened financial risk and a need to attract investment, but the perceived financial risk was due to DP&L’s own poor management decisions. The PUCO decision also failed to consider countervailing factors such as for DP&L’s inadequate reliability performance and harsh economic conditions in setting the return on equity.

The reasons for granting this Application for Rehearing are more fully set forth in the attached Memorandum in Support.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

# I. INTRODUCTION

 OCC files this Application for Rehearing asking the PUCO to modify or reverse its Order of December 14, 2022. The Order allows DP&L to increase its electric distribution rates by $75.6 million annually.[[10]](#footnote-11) The PUCO’s Order violates Ohio ratemaking law as set forth in Revised Code Title 49[[11]](#footnote-12) as well as court decisions and prior PUCO rulings interpreting that law.

# II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10 and O.A.C. 4901-1-35. This statute provides that, within thirty days after the PUCO issues an order, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.”[[12]](#footnote-13) Furthermore, the application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”[[13]](#footnote-14)

In considering an application for rehearing, Ohio law provides that the PUCO “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear.”[[14]](#footnote-15) Furthermore, if the PUCO grants a rehearing and determines that “the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same \* \* \*.”[[15]](#footnote-16)

OCC meets the statutory requirements applicable to applicants for rehearing pursuant to R.C. 4903.10. Accordingly, OCC respectfully requests the PUCO grant rehearing on the matters specified below.

# III. ARGUMENTS ON ASSIGNMENTS OF ERROR

1. ASSIGNMENT OF ERROR NO. 1: The PUCO erred by failing to remove from plant-in-service and depreciation reserve, DP&L’s earnings-based incentive compensation and $16.8 million in improper capitalized storm costs, in violation of the FERC Uniform System of Accounts, which DP&L must follow under R.C. 4905.13 and O.A.C. 4901:1-9-05. Additionally, the PUCO’s ruling is contrary to past precedent, and the PUCO failed to show how its new course is **“substantively reasonable and lawful.”[[16]](#footnote-17)**

At the hearing, OCC argued that the PUCO Staff failed to address capitalized storm costs that are either inappropriate for collection from consumers altogether or inappropriate for inclusion in rate base.[[17]](#footnote-18) Since the date certain in the last rate case, DP&L recorded 19 major storms and booked to plant-in-service $28.9 million in storm costs.[[18]](#footnote-19) OCC’s expert, Mr. Willis, recommended an adjustment of $16.8 million to remove administrative and general overheads, operation and maintenance expenses, cash bonuses, meals, picnics and parties, travel, and office supplies that do not qualify for rate base, rate of return recovery.[[19]](#footnote-20)

 Capitalized costs such as cash bonuses, office supplies, travel, picnics, meals and parties should be excluded from the revenue requirement because they are not necessary in the provision of electric service to consumers and should be paid for by shareholders, not consumers.[[20]](#footnote-21) Even if these items were properly collectable (they are not), they should not be included in rate base and collected through a return on and return of capital.[[21]](#footnote-22)

OCC recommended that the PUCO adjust DP&L’s depreciation reserve and depreciation expenses to remove $485,717 in capitalized storm costs. OCC also recommended that the depreciation reserve should be reduced after the capitalized earnings-based incentive compensation was removed from plant-in-service.[[22]](#footnote-23)

The PUCO’s Order rejected OCC’s position, with the following rationale:

Further, with respect to OCC’s objections, we agree with Staff that AES Ohio was unaware of any obligation to maintain its storm cost and plant-in-service accounts such that incentive-based labor costs would not be subject to capitalization and acted reasonably in accounting for these costs based on the 2015 Rate Case. That said, as Staff recommends, the Commission finds that going forward, AES Ohio shall exclude all capitalized earnings-based incentive compensation from future plant-in-service and storm costs accounts to ensure that shareholders serve as the funding source for those incentives.[[23]](#footnote-24)

The PUCO’s rationale for rejecting OCC’s argument lacks evidentiary support and is unjust and unreasonable. The Uniform System of Accounts defines the types of overhead costs that may be included in a capitalized account:

4.  Overhead Construction Costs.

A. All overhead construction costs, such as engineering, supervision, general office salaries and expenses, construction engineering and supervision by others than the accounting utility, law expenses, insurance, injuries and damages, relief and pensions, taxes and interest, shall be charged to particular jobs or units on the basis of the amounts of such overheads reasonably applicable thereto, to the end that each job or unit shall bear its equitable proportion of such costs and that the entire cost of the unit, both direct and overhead, shall be deducted from the plant accounts at the time the property is retired.[[24]](#footnote-25)

