BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Dayton Power and Light Company for Approval of its Energy Efficiency and Peak Demand Reduction Portfolio Plan.	))))	Case No. 16-649-EL-POR Case No. 16-1369-EL-WVR

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

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The Public Utilities Commission of Ohio ("PUCO") should protect consumers from paying too much for utility-run energy efficiency programs. It has already done so by ordering Ohio utilities to limit (or cap) the amount that they can charge consumers for energy efficiency program costs and utility profits (shared savings).[1] But here, the PUCO, in its September 27, 2017 Order (the "Order"), has undermined its goal of cost containment for consumers. Under the Order, consumers will be made to pay Dayton Power & Light Company ("DP&L") tens of millions of dollars per year in so-called "lost revenues," over and above the capped amount of program costs and utility profits.

Lost revenues charges of this magnitude are unreasonable. They are also unlawful in this case because they violate Ohio Substitute Senate Bill 310, 130th General Assembly ("SB 310"), and because they violate the express terms of a settlement that the PUCO approved in DP&L's previous energy efficiency portfolio case.

[1] *See, e.g., In re Application of Duke Energy Ohio, Inc. for Approval of its 2017-2019 Energy Efficiency & Peak Demand Reduction Program Portfolio Plan,* Case No. 16-576-EL-POR, Opinion & Order (Sept. 27, 2017) (modifying proposed settlement to limit program costs and utility profits to 4.0% of the utility's total revenues).

The PUCO's Order is unlawful, unreasonable, unjust, and unwarranted in the following respects:

Assignment of Error 1: The Order is unreasonable because it approves a settlement that does not benefit customers or the public interest.

Assignment of Error 2: The Order is unlawful because it does not set forth the reasons for the PUCO's decision. This violates R.C. 4903.09 and Ohio Supreme Court precedent.

Assignment of Error 3: The Order is unlawful because it modifies DP&L's previous energy efficiency portfolio, which Ohio Senate Bill 310 expressly prohibits.

Assignment of Error 4: The Order is unlawful and unreasonable because it violates the terms of the approved settlement from DP&L's previous energy efficiency portfolio case, to the detriment of customers who would be charged more in the name of energy efficiency.

Assignment of Error 5: The Order is unlawful and unreasonable because it results in retroactive ratemaking to the detriment of customers who would pay more for energy efficiency.

Assignment of Error 6: The Order is unlawful because it approves DP&L's lost revenues mechanism without any showing that the mechanism "reasonably aligns the interests of the utility and of its customers," as required by R.C. 4928.66(D).

The PUCO should grant rehearing. It should modify the Order to state that DP&L cannot charge customers for lost revenues in 2016 and 2017.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In this case, the PUCO approved a settlement that offers some protection to customers. Under the settlement, DP&L cannot charge customers more than $33.8 million per year in energy efficiency program costs and utility profits. But this is not all that consumers will pay. They will also pay "lost revenues" charges to DP&L, which are over $20 million for 2016. This surcharge is unlawful, unreasonable, unjust, and unwarranted.

II. STANDARD OF REVIEW

After an order is entered, intervenors in a PUCO proceeding have a statutory right to apply for rehearing "in respect to any matters determined in the proceeding."[2] An application for rehearing must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[3]

In considering an application for rehearing, R.C. 4903.10 provides that the PUCO may grant and hold rehearing if there is "sufficient reason" to do so. After such rehearing,

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[2] R.C. 4903.10.

[3] R.C. 4903.10(B). *See also* Ohio Admin. Code 4901-1-35(A).

the PUCO may "abrogate or modify" the order in question if the PUCO "is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted."[4]

The Order is unlawful, unreasonable, unjust, and unwarranted under R.C. 4903.10. The PUCO should grant the Office of the Ohio Consumers' Counsel's ("OCC") application for rehearing. It should abrogate or modify the Order, consistent with OCC's recommendations in this application for rehearing.

III. RECOMMENDATIONS

Assignment of Error 1: The Order is unreasonable because it approves a settlement that does not benefit customers or the public interest.

A. The PUCO's approval of DP&L's lost revenues undermines the protection that customers receive from the approved 4.0% cost cap.

In recent energy efficiency portfolio cases, the PUCO has expressed a concern for the rising costs of Ohio's utility-run energy efficiency programs. In Duke Energy's case, the PUCO amended the utility's proposed settlement to include a 4.0% cost cap, finding that "a cap on EE/PDR program costs and shared savings constitutes a reasonable measure to limit customer exposure to future bill increases" and that the cap would "provide an appropriate limitation on the EE/PDR costs to be recovered from Duke's customers."[5] In AEP Ohio's case, the PUCO approved an unopposed settlement and gave its general views on why a cost cap is good policy:

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[4] R.C. 4903.10(B).

[5] *In re Application of Duke Energy Ohio, Inc. for Approval of its 2017-2019 Energy Efficiency & Peak Demand Reduction Program Portfolio Plan*, Case No. 16-576-EL-POR, Opinion & Order ¶ 46 (Sept. 27, 2017).

> The additional of an annual cost cap is a reasonable response to concerns which have been raised regarding potential increases in the costs of the EE/PDR programs, and the annual cost cap should incent AEP Ohio to manage the costs of the programs in the most efficient manner possible. In light of the importance of the annual cost cap, the Commission notes that we will be reluctant to approve stipulations in other EE/PDR program portfolio cases which do not include a similar cap on EE/PDR program costs.[6]

Here in DP&L's case, there is a 4.0% cost cap under the Settlement. But the protection that customers may receive from that cost cap is severely undermined by the substantial amount of lost revenues that customers can be charged, over and above the cost cap.

The 4% cost cap limits the amount of program costs and shared savings to about $33.8 million per year. Under the Settlement, however, DP&L can charge customers an additional $20 million or more per year in lost revenues.[7] Customers pay these lost revenues charges through DP&L's energy efficiency rider, just as they do program costs and shared savings. Allowing DP&L to charge customers lost revenues of this magnitude undoes the benefits of the cost cap and critically undermines the PUCO's stated goal of protecting consumers from bill increases through the energy efficiency rider.

B. The 2017 Settlement is unreasonable because it will result in DP&L's customers paying one of the highest, if not the highest, rates of lost revenues in the country.

DP&L's claimed lost revenues are considerably out of line with program costs. In a 2015 study, the American Council for an Energy-Efficient Economy surveyed 32 utilities in 17 states and found that the typical utility with a lost revenue mechanism was

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[6] *In re Application of Ohio Power Co. for Approval of its Energy Efficiency & Peak Demand Reduction Program Portfolio Plan for 2017 through 2020*, Case No. 15-574-EL-POR, Opinion & Order ¶ 32 (Jan. 18, 2017).

[7] OCC Ex. 1 (Shutrump Direct) at 6 (citing DP&L's response to OCC INT-34).

permitted to charge customers for lost revenues equal to about 25% of program costs.[8] Among those surveyed, just one charged customers for lost revenues that were more than 60% of program costs.[9] But DP&L's asserted lost revenues are at least **90%** of program costs for 2016.[10] The lost revenues that DP&L would collect under the 2017 Settlement for 2016, therefore, would be one of the highest in the entire country, if not *the* highest.[11] Lost revenues of this magnitude are facially unreasonable. They do not benefit consumers or the public interest. The PUCO should grant rehearing and modify the 2017 Settlement to eliminate or substantially reduce the amount of lost revenues that DP&L can charge customers for.

C. Residential customers are especially harmed by the lost revenues proposal—they will pay over $16 million in lost revenues for residential programs that cost just $8.2 million.

DP&L's lost revenues proposal is especially unfair to residential consumers because they pay the bulk of the lost revenues charges. Residential programs make up just 37% of the total program budget.[12] But residential customers will pay 80% of the lost distribution revenues for 2016.[13] The following chart highlights the disparity in 2016 lost revenues charges to residential and nonresidential customers:

[8] OCC Ex. 1 (Shutrump Direct) at 11.

[9] *Id.* at 11.

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

[11] *Id.* at 10.

[12] DP&L Ex. 3 at 10 ($8,231,790 residential program budget out of $22,434,845 total budget for 2015, which was continued for 2016 under SB 310 and for 2017 under the Settlement).

[13] OCC Ex. 1 (Shutrump Direct) at CS-1, page 16 ($16,006,102 out of $20,096,806).

	Program Costs[14]	Lost Revenues[15]	Lost Revenues as % of Program Costs
Residential	$8.2 million	$16.0 million	194%
Non-Residential	$11.4 million	$4.1 million	36%

Nonresidential customers receive a 36% mark up on programs to pay lost revenues to DP&L, but residential customers receive a **194% markup**. This level of lost revenue surcharges is not just unreasonable—it is unconscionable. The PUCO should find that lost revenues of this magnitude do not benefit customers or the public interest. It should modify the 2017 Settlement to eliminate or substantially reduce the amount of lost revenues that DP&L can charge customers, and especially residential customers.

D. The Order is unreasonable because it does not follow PUCO precedent regarding the utility's burden of proving the need for lost revenues.

It is not a foregone conclusion that an electric utility is entitled to recover every dollar that it may give up as a result of energy efficiency programs. In a 2009 case, AEP Ohio signed a settlement that proposed that the utility charge customers for lost revenues for three vintage years, until rates were approved in another base rate case, or until a decoupling mechanism was implemented.[16]

In AEP's case, IEU-Ohio objected to the proposal on the grounds that the utility "failed to demonstrate that the recovery of lost distribution revenue is necessary to allow [the utility] the opportunity to recover its cost of providing distribution service and a fair and reasonable rate of return."[17] In other words, IEU argued that if the utility can meet its

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[14] DP&L Ex. 3 at 10.

[15] OCC Ex. 1 (Shutrump Direct) at CS-1, page 16.

[16] *In re Application of [AEP Ohio] for Approval of its Program Portfolio Plan*, Case No. 09-1089-EL-POR, Opinion & Order at 13 (Mar. 13, 2010) (the "2010 AEP Order").

[17] 2010 AEP Order at 24.

revenue requirement and earn a fair and reasonable rate of return without charging customers for lost revenues, then the utility cannot claim that it has been harmed by the savings customers achieve under energy efficiency programs. The PUCO agreed with IEU: "the record fails to establish what revenue is necessary to provide AEP-Ohio with the opportunity to recover its costs and to earn a fair and reasonable return."[18] Thus, the PUCO found that even AEP's proposed three-year limit on lost revenues was not justified and it reduced the period to less than one year.[19]

As in AEP Ohio's case, DP&L has not provided any evidence that its energy efficiency programs are causing it to be unable to meet its revenue requirement or to earn a fair and reasonable rate of return. Further, DP&L's proposal is even broader than AEP's was because it permits DP&L to collect lost revenues not just for three vintage years but for an unlimited amount of time.[20] The PUCO should follow the precedent it set in AEP Ohio's case—as the Ohio Supreme Court has instructed it to do[21]—and should protect customers from excessive lost revenues charges. The PUCO should not authorize DP&L to charge customers lost revenues without a clear showing that DP&L is unable to meet its revenue requirement plus a fair and reasonable rate of return without such lost revenues. And even then, lost revenues should be limited to no more than three vintage

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[18] *Id.* at 26.

[19] *Id.*

[20] Joint Ex. 1 § II.A. iv.

[21] *See In re Duke Energy Ohio, Inc.*, 2017-Ohio-5536 ¶ 23 (2017) ("We have instructed the commission to respect its own precedents in its decisions to assure the predictability which is essential in all areas of law, including administrative law.") (citation omitted).

years or the life of the measure (whichever is shorter),[22] not the unlimited number of years that DP&L proposes.

Assignment of Error 2: The Order is unlawful because it does not set forth the reasons for the PUCO's decision. This violates R.C. 4903.09 and Ohio Supreme Court precedent.

The Order fails to explain the PUCO's reasons for rejecting OCC's argument that DP&L should not be permitted to charge customers millions of dollars in lost revenues for 2016 and 2017. This violates R.C. 4903.09 and Ohio Supreme Court precedent.

By law, the PUCO is required to file a written opinion "settling forth the reasons prompting the decisions arrived at."[23] As interpreted by the Ohio Supreme Court, this means that PUCO orders must be sufficiently detailed "to enable the court to make its review as to lawfulness and reasonableness."[24]

Recently, in *In re Application of Columbus Southern Power Co.*,[25] the utility argued that the PUCO failed to address its arguments regarding the proper application of the significantly excessive earnings test. The Supreme Court held that the PUCO is required to respond to parties' arguments and explain why it agrees or disagrees with them: "The commission never offered a response to AEP's claims and thus failed to explain its decision. This was error."[26]

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[22] OCC Ex. 1 (Shutrump Direct) at 12:17-21.

[23] R.C. 4903.09 (emphasis added).

[24] *MCI Telecom. Corp. v. PUCO*, 32 Ohio St. 3d 306, 312 (1987).

[25] 147 Ohio St. 3d 439 (2016).

[26] *Id.* ¶ 66.

DP&L's current case is indistinguishable. In its post-hearing briefs, OCC explained why DP&L's proposed lost revenue charges for 2016 and 2017 (i) are unlawful, and (ii) do not benefit customers or the public interest.

OCC argued that DP&L's proposed 2016 lost revenues charges are unreasonable because they will nearly double the cost of the programs for customers, which means that DP&L's customers pay one of the highest—if not *the* highest—lost revenue rates in the country.[27] The Order did not address this argument.

OCC argued that DP&L's proposed lost revenues are unreasonable because there is no cap on the annual amount charged to customers and no limit on the number of years that DP&L can charge customers for lost revenues.[28] The Order did not address this argument.

OCC argued that, contrary to DP&L's claim, neither the Ohio Revised Code nor the PUCO's rules *require* the PUCO to approve a utility's request to charge customers for lost revenues.[29] The Order did not address this argument.

OCC argued that it was not unfair to DP&L to deny lost revenues for 2016 because DP&L had the option to request modification of its portfolio under SB 310 but chose not to.[30] DP&L argued that it would be unjust and unreasonable for customers to benefit from DP&L's programs in 2016 while not allowing DP&L to recover lost revenues.[31] The PUCO addressed this argument by restating DP&L's position and

[27] OCC Initial Brief at 11-13.

[28] OCC Initial Brief at 7-11.

[29] OCC Reply Brief at 4-6.

[30] OCC Initial Brief at 21-22.

[31] DP&L Reply Brief at 18.

summarily concluding: "We agree."[32] But the PUCO did not explain its reasoning. A simple "we agree" provides no insight into the PUCO's decision-making and does not comply with R.C. 4903.09 or Ohio Supreme Court precedent.

OCC argued that DP&L's proposed lost revenues charges for 2016 violate SB 310 because SB 310 prohibited modifications to DP&L's previous energy efficiency portfolio, and approving lost revenues for 2016 constitutes a modification.[33] As OCC explained, the Order modifies the previous portfolio not once, but twice. First, it modifies the portfolio by permitting lost revenues after December 31, 2015.[34] Second, it modifies the portfolio by increasing the cap on lost revenues above the $72 million amount that OCC and DP&L negotiated (and which the PUCO approved).[35] The Order does not address these arguments, but instead provides a single conclusory sentence: "We are not persuaded by the evidence in the record that the $72 million cost cap on recovery of lost distribution revenues negotiated for DP&L's 2013-2015 Program Portfolio should automatically apply to any subsequent lost distribution revenues by virtue of the Company's election to extend its Second Portfolio Plan through 2016 under S.B. 310."[36]

The Order does not attempt to interpret SB 310, does not attempt to interpret the language of the approved stipulation from DP&L's 2013 portfolio case, and does not otherwise provide any evaluation of OCC's and DP&L's respective positions. R.C. 4903.09 and Ohio Supreme Court precedent require the PUCO to provide not just its bare

[32] Order ¶ 51.

[33] OCC Initial Brief at 18-21.

[34] Order ¶ 52. 2017 Settlement at 11.

[35] Order ¶ 52.

[36] Order ¶ 52. The PUCO separately addressed OCC's retroactive ratemaking argument with slightly more detail regarding its reasoning. *See* Order ¶ 51.

conclusions but an explanation of *why* it reached those conclusions. The Order does not satisfy this requirement. The PUCO should grant rehearing.

Assignment of Error 3: The Order is unlawful because it modifies DP&L's previous energy efficiency portfolio, which Ohio Senate Bill 310 expressly prohibits.

The PUCO is a creature of statute and must follow the laws that the General Assembly enacts.[37] The Order does not do so—it violates SB 310. Thus, the PUCO should grant rehearing.

When SB 310 froze Ohio's energy efficiency mandates for 2015 and 2016, the General Assembly gave each utility two options. The utility could (i) continue its then-current programs, or (ii) request PUCO approval to modify its portfolio for 2015 and 2016.[38] DP&L chose to continue its portfolio (the "2013 Portfolio") under the first option.[39]

Under the first option, DP&L was not permitted to make any modifications to its portfolio of programs. SB 310 makes this clear not once, but twice. First, under SB 310 § 6(A), DP&L was required to continue its programs "<u>with no amendments to the plan</u>, for the duration that the Public Utilities Commission originally approved."[40] Thus, under this provision, DP&L's programs continued through the end of 2015 without modification. Second, under SB 310 § 6(D), DP&L's portfolio was automatically continued through the end of 2016 "<u>with no amendments to the plan</u>."[41] There is no

[37] *See, e.g., Columbus S. Power Co. v. Public Utils. Comm'n*, 67 Ohio St. 3d 535, 537 (1993) ("It is axiomatic that the PUCO, as a creature of statute, may exercise only that jurisdiction conferred upon it by the General Assembly.").

[38] SB 310 § 6(A).

[39] Joint Ex. 1 at 5.

[40] Emphasis added.

[41] Emphasis added.

leeway here: DP&L opted to continue its portfolio for 2015 and 2016 and its portfolio is not permitted to be amended under SB 310.

Yet now, two years after SB 310 became effective, the PUCO has retroactively modified DP&L's 2013 Portfolio by allowing DP&L to charge customers over $20 million in lost revenues for 2016.

The stipulation regarding the 2013 Portfolio, which the PUCO approved,[42] contains several references to the year 2015, including:

- "For the 2014 and 2015 Plan years, DP&L agrees to source 100% of the customer funded Residential Low-Income Affordability Program to OPAE."[43]

- "DP&L will reserve from its business programs budgets $75,000 per year for the 2014 and 2015 program years for the Ohio Hospital Association to conduct hospital energy audits, promote energy efficiency and DP&L programs to its members, and conduct energy efficiency training."[44]

- "DP&L agrees to provide PWC $200,000 annually for the 2014 and 2015 Plan years from its Pilot Program to deliver customer funded weatherization and energy efficiency services to low income customers."[45]

- "DP&L agrees to allocate a minimum of ... 20% of the annual Residential Lighting Program incentive budget to incentivize LED lighting for the 2015 program year."[46]

There is no dispute that SB 310, by continuing DP&L's portfolio without modification for 2016, also continued each of these obligations for 2016. But now, the

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[42] *In re Application of the Dayton Power & Light Co. for Approval of its Energy Efficiency & Peak Demand Reduction Program Portfolio Plan for 2013 through 2015*, Case No. 13-833-EL-POR, Opinion & Order at 5 (Dec. 4, 2013) (the "2013 Order").

[43] Case No. 13-833-EL-POR, Stipulation & Recommendation at 5 (Oct. 2, 2013) (the "2013 Settlement), attached as Exhibit CS-7 to OCC Ex. 1 (Shutrump Direct).

[44] 2013 Settlement at 5-6.

[45] 2013 Settlement at 8.

[46] 2013 Settlement at 10.

PUCO makes a special exception for one other 2013 Settlement term that refers to 2015—and in doing so undoes the cap on lost revenues. Under the 2013 Settlement, "DP&L will collect no more than $72 million dollars total of lost distribution revenues related to its first energy efficiency portfolio (approved in Case No. 08-1094-EL-SSO) and its second portfolio (Case No. 13-833-EL-POR) through December 31, 2015."[47] So while all other obligations for 2015 carry through to 2016, this one does not. Instead, the PUCO has ruled that the $72 million cap on lost revenues does not continue to apply through the end of 2016.

This cherry-picking violates SB 310. Again, SB 310 continued DP&L's 2015 portfolio with no modifications for 2016. That's why the provisions related to OPAE, OHA, PWC, and LED lighting all continued to be effective for 2016. Just the same, the $72 million cap on lost revenues must be carried through for 2016. DP&L cannot have it both ways. DP&L wants to interpret SB 310 to mean that it can continue to collect lost revenues for 2016 because it was permitted to collect them in 2015, but DP&L wants the $72 million cap deleted. This selective and inconsistent interpretation is unreasonable.

Any ruling that allows DP&L to collect more than $72 million in lost revenues through December 31, 2016 constitutes an unlawful modification to DP&L's 2013 portfolio. And because DP&L already collected the full $72 million before the end of 2015,[48] the PUCO must find that DP&L is entitled to no lost revenues for 2016.

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[47] 2013 Settlement at 12-13.

[48] *See* DP&L Reply Brief at 17 (noting that DP&L reached the $72 million maximum in late 2015).

Assignment of Error 4: The Order is unlawful and unreasonable because it violates the terms of the approved settlement from DP&L's previous energy efficiency portfolio case, to the detriment of customers who would be charged more in the name of energy efficiency.

The Order also contradicts the plain language of the 2013 Settlement, which the PUCO approved. The 2013 Settlement provides:

> DP&L agrees that the lost revenue cap totaling $72 million over the seven-year period ending December 31, 2015 as established in Case No. 08-1094-EL-SSO will continue to apply over the term of the 2013-2015 Program Portfolio. This means that DP&L will collect no more than $72 million dollars [sic] of lost distribution revenues related to its first energy efficiency portfolio (approved in Case No. 08-1094-EL-SSO) and its second portfolio (Case No. 13-833-EL-POR) through December 31, 2015.
>
> If the Commission does not authorize collection of lost distribution revenues from customers relating to DP&L's First Energy Efficiency Portfolio (approved in Case No. 08-1094, et al.) or Second Energy Efficiency Portfolio (Case No. 13-833-EL-POR) after a hearing held for DP&L's Third Energy Efficiency Portfolio Application, the Signatory parties agree that DP&L shall not collect lost distribution revenues related to its First Energy Efficiency Portfolio or Second Energy Efficiency Portfolio beyond December 31, 2015.[49]

The key language here is that DP&L cannot charge customers for any lost revenues after December 31, 2015 unless the PUCO authorizes them after a hearing on DP&L's third energy efficiency portfolio application. The third energy efficiency portfolio application is the application that DP&L filed in this case on June 15, 2016.[50] But the PUCO did not hold a hearing on that application.

Instead, DP&L effectively withdrew the application and replaced it with a settlement that continues DP&L's <u>second</u> energy efficiency portfolio for one more year. As the 2017 Settlement reads: "For 2017, DP&L will continue the energy efficiency

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[49] 2013 Settlement at 12-13.

[50] DP&L Ex. 2 (the "2016 Application").

programs as set forth in DP&L's 2015 program budget filed with its second Energy Efficiency Portfolio Plan, except as modified by the terms and provisions contained within this Stipulation and Recommendation."[51] When the Attorney Examiner held a hearing in this case, it was not a "hearing held for DP&L's Third Energy Efficiency Portfolio Application," as would be required for any approval of lost revenues beyond December 31, 2015.

DP&L abandoned the third energy efficiency portfolio application in its entirety and instead opted to continue its second energy efficiency portfolio for one more year. Thus, the Order approves lost revenues after December 31, 2015 without the requisite "hearing held for DP&L's Third Energy Efficiency Portfolio Application." This warrants rehearing and modification of the 2017 Settlement to eliminate approval of lost revenues after December 31, 2015.

Assignment of Error 5: The Order is unlawful and unreasonable because it results in retroactive ratemaking to the detriment of customers who would pay more for energy efficiency.

A. The Order violates Ohio Supreme Court precedent.

The PUCO cannot authorize a utility to charge higher future rates to make up for past losses.[52] But this is precisely what the Order does. The Order was entered in September 2017, yet it authorizes DP&L to charge customers for losses from 2016. These losses don't even pertain to the portfolio in this case (which is for 2017 only), and some of them occurred before DP&L even filed its application in this case (June 15, 2016).

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[51] 2017 Settlement § I.A (emphasis added). *See also* DP&L Initial Brief at 9 ("The 2016 Stipulation represents that one year extension of the Company's already existing energy efficiency programs ....") (emphasis added).

[52] *Lucas Cnty. Comm'rs v. PUCO*, 80 Ohio St. 3d 344, 348 (1997) ("retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme").

The fundamental rule against retroactive ratemaking has been recognized in the State of Ohio for decades, including by the Ohio Supreme Court in *Keco*[53] in 1957, *Lucas County*[54] in 1997, and more recently in 2011 in *Columbus Southern.*[55] But here, the PUCO allows DP&L to charge customers higher future rates through DP&L's energy efficiency rider to make up for alleged "lost revenues" from 2016.[56] This is textbook retroactive ratemaking, which the PUCO cannot allow.

Consistent with *Keco* and subsequent Ohio Supreme Court case law, the PUCO cannot authorize a utility to retroactively recover past losses. In *Columbus Southern*, the utility sought a rate increase effective January 2009, but the PUCO did not issue an order granting the increase until mid-March of that year.[57] The PUCO, however, permitted the utility to recover the full amount of the increase as though the higher rates had been in effect as of January 1, 2009. It accomplished this by setting the utility's rates at a level that would allow it to recover 12 months of rate increases (*i.e.*, January through December 2009) in a nine-month period (April through December 2009).[58]

The Ohio Supreme Court ruled that this was retroactive ratemaking.[59] As the Court explained, the PUCO effectively permitted the utility to recover losses from January, February, and March 2009—that is, losses the utility suffered *before* the PUCO's

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[53] *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 259 (1957).

[54] 80 Ohio St. 3d 344.

[55] *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 514-15 (2011).

[56] Joint Ex. 1 § II.A ("DP&L will be permitted to recover lost distribution revenues incurred during 2016").

[57] 67 Ohio St. 3d at 514.

[58] *Id.*

[59] *Id.*

order approving the rate increase.[60] This violated *Keco* and the rule against retroactive ratemaking.[61] The Ohio Supreme Court has established clear precedent: a utility cannot charge customers for losses that the utility incurred prior to the entry of the order approving those charges.

The Order violates this precedent. It authorizes DP&L to charge customers for distribution revenues that DP&L purportedly lost as a result of its energy efficiency programs in 2016.[62] But the 2017 Settlement was not even filed until December 13, 2016, and the Order was not entered until September 27, 2017. An order issued in September 2017 cannot authorize DP&L to increase customer rates based on losses that occurred from January through December 2016. This is contrary to the rule set forth in *Columbus Southern* and the clear prohibition on retroactive ratemaking established in *Keco* and *Lucas County*.

B. R.C. 4928.66 does not authorize the PUCO to engage in retroactive ratemaking.

Without further explanation, the Order states: "OCC's argument regarding retroactive ratemaking ignores the Commission's statutory authority granted through R.C. 4928.66 to establish a recovery mechanism under Ohio Adm. Code 4901:1-39-07(A)."[63] But R.C. 4928.66 does not authorize the PUCO to engage in retroactive ratemaking.

In fact, R.C. 4928.66 says very little at all about ratemaking. R.C. 4928.66(D) authorizes the PUCO to establish rules "regarding the content of an application by an electric distribution utility for commission approval of a revenue decoupling

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[60] *Id.* at 515.

[61] *Id.*

[62] Joint Ex. 1 § II.A.

[63] Order ¶ 51.

mechanism." It also provides that the PUCO "may approve an application under this division if it determines both that the revenue decoupling mechanism provides for the recovery of revenue that otherwise may be foregone by the utility as a result of or in connection with the implementation by the electric distribution utility of any energy efficiency or energy conservation programs and reasonably aligns the interests of the utility and of its customers in favor of those programs."

This language does not save the PUCO from its unlawful retroactive ratemaking in this case. Under Ohio law, a statute is "presumed to be prospective in its operation unless expressly made retrospective."[64] To overcome this presumption of prospective application, the statute must "clearly proclaim" its retroactive application.[65] R.C. 4928.66(D) does not "clearly proclaim" its retroactive application. It says only that the PUCO can establish rules and that it can approve a revenue decoupling mechanism. Approval of a revenue decoupling mechanism can be done on a forward-looking basis, just like any other ratemaking that the PUCO is authorized to engage in. Nothing in the plain language of R.C. 4928.66(D) states or even remotely suggests that it creates an exception to the rule that statutes apply prospectively or the decades old Ohio Supreme Court precedent against retroactive ratemaking.

What's more, the PUCO's own rule—which it cites in the Order in rejecting OCC's retroactive ratemaking argument—is explicitly forward looking. The Order notes that the PUCO has established a rule for the utility's recovery of energy efficiency costs,

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[64] R.C. 1.48.

[65] *Hyle v. Porter*, 117 Ohio St. 3d 165, 167 (2008) ("Pursuant to R.C. 1.48, if the statute is silent on the question of its retroactive application, we must apply it prospectively only. In order to overcome the presumption that a statute applies prospectively, a statute must 'clearly proclaim' its retroactive application.").

Ohio Administrative Code 4901:1-39-07(A). This rule reads: "With the filing of its proposed program portfolio plan, the electric utility may submit a request for recovery of an approved rate adjustment mechanism, commencing after approval of the electric utility's program portfolio plan, of costs due to electric utility peak-demand reduction, demand response, energy efficiency program costs, appropriate lost distribution revenues, and shared savings."[66] The Order, however, would allow DP&L to recover lost revenues commencing before approval of DP&L's 2017 Settlement. This is inconsistent with the PUCO's rule and constitutes retroactive ratemaking.

C. The Ohio Supreme Court's decision in *River Gas* is distinguishable and does not authorize the PUCO to engage in retroactive ratemaking here.

The Order rejects OCC's retroactive ratemaking argument in part because, according to the PUCO: "The Ohio Supreme Court has held that the prohibition against retroactive ratemaking does not apply where there is an established recovery mechanism that allows the utility to pass variable costs directly to customers."[67] But this description of the Supreme Court's ruling is over-simplified and fails to recognize that *River Gas* is distinguishable from DP&L's current case.

The Supreme Court did not rule in *River Gas* that the retroactive ratemaking principle is categorically inapplicable to variable rate mechanisms. In *River Gas*, the Supreme Court addressed the utility's fuel cost adjustment rate mechanism.[68] The fuel cost mechanism was, as the court described, "varied without prior approval of the

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[66] Ohio Adm. Code 4901:1-39-07(A) (emphasis added).

[67] Order ¶ 51 (citing *River Gas Co. v. Pub. Utils. Comm'n*, 69 Ohio St. 2d 509 (1982)).

[68] *River Gas*, 69 Ohio St. 2d at 513.

commission."[69] But crucially, the variable rate mechanism remained subject to subsequent review by the PUCO. The Supreme Court found that the PUCO could audit the fuel cost adjustment charges and adjust the rate after the fact to account for any past errors.[70] In *River Gas*, there was no dispute that the utility could charge customers for fuel costs; the only dispute was about how much. This is markedly different from DP&L's current case.

Here, the dispute is not about the PUCO's ability to review the *amount* that DP&L is charging customers for lost revenues. Rather, the dispute is about the PUCO's ability to authorize DP&L to charge customers for an entire category of charges that have never before been approved for 2016. This would be akin to the PUCO, in *River Gas*, retroactively authorizing the utility to charge customers for a new type of charge through its fuel cost adjustment rate mechanism. In *River Gas*, the Ohio Supreme Court did not rule that the PUCO can retroactively authorize new types of charges as long as those charges are inserted into a variable rate mechanism. It simply ruled that variable rate mechanisms remain subject to audit and subsequent review by the PUCO. *River Gas* might apply if, in a future case, the PUCO were to audit DP&L's lost revenue charges and ultimately determine that they were too high, thereby justifying a disallowance for the benefit of customers. But it does not apply now to the PUCO's unlawful retroactive approval of DP&L's lost revenue charges for 2016.

[69] *Id.*

[70] *Id.* at 513-15.

D. The Order constitutes ratemaking.

Seemingly in response to OCC's retroactive ratemaking arguments, the Order states that "this Commission's approval of an accounting modification, such as a deferral, does not constitute ratemaking and, thus, does not violate the rule against retroactive ratemaking."[71] It is not clear how this applies to the PUCO's decision to approve the 2017 Settlement because the 2017 Settlement does not seek any accounting modifications or deferrals. Indeed, the 2017 Settlement specifically contemplates that approval will result in a modification to DP&L's energy efficiency tariff so that customers can be charged for lost revenues.[72] This is not an accounting modification or deferral—it is ratemaking.

Assignment of Error 6: The Order is unreasonable because it approves DP&L's lost revenues mechanism without any showing that the mechanism "reasonably aligns the interests of the utility and of its customers," as required by R.C. 4928.66(D).

In the Order, the PUCO concludes that it can approve the proposed lost revenues mechanism pursuant to its ratemaking authority under R.C. 4928.66.[73] Though not stated in the Order, it appears that the PUCO is referring to R.C. 4928.66(D).[74] Under R.C. 4928.66(D), the PUCO has the authority to "establish rules regarding the content of an application by an electric distribution utility for commission approval of a revenue decoupling mechanism." The PUCO can only approve such an application if the decoupling mechanism "reasonably aligns the interests of the utility and its customers."[75]

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[71] Order ¶ 51.

[72] 2017 Settlement at 11.

[73] Order ¶ 51.

[74] R.C. 4928.66 contains only two provisions that are even arguable related to ratemaking. R.C. 4928.66(D) is one, and the other is R.C. 4928.66(A)(2)(c). R.C. 4928.66(A)(2)(c) pertains to mercantile customer exemptions from energy efficiency charges, so it clearly does not apply to OCC's arguments regarding residential customer charges for lost revenues.

[75] R.C. 4928.66(D).

The signatory parties to the 2017 Settlement submitted the testimony of just two witnesses: PUCO Staff witness Kristen Braun and DP&L witness Tyler Teuscher. Ms. Braun does not mention lost revenues at all in her testimony.[76] And Mr. Teuscher merely describes the basic terms of the 2017 Settlement: "DP&L will be permitted to recover lost distribution revenues incurred during 2016 and beyond" and "lost distribution revenues will likewise be recovered through the EER."[77] Neither witness made any attempt to explain how the proposed lost revenues would in any way "reasonably align the interests" of DP&L and its customers. To the contrary, DP&L's and its customers' interests could not be less aligned: customers pay $20 million in lost revenues and get nothing in return, and DP&L gets the $20 million from its customers. The PUCO should conclude that DP&L has not met its burden of proving that its proposed lost revenues mechanism complies with the law and should grant rehearing to remove lost revenues from the 2017 Settlement.

IV. CONCLUSION

The Order is unlawful in several regards. First, it modifies DP&L's previous energy efficiency portfolio in violation of SB 310. Second, it contradicts the express terms of the approved settlement from DP&L's previous energy efficiency portfolio case. Third, it results in unlawful retroactive ratemaking. Fourth, it approves lost revenues charges that do not align the interests of DP&L and its customers. And fifth, it does not set forth the reasons for the PUCO's decisions, as required by R.C. 4903.09 and Ohio Supreme Court precedent.

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[76] PUCO Staff Ex. 1 (Braun Direct).

[77] DP&L Ex. 1 (Teuscher Direct) at 4.

The Order is also unreasonable. It is unreasonable because it undermines the PUCO's stated goal of limiting annual charges to consumers for energy efficiency. It is unreasonable because it will result in DP&L's customers paying one of the highest lost revenues rates in the country (if not the highest). It is unreasonable because it allows DP&L to charge residential customers over $16 million in lost revenues for 2016 as compared to just $8 million in program costs. And it is unreasonable because DP&L has not shown that energy efficiency programs are in fact hindering it from meeting its revenue requirement plus a reasonable rate of return.

The PUCO should grant rehearing and should modify the 2017 Settlement to state that customers shall not pay lost revenues for 2016 and 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was served on the persons stated below via electronic transmission, this 27th day of October 2017.

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