

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	)	
the Dayton Power and Light Company for	)	Case No. 16-0395-EL-SSO
Approval of its Electric Security Plan.	)	
	)	
In the Matter of the Application of the	)	
Dayton Power and Light Company for	)	Case No. 16-0396-EL-ATA
Approval of Revised Tariffs.	)	
	)	
In the Matter of the Application of the	)	
Dayton Power and Light Company for	)	Case No. 16-0397-EL-AAM
Approval of Certain Accounting Authority	)	
Pursuant to Ohio Rev. Code § 4905.13.	)	

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**SUPPLEMENTAL BRIEF FOR ENDING DP&L'S CHARGE TO CONSUMERS  
FOR ITS SO-CALLED DISTRIBUTION MODERNIZATION RIDER AND FOR  
MAKING THE CHARGE SUBJECT TO REFUND  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

The Public Utilities Commission of Ohio (“PUCO”) should order Dayton Power and Light (“DP&L”) to immediately stop charging consumers for its Distribution Modernization Rider (“DMR” or “DP&L’s charge”). But if the PUCO allows DP&L to continue collecting the charge from consumers, the PUCO should make DP&L’s charge subject to refund. Refundability of the charge will protect consumers in the event the Supreme Court of Ohio (“Court”) or the PUCO later finds the charge to be improper. The PUCO should not repeat the recent travesty of justice for consumers regarding FirstEnergy’s nearly identical charge that the Supreme Court found to be unlawful. There, FirstEnergy walked away with nearly a half-billion dollars of improper, so-called distribution modernization charges. FirstEnergy didn’t have to refund its charges to

consumers, because the PUCO declined to make the charges subject to refund. DP&L's customers have already paid approximately \$175 million (about \$8.75 million monthly) for the charge since November 1, 2017. And these substantial charges are being paid by consumers in DP&L's service territory where approximately 35.5% of Dayton's residents are at the poverty level, 30,000 DP&L customers are on Percentage of Income Payment Plans, and another 187,000 customers were unable to pay their electric bills and were required to be on a PUCO-ordered payment plan to prevent loss of service.<sup>1</sup>

In its *Ohio Edison* decision, the Court held that FirstEnergy's nearly identical Distribution Modernization Rider ("FirstEnergy's charge") was unlawful because it was *not* authorized by R.C. 4928.143(B)(2)(h).<sup>2</sup> It was unlawful because the PUCO did not require FirstEnergy to spend any funds from the charge on grid-modernization – its collection of funds was not "conditioned upon completion" of any requirement.<sup>3</sup> It was also ruled unlawful because it did not protect consumers who are paying FirstEnergy's charge.<sup>4</sup>

DP&L's charge to customers is nearly identical to FirstEnergy's. Like FirstEnergy, DP&L is not required to spend a penny on grid-modernization – its receipt of funds from the charge is not "conditioned upon the completion" of any requirement.<sup>5</sup> Like FirstEnergy, DP&L's charge is not subject to adequate consumer protections.

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<sup>1</sup> Supplemental Direct Testimony of James D. Williams (OCC Ex. 13) filed March 29, 2017 at 12:13-13:18.

<sup>2</sup> *In re Application of Ohio Edison Co.*, Slip Opinion No. 2019-Ohio-2401.

<sup>3</sup> *Id.* at ¶¶ 14-19.

<sup>4</sup> *Id.* at ¶¶ 20-29.

<sup>5</sup> *See* Opinion and Order at 26-27 (Oct. 20, 2017).

Under the Court's recent decision, DP&L's charge is unlawful. To protect DP&L's nearly 460,000 residential consumers, the PUCO should immediately end DP&L's charge. At the least, the PUCO should protect consumers by making DP&L's charge subject to refund.

## **II. STATEMENT OF THE CASE**

This case began in February 2016 with DP&L's application to fulfill its obligation to provide a standard service offer with an electric security plan.<sup>6</sup> In its application, DP&L proposed a charge to customers ("OVEC subsidy rider") to subsidize the costs of producing power at two 1950s era coal plants in which it has interests (the OVEC units). DP&L's charge for credit support was also proposed. The Office of the Ohio Consumers' Counsel ("OCC") has demonstrated before the PUCO that customers should be protected from paying these charges.

On March 14, 2017, several parties, including IGS, submitted an Amended Stipulation ("Settlement") for approval to the PUCO.<sup>7</sup> Under the Settlement, the OVEC subsidy rider would be bypassable – shopping customers would not pay it.<sup>8</sup> The Settlement includes the DMR charge.

On October 20, 2017, the PUCO modified the March 14, 2017 Settlement and approved the OVEC subsidy rider and the DMR charge over several objections, including OCC's objection to making customers pay any subsidy charge for the OVEC coal plants and credit support. In modifying the Settlement, the PUCO made the OVEC subsidy rider

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<sup>6</sup> See DP&L's Application (February 22, 2016).

<sup>7</sup> See *Amended Stipulation and Recommendation*, March 14, 2017 ("Settlement").

<sup>8</sup> Settlement at 13.

non-bypassable and ordered DP&L to charge the rate to all customers, shopping and non-shopping alike.<sup>9</sup> The PUCO agreed with OCC that the OVEC subsidy rider should be non-bypassable because under a bypassable rider there would be a potential for escalating bill impacts to standard service offer customers as shopping increases.<sup>10</sup>

Several parties, including OCC, sought rehearing on the PUCO's modification of the Settlement but the PUCO denied them.<sup>11</sup> On October 19, 2018, and under Provision XI(5) of the Settlement, IGS filed a Notice of Withdrawal from the Amended Stipulation and Recommendation.<sup>12</sup> IGS argued that the PUCO modification to the Settlement (making the OVEC subsidy rider non-bypassable) was material and undermined the benefit of the bargain for IGS.<sup>13</sup> After withdrawing, IGS submitted the Supplemental Direct Testimony of Matthew White on February 12, 2019.<sup>14</sup>

IGS's testimony presents two potential modifications to the Settlement. In the first, notwithstanding that the PUCO itself modified the Settlement to make the OVEC subsidy rider non-bypassable, IGS urges the PUCO to make the OVEC subsidy rider bypassable. This would enable customers of marketer providers (50% of total customers

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<sup>9</sup> Opinion and Order at 35 (Oct. 20, 2017).

<sup>10</sup> *Id.*

<sup>11</sup> OCC opposed the Settlement and has appealed the PUCO Order approving the settlement. *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan*, Sup. Ct. 2019-0020, OCC Notice of Appeal (Jan. 7, 2019).