 This definition of collectible costs excludes any category for cash bonuses, travel, office supplies, picnics, meals and parties. DP&L is required to follow the Uniform System of Accounts.[[25]](#footnote-26) OCC identified $485,717 in capitalized storm costs which do not meet this definition. The PUCO’s Order lacks evidentiary support because the undisputed evidence presented by OCC establishes that these items fall outside the Uniform System of Accounts and therefore should have been excluded from rate base and depreciation reserve. DP&L’s failure to comply with the accounting as set forth in the Uniform System of Accounts should not be excused or used as reason for including the expenses in the rates that consumers pay.

 OCC also argued that capitalized earnings-based incentive compensation should have been removed from plant-in-service and depreciation reserve. The PUCO rejected this argument, but the PUCO’s Order is internally inconsistent. The PUCO removed earnings-based incentive compensation from DP&L’s operating expenses[[26]](#footnote-27) but not from plant-in-service or depreciation reserve.

The PUCO’s ruling is not only internally inconsistent, it is also inconsistent with past PUCO rulings. In its Opinion and Order in Case Numbers 17-38-EL-RDR and 18-230-EL-RDR, the PUCO stated:

[T]he Commission has previously addressed the issue of incentive compensation in a number of rate cases and rider proceedings.[[27]](#footnote-28) In these prior cases, the PUCO has concluded that, to the extent that a public utility awards financial incentives to its employees for achieving financial goals, shareholders are the primary beneficiary and, therefore, that portion of the incentive compensation should not be collected from consumers.[[28]](#footnote-29)

The PUCO has also stated: “To the extent that financial incentives are awarded for achieving financial goals, the primary benefit of such financial incentives accrues to shareholders and that portion of incentive compensation should not be recovered from ratepayers.”[[29]](#footnote-30) In the present case, the PUCO should have followed this established precedent and excluded this item from base rates and depreciation reserve.

The PUCO must “respect its own precedents in its decisions to assure the predictability, which is essential in all areas of the law, including administrative law.”[[30]](#footnote-31) If the PUCO decides not to follow its own prior decisions, it must explain why it does so.[[31]](#footnote-32) Any new course taken by the PUCO must be “substantively reasonable and lawful.”[[32]](#footnote-33)

The PUCO failed to follow its precedent of excluding capitalized earnings-based incentive compensation, which should have been removed from plant-in-service and depreciation reserve. The PUCO’s stated rationale for not excluding this item from plant-in-service and depreciation reserve is that “AES Ohio was unaware of any obligation” to do so.[[33]](#footnote-34) DP&L’s lack of awareness of the law is no excuse. The PUCO’s stated rationale for not following its existing precedent is lacking. It would be unjust and unreasonable to allow DP&L to collect these costs. The PUCO should therefore grant rehearing and remove these costs.

## **B. ASSIGNMENT OF ERROR NO. 2:** **The PUCO erred by violating R.C. 4903.09 and R.C. 4909.15 by allowing DP&L to collect up to $20 million in base rates for vegetation management, and approving additional deferral authority up to $7.5 million, without any evidentiary support and based on estimates of future costs occurring outside the test year. The PUCO also acted unreasonably by not requiring DP&L to update its vegetation management plan to reflect changes it proposed regarding the cycle-based tree trimming program as well as maintenance of vegetation inside and outside the right-of-way.**

### 1. Background of DP&L’s current vegetation management performance.

OCC presented Mr. James Williams to testify about DP&L’s vegetation management practices. Mr. Williams testified that, according to the PUCO-approved DP&L Inspection, Maintenance, Repair, and Replacement Program, DP&L is required to complete tree trimming of all circuits within the right-of-way under a five-year cycle-based program.[[34]](#footnote-35)

 But even though DP&L is required to trim trees within the right-of-way on a five-year cycle, the Utility is not doing so.[[35]](#footnote-36) And even though customer interruptions associated with trees inside the right-of-way are increasing, DP&L has chosen to selectively defer the cycle-based tree trimming program due to the alleged costs.[[36]](#footnote-37) And DP&L even acknowledged that the deferral in tree trimming work allows additional growth and leads to additional system impacts because the additional vegetation growth places distribution poles, wires, and other infrastructure at risk for damage and causes more tree-caused outages.[[37]](#footnote-38) In fact, between 2018 and 2020, the Utility has failed to meet the five-year cycle-based tree trimming requirements.[[38]](#footnote-39) This is particularly unreasonable considering the significant increases in baseline vegetation management expense ($15.7 million plus deferral expenses of up to $4.6 million) that DP&L received in its last base last rate case.[[39]](#footnote-40)

OCC’s expert witness Mr. Williams explained in his testimony that in 2019, DP&L reported only completing tree trimming on 71 of the 108 circuits in in 2018 that it should have completed for the year.[[40]](#footnote-41) In 2020, DP&L reported completing tree trimming on 91 of the 108 circuits in in 2019 that it should have completed for the year.[[41]](#footnote-42) In 2021, DP&L reported completing tree trimming on 89 of the 108 circuits in 2020 that it should have completed for the year.[[42]](#footnote-43)

According to Mr. Williams, DP&L’s explanation for not meeting the PUCO approved vegetation management requirements was “[c]hallenging labor market conditions…”[[43]](#footnote-44) And more specifically, DP&L has provided the following statement as their explanation in its Rule 26 filings for not meeting tree trimming requirements:

Challenging labor market conditions affecting the entire vegetation management industry have led to widespread price increases and schedule completion shortfalls for many utilities. Currently there is not enough qualified labor in the utility vegetation management industry to effectively meet the increasing needs of electricity providers. As a result, DP&L Ohio has faced significant challenges in trying to overcome the labor shortages and the related price increases. To the best of its ability, DP&L Ohio made strategic decisions to focus its vegetation management efforts in such a way as to maximize the potential benefit to [consumers] by prioritizing circuits based on safety, reliability and vegetation risk.[[44]](#footnote-45)

 Identical statements are found in each of the system improvement plan reports for 2018 through 2020.[[45]](#footnote-46) Mr. Williams explained in his testimony that in comparing the number of tree-caused outages between 2015 and 2020, there is a significant increase in outages associated with tree trimming that are contributing to declines in DP&L’s reliability performance as shown in the table below.[[46]](#footnote-47)

**Inside Row Tree Caused Outages 2015 – 2020 (Excludes Major Events and Transmission Outages)**[[47]](#footnote-48)

|  |  |  |  |
| --- | --- | --- | --- |
| **Year** | **Events** | **Consumers Interrupted** | **Consumer Minutes Interrupted** |
| 2015 | 145 | 7,007 | 1,393,088 |
| 2016 | 116 | 6,112 | 2,006,194 |
| 2017 | 318 | 17,128 | 3,265,144 |
| 2018 | 310 | 16,973 | 3,366,969 |
| 2019 | 368 | 22,079 | 4,318,048 |
| 2020 | 162 | 16,135 | 2,652,857 |
| Average 2015-2017 | 193 | 10,082 | 2,221,475 |
| Average 2018-2020 | 280 | 18,396 | 3,459,281 |
| Percentage Change | 45.1% | 82.5% | 55.7% |

DP&L’s tree-caused outages within the right-of-way have increased significantly despite the increase in base rates and deferrals of vegetation management expenses that were authorized in the last DP&L base rate case.[[48]](#footnote-49) There was a 45.1% increase in the average number of in right-of-way tree-caused outages for the period 2018 through 2020 compared with the average number of outages between 2015 and 2017 and before rate increases went into effect after the last base rate case.[[49]](#footnote-50)

There is an 82.5% increase in the number of consumers interrupted on average between 2018 and 2020 compared with the average number of consumers interrupted due to in right-of-way tree-caused outages between 2015 and 2017.[[50]](#footnote-51) And there is a 55.7% increase in the number of consumer minutes interrupted during right-of-way tree-caused outages during the period 2018 through 2020 compared with the average number of consumer minutes interrupted between 2015 and 2017.[[51]](#footnote-52)

In sum, DP&L’s reliability is getting worse, not better—despite the PUCO authorizing increased vegetation management spending for DP&L. Moreover, DP&L is seeking authority to spend more money on vegetation management activities while not actually using the full amount currently available for vegetation management.

### 2. Approved vegetation management expenses included in base rates unreasonably and unlawfully include expenses outside of the test year.

DP&L proposed a new approach to vegetation management involving a hybrid plan of trimming all distribution circuits over a four- to five-year term both within and outside the right-of-way.[[52]](#footnote-53) DP&L requested approval to collect $30 million for this program ($25 million for circuits within the right-of-way; $3.5 million for outside the right-of-way; and $1.5 million for additional tree-trimming as needed between cycles).[[53]](#footnote-54)

Staff recommended an increase in DP&L’s baseline expenses for vegetation management by $1.8 million, from $15.7 million to $17.5 million.[[54]](#footnote-55) The PUCO Staff Report contained no analysis or support from the PUCO Staff for its recommendation to increase the baseline expenses for vegetation management from the current $15.7 million to $17.5 million, annually. The PUCO Staff did not perform any analysis of the underlying factors that DP&L claims caused the proposed increase in tree trimming expenses.[[55]](#footnote-56)

Additionally, the PUCO Staff did not analyze the impact of DP&L’s failure to comply with its vegetation management plan and how this contributed to DP&L failure to meet the minimum distribution reliability performance standards.[[56]](#footnote-57) The PUCO Staff Report contained no analysis of the recommendations and costs proposed by DP&L for modifying the cycle duration to four to five years, initiating hot spot tree trimming, or expanding the vegetation management program to include tree trimming and removals outside the right-of-way.[[57]](#footnote-58)

OCC recommended no increase in DP&L’s baseline amount for vegetation management due to DP&L’s poor reliability performance with the amount for vegetation management which it currently receives through base rates.

The PUCO’s Order increased the vegetation management expense in base rates by $4.3 million, to an annual level of $20 million.[[58]](#footnote-59) The PUCO justified this amount as follows: “we find that an annual increase of $4.3 million to $20 million is appropriate in recognition of the Company’s evidence of recent spending and future cost estimates that are part of the case record.”[[59]](#footnote-60)

The amount of this increase is unjust and unreasonable. Under R.C. 4909.15, rate increases must be based on the cost of service during the test year.[[60]](#footnote-61) DP&L’s evidence of “recent spending and future cost estimates” fail this test. The Ohio Supreme Court has allowed a post-test-year adjustment for vegetation management expense for DP&L when DP&L documented with particularity how it needed to incur the additional expense to meet the requirements of a specific, PUCO-ordered vegetation management plan (“Where, as here, the commission orders a utility to adopt a specific plan to assure continued safe, efficient service, R.C. 4909.15(D) provides sufficient statutory authority for post-test-year adjustments.”).[[61]](#footnote-62)

But DP&L does not need to collect additional costs to meet a PUCO-ordered vegetation management plan. In fact, DP&L isn’t even spending the full amount of the money it currently receives in rates for meeting its vegetation management plan – choosing instead to use the money for other purposes.

The foregoing exception noted above is a narrow one and does not apply under the facts of this case, so DP&L can only collect expenses which fall within the test period.[[62]](#footnote-63) In *Consumers’ Counsel v. Pub. Util. Comm.,[[63]](#footnote-64)* the Supreme Court held that a utility could not collect the cost for a wage increase included in a collective bargaining agreement negotiated and signed between the utility and a union representing its employees because the effective date of the wage increase fell outside the test period.[[64]](#footnote-65) Certainly a collective bargaining agreement negotiated and signed and binding upon the utility provides much more of a known and measurable cost as compared to the vague “recent spending and future cost estimates” at issue here. The PUCO therefore should have disallowed any amount above the Staff’s recommendation of a $1.8 million increase for vegetation management because such additional amount is unsupported by evidence, falls outside the test period and does not qualify as a known and measurable change which would qualify to be included in rates.

### 3. Deferred vegetation management costs.

DP&L also requested approval to recover existing deferred vegetation management costs, and to incur future vegetation management deferrals. The PUCO Staff recommended that DP&L defer its existing $13.7 million balance for vegetation management expenses over a five-year period, which the PUCO approved.[[65]](#footnote-66)

The PUCO’s Order is unreasonable because the PUCO Staff Report does not contain any analysis of the prudency of the supposed approximate $13.7 million collection of deferred vegetation management expense from customers.[[66]](#footnote-67) The PUCO Staff should have examined these alleged expenses to determine if they are just and reasonable before recommending that the charges be imposed onto consumers. OCC’s expert Mr. Williams explained that this is especially true given DP&L’s failure to use the additional funds to adequately perform tree trimming since at least 2018.[[67]](#footnote-68) DP&L has failed to comply with its Inspection, Maintenance, Repair and Replacement Program regarding vegetation management within the right-of-way and DP&L has failed to meet the minimum PUCO performance standards for distribution reliability.[[68]](#footnote-69)

DP&L also proposed expanding its vegetation management program to include intra-cycle hot-spot tree trimming and vegetation removal outside of the right-of-way. The PUCO recommended that DP&L should be authorized to defer an additional $5 million annually in tree trimming expenses.[[69]](#footnote-70) The PUCO inexplicably approved $7.5 million in future deferral authority for this program.[[70]](#footnote-71) The PUCO’s approval of this prospective deferral authority is unreasonable and inconsistent with prior PUCO precedent.

Under its existing precedent, the PUCO applies the following test to determine whether to authorize a utility to defer an expense:

1. whether the utility's current rates are sufficient to cover the costs of the requested deferral;
2. whether the costs are material;
3. whether the reason for requesting the deferral is outside the utility's control;
4. whether the expenses are atypical and infrequent; and
5. whether the financial integrity of the utility will be significantly and adversely affected, if the deferral is not granted.[[71]](#footnote-72)

The PUCO did not apply this test in evaluating whether to approve this deferral; therefore, the PUCO did not follow its own precedent. As noted earlier, the PUCO must “respect its own precedents in its decisions to assure the predictability, which is essential in all areas of the law, including administrative law.”[[72]](#footnote-73) If the PUCO decides not to follow its own prior decision, it must explain why it does so.[[73]](#footnote-74) Finally, the new course taken by the PUCO must be “substantively reasonable and lawful.”[[74]](#footnote-75) The PUCO’s failure to apply this test for approving deferrals was therefore unreasonable.

DP&L’s request for future vegetation management deferral authority does not meet the PUCO’s five-factor test for deferral authority, for the following reasons:

1. DP&L failed to demonstrate that its current rates are inadequate to cover the costs of the requested deferral. As noted above, DP&L is not spending the full amount currently authorized in rates for vegetation management, and PUCO Staff has recommended a $1.8 million increase in these rates. DP&L made no showing that these amounts are inadequate to cover the costs of the vegetation management expenses for which it seeks a deferral;
2. DP&L failed to demonstrate that that the vegetation management expenses are material – the PUCO Staff recommended a deferral of up to $5 million but there is no evidence of how much expense DP&L would incur in a given year and whether the annual amounts are material;
3. DP&L failed to demonstrate that the reason for requesting the deferral is outside of its control – DP&L has not spent the full amount currently authorized in rates for vegetation management and this failure to perform the vegetation management work by spending the full amount authorized in base rates was within its control;
4. DP&L failed to demonstrate that vegetation management expenses are atypical and infrequent – in fact, vegetation management is a typical, frequent and constant requirement for electric utilities; and
5. DP&L failed to demonstrate that its financial integrity of the utility will be significantly and adversely affected if the deferral is not granted.

Under these circumstances, the PUCO should not have approved the deferral. In the alternative, the PUCO acted unreasonably by failing to offset future deferrals by the amount of DP&L’s under-spending of the full amount of vegetation management expenses embedded in base rates.

### 4. Failure to update vegetation management plan.

As an additional matter, it was unreasonable for the PUCO to approve vegetation management expenses and future deferrals without DP&L obtaining prior approval of an updated vegetation management plan that prescribes DP&L’s responsibilities, and the standards that must be met for future collection of any additional money from customers.[[75]](#footnote-76) And the PUCO also acted unreasonably by failing to link DP&L’s collection of vegetation management expenses and deferrals to a PUCO Staff audit before the costs are passed on to consumers.[[76]](#footnote-77) The PUCO acted unreasonably by approving the expenses and deferrals without enforcing the DP&L Inspection, Maintenance, Repair, and Replacement Program Plan and DP&L’s failure to adequately perform tree trimming on its distribution circuits since 2018.[[77]](#footnote-78) The solution for the inadequate service DP&L has been permitted to provide consumers is for the PUCO to enforce its reliability standards and associated maintenance and repair plans and programs - - not requiring consumers to spend more hard-earned money.

C. ASSIGNMENT OF ERROR NO. 3: The PUCO erred by violating R.C. 4903.09 by approving a return on equity at the upper quartile of PUCO Staff’s recommended range. The PUCO ruling was based on a perception of heightened financial risk and a need to attract investment, but the perceived financial risk was due to DP&L’s own poor management decisions. The PUCO decision also failed to consider countervailing factors such as for DP&L’s inadequate reliability performance and harsh economic conditions in setting the return on equity.

The parties provided varying recommendations for the return on equity. The PUCO Staff recommended a return on equity within a range of 9.28 to 10.29 percent.[[78]](#footnote-79) DP&L recommended a return on equity of 10.5 percent,[[79]](#footnote-80) which was outside the PUCO Staff’s recommended range. OCC proposed a return on equity of 9.3 percent,[[80]](#footnote-81) which was just within the lower end of PUCO Staff’s recommendation. Walmart recommended a rate of return at the lower end of PUCO Staff’s recommendation.[[81]](#footnote-82)

The PUCO decided on a return on equity of 9.999, based on the following reasoning:

[The Commission finds persuasive Staff’s proposed overall ROR and ROE ranges of 7.05 to 7.59 percent and 9.28 to 10.29 percent, respectively. Absent special circumstances calling for downward or upward adjustments, the Commission further finds it reasonable to begin at the range midpoints: a 7.32 percent ROR and 9.78 percent ROE. *In this case, however, special circumstances do exist, and they point to upward adjustments. The Commission specifically highlights two of those circumstances: (1) the heightened financial risk that the Company currently faces, and will likely continue to face, which increases the cost of equity and (2) the Company’s concurrent need to be able to continue to attract and invest the capital needed to make customer beneficial network renovations and improvements to support maintaining and improving reliability and service quality for customers*.[[82]](#footnote-83)

 The PUCO accepted evidence showing a need for an upward adjustment to the return on equity but ignored evidence showing a need for a downward adjustment to the return on equity. The record contained evidence of three “special circumstances” calling for a downward adjustment in the return on equity. These factors consist of: (1) DP&L’s heightened financial risk was due to its own poor management decisions in taking on excessive debt when AES acquired DP&L; (2) DP&L failed to spend the revenues allocated in current rates for vegetation management and diverted these funds elsewhere, resulting in inadequate service; and (3) harsh economic conditions for consumers arising out of the COVID-19 pandemic.

 The PUCO minimally addressed the first factor but, in its analysis, actually ignored certain evidence favoring consumers because it did not actually make any downward adjustment to DP&L’s return on equity based on DP&L’s poor management decisions. The PUCO explained:

…we acknowledge that while rate payers cannot be held responsible for the business decisions made by a company in acquiring a utility the Commission must do what we can to safeguard the financial integrity of the regulated utility providing essential electric service to Ohioans.[[83]](#footnote-84)

 At hearing, PUCO Staff witness Mr. Buckley acknowledged that DP&L’s management was responsible for its current predicament and that the PUCO should not reward DP&L for its own poor management by awarding it the high end of Staff’s recommend return.[[84]](#footnote-85) Mr. Buckley also cited the fact that DP&L created additional financial risk by holding onto its generating plants after other Ohio electric distribution utilities sold theirs.[[85]](#footnote-86) Mr. Buckley also testified that the PUCO should not reward DP&L with a high recommended return where the Company has failed to deliver adequate service quality.[[86]](#footnote-87)

The PUCO acknowledged the evidence that DP&L’s bad business decision in taking on excessive debt was the cause of DP&L’s heightened financial risk. The PUCO further acknowledged that “rate payers cannot be held responsible for the business decisions made by a company in acquiring a utility.”[[87]](#footnote-88) Yet by failing to adjust Staff’s recommended return on equity downward to account for this factor (or to weigh it against any special circumstances which merited an upward adjustment), *the PUCO did exactly what it said it could not do – hold consumers responsible for DP&L’s bad business decision in taking on excessive debt when it was acquired by AES.* The PUCO simply ignored this evidence, as well as the evidence of DP&L’s inadequate service quality and the harsh economic conditions faced by consumers.

When deciding a utility’s return on equity, the PUCO must account not only for the special circumstances calling for upward adjustments but also the special circumstances calling for downward adjustments. The PUCO’s decision must reflect a fair balancing of both types of adjustments.

The leading case is *Consumers’ Counsel v. Pub. Util. Comm.[[88]](#footnote-89)* This was a Cleveland Electric Illuminating Company rate case filed after the cancellation, and disallowance, of four nuclear units at the Davis Besse nuclear plant. One issue involved the proper return on equity. The PUCO Staff’s recommended range for the rate of return was 17.02 to 18.13 percent.[[89]](#footnote-90) The PUCO considered two factors which called for adjustments to the return on equity – one upward adjustment and one downward adjustment.[[90]](#footnote-91) The PUCO took into account both factors and arrived at a return on equity of 17.30 percent, which was below the mid-point of the PUCO Staff’s recommended range.[[91]](#footnote-92) The Supreme Court of Ohio approved the PUCO’s methodology for deciding the return on equity.

In *Consumers’ Counsel v. Pub. Util. Comm,[[92]](#footnote-93)* OCC had argued that the PUCO should not have taken into account the utility’s heightened financial risk because this effectively allowed the utility to collect costs for the four terminated nuclear units. The Ohio Supreme Court rejected OCC’s argument but approved the PUCO’s methodology of deciding the return on equity by beginning with the mid-point of the PUCO Staff’s recommended range, then factoring in special circumstances calling for upward adjustments as well as downward adjustments.[[93]](#footnote-94) Here the PUCO only considered upward adjustments to the rate of return and no downward adjustments.

The PUCO also erred by failing to make a downward adjustment in the return on equity for DP&L’s inadequate service. Under R.C. 4909.154, the PUCO "shall consider the management policies, practices and organization of the public utility" in fixing "just, reasonable, and compensatory rates...."[[94]](#footnote-95)

The seminal case on return on equity is *Bluefield Water Works v. Pub. Serv. Comm.[[95]](#footnote-96)* The United States Supreme Court noted

The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, *under efficient and economical management*, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.[[96]](#footnote-97)

 In the present case, DP&L lacked “efficient and economical management” due to its bad business decision to take on excess debt when AES acquired DPL and not to use the vegetation management revenues in rates for vegetation management purposes.

 The PUCO also takes into account whether economic conditions are especially difficult for consumers as another “special circumstance” for making a downward adjustment to the return on equity (“Based on the harsh economic times as reflected in the testimony of this proceeding and because this marks the Company's fourth application for an increase in rates in just over five years, the Commission determines that the first quartile of Staff's recommended rate of return of 7.73 percent is fair and reasonable….”).[[97]](#footnote-98) We have soaring energy prices, inflation and unemployment.[[98]](#footnote-99) The stock market is crashing.[[99]](#footnote-100) A recession is looming.[[100]](#footnote-101) The PUCO did not take this factor into account, even though economic conditions are very challenging for consumers. The PUCO should have taken the harsh economic conditions into account as a reason for a downward adjustment in the return on equity.

 The PUCO’s award of a 9.999% return on equity to DP&L is also inconsistent with the 9.5% return on equity in *In re Duke Rate Case.[[101]](#footnote-102)* Both cases were decided the same day. DP&L and Duke have adjacent service territories. Both utilities serve a largely urban customer base. The major difference in the financial risk faced by both utilities is DP&L’s self-created financial risk by taking on excessive debt at the time of the merger. Moreover, the PUCO’s award of a 9.999% return on equity for DP&L rewards it for a lack of reliable service, which was inferior to Duke’s.

 The evidentiary hearing in this case concluded on February 7, 2022.[[102]](#footnote-103) Yet DP&L cannot implement the new rates until the PUCO approves a new ESP. The evidentiary hearing in DP&L’s new ESP case will not *begin* until March 6, 2023 – over one year *after* the evidentiary hearing concluded in the present case.[[103]](#footnote-104) The PUCO stated that it “is mindful of AES Ohio’s financial position and *does not discount the additional hardship* that will result from a temporary freeze of distribution rates.”[[104]](#footnote-105) By all appearances, the PUCO compensated DP&L for this “additional hardship” by authorizing a higher return on equity (*i.e*., rate of profit) than was supported by the record. The higher profit seems intended to compensate AES Ohio for the delay in implementing its new rates. This results-oriented approach to decision-making is unjust, unreasonable and unfair to consumers who will be required to pay the resulting higher rates.

# IV. CONCLUSION

 Based on the foregoing, OCC respectfully requests that the PUCO grant rehearing on the issues discussed above.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 13th day of January 2023.

 */s/ John Finnigan*

 John Finnigan

 Assistant Consumers’ Counsel

The PUCO’s e-filing system will electronically serve notice of the filing of this document on the following parties:

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2. S. Min, *Dow closes out its worst day in three months, falls more than 700 points as recession fears grow,* CNBC.com (Dec. 15, 2022). [↑](#footnote-ref-3)
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