**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

|  |  |  |
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| In the Matter of the Application of the Dayton Power and Light Company for Approval of its Plan to Modernize its Distribution Grid.  In the Matter of the Application of the Dayton Power and Light Company for Approval of a Limited Waiver of Ohio Adm. Code 4901:1-18-06(A)(2).  In the Matter of the Application of the Dayton Power and Light Company for Approval of Certain Accounting Methods.  In the Matter of the Application of the Dayton Power and Light Company for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm. Code 4901:1-35-10 for 2018.  In the Matter of the Application of the Dayton Power and Light Company for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm. Code 4901:1-35-10 for 2019.  In the Matter of the Application of The Dayton Power and Light Company for a Finding that its Current Electric Security Plan Passes the Significantly Excessive Earnings Test and the More Favorable in the Aggregate Test in R.C. 4928.143(E). | )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  ) | Case No. 18-1875-EL-GRD  Case No. 18-1876-EL-WVR  Case No. 18-1877-EL-AAM  Case No. 19-1121-EL-UNC  Case No. 20-1041-EL-UNC  Case No. 20-680-EL-UNC |

**MEMORANDUM CONTRA DP&L’S APPLICATION FOR REHEARING**

**BY**

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July 30, 2021 (willing to accept service by e-mail)

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**MEMORANDUM CONTRA DP&L’S APPLICATION FOR REHEARING**

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# I. INTRODUCTION

Despite a utility-friendly and anti-consumer ruling from the PUCO, Dayton Power and Light Company d/b/a AES Ohio (“DP&L”) has applied for rehearing, asking the PUCO to not only affirm its ruling but to also add additional reasons supporting the ruling. As the Office of the Ohio Consumers’ Counsel (“OCC”) explained in its own application for rehearing,[[1]](#footnote-2) the PUCO’s June 16, 2021 Opinion & Order (the “Order”) was unlawful and unreasonable for numerous reasons, including because it denied consumers refunds for DP&L’s significantly excessive profits and approved more than $300 million in continued charges to consumers under DP&L’s Rate Stabilization Charge (“RSC”). The PUCO should deny DP&L’s application for rehearing in its entirety because it should grant OCC’s application for rehearing. If OCC’s application for rehearing is granted and OCC’s recommendations adopted, then DP&L’s application for rehearing would necessarily have to be denied because it is inconsistent with OCC’s.

Regardless, even if the PUCO affirms its Order on rehearing, it should deny DP&L’s application for rehearing. DP&L’s arguments are meritless for the reasons explained below.

# II. ARGUMENT

## A. The PUCO reasonably and lawfully rejected DP&L’s arguments that were harmful to consumers regarding its significantly excessive profits.

As OCC explained in its own application for rehearing, DP&L’s profits in 2018 and 2019 were significantly excessive, and the PUCO was therefore wrong when it ruled that consumers do not deserve a refund.[[2]](#footnote-3) In contrast, DP&L applied for rehearing, arguing that although the PUCO’s ruling was correct, the PUCO should adopt additional reasons to deny refunds to consumers.[[3]](#footnote-4)

According to DP&L, the PUCO should have adopted DP&L’s arguments that (i) amounts that consumers paid under the Distribution Modernization Rider (“DMR”) should be excluded from DP&L’s profits, (ii) DP&L’s equity balance should be artificially increased to account for write-offs that occurred before 2018, (iii) DP&L’s equity balance should be artificially increased to account for a $150 million payments and a $150 “planned” payment from AES to DP&L, even though no such payments were made in the years in question (2018 and 2019), (iv) the PUCO should make adjustments to DP&L’s profits calculation to account for the Tax Cuts and Jobs Act of 2017 and certain property tax adjustments, and (v) when applying the significantly excessive earnings test, the PUCO should have subtracted from DP&L’s 2018 and 2019 profits the hypothetical amount that DP&L would have charged customers under the Rate Stabilization Charge.[[4]](#footnote-5)

As OCC explained in its briefs, these arguments are meritless. Likewise, the PUCO Staff’s witness did not adopt any of these recommendations.[[5]](#footnote-6) The PUCO was correct to reject them.

### 1. The PUCO reasonably and lawfully rejected DP&L’s manipulations of the significantly excessive earnings test, all of which reduce DP&L’s profits on paper only and serve no purpose other than to deny refunds to consumers.

a. The PUCO reasonably and lawfully rejected DP&L’s argument that profits resulting from the DMR should be excluded when assessing whether DP&L’s profits were significantly excessive because DP&L’s argument contradicts binding Ohio Supreme Court precedent.

In a recent case involving Ohio Edison (a FirstEnergy utility), the Court ruled that FirstEnergy’s DMR could not be excluded from its earnings in determining whether the utility had significantly excessive profits under R.C. 4928.143(F):

OCC maintains that the DMR is a provision of the ESP and constitutes an “adjustment” under R.C. 4928.143(F). OCC therefore contends that ... the commission was *required* to consider whether the DMR—as an adjustment to the ESP—resulted in excessive earnings.

OCC is correct.

...

There is no question that the DMR constituted a change in rates when compared to the rates in the electric utility’s preceding rate plan. ... Therefore, the DMR constitutes an “adjustment” under R.C. 4928.143(F) and the commission was *required* to include the DMR when determining whether the plan resulted in excessive earnings.

Accordingly, we hold that the commission’s actions in this case—removing DMR revenue from the calculation used to determine whether the ESP resulted in excessive earnings—violated R.C. 4928.143(F).[[6]](#footnote-7)

DP&L claims that despite this ruling, the PUCO should nonetheless exclude DP&L’s DMR earnings from its 2018 and 2019 profits review, thus artificially lowering DP&L’s profits (return on equity) on paper, which would deny customers any refund.[[7]](#footnote-8) DP&L makes three arguments in its attempt to avoid this Supreme Court precedent. First, DP&L argues that the DMR was not an “earned return” and thus need not be counted toward its profits.[[8]](#footnote-9) Second, DP&L argues that the DMR should be excluded as an “extraordinary and one-time item.”[[9]](#footnote-10) Third, DP&L argues that the DMR should be excluded because it was a “capital charge.”[[10]](#footnote-11)

Broadly speaking, each of these arguments attempts to distinguish DP&L’s DMR from FirstEnergy’s DMR to avoid the conclusion that *Ohio Edison* is binding. But the *Ohio Edison* ruling *is* binding because the PUCO has already ruled that DP&L’s DMR is substantially the same as FirstEnergy’s.

In an earlier Ohio Supreme Court opinion, the Court ruled that FirstEnergy’s DMR was unlawful.[[11]](#footnote-12) Following that ruling, the PUCO asked parties to address whether the Court’s invalidation of FirstEnergy’s DMR would also require DP&L’s DMR to be eliminated.[[12]](#footnote-13) In response, DP&L argued that its distribution modernization rider was different from FirstEnergy’s.[[13]](#footnote-14)

The PUCO rejected DP&L’s arguments, stating that they “miss the forest for the trees.”[[14]](#footnote-15) As the PUCO recognized, FirstEnergy’s and DP&L’s distribution modernization riders were “fundamentally similar,” namely, they were both “nonbypassable riders, established to promote the financial integrity of EDUs.”[[15]](#footnote-16) The PUCO went further, noting that even if DP&L were to modify its DMR, it “would do nothing to address [the] fundamental point” that it is an unlawful charge to promote DP&L’s financial integrity, just like FirstEnergy’s DMR.[[16]](#footnote-17) Accordingly, the PUCO relied on the Supreme Court’s ruling and ordered the elimination of DP&L’s charges to consumers under its DMR.[[17]](#footnote-18) In sum, when the Supreme Court ruled that FirstEnergy’s DMR was unlawful, the PUCO in turn ruled that DP&L’s DMR was also unlawful because the two DMRs were substantially the same.

That same reasoning applies here. The Supreme Court has ruled that FirstEnergy must include its DMR earnings for purposes of the significantly excessive earnings test. That ruling applies to DP&L’s DMR earnings, meaning they must be included in determining whether DP&L had significantly excessive profits. As to DP&L’s specific arguments, each one fails.

Regarding DP&L’s claim that the DMR was not an “earned return,” there is nothing in R.C. 4928.143(F) stating or even suggesting that a utility’s earnings are to be excluded where the utility uses funds to pay its affiliate’s debt. Further, as DP&L’s own witness admitted, “cash is fungible,”[[18]](#footnote-19) so the idea that “DMR” funds were used to pay off debt, while some other funds were used to generate profits for DP&L, is factually unsupportable. The PUCO was right to conclude that the DMR funds were “earned returns” for DP&L.[[19]](#footnote-20)

DP&L also claims that the DMR was an extraordinary and one-time item and thus should be excluded from the SEET. As OCC explained in its brief, the PUCO should reject this claim because it would effectively render the entire SEET meaningless. All ESP charges are limited in duration to the length of the ESP (or shorter), so by DP&L’s logic, every ESP charge in every case would be a “one-time item,” and the entire ESP would be excluded from the profits review.[[20]](#footnote-21) The PUCO properly agreed with OCC’s argument and rejected DP&L’s.[[21]](#footnote-22)

Finally, DP&L claims that the DMR should be excluded from the profits review because it was a “capital charge.”[[22]](#footnote-23) But as OCC witness Dr. Daniel Duann explained, there is no such thing as a “capital charge.” DP&L appears to have made this term up, as it is not a recognized term in economics or finance.[[23]](#footnote-24) Unsurprisingly, therefore, there is no mention of capital charges in R.C. 4928.143(F). Again, the PUCO was right to reject DP&L’s “capital charge” argument, for which there is no legal precedent.[[24]](#footnote-25)

In sum, the PUCO was wrong to deny consumers refunds for DP&L’s significantly excessive profits. It should not make this ruling worse by adopting DP&L’s flawed additional justifications for that conclusion.

b. The PUCO reasonably and lawfully rejected DP&L’s argument that it should artificially inflate its equity balance by $1 billion to reduce its profits (on paper only) in an attempt to deny refunds to consumers.

In its testimony, DP&L argued that the PUCO should add more than $1 billion to its 2018 and 2019 equity balances based on asset write-offs that occurred before 2018.[[25]](#footnote-26) The PUCO did not adopt DP&L’s recommendation.[[26]](#footnote-27) Nor should it on rehearing.

DP&L did not have $1 billion in equity in 2018 and 2019 because those generation assets were written off before 2018. As DP&L witness Malinak explained, DP&L wrote off certain assets between 2012 and 2016.[[27]](#footnote-28) This caused DP&L’s equity to decrease. DP&L, however, recommends that the PUCO undo the write-off on paper by adding more than $1 billion to DP&L’s equity balance for 2018 and 2019. But this is a phantom equity adjustment. DP&L had no such $1 billion in equity in 2018 or 2019—it was written off between 2012 and 2016. Adding it to the 2018 and 2019 equity balance is pure fiction.

The PUCO has not adopted this type of adjustment in the past, instead requiring a utility’s equity balance to be assessed based on the year in question.[[28]](#footnote-29) And DP&L abandoned this argument when it signed the Settlement: DP&L did not include this adjustment when it filed its applications in the 2018 and 2019 SEET Cases, and the Settlement says that DP&L is standing behind those applications.[[29]](#footnote-30)

There is no precedent whatsoever for DP&L’s proposal to add $1 billion to its equity balance that simply did not exist in 2018 or 2019. On rehearing, the PUCO should not adopt DP&L’s meritless arguments.

c. The PUCO reasonably and lawfully rejected DP&L’s proposal to artificially increase its equity balance by $300 million to account for equity investments by AES that did not occur (if they will ever occur at all) until after the end of 2019 and thus are entirely unrelated to DP&L’s 2018 and 2019 profits.

DP&L’s ultimate parent company, AES Corp., invested $150 million in DP&L in 2020. DP&L wants the PUCO to pretend that this investment occurred in 2018 by adding it to DP&L’s equity balance for 2018 and 2019 because this has the effect of reducing (on paper only) DP&L’s profits. AES Corp. *might* invest another $150 million in DP&L in 2021. But AES Corp. has not made a binding commitment to do so, and despite the Settlement having been approved more than a month ago, AES Corp. has not yet made this investment. But DP&L says that the PUCO should nonetheless add this as-yet-nonexistence $150 million investment to its equity balance for 2018 and 2019, again inflating DP&L’s equity and reducing (on paper only) DP&L’s profits for those years. The PUCO rightfully declined to adopt DP&L’s recommendations.[[30]](#footnote-31)

On rehearing, DP&L makes all the same arguments that the PUCO did not find persuasive when it issued the Order. On rehearing, it should again reject DP&L’s make-believe accounting adjustments.

The law, R.C. 4928.143(F), says that the PUCO shall retrospectively consider, each year, whether the utility’s electric security plan resulted in significantly excessive profits. The purpose of the retrospective review is to determine, on an after the fact basis, whether the profits earned under the electric security plan were too high. And the PUCO has consistently looked at electric security plans, year-by-year, assessing the profits attributable to that year—not taking into

account equity investments that might occur after the year in question.[[31]](#footnote-32) There is no basis for the PUCO to depart from the lawful and reasonable approach of evaluating profits based on activity that occurred in the year that is being evaluated.

Further, as with the $1 billion adjustment discussed above, DP&L abandoned this argument when it signed the Settlement: DP&L did not include this adjustment when it filed its applications in the 2018 and 2019 SEET Cases, and the Settlement says that DP&L is standing behind those applications.[[32]](#footnote-33) Even DP&L witness Malinak, the proponent of this $300 million adjustment, previously testified in this very case that equity investments should only be counted in the year they are actually made, not retroactively.[[33]](#footnote-34)

Adopting DP&L’s approach of adding equity based on investments made after the end of the year in review would set a dangerous precedent and fundamentally conflicts with the purpose of the retrospective review. A utility’s parent company could easily manipulate the significantly excessive earnings test by announcing that they “plan” to make an equity investment, thus artificially lowering the utility’s profits during the year under review and thwarting refunds for customers. The PUCO should reject DP&L’s attempt to do so here.

The profits review law requires the PUCO to look at what actually occurred in 2018 and 2019 (the years under SEET review). Either DP&L had significantly excessive profits in those years or it did not. Whether AES made or makes equity investments in 2020 and 2021 does not affect what happened in 2018 and 2019.[[34]](#footnote-35) The PUCO should again reject DP&L’s self-serving recommendation to retroactively give it credit for future equity investments.

d. The PUCO reasonably and lawfully rejected DP&L’s proposal to reduce its earnings by $18 million for a tax adjustment.

DP&L argued that the PUCO should reduce its earnings by $18 million to account for a “tax event” that occurred in 2019 related to the Tax Cuts and Jobs Act of 2017.[[35]](#footnote-36) The PUCO did not adopt this recommendation in the Order.[[36]](#footnote-37) The PUCO should not adopt this argument on rehearing.

As with DP&L’s other proposed adjustments, this $18 million adjustment lowers DP&L’s profits on paper only. DP&L cites no precedent for this type of adjustment. Further, DP&L provided no support for the calculation for the $18 million figure, and as OCC witness Duann testified, this type of adjustment is “a normal part of doing business” for DP&L.[[37]](#footnote-38) Thus, it is not the type of extraordinary event that can be excluded from the SEET.

e. The PUCO reasonably and lawfully rejected DP&L’s proposal to subtract hypothetical Rate Stabilization Charges from DP&L’s 2018 and 2019 profits.

DP&L argues that if its DMR earnings are included in profits, then the PUCO should subtract more than $60 million from earning in 2018 and 2019 in hypothetical Rate Stabilization Charge earnings—earnings DP&L *would have* collected from consumers had the Rate Stabilization Charge been in effect for all of 2018 and 2019.[[38]](#footnote-39) The PUCO rightfully declined to adopt this recommendation.[[39]](#footnote-40)

The PUCO should again reject it on rehearing. As OCC witness Duann explained, DP&L’s argument makes no sense because there were no such Rate Stabilization Charges in 2018, and Rate Stabilization Charges for 2019 were negligible because that charge did not go back into effect until December 19, 2019.[[40]](#footnote-41) Further, RSC revenues have always been included in the SEET, so there is no basis to start excluding them now.[[41]](#footnote-42) And as with DP&L’s other proposed adjustments, DP&L cites no case in which the PUCO has made this type of adjustment.

## B. The PUCO should reject DP&L’s argument that R.C. 4928.143(C)(2)(b) justifies charges to consumers under the Rate Stabilization Charge.

The PUCO ruled that DP&L’s Rate Stabilization Charge is lawful.[[42]](#footnote-43) DP&L agrees with this ruling but nonetheless applied for rehearing, asking the PUCO to adopt additional reasons for concluding that the RSC is lawful.[[43]](#footnote-44) DP&L argues that the Rate Stabilization Charge is lawful because “R.C. 4928.143(C)(2)(b) required the Commission to implement the RSC after [DP&L] terminated its third Electric Security Plan [] and reverted to ESP I, which included the RSC.”[[44]](#footnote-45) The PUCO should deny DP&L’s assignment of error because R.C. 4928.143(C)(2)(b) is inapplicable in this proceeding. And even if it were applicable, DP&L’s argument is wrong: R.C. 4928.143(C)(2)(b) did not require the PUCO to allow charges to consumers under the Rate Stabilization Charge.

### 1. R.C. 4928.143(C)(2)(b) does not apply in this case.

R.C. 4928.143(C)(2)(b) addresses what happens when a utility withdraws from its electric security plan. It says, “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 ... until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.” DP&L did withdraw from ESP III and revert to ESP I—but not in this case.

DP&L’s withdrawal from ESP III occurred in Case No. 16-395-EL-SSO.[[45]](#footnote-46) DP&L’s reversion to ESP I occurred in Case No. 08-1094-EL-SSO.[[46]](#footnote-47) This occurred in December 2019—before the current quadrennial review (Case No. 20-680-EL-UNC) was even filed. Whether R.C. 4928.143(C)(2)(b) required the PUCO to allow DP&L to charge customers under the Rate Stabilization Charge is an issue that was addressed (and continues to be addressed on rehearing) in Case Nos. 08-1094-EL-SSO and 16-395-EL-SSO. In the above-captioned cases, the issues are different.

In the current quadrennial review case (Case No. 20-680-EL-UNC), the PUCO must apply R.C. 4928.143(E), which addresses whether a utility’s electric security plan “continues to be more favorable in the aggregate” than a market rate offer and whether the plan is “substantially likely to provide” the utility with significantly excessive profits. R.C. 4928.143(C)(2)(b) plays no role in that analysis because DP&L’s reversion to ESP I was a prerequisite for the current case being filed in the first place—there would be no quadrennial review had DP&L continued with ESP III. Thus, it makes no sense for DP&L to argue that the PUCO should rely on R.C. 4928.143(C)(2)(b) in the current cases for its conclusion that the Rate Stabilization Charge is lawful.

### 2. The PUCO was not required to revive the Rate Stabilization Charge when DP&L reverted to ESP I.

Even if R.C. 4928.143(C)(2)(b) were applicable here (which it is not), the PUCO should not rely on R.C. 4928.143(C)(2)(b) to rule that the Rate Stabilization Charge is lawful.

First, R.C. 4928.143(C)(2)(b) requires the utility to revert to its most recent “*standard service offer*,” not its most recent “electric security plan.” And under Ohio law, an electric security plan and a standard service offer are not the same. A “standard service offer” has been defined by the General Assembly under R.C. 4928.141. R.C. 4928.141 requires electric distribution utilities to provide a “standard service offer” through either a market rate offer or an electric security plan. Specifically, the statute requires that a utility “shall provide customers, on a comparable and nondiscriminatory basis within its certified territory, a standard offer of all competitive retail electric services necessary to maintain essential electric service to customers, including a firm supply of electric generation service.” That is, a “standard service offer,” as defined under R.C. 4928.141, means the supply of generation.

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

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

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

When the General Assembly provided for continuation of a utility’s “standard service offer” under R.C. 4928.143(C)(2)(b), the PUCO cannot presume that the General Assembly intended to provide for continuation of a utility’s “electric security plan.” “It is to be presumed that each word in a statute was placed there for a purpose.”[[47]](#footnote-48) Under “the basic rules of statutory construction, the words in statutes should not be construed to be redundant, nor should any words be ignored.”[[48]](#footnote-49) Thus, R.C. 4928.143(C)(2)(b) does not require the utility’s “electric security plan” to be continued—only the utility’s “standard service offer,” which does not include the Rate Stabilization Charge.

Second, even if the Rate Stabilization Charge was lawful at the time it was approved as part of ESP I, intervening changes in law have now rendered it unlawful. The PUCO cannot simply ignore these changes in law by allowing DP&L to continue the Rate Stabilization Charge.

In *In re Columbus Southern Power Co.*,[[49]](#footnote-50) decided after ESP I was initially approved, the PUCO had approved $500 million in POLR charges to AEP consumers.[[50]](#footnote-51) The PUCO ruled that these charges were “based on the cost” to the utility of being the provider of last resort.[[51]](#footnote-52) The Court ruled, however, that there was no support for the PUCO’s conclusion that AEP would incur $500 million in costs as the provider of last resort.[[52]](#footnote-53) As the Court stated, “we can find no evidence suggesting that AEP’s POLR charge is related to any costs it will incur.”[[53]](#footnote-54) Likewise, the Court concluded that “the manifest weight of the evidence contradicts the commission’s conclusion that the POLR charge is based on cost.”[[54]](#footnote-55) The PUCO had erred because the Court has previously ruled that the PUCO must “‘carefully consider what costs it is attributing’ to ‘POLR obligations.’”[[55]](#footnote-56) Thus, the Court found that the PUCO abused its discretion and reversed.[[56]](#footnote-57)

On remand, the PUCO rejected AEP’s non-cost-based justification for POLR charges to consumers.[[57]](#footnote-58) The PUCO found that AEP’s use of a financial model was insufficient to justify charges to consumers for alleged POLR costs because it “fails to provide a reasonable measure of the Companies’ POLR costs.”[[58]](#footnote-59)

In another recent ruling, *In re Ohio Edison Co.*,[[59]](#footnote-60) the Ohio Supreme Court overturned the PUCO’s approval of FirstEnergy’s DMR. There, the PUCO had approved a DMR for FirstEnergy “to provide credit support” for FirstEnergy.[[60]](#footnote-61) Despite being called a “distribution modernization rider,” the Court found that none of the DMR funds were required to be used for distribution modernization. To the contrary, the utility would separately recover all distribution modernization costs through another rider, Rider AMI.[[61]](#footnote-62) Thus, the DMR charges to consumers were not in any way related to any costs that FirstEnergy incurred. The Court reversed the PUCO and remanded with an order requiring the PUCO to remove the DMR from FirstEnergy’s electric security plan.[[62]](#footnote-63)

The PUCO recognized this precedent in a recent ruling regarding DP&L’s third electric security plan:

The line of cases from *Columbus S. Power Co.*, 2011-Ohio-1788, to *Ohio Edison* demonstrates that nonbypassable riders, established to promote the financial integrity of EDUs, are unlawful and are not authorized by R.C. 4928.143, the statute creating electric security plans.[[63]](#footnote-64)

Following *Ohio Edison* and similar Supreme Court rulings,[[64]](#footnote-65) the PUCO ordered DP&L to remove its own DMR from its electric security plan because DP&L’s DMR was substantially the same as FirstEnergy’s.[[65]](#footnote-66) That is, in charging consumers under its DMR, DP&L was not collecting any costs that it incurred to provide distribution service.

These intervening Supreme Court and PUCO rulings render the Rate Stabilization Charge unlawful. At the time the PUCO approved the charge in ESP I, these binding rulings did not exist. Now, however, binding precedent prohibits the PUCO from approving a non-cost-based provider of last resort (“POLR”) charge, and it prohibits the PUCO from approving a financial integrity charge. As it currently exists, the RSC is both.

In 2009, the Rate Stabilization Charge was arguably justifiable as a cost-based POLR charge because DP&L in fact owned generation in 2009. But now, there is no basis whatsoever for the $79 million charge to consumers. To the contrary, DP&L offered no evidence that it will spend even a single dollar for out-of-pocket costs associated with being the provider of last resort. This makes sense because when a supplier defaults and a consumer needs default generation service, that service is provided by marketers—not DP&L—through the standard service offer.[[66]](#footnote-67)

Third, even if it were lawful for the PUCO to allow DP&L to revert to ESP I, including the Rate Stabilization Charge, the Settlement separately provides for the continuation of the charge, thus making it again ripe for PUCO review as to its legality. The continuation of the RSC is a term of the Settlement, so the PUCO cannot approve its continuation as part of the Settlement unless the RSC is lawful. And given the binding Supreme Court precedent cited above, it is not. This provides a separate an independent basis for the PUCO to reject the RSC and DP&L’s reliance on R.C. 4928.143(C)(2)(b) (or any other statute) to support it.

# III. CONCLUSION

To protect consumers, the PUCO should grant OCC’s application for rehearing and deny DP&L’s.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission this 30th day of July 2021.

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1. Application for Rehearing by Office of the Ohio Consumers’ Counsel (July 16, 2021) (the “OCC AFR”). [↑](#footnote-ref-2)
2. OCC AFR, Assignment of Error 5. [↑](#footnote-ref-3)
3. Application for Rehearing and Memorandum in Support of the Dayton Power and Light Company d/b/a/ AES Ohio, Memo in Support at 2-14 (July 16, 2021) (the “DP&L AFR”). [↑](#footnote-ref-4)
4. DP&L AFR at 2. [↑](#footnote-ref-5)
5. PUCO Staff Ex. 1 (Buckley Testimony). [↑](#footnote-ref-6)
6. *In re Ohio Edison Co.*, 2020-Ohio-5450, ¶¶ 25-27 (emphasis added). [↑](#footnote-ref-7)
7. DP&L AFR at 3-9. [↑](#footnote-ref-8)
8. DP&L AFR at 3-6. [↑](#footnote-ref-9)
9. DP&L AFR at 6-8. [↑](#footnote-ref-10)
10. DP&L AFR at 8-9. [↑](#footnote-ref-11)
11. *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73 (2019). [↑](#footnote-ref-12)
12. *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, Entry (July 2, 2019). [↑](#footnote-ref-13)
13. Case No. 16-395-EL-SSO, Supplemental Opinion & Order ¶ 94 (November 21, 2019). [↑](#footnote-ref-14)
14. *Id.* ¶ 102. [↑](#footnote-ref-15)
15. *Id.* ¶¶ 107-08. [↑](#footnote-ref-16)
16. *Id.* ¶ 108. [↑](#footnote-ref-17)
17. *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, Supplemental Opinion & Order (November 21, 2019). [↑](#footnote-ref-18)
18. DP&L Ex. 7 (Garavaglia Testimony) at 8. [↑](#footnote-ref-19)
19. Order ¶ 65. [↑](#footnote-ref-20)
20. OCC Reply Brief at 9. [↑](#footnote-ref-21)
21. Order ¶ 65. [↑](#footnote-ref-22)
22. DP&L AFR at 8-9. [↑](#footnote-ref-23)
23. OCC Ex. 5 (Duann Supplemental Testimony) at 16. [↑](#footnote-ref-24)
24. Order ¶ 65. [↑](#footnote-ref-25)
25. DP&L Ex. 2 (Malinak Supplemental Testimony) at 15-16. [↑](#footnote-ref-26)
26. Order ¶¶ 64-69 (adopting the Staff’s recommendations, which did not include adding $1 billion to DP&L’s equity based on the write-offs). [↑](#footnote-ref-27)
27. Tr. Vol. I at 87 (Malinak). [↑](#footnote-ref-28)
28. *See, e.g., In re Determination of the Existence of Significantly Excessive Earnings for 2012 Under the Elec. Sec. Plan of the Dayton Power & Light Co.*, Case No. 13-1495-EL-UNC, Opinion & Order (February 13, 2014); *In re Determination of Significantly Excessive Earnings for 2013 Under the Elec. Sec. Plan of the Dayton Power & Light Co.*, Case No. 14-831-EL-UNC, Opinion & Order (October 1, 2014); *In re Determination of Significantly Excessive Earnings for 2014 Under the Elec. Sec. Plan of the Dayton Power & Light Co.*, Case No. 15-298-EL-UNC, Opinion & Order (December 16, 2015); *In re Determination of the Existence of Significantly Excessive Earnings for 2015 Under the Elec. Sec. Plan of the Dayton Power & Light Co.*, Case No. 16-920-EL-UNC (Opinion & Order September 6, 2017); *In re Applications of the Dayton Power & Light Co. for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm. Code 4901:1-35-10 for 2016 and 2017*, Case Nos. 17-1213-EL-UNC, 18-873-EL-UNC, Opinion & Order (September 6, 2018). [↑](#footnote-ref-29)
29. OCC Ex. 17 (DP&L’s 2018 SEET Application), OCC Ex. 18 (DP&L’s 2019 SEET Application), Joint Ex. 1 (Settlement). [↑](#footnote-ref-30)
30. Order ¶¶ 64-69 (adopting the Staff’s recommendations, which did not include increasing DP&L’s equity balance by $300 million to account for the AES contributions). [↑](#footnote-ref-31)
31. *See, e.g., In re Determination of the Existence of Significantly Excessive Earnings for 2012 Under the Elec. Sec. Plan of the Dayton Power & Light Co.*, Case No. 13-1495-EL-UNC, Opinion & Order (February 13, 2014); *In re Determination of Significantly Excessive Earnings for 2013 Under the Elec. Sec. Plan of the Dayton Power & Light Co.*, Case No. 14-831-EL-UNC, Opinion & Order (October 1, 2014); *In re Determination of Significantly Excessive Earnings for 2014 Under the Elec. Sec. Plan of the Dayton Power & Light Co.*, Case No. 15-298-EL-UNC, Opinion & Order (December 16, 2015); *In re Determination of the Existence of Significantly Excessive Earnings for 2015 Under the Elec. Sec. Plan of the Dayton Power & Light Co.*, Case No. 16-920-EL-UNC (Opinion & Order September 6, 2017); *In re Applications of the Dayton Power & Light Co. for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm. Code 4901:1-35-10 for 2016 and 2017*, Case Nos. 17-1213-EL-UNC, 18-873-EL-UNC, Opinion & Order (September 6, 2018). [↑](#footnote-ref-32)
32. OCC Ex. 17 (DP&L’s 2018 SEET Application), OCC Ex. 18 (DP&L’s 2019 SEET Application), Joint Ex. 1 (Settlement). [↑](#footnote-ref-33)
33. *See* DP&L Ex. 1A (Malinak Initial Testimony) at Exhibit RJM-29 (calculating DP&L’s equity balance for 2019 without adding any of the $300 million in AES equity investments and calculating DP&L’s equity balance for 2020 with only the $150 million investment made that year); Tr. Vol I at 98-99 (Malinak) (confirming this information on the public record). [↑](#footnote-ref-34)
34. *Accord Cincinnati Gas & Elec. Co. v. PUCO*, 86 Ohio St.3d 53 (1999) (rejecting as unlawful the PUCO’s attempt to “impute” revenues into a year in which those revenues did not actually occur). [↑](#footnote-ref-35)
35. DP&L AFR at 13. [↑](#footnote-ref-36)
36. Order ¶¶ 64-69 (adopting the Staff’s recommendations, which did not include the $18 million tax adjustment). [↑](#footnote-ref-37)
37. OCC Ex. 5 (Duann Supplemental Testimony) at 27-28. [↑](#footnote-ref-38)
38. DP&L AFR at 13-14. [↑](#footnote-ref-39)
39. Order ¶¶ 64-69 (adopting the Staff’s recommendations, which did not include subtracting the hypothetical RSC charges). [↑](#footnote-ref-40)
40. OCC Ex. 5 (Duann Supplemental Testimony) at 27-28. [↑](#footnote-ref-41)
41. *Id.* [↑](#footnote-ref-42)
42. Order ¶ 57 (“we find that the RSC charge remains lawful”). [↑](#footnote-ref-43)
43. DP&L AFR, Memo in Support at 15-16. [↑](#footnote-ref-44)
44. DP&L AFR at 2. [↑](#footnote-ref-45)
45. Case No. 16-395-EL-SSO, Finding & Order (December 18, 2019) (approving DP&L’s withdrawal from ESP III). [↑](#footnote-ref-46)
46. Case No. 08-1094-EL-SSO, Second Finding & Order (December 18, 2019) (approving DP&L’s reversion to ESP I). [↑](#footnote-ref-47)
47. *State ex rel. Bohan v. Industrial Com*, 147 Ohio St. 249, 251 (1946). [↑](#footnote-ref-48)
48. *East Ohio Gas Co. v. Pub. Util. Comm*., 39 Ohio St.3d 295, 299 (1988). [↑](#footnote-ref-49)
49. 2011-Ohio-1788. [↑](#footnote-ref-50)
50. 2011-Ohio-1788, ¶¶ 22, 24. [↑](#footnote-ref-51)
51. 2011-Ohio-1788, ¶ 24. [↑](#footnote-ref-52)
52. 2011-Ohio-1788, ¶¶ 24-29. [↑](#footnote-ref-53)
53. 2011-Ohio-1788, ¶ 25. [↑](#footnote-ref-54)
54. 2011-Ohio-1788, ¶ 29. [↑](#footnote-ref-55)
55. 2011-Ohio-1788, ¶ 29. [↑](#footnote-ref-56)
56. 2011-Ohio-1788, ¶ 29 (“Ruling on an issue without record support is an abuse of discretion and reversible error. Therefore, we reverse the provisions of the order authorizing the POLR charge.”). [↑](#footnote-ref-57)
57. *In re the Ohio Power Company*, Pub. Util. Comm. No. 08-917-EL-SSO, Order on Remand (October 3, 2011). [↑](#footnote-ref-58)
58. *Id.* [↑](#footnote-ref-59)
59. 2019-Ohio-2401. [↑](#footnote-ref-60)
60. 2019-Ohio-2401, ¶ 18. [↑](#footnote-ref-61)
61. 2019-Ohio-2401, ¶ 18. [↑](#footnote-ref-62)
62. 2019-Ohio-2401, ¶ 2 (the Court remands “with instruction to remove the DMR from FirstEnergy’s ESP”). [↑](#footnote-ref-63)
63. *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, Supplemental Opinion & Order ¶ 108 (November 21, 2019). [↑](#footnote-ref-64)
64. *See In re Columbus S. Power Co.*, 2011-Ohio-1788; *In re Columbus S. Power Co.*, 2016-Ohio-1608; *In re Dayton Power & Light Co.*, 2016-Ohio-3490. [↑](#footnote-ref-65)
65. *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, Supplemental Opinion & Order ¶¶ 102-110 (November 21, 2019). [↑](#footnote-ref-66)
66. OCC Ex. 2 (Kahal Supplemental Testimony) at 24 (“POLR obligations were shifted to the marketers who bid in competitive auctions to supply the standard service offer to DP&L’s customers”). [↑](#footnote-ref-67)