<sup>12</sup> *Notice of withdrawal from Amended Stipulation and Recommendation* at 2, (October 19, 2018) ("Notice of Withdrawal") (If any party withdraws as a signatory party to the Stipulation, "the Commission will convene an evidentiary hearing to afford that Signatory Party the opportunity to contest the Stipulation by presenting evidence through witnesses, to cross-examine witnesses, to present rebuttal testimony, and to brief all issues that the Commission shall decide based upon the record and briefs.").

<sup>13</sup> *Id.*

<sup>14</sup> Supplemental Direct Testimony of Matthew White on Behalf of Interstate Gas Supply, Inc. (February 12, 2019) ("White's Testimony").

shop in DP&L service territory<sup>15</sup>) such as IGS to avoid the charges, while forcing DP&L's standard offer customers to pay more, as IGS admitted.<sup>16</sup> This effectively allows marketers like IGS to have more head room to make a profit. IGS also argues that a non-bypassable rider would allow DP&L to collect generation-related revenue that it cannot otherwise collect from the competitive market.<sup>17</sup> Finally, IGS argues that denying this cost recovery would prevent shopping customers from paying an "anticompetitive subsidy" for generation costs through distribution charges.<sup>18</sup>

IGS's second proposal is to unbundle costs associated with standard service offer rates by creating two new riders.<sup>19</sup> The first would be a credit rider allowing all customers to avoid distribution costs that IGS claims are solely related to DP&L's standard offer.<sup>20</sup> The second would be paid only by SSO customers and the total negative revenue requirement under the first rider would be the same as the total positive revenue requirement under the second rider.<sup>21</sup>

A hearing necessitated by IGS's Notice of Withdrawal began on April 1, 2019, and continued through April 3, 2019, with rebuttal testimony taken on April 15, 2019.<sup>22</sup> Post-hearing briefs were filed May 15, 2019 and reply briefs May 30, 2019.

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<sup>15</sup> Hearing Transcript, Vol. III at 1399:19-22.

<sup>16</sup> Hearing Transcript Vol. III at 1401:18-19; Willis Testimony at 3:18-20.

<sup>17</sup> White's Testimony at 4:7-9.

<sup>18</sup> White's Testimony at 5:14-18.

<sup>19</sup> White's Testimony at 3:17-20, 9:21,10:11-21.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *See* Entry (July 2, 2019) at 2.



On June 19, 2019, the Supreme Court of Ohio issued its decision in *In re Application of Ohio Edison Co.*, reversing the PUCO’s approval of FirstEnergy’s DMR charge and remanding with instructions to remove the charge from FirstEnergy’s ESP.<sup>23</sup>

The Opinion and Order in this case adopted a Settlement that included a charge similar to FirstEnergy’s charge held unlawful in *Ohio Edison*. Given the Court’s ruling in *Ohio Edison*, the attorney examiner found “that parties should have the opportunity to brief the impact of *Ohio Edison* on this proceeding.”<sup>24</sup> The attorney examiner therefore permitted parties to file supplemental briefs “narrowly focused on the issue of the applicability” of *Ohio Edison*.<sup>25</sup>

### **III. STANDARD OF REVIEW**

The Settlement is still before the PUCO for review. The Settlement, IGS’s proposed changes to the Settlement, and the Settlement’s provisions in light of *Ohio Edison* must be reviewed under the settlement standard.

The Court stated in *Duff v. Pub. Util. Comm.*<sup>26</sup> that a settlement is merely a recommendation that is not legally binding upon the PUCO. The PUCO “may take the stipulation into consideration but must determine what is just and reasonable from the evidence presented at the hearing.”<sup>27</sup> The Court in *Consumers’ Counsel v. Pub. Util.*

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<sup>23</sup> See *id.* at 3.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367 (1978); see also Ohio Adm. Code 4901-1-30(E).

<sup>27</sup> See *id.*

*Com.*<sup>28</sup> considered whether a just and reasonable result was achieved with reference to the following criteria adopted by the PUCO in evaluating settlements:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties, where there is diversity of interests among the stipulating parties?
2. Does the settlement package violate any important regulatory principle or practice?
3. Does the settlement, as a package, benefit customers and the public interest?

The PUCO also routinely considers whether the parties represent a diversity of interests.

The PUCO has applied the settlement standard to determine if the original proposed settlement, with a bypassable OVEC subsidy rider, was just and reasonable.<sup>29</sup> It was not. The PUCO agreed with OCC that leaving the OVEC subsidy rider bypassable would have an anti-competitive effect by artificially inflating standard service offer prices and increasing the risk for escalating bill impacts as shopping increases.<sup>30</sup> IGS's proposal asks the PUCO to approve a settlement provision that it has already deemed unjust and unreasonable. IGS is not proposing something new for the PUCO to consider. IGS's proposal should be rejected.

Now, the PUCO must apply its settlement test to decide if the Settlement is reasonable, in the public interest, and complies with Ohio law in light of *Ohio Edison*.<sup>31</sup>

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<sup>28</sup> *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992).

<sup>29</sup> Opinion and Order at 60.

<sup>30</sup> *Id.* at 34-35.

<sup>31</sup> *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367 (1978); *see also* Ohio Adm. Code 4901-1-30(E).

A settlement must satisfy the provisions in R.C. 4905.22, which requires that every public utility furnish necessary and adequate service and facilities, and that all charges for any service must be just and reasonable.

As OCC demonstrates below, the Settlement fails to satisfy this standard as well as the settlement test. The Settlement including DP&L's charge fails the second and third prongs of the settlement test. Because DP&L's charge is unlawful under *Ohio Edison*, the settlement violates important regulatory principles and practices and, as a package, does not benefit customers and the public interest.

#### IV. RECOMMENDATIONS

**A. In its *Ohio Edison* decision that now controls this DP&L case, the Court explained what makes a “distribution modernization” charge unlawful.**

In its recent *Ohio Edison* decision, the Court found that FirstEnergy's charge was unlawful for two reasons.<sup>32</sup> First, FirstEnergy's charge was unlawful because it did not qualify as an “incentive” under R.C. 4928.143(B)(2)(h).<sup>33</sup>

FirstEnergy's charge was authorized by the PUCO solely under R.C. 4928.143(B)(2)(h).<sup>34</sup> That statute authorizes “[p]rovisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary,...provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility.”<sup>35</sup> The Court ruled that FirstEnergy's charge did not qualify as an “incentive” because

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<sup>32</sup> *Ohio Edison* at ¶¶ 14-29.

<sup>33</sup> *Id.* at ¶¶ 14-19.

<sup>34</sup> First Energy Case 14-1297-EL-SSO, Fifth Entry on Rehearing at 56 (Oct. 12, 2016).

<sup>35</sup> R.C. 4928.143(B)(2)(h).

FirstEnergy's collection of funds from the charge was not "conditioned upon the completion" of any requirement to spend the funds on grid-modernization.<sup>36</sup>

Second, the Court determined that FirstEnergy's charge was unlawful because there were insufficient consumer protections attached to the charge as a condition to collecting DMR revenue.<sup>37</sup>

FirstEnergy was not required to spend a penny on grid-modernization.<sup>38</sup> FirstEnergy is not under any PUCO directives or timeline to begin or complete any grid-modernization *as a condition* to receiving DMR funds.<sup>39</sup> FirstEnergy's charge is not subject to any effective conditions or penalties on collecting revenues if the DMR funds do not serve their intended purpose.<sup>40</sup>

**1. The Court's analysis in *Ohio Edison* should be applied here to protect consumers.**

In *Ohio Edison*, the Court analyzed if FirstEnergy's charge was an "incentive" to grid-modernization within the meaning of R.C. 4928.143(B)(2)(h). Although the Court noted that R.C. 4928.143(B)(2)(h) does not define "incentive," it specifically rejected the PUCO's dictionary definition of "incentive" as something that stimulates one to take action or work harder.<sup>41</sup> The Court explained that the credit support that FirstEnergy's charge was providing for FirstEnergy and its parent was not an incentive.<sup>42</sup> Enabling a

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<sup>36</sup> *Ohio Edison* at ¶¶ 14-19.

<sup>37</sup> *Id.* at ¶¶ 20-29.

<sup>38</sup> *See* Opinion and Order at 26-27 (Oct. 20, 2017).

<sup>39</sup> In its Third Entry on Rehearing p. 23, the PUCO did argue that the Amended Stipulation provides for grid-modernization because it required DP&L to file a grid-modernization plan. However, filing a plan and conditioning the receipt of DMR funds upon actual grid-modernization spending are very different.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at ¶ 15.

<sup>42</sup> *Ohio Edison* at ¶ 14.

utility to potentially obtain capital for *future* infrastructure projects on favorable credit terms is not an incentive, the Court ruled.<sup>43</sup> A regulatory body's *intention* for how funds are supposed to be used is not an incentive.<sup>44</sup> Upfront monetary awards with no meaningful conditions attached are not incentives.<sup>45</sup>

The Court explained that "incentive" within the meaning of R.C. 4928.143(B)(2)(h) is something that "generally serves to induce someone to take some action that otherwise would not be taken but for the incentive."<sup>46</sup> Further, the Court explained that although FirstEnergy's charge was intended as a financial "incentive," it is "inherent in an incentive payment that the recipient must do something to be paid."<sup>47</sup> A financial incentive "is generally conditioned upon completion of a particular action."<sup>48</sup> According to the Court, an incentive under R.C. 4928.143(B)(2)(h) is a mechanism that induces action that otherwise would not be taken but for the incentive, financial or otherwise, "conditioned upon the completion" of a particular action.<sup>49</sup> FirstEnergy's charge did not fit the Court's interpretation of "incentive." The Court ordered the PUCO to remove FirstEnergy's charge from its ESP.<sup>50</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at ¶ 19.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at ¶ 16.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at ¶¶ 16-17.

<sup>50</sup> *Id.* at ¶ 29.

- a. **FirstEnergy’s charge was unlawful because it was not “conditioned upon the completion” of a requirement to spend DMR funds on grid modernization, and so it was not an incentive within the meaning of R.C. 4928.143(B)(2)(h).**

In finding that FirstEnergy’s charge was not an “incentive,” the Court explained that “incentive” ratemaking uses rewards and penalties that link utility revenues to various standards or goals.<sup>51</sup> The PUCO in approving FirstEnergy’s charge did not use rewards and penalties that linked FirstEnergy’s revenues to various standards or goals. Instead of placing some requirement to invest directly in grid-modernization, the PUCO merely relied on “Staff’s intent for Rider DMR to jump start the Companies’ grid-modernization efforts.”<sup>52</sup> “The PUCO staff’s wishful thinking cannot take the place of real requirements, restrictions, or conditions imposed by the commission for the use of [FE] DMR funds.”<sup>53</sup> The Court found that this was not sufficient to explain how FirstEnergy’s charge would encourage investment in the grid.<sup>54</sup> FirstEnergy received DMR funds upfront before any projects were undertaken or completed.<sup>55</sup> There were no directives or timelines regarding specific projects, and the PUCO made it clear that there were no projects planned in the immediate future.<sup>56</sup>

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<sup>51</sup> *Ohio Edison* at ¶ 17.

<sup>52</sup> *Id.* at ¶ 19.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Ohio Edison* at ¶ 18.

<sup>56</sup> *Id.*

The Court in *Ohio Edison* concluded that the PUCO failed to place any effective condition or penalty on FirstEnergy if the DMR funds were not used for their intended purpose.<sup>57</sup> FirstEnergy's charge was therefore not an "incentive."

**b. FirstEnergy's charge was unlawful because there were insufficient consumer protections.**

In addition to finding no "incentive" for FirstEnergy to invest in grid-modernization, the Court also determined that there were insufficient consumer protections attached to FirstEnergy's charge.<sup>58</sup> The Court considered (and rejected) three "conditions" that the PUCO put on FirstEnergy's charge.<sup>59</sup> First, FirstEnergy had to keep its corporate headquarters and nexus of operations in Akron.<sup>60</sup> Second, there could be no change in the "control" of the FirstEnergy companies<sup>61</sup> as that term is defined in R.C. 4905.402(A)(1).<sup>62</sup> Third, FirstEnergy had to demonstrate sufficient progress in implementing and deploying grid-modernization programs approved by the PUCO.<sup>63</sup> FirstEnergy argued that these "conditions" ensured that the DMR funds were not just a gift and that they would be used to jump-start grid-modernization initiatives.<sup>64</sup>

But the Supreme Court of Ohio agreed with appellants, OCC included, that these "conditions" were meaningless and failed to sufficiently protect consumers.<sup>65</sup> The Court

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at ¶ 20.

<sup>60</sup> *Id.*

<sup>61</sup> The FirstEnergy Companies are Ohio Edison, the Cleveland Electric Illuminating Company, and the Toledo Edison Company.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at ¶ 21.

<sup>65</sup> *Id.* at ¶ 22.

explained that there was no distinguishable penalty if FirstEnergy did not comply with the PUCO's "conditions" on collecting FirstEnergy's charge.<sup>66</sup> The Court dismissed the idea that FirstEnergy would actually be required to forfeit funds from the charge if it failed to comply with any of the PUCO's "conditions." FirstEnergy had been collecting under the DMR charge since January 1, 2017.<sup>67</sup> But under R.C. § 4905.32, any refund of collected funds would not be permitted unless the tariff applying those rates included a refund mechanism.<sup>68</sup> The PUCO did not subject FirstEnergy's charge collected from customers to refund if FirstEnergy failed to comply with the "conditions."<sup>69</sup> The Court found that consumers were not adequately protected because FirstEnergy's charge collected from customers could not be refunded.<sup>70</sup>

The Court also found that the PUCO's audit review of DMR spending was insufficient to protect consumers from the misuse of DMR funds.<sup>71</sup> When it approved FirstEnergy's ESP, the PUCO directed its Staff to periodically review how FirstEnergy used funds from FirstEnergy's charge in support of grid-modernization.<sup>72</sup> The PUCO clarified on rehearing that this review would be ongoing and in real time by a third-party monitor.<sup>73</sup> The monitor, Oxford Advisors, L.L.C. ("Oxford"), was directed to submit quarterly reports to PUCO Staff to document whether FirstEnergy had implemented its

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, 106 N.E.3d 1, ¶ 15-20; *Ohio Edison* at ¶ 23.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at ¶ 23.

<sup>71</sup> *Id.* at ¶ 24.

<sup>72</sup> Opinion and Order at 27; *Ohio Edison* at ¶ 24.

<sup>73</sup> *Id.*



DMR charge in compliance with the PUCO's orders.<sup>74</sup> Oxford was also to submit a midterm report if FirstEnergy sought to extend the DMR charge beyond its initial three-year term, and a final report within 90 days of the termination of the DMR charge.<sup>75</sup>

Although the PUCO ordered that any participant in the proceeding could examine Oxford's conclusions, results, and recommendations, they were not available until they were filed with the PUCO.<sup>76</sup> And that would only occur if FirstEnergy filed to extend or terminate the its charge – long after funds from the DMR charge were already collected and spent.<sup>77</sup> The Court found that there was no clear remedy available to parties, the PUCO, or the Supreme Court of Ohio should it find that FirstEnergy improperly spent funds from the DMR charge.<sup>78</sup> Therefore, the Court found the audit review unhelpful in protecting consumers against improper spending of FirstEnergy's charge. The reports generated as a result of the review would not be available until *after* FirstEnergy's charge was collected and spent. And there would be no remedy if FirstEnergy's spending is found improper.<sup>79</sup>

Tragically, the PUCO failed to protect customers because the \$456 million collected from customers through FirstEnergy's charge was not collected subject to refund. As the Court correctly noted,<sup>80</sup> there is no consequence (and no protection for customers) for FirstEnergy's behavior – not spending a penny on distribution service for

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<sup>74</sup> *Ohio Edison* at ¶ 25.

<sup>75</sup> *Ohio Edison* at ¶ 25.

<sup>76</sup> First Energy Case 14-1297-EL-SSO, Opinion and Order at 49-50 (Aug. 16, 2017); *Ohio Edison* at ¶ 26.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Ohio Edison* at ¶29.

customers but using customers' money to give higher dividends to its parent and potentially to its parent's shareholders.

Further, the Court found that the PUCO's PowerForward initiative delays the implementation of FirstEnergy's grid-modernization plan.<sup>81</sup> The Court acknowledged that the PUCO conditioned FirstEnergy's charge on demonstrating sufficient progress in implementing and deploying *PUCO approved* grid-modernization projects.<sup>82</sup> And although FirstEnergy filed an application on February 29, 2016 proposing a grid-modernization plan, the PUCO made the condition of "sufficient progress" in implementing and deploying PUCO-approved projects practically impossible to comply with.<sup>83</sup> This is because it ordered that no projects would be approved until *after* the completion of its PowerForward initiative.<sup>84</sup>

The PowerForward Roadmap was completed on August 29, 2018, and the PUCO is still in the process of implementing it.<sup>85</sup> But at the same time FirstEnergy's charge was initially approved for three years beginning January 1, 2017.<sup>86</sup> The Court found that this delay made it likely that FirstEnergy would collect most, if not all, of the DMR charge *before* the PUCO actually approved any distribution modernization projects.<sup>87</sup> The Court found that delays due to PowerForward undermined the "condition" of demonstrating

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<sup>81</sup> *Ohio Edison* at ¶¶ 27-29.

<sup>82</sup> *Ohio Edison* at ¶ 27.

<sup>83</sup> *Id.*

<sup>84</sup> *Ohio Edison* at ¶¶ 27-28; *FirstEnergy Grid Modernization Business Plan*, Pub. Util. Comm. No. 16- 481-EL-UNC.

<sup>85</sup> [www.puco.ohio.gov/industryinformation/industry-topics/powerforward/](http://www.puco.ohio.gov/industryinformation/industry-topics/powerforward/) (accessed July 15, 2019).

<sup>86</sup> *Ohio Edison* at ¶ 28.

<sup>87</sup> *Ohio Edison* at ¶ 28.

sufficient progress in implementing and deploying PUCO approved grid-modernization projects and was insufficient to protect consumers.<sup>88</sup>

The Supreme Court of Ohio found that the alleged “conditions” on FirstEnergy’s charge contained no actual consequences, and therefore no consumer protections, if FirstEnergy failed to honor them.<sup>89</sup> Therefore, the Court concluded that the FE DMR was not subject to sufficient consumer protections and was unlawful under R.C. § 4928.143(B)(2)(h).<sup>90</sup>

**2. DP&L’s charge is unlawful under *Ohio Edison*, and should no longer be collected from consumers, because DP&L’s charge is not “conditioned upon the completion” of spending funds from DP&L’s charge on grid-modernization and there are insufficient consumer protections.**

As the PUCO has recognized, DP&L’s charge is “similar” to FirstEnergy’s.<sup>91</sup> But it is more than just “similar.” It is nearly identical to the FirstEnergy’s unlawful charge. DP&L’s charge suffers from the same fatal flaws as FirstEnergy’s unlawful charge. DP&L’s charge is not “conditioned upon the completion” of *any* grid-modernization.<sup>92</sup> DP&L’s charge lacks sufficient consumer protections.<sup>93</sup>

Like FirstEnergy’s charge found unlawful in *Ohio Edison*, DP&L’s charge is unlawful.<sup>94</sup> It is not an “incentive” under R.C. 4928.143(B)(2)(h). Like it did in connection with the unlawful FirstEnergy charge, the PUCO relied on the dictionary

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See Case No. 16-395-EL-SSO, Entry (July 2, 2019).

<sup>92</sup> See Opinion and Order at 26-27 (Oct. 20, 2017).

<sup>93</sup> *Ohio Edison* at ¶¶ 20-29.

<sup>94</sup> *Ohio Edison* at ¶ 29.

definition of “incentive.”<sup>95</sup> And like it did in connection with the unlawful FirstEnergy charge, the PUCO asserted that “the DMR provides DP&L with the ability to access the capital markets at favorable rates to ensure investment in the distribution system and that accessing the capital markets will enable the Company to procure funds to jumpstart their distribution grid modernization initiatives.”<sup>96</sup> And like the FirstEnergy charge, DP&L’s charge is unlawful because DP&L’s collection of funds from the charge are not an “incentive.” It is not “conditioned upon the completion” of spending DMR funds on grid-modernization.<sup>97</sup> It is also unlawful because there are insufficient consumer protections attached to DP&L’s charge.<sup>98</sup> Because these charges are unlawful they violate the second prong of the PUCO’s settlement standard. Additionally, it is not in the public interest to collect unlawful charges from customers, thus violating the third prong of the PUCO’s settlement standard.

**a. DP&L’s charge is unlawful under *Ohio Edison*, and would therefore harm consumers, because DP&L is not required to spend DMR funds on grid-modernization.**

Under *Ohio Edison*, the Supreme Court of Ohio found that FirstEnergy’s charge was unlawful because collecting it from consumers was not “conditioned upon completion” of spending on grid-modernization – it was not an “incentive.”<sup>99</sup> The Court held that “credit support” is not an incentive under R.C. 4928.143(B)(2)(h).<sup>100</sup> Likewise,

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<sup>95</sup> Opinion and Order at 48.

<sup>96</sup> *Id.* at 49.

<sup>97</sup> *Ohio Edison* at ¶¶ 14-19.

<sup>98</sup> *Id.* at ¶¶ 20-26.

<sup>99</sup> *Id.* at ¶¶ 14-19.

<sup>100</sup> *Id.* at ¶ 19.

PUCO Staff's "intentions" are not an incentive under R.C. 4928.143(B)(2)(h).<sup>101</sup> And any alleged "conditions" are meaningless where there is no penalty if the "condition" is not met.<sup>102</sup>

On March 14, 2017 DP&L filed, and the PUCO later approved, an Amended Stipulation and Recommendation that did not contain any requirements that DP&L's charge was "conditioned upon completion" of any grid-modernization.<sup>103</sup> The Amended Stipulation specifically states that "Cash flow from the DMR will be used to (a) pay interest obligations on existing debt at DPL Inc. and DP&L; (b) make discretionary debt prepayments at DPL Inc. and DP&L; and (c) position DP&L to make capital expenditures to modernize and/or maintain DP&L's transmission and distribution infrastructure."<sup>104</sup>

Nowhere in the Amended Stipulation, or the PUCO decisions approving it, is DP&L required to spend *any* of the DMR charge *directly* on grid-modernization. Although in its Third Entry on Rehearing, the PUCO explained that DP&L is required to file a Grid Modernization Plan, this is not a requirement that makes DP&L's collection of the DMR charge "conditioned upon completion" of the Plan.<sup>105</sup> It is not a requirement because the PUCO attached a disclaimer to its requirement stating "we cannot commit that the grid modernization plan will be fully implemented by the end of the ESP...in

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<sup>101</sup> *Id.* at ¶¶ 18-19.

<sup>102</sup> *Id.* at ¶ 29.

<sup>103</sup> *In re the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan, et al*, Case No. 16-395-EL-SSO, Amended Stipulation and Recommendation (filed March 14, 2017); *In re the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan, et al*, Case No. 16-395-EL-SSO, Opinion and Order at ¶¶ 42-45 (October 20, 2017).

<sup>104</sup> Amended Stipulation at 5; Opinion and Order at ¶ 27.

<sup>105</sup> Third Entry on Rehearing at 9.

fact, it is unlikely....”<sup>106</sup> The Third Entry on Rehearing also made it clear that DP&L’s spending of the DMR charge on grid-modernization is delayed by PowerForward, just as FirstEnergy’s was.<sup>107</sup>

The PUCO’s assertion that “the Amended Stipulation, rather than the DMR, requires that DP&L invest in grid modernization, subject to Commission approval of the modernization plan,” and that “[t]he DMR provides DP&L with the means to improve its credit worthiness and overall financial integrity so that it can satisfy the requirement to make grid modernization investments, and to do so in a financially efficient manner” does not save DP&L’s charge.<sup>108</sup> There is no *requirement* to spend the DMR charge on grid-modernization.<sup>109</sup> The Third Entry on Rehearing makes this even more clear, stating:

It is important to note that the term of the ESP is six years, commencing November 1, 2017, which allows the Commission, the Company and stakeholders to take a long-term perspective on the modernization plan. We **cannot commit** that the grid modernization plan will be fully implemented by the end of the ESP on October 31, 2023; in fact, **it is unlikely** that technology approved under the plan can be fully deployed by that date. However, by the end of the ESP, DP&L will have a long-term grid modernization **plan** in place and substantial progress **in implementing the** grid modernization **plan** will be achieved.<sup>110</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> *See Id.* at 23 (September 19, 2018 (“We expect that the modernization plan will be guided by the Commission’s PowerForward Initiative”); *see also* Entry at 2 (July 12, 2018) (“However, because the Commission is currently continuing its work in the PowerForward initiative and because DP&L should have a full opportunity to incorporate the results of the initiative into its comprehensive infrastructure modernization plan, the attorney examiner finds, *sua sponte*, that the deadline for the filing of the comprehensive infrastructure modernization plan should be extended to the earlier of three months after the completion of the Commission’s PowerForward initiative or December 3, 2018, unless otherwise ordered by the Commission.”).

<sup>108</sup> *Id.* at 9.

<sup>109</sup> Third Entry on Rehearing at 9 (internal punctuation removed).

<sup>110</sup> *Id.* (emphasis added).

While it is commendable that the PUCO wants DP&L to have a grid-modernization plan, there is no condition or requirement that DP&L do so to collect the DMR charge from consumers. Under *Ohio Edison*, this is not a “condition,” or “requirement” under R.C. 4928.143(B)(2)(h). Also, the PUCO’s reasoning and intention for approving DP&L’s charge was for DP&L to “use the funds recovered under the DMR **exclusively to improve its ability to access capital markets**...the DMR will enable DPL, Inc. and DP&L to pay down their existing debt.”<sup>111</sup> This language of what the PUCO intended is almost identical to the language used in approving FirstEnergy’s charge, discussed above, which the Supreme Court of Ohio found unlawful.<sup>112</sup>

Like FirstEnergy, DP&L’s charge is subject to audit “in order to ensure that DMR revenues are used in a manner consistent with the Amended Stipulation.”<sup>113</sup> The Auditor selected for DP&L was Oxford.<sup>114</sup>

DP&L’s charge, and the language used by the PUCO to approve it, is nearly identical to FirstEnergy’s charge that the Supreme Court of Ohio found unlawful in *Ohio Edison*. Like *Ohio Edison*, DP&L’s charge is not “conditioned upon the completion” of spending DMR funds on grid-modernization.<sup>115</sup> Also like *Ohio Edison*, the PUCO found that DP&L could use its DMR charge for “credit support” and “access to capital markets.”<sup>116</sup> Finally, as the Supreme Court of Ohio found in *Ohio Edison*, the PUCO-

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<sup>111</sup> *Id.* Opinion and Order at ¶ 42.

<sup>112</sup> *Ohio Edison* at ¶¶ 11, 19.

<sup>113</sup> Opinion and Order at 27.

<sup>114</sup> Case 18-264-EL-RDR, Entry at 1 (April 11, 2018).

<sup>115</sup> *Ohio Edison* at ¶ 14.

<sup>116</sup> Opinion and Order at 26-27.

ordered audit by Oxford does not save DP&L's charge. Therefore, under *Ohio Edison*, DP&L's charge is not an "incentive" under R.C. 4928.143(B)(2)(h). It is unlawful.<sup>117</sup>

**b. DP&L's charge is unlawful under *Ohio Edison* because there are insufficient consumer protections.**

Under *Ohio Edison*, DP&L's charge is unlawful because there are insufficient consumer protections. In *Ohio Edison*, the Supreme Court of Ohio found that FirstEnergy's charge (nearly identical to DP&L's) contained provisions that were insufficient to protect consumers.<sup>118</sup> The Court found that there was no PUCO imposed penalty on FirstEnergy if it failed to meet the terms of the DMR charge or the "conditions" placed on the DMR charge.<sup>119</sup> Finally, the Court found insufficient consumer protections because FirstEnergy's charge did not contain a refund provision.<sup>120</sup> DP&L's nearly identical charge has the same flaws.

Like the unlawful charge in *Ohio Edison*, DP&L's charge is subject to meaningless conditions.<sup>121</sup> The only requirement on DP&L's charge is that it spends the funds to "(a) pay interest obligations on existing debt at DPL and DP&L; (b) make discretionary debt prepayments at DPL and DP&L; and (c) position DP&L to make capital expenditures to modernize and/or maintain DP&L's transmission and distribution infrastructure."<sup>122</sup> To ensure compliance with this "condition," the PUCO ordered that DP&L's charge would be subject to a third-party auditor review and that "[t]his review

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<sup>117</sup> *Ohio Edison* at ¶ 29.

<sup>118</sup> *Id.* at ¶¶ 20-29.

<sup>119</sup> *Id.* at ¶ 22.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at ¶ 21.

<sup>122</sup> Opinion and Order at 26-27.



process is consistent with reviews established for riders similar to the DMR.”<sup>123</sup> But the *Ohio Edison* Court specifically held that audit review is “unhelpful” as a condition.<sup>124</sup>

DP&L’s audit review requires a third-party “monitor” (Oxford) to assist Staff in reviewing DP&L’s compliance with the Amended Stipulation (identical to FirstEnergy).<sup>125</sup> This “monitor” is required to provide quarterly interim updates on use of the DMR charge (identical to FirstEnergy), a midterm report within 60 days in any proceeding where DP&L seeks an extension of the DMR charge (identical to FirstEnergy), and a final report within 90 days after termination of the DMR charge or its extension (identical to FirstEnergy).<sup>126</sup>

The PUCO also ordered that any participant in this proceeding could examine Oxford’s conclusions, results, and recommendations, but they are not available unless and until they are filed with the PUCO (identical to FirstEnergy).<sup>127</sup> But this will only occur if DP&L files to extend or terminate the DMR charge -- long after funds from the DMR charge are already spent (just like FirstEnergy).<sup>128</sup> DP&L filed its extension case on January 23, 2019.<sup>129</sup> The auditor, Oxford, filed its Midterm Report on June 14, 2019.<sup>130</sup>

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<sup>123</sup> Opinion and Order at 27. The PUCO also cited directly to its decision in FirstEnergy’s case, which the court has found unlawful.

<sup>124</sup> Opinion and Order at ¶ 43; *Ohio Edison* at ¶ 24.

<sup>125</sup> Opinion and Order at ¶ 43.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Case 19-0162-EL-RDR

<sup>130</sup> *In re Matter of the Review of the Distribution Modernization Rider of the Dayton Power and Light Company*, Case 18-264-EL-RDR, Midterm Report (Filed June 14, 2019).

The audit review here is unhelpful in protecting consumers against improper spending of DP&L's charge (just like FirstEnergy's).<sup>131</sup> This is true because the auditor reports are unavailable until after DP&L's charge is nearly spent (just like FirstEnergy's), nearly \$175 million in this case thus far.<sup>132</sup> Worse, there is likely no remedy if this spending is found improper due to the Court's ruling in *Keco* (just like in FirstEnergy).<sup>133</sup>

The audit provision of DP&L's charge (just like FirstEnergy) and the inability to refund unlawful charges to consumers (just like FirstEnergy) are insufficient to protect consumers (just like FirstEnergy). Accordingly, the PUCO should find that DP&L's charge is unlawful under *Ohio Edison*. The PUCO should order that the DMR charge be removed from DP&L's ESP.

**3. FirstEnergy's and DP&L's charge are the same in all material respects under the *Ohio Edison* analysis and, therefore, DP&L's charge is unlawful under *Ohio Edison* and should no longer be collected from consumers.**

As the chart below illustrates, FirstEnergy and DP&L's charges are the same in all material respects under the Court's analysis in *Ohio Edison*. Neither charge required spending on grid-modernization. Neither charge has sufficient consumer protections. Neither charge was subject to PUCO directives, timelines, or effective conditions. Neither charge was subject to penalty, nor refunds for noncompliance. The Supreme Court of Ohio found that FirstEnergy's charge was unlawful and should be removed from its ESP. To protect consumers, the PUCO should do the same for DP&L's unlawful charge.

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<sup>131</sup> *Ohio Edison* at ¶ 24.

<sup>132</sup> *Id.*

<sup>133</sup> *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957).

<b>FE's charge</b>	<b>Unlawful</b>	<b>DP&amp;L's charge</b>	<b>Unlawful</b>
Incentive with no requirement to spend on grid modernization.	YES	Incentive with no requirement to spend on grid modernization.	YES
Insufficient Consumer Protections	YES	Insufficient Consumer Protections	YES
No PUCO directives	YES	No PUCO directives	YES
No PUCO timelines	YES	No PUCO timelines	YES
No PUCO effective conditions	YES	No PUCO effective conditions	YES
No penalty	YES	No penalty	YES
No refunds	YES	No refunds	YES

DP&L's charge is unlawful under *Ohio Edison*. Therefore, it violates the second prong of the PUCO's settlement standard. Further, it is not in the public interest to collect unlawful charges from customers, thus violating the third prong of the PUCO's settlement standard.

**B. Alternatively, if the PUCO determines that DP&L may continue to collect the charge from consumers, then it should make DP&L's charge subject to refund.**

As explained above, based on the Ohio Supreme Court's ruling in *Ohio Edison*, the PUCO should immediately remove DP&L's nearly identical charge. If the PUCO does not do so, it should for consumer protection require DP&L's charge to be collected subject to refund pending the outcome of this case and any appeals to the Ohio Supreme Court. Given *Ohio Edison*, which struck down a "similar" DMR charge, the PUCO should act now to stem the injury to customers that will ensue if DP&L's charge, like FirstEnergy's charge, is found to be unlawful, yet consumers receive no refund of the unlawful charges paid.

Customers in this state have already lost out on refunds of over a billion dollars under Ohio Supreme Court precedent that allows utilities to keep charges (without refunding) that they collected from consumers even after the Court's decisions finding

that the charges are unlawful.<sup>134</sup> The PUCO has the authority to put a stop to this continuing travesty of justice. As the Court pointed out in *Ohio Edison*, the unlawful charges collected from consumers by FirstEnergy are not refundable because the PUCO did not make FirstEnergy's charge subject to refund.<sup>135</sup> The PUCO can simply make the tariffs that collect DP&L's charge subject to refund, as OCC Witness Kahal urged in testimony filed earlier in this case. Exercising this option will prevent injury to the interests of the public and will prevent irreparable harm to customers.

It is not in the public interest to collect potentially unlawful charges from customers without those charges being collected from customers subject to refund, thus violating the third prong of the PUCO's settlement standard.

**The PUCO has authority to make DP&L's charge subject to refund.**

DP&L's customers have been paying the DMR charge for unlawful credit support since November 1, 2017, with approximately \$ 175 million being collected to date. Consumers will not likely be able to receive a refund of what has already been paid even if the Court (or the PUCO) determines the charge is unlawful. The Court recognized that there is an apparent unfairness when a charge is determined to be unlawful yet customers get no refund of charges unlawfully collected.<sup>136</sup>

But if the PUCO directs that the DMR charge be collected subject to refund, the PUCO can avoid these unfair and unjust results and stem the harm DP&L's customers may

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<sup>134</sup> See *In re Columbus S. Power Co.*, 128 Ohio St.3d 512 (\$63 million); *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448 (\$368 million); *In re: Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166 (\$330 million); *In re Application of Ohio Edison Co.*, Slip Opinion No. 2019-Ohio-2401 (\$456 million).

<sup>135</sup> See *Ohio Edison* at ¶¶ 22-23.

<sup>136</sup> See *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 ¶15-21.

incur. The PUCO's authority to take action to protect customers can be found under various statutes and case precedent.

The PUCO has acted to prevent harm from occurring by ordering utilities, on an ongoing basis, to collect an existing rate increase subject to refund and subject to appropriate interest charges. The PUCO has used this approach to permit it to explore the reasonableness of rates in light of events that occurred after the issuance of its orders. For instance, the PUCO granted rehearing and ordered rates to be collected subject to refund in a rate case filed by the Columbus & Southern Ohio Electric Company.<sup>137</sup> In that rate case, one week after the issuance of the PUCO's rate order, the Nuclear Regulatory Commission issued an Order that suspended construction at the Zimmer Nuclear Power Plant ("Zimmer"). The original Opinion and Order included a rate base allowance for construction work in progress ("CWIP") for Zimmer.<sup>138</sup>

In its order setting the rehearing, the PUCO approved the utility's filed tariffs but expressly found the portion of the increase granted attributable to Zimmer CWIP "should be made subject to refund, pending a rehearing on the CWIP issue."<sup>139</sup> A rehearing was held and the PUCO ordered that all of the Zimmer costs should be excluded from CWIP. The PUCO ordered the utility to file tariffs reducing the total revenue requirements by approximately \$13 million.<sup>140</sup> The utility appealed and sought a stay of the PUCO's Order on Rehearing from the Supreme Court of Ohio. The Court granted the stay but

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<sup>137</sup> *In re Columbus & Southern Ohio Electric Co.*, Case No. 83-1058-EL-AIR, Entry (November 17, 1982).

<sup>138</sup> *Id.*, Opinion and Order at 8-14 (November 5, 1982).

<sup>139</sup> *Id.*, Entry at 1 (November 17, 1982).

<sup>140</sup> *Id.*, Order on Rehearing (March 16, 1983).

subsequently affirmed the PUCO's denial of a CWIP allowance.<sup>141</sup> After the PUCO's action was upheld on appeal,<sup>142</sup> the PUCO ordered the utility to refund approximately \$4.5 million to its customers.<sup>143</sup> The PUCO ordered the collection, subject to refund to protect customers in the event of a later decision that the utility was collecting more from customers than warranted by law, rule, or reason.

Another example where the PUCO has collected rates subject to refund involved the Ohio Utilities Company.<sup>144</sup> After a rate order was issued,<sup>145</sup> legislation was enacted that changed Ohio's ratemaking formula. The PUCO opened an investigation to determine if the previously-established rates were still reasonable in light of the new law.<sup>146</sup> The PUCO determined that the rates were excessive, taking into account the new law, and ordered the utility to withdraw its tariffs and file new lower rates consistent with the PUCO's findings.<sup>147</sup> The utility sought a stay of the PUCO's order, pending further

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<sup>141</sup> *Columbus & Southern Ohio Electric Co. v. Pub. Util. Comm.*, (1984) 10 Ohio St.3d 12.

<sup>142</sup> *Columbus & Southern Ohio Electric Co. v. Pub. Util. Comm.*, (1984) 10 Ohio St.3d 12.

<sup>143</sup> *In re Columbus & Southern Ohio Electric Co.*, Case No. 81-1058-EL-AIR, Order on Rehearing (May 1, 1984).

<sup>144</sup> *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry at 2 (June 7, 1978).

<sup>145</sup> *In the Matter of the Ohio Utilities Co. Application for an Increase in Rates*, Case No. 79-529-WS-AIR, Opinion and Order (January 18, 1977).

<sup>146</sup> *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry (September 7, 1977).

<sup>147</sup> *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Opinion and Order (May 18, 1978).

review, which was granted with the condition that the utility was required to collect rates subject to refund.<sup>148</sup>

In a case involving AEP's Rate Stability Rider ("RSR"), the PUCO ordered that the RSR be collected subject to refund after the case was remanded by the Court.<sup>149</sup> The PUCO "direct[ed] AEP Ohio to file revised tariffs that provide that the RSR is being collected subject to refund" in order to protect consumers from irreparable harm – continuing to pay the RSR without the potential of getting a refund.<sup>150</sup>

And of course, the PUCO just recently issued an Entry making FirstEnergy's charge subject to refund.<sup>151</sup> The PUCO issued an Entry making FirstEnergy's charge subject to refund pending the Court's ruling on FirstEnergy's motion for reconsideration, filed with the Court on July 1, 2019.<sup>152</sup>

The PUCO can act now to prevent further harm to DP&L's consumers under the DMR charge. It should do so. It is fair to DP&L's consumers who should not be paying

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<sup>148</sup> *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry (June 7, 1978). The utility was also required to file an "undertaking" consisting of a promise to refund any amount collected for service rendered after the date of the Entry by a method later determined by the Commission (either cash refund or as a credit to future bills). The undertaking was required to be under oath by an officer of the company and was to include a promise to include interest. The amount ordered for refund was the amount collected for service in excess of those rates ultimately determined to be lawful. *Id.*

<sup>149</sup> *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC et. al. (May 18, 2016).

<sup>150</sup> *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC et. al. at 4 (May 18, 2016).

<sup>151</sup> *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Entry (July 2, 2019).

<sup>152</sup> *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Entry (July 2, 2019).

the unwarranted charge in the first place. In an earlier phase of this proceeding, OCC Witness Kahal urged the PUCO to order that DP&L's charge be refundable.

OCC Witness Kahal explained that the “overriding concern [with not making the DMR subject to refund] is one of inequity between shareholder and utility customers.”<sup>153</sup> Were the PUCO, or the Supreme Court of Ohio on appeal, to find DP&L's charge unlawful, DP&L was never entitled to the revenue in the first place.<sup>154</sup> “Therefore, absent a subject to refund provision, inevitably, utility customers experience very substantial irreparable harm.”<sup>155</sup> Accordingly, a subject to refund provision is required as a matter of basic equity.<sup>156</sup>

OCC Witness Kahal also testified that it is a tool routinely used by regulators,<sup>157</sup> including the Federal Energy Regulatory Commission. And although making DP&L's charge subject to refund involves more risk, OCC Witness Kahal observed that “DP&L is being well compensated for that risk . . . .”<sup>158</sup> Mr. Kahal testified that given the “very lucrative” returns on equity DP&L obtains as a result of the DMR charge, “it is entirely reasonable to ask DP&L to bear the refund risk[.]”<sup>159</sup> Mr. Kahal also testified that any argument that a potential refund would harm financial integrity “really does not apply, or at best is unpersuasive.”<sup>160</sup> AES, as DP&L's ultimate

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<sup>153</sup> Supplemental Direct Testimony of Matthew I. Kahal (March 29, 2017) (OCC Ex. 12) at 52.

<sup>154</sup> *See id.*

<sup>155</sup> *See id.*

<sup>156</sup> *See id.*

<sup>157</sup> *See id.*

<sup>158</sup> *See id.* at 53.

<sup>159</sup> *See id.*

<sup>160</sup> *See id.*



parent, is responsible for ensuring the financial integrity of the utility that it owns.<sup>161</sup>

According to Witness Kahal “AES clearly has the capability of replacing the refunded earnings. . . . [A refund] is only a very small percentage of the AES equity and annual cash flow.”<sup>162</sup>

The PUCO should have considered the testimony and recommendations of OCC Witness Kahal in this regard. It did not. The PUCO should now order that DP&L’s charge be collected subject to refund, especially given the Supreme Court’s holding in *Ohio Edison*. And in the interest of fairness, if refunds are ordered the refunds should include carrying charges equal to DP&L’s PUCO-authorized return on debt.

The PUCO should make DP&L’s collection of DMR charges subject to refund pending the outcome of this case and any appeals to the Court. The PUCO has acknowledged that DP&L’s charge is similar to the FirstEnergy unlawful charge to consumers.<sup>163</sup> It has invited parties to brief the impact of *Ohio Edison* on this proceeding.<sup>164</sup> Given the unlawfulness of DP&L’s charge under *Ohio Edison*, the PUCO should protect consumers by making DP&L’s charge subject to refund and should require refunds, if eventually ordered, to be paid back with interest. Making DP&L’s charge subject to refund is consistent with the PUCO’s precedent, as outlined above. It is also consistent with the PUCO’s treatment of FirstEnergy’s charge in light of *Ohio Edison*.

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<sup>161</sup> *See id.*

<sup>162</sup> *See id.*

<sup>163</sup> *See* Case No. 16-395-EL-SSO, Entry (July 2, 2019).

<sup>164</sup> *See id.*

## V. CONCLUSION

The Settlement including DP&L's charge fails the second and third prongs of the settlement test. Because DP&L's charge is unlawful under *Ohio Edison*, the settlement violates important regulatory principles and practices and, as a package, does not benefit customers and the public interest.

DP&L's charge is nearly identical to First Energy's charge, which was held unlawful in *Ohio Edison*. Neither charge qualifies as an incentive provision that is allowable under Ohio law. Both charges provide financial rewards to utilities with no requirement to spend them on grid-modernization. Neither charge is subject to effective consumer protections. The Supreme Court of Ohio held that FirstEnergy's charge was unlawful and ordered it removed from FirstEnergy's ESP in *Ohio Edison*. DP&L's nearly identical charge is also unlawful. The PUCO should likewise order DP&L's charge removed from its ESP immediately to protect consumers.

Further, the PUCO should protect consumers by ruling that any DMR credit support payments are to be collected subject to refund, including carrying charges. Without this consumer protection, consumers will not likely be able to receive a refund of what has already been paid even if the Court (or the PUCO) determines the charge is unlawful.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the Supplemental Brief was served upon the following parties via electronic transmission this 1<sup>st</sup> day of August 2019.

/s/ William J. Michael

William J. Michael

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## **SERVICE LIST**

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Summary: Brief Supplemental Brief for Ending DP&L's Charge to Consumers for its So-Called Distribution Modernization Rider and for Making the Charge Subject to Refund by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.