

**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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**MEMORANDUM CONTRA DAYTON POWER AND LIGHT COMPANY'S  
MOTION TO STRIKE SUPPLEMENTAL BRIEFS  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

In their July 2, 2019 Entry, the Attorney Examiners in this ongoing proceeding wisely found that “parties should have the opportunity to brief the impact” of a recent Supreme Court decision on Dayton Power & Light’s (“DP&L”) so-called distribution modernization charge (“Charge”), the *Ohio Edison*<sup>1</sup> case.<sup>2</sup> The Entry was issued after the Attorney Examiners found that the settlement in this proceeding included the Charge that is “similar to, but not identical with” the modernization rider overturned by the Court in the *Ohio Edison* case.<sup>3</sup>

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<sup>1</sup> Slip Opinion No. 2019-Ohio-2401 (2019).

<sup>2</sup> See Entry (July 2, 2019) (“Entry”).

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

Parties – including DP&L and the Office of the Ohio Consumers’ Counsel (“OCC”) – responded to the Attorney Examiners’ Entry that allowed “supplemental briefs” (but no reply briefs). Supplemental briefs were filed on August 1, 2019.<sup>4</sup>

But on August 21, 2019, DP&L filed a motion to strike the briefs of OCC; Interstate Gas Supply, Inc. (“IGS”); Environmental Defense Fund, Environmental Law & Policy Center, Ohio Environmental Council, and Sierra Club (“Environmental Group”). In its Motion DP&L argues that these parties’ supplemental briefs should be stricken because the parties waived the right to argue against the Charge or will suffer no harm from imposition of the Charge. In reality, DP&L is grasping at straws and seeking to prevent consumers from being heard on why its own similar Charge to customers is also unlawful.

But DP&L’s Motion should be denied. The Attorney Examiners had the authority to issue the Entry requesting supplemental briefs and the parties’ complied with the Entry. DP&L does not argue otherwise. Further, DP&L’s Motion is nothing more than a late filed interlocutory appeal of the Attorney Examiners’ Entry and should be denied.

If the PUCO nonetheless considers the Motion, it should be rejected to protect consumers. It misrepresents the record in this case. And it fails to acknowledge that the issue is still live in DP&L’s ongoing proceeding. An accurate review of the record and accounting for the procedural posture of the case requires denying DP&L’s Motion.

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<sup>4</sup> See Docket.

## II. BACKGROUND

This case began in February 2016 with DP&L’s application to fulfill its obligation to provide a standard service offer through an electric security plan.<sup>5</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 on customers for credit support, the Charge, was also proposed. 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>6</sup> Under the Settlement, the OVEC subsidy rider would be bypassable – shopping customers would not pay it.<sup>7</sup> The Settlement also includes the Charge. OCC opposed the Settlement.

On October 20, 2017, the PUCO modified the March 14, 2017 Settlement and approved the OVEC subsidy rider and the Charge over several objections, including OCC’s objections against customers subsidizing the OVEC coal plants and paying for credit support of DP&L and its parent, DPL Inc. In modifying the Settlement, the PUCO made the OVEC subsidy rider non-bypassable and ordered DP&L to charge the rate to all customers, shopping and non-shopping alike.<sup>8</sup> The PUCO agreed with OCC that the OVEC subsidy rider (if approved) should be non-bypassable because under a bypassable

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<sup>5</sup> See DP&L’s Application (February 22, 2016).

<sup>6</sup> See *Amended Stipulation and Recommendation*, March 14, 2017 (“Settlement”).

<sup>7</sup> Settlement at 13.

<sup>8</sup> Opinion and Order at 35 (October. 20, 2017).

rider there would be a potential for escalating bill impacts to standard service offer customers as shopping increases.<sup>9</sup>

Several parties, including OCC and the Environmental Group, sought rehearing on the PUCO's modification of the Settlement but the PUCO denied them.<sup>10</sup> On October 19, 2018, while this case was still in the application for rehearing stage,<sup>11</sup> 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. IGS urges the PUCO to modify the Settlement by making the OVEC subsidy rider bypassable. This would enable customers of marketers (50% of total customers shop in DP&L service

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

<sup>10</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). The Environmental Advocates sought rehearing specifically on the distribution modernization charge, claiming that the charge is not an incentive under Ohio law. Application for rehearing at 2 (November. 17, 2017).

<sup>11</sup> For example, OCC filed an application for rehearing on October 19, 2018. The PUCO did not rule on it until November 7, 2018. *See* OCC's Third Application for Rehearing (October 19, 2018); Fourth Entry on Rehearing (November 7, 2018).

<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").

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 make more profits. 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 charging shopping customers for this cost would be 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 rider giving credit to customers allowing all customers to avoid distribution costs that IGS claims are solely related to DP&L's standard offer.<sup>20</sup> The second rider 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. To date, the PUCO has not ruled in this case. It is a long way from over.

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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, during the pendency of this case the Supreme Court of Ohio issued its decision in *Ohio Edison*. There it reversed the PUCO's approval of FirstEnergy's so-called Distribution Modernization Rider ("FirstEnergy's Charge") and remanded the case to the PUCO with instructions to remove the charge from FirstEnergy's electric security plan.<sup>23</sup> The Court's reversal of the charge was affirmed when the Court denied FirstEnergy's motion for reconsideration of the matter.<sup>24</sup>

Before the Ohio Supreme Court ruling in *Ohio Edison*, the PUCO had approved in its Opinion and Order in this case a very similar Charge for DP&L. Given the Court's ruling in *Ohio Edison*, the Attorney Examiners found "that parties should have the opportunity to brief the impact of *Ohio Edison* on this proceeding."<sup>25</sup> The Attorney Examiners found that the Settlement in this proceeding included a distribution modernization rider that is "similar to, but not identical with" the modernization rider overturned by the Court in the *Ohio Edison* case.<sup>26</sup> The Attorney Examiners therefore permitted parties to file supplemental briefs "narrowly focused on the issue of the applicability" of *Ohio Edison*.<sup>27</sup> Parties did so on August 1, 2019.<sup>28</sup> The Entry did not provide for reply briefs.<sup>29</sup> No party, including DP&L, challenged the Attorney Examiners' ruling requesting supplemental briefs.

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

<sup>24</sup> *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*, S.Ct. Case No. 2017-1664, Reconsideration Entry (filed August 20, 2019).

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

<sup>26</sup> See *id.*

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

<sup>28</sup> Parties filing supplemental briefs included DP&L, OCC, IGS, and the Environmental Group. See Docket.

<sup>29</sup> See Entry.



OCC demonstrated in its supplemental brief that the Charge, solely for credit support, is unlawful just as the Court had determined with respect to the FirstEnergy Charge.<sup>30</sup> Others in the case also came to the same conclusion (IGS and the Environmental Group).<sup>31</sup> On the other hand, DP&L attempted to distinguish its charge from the one found unlawful in *Ohio Edison*.<sup>32</sup> Nowhere in its supplemental brief did DP&L assert that *Ohio Edison* is inapplicable because parties had waived the ability to argue its applicability.<sup>33</sup> Nor did DP&L file an interlocutory appeal<sup>34</sup> of the Entry allowing supplemental briefing.

### III. RECOMMENDATIONS

#### A. The PUCO should protect consumers and deny DP&L's Motion outright as lacking merit and baseless.

The Attorney Examiners' Entry permitted parties to brief the applicability of *Ohio Edison* to this case.<sup>35</sup> Clearly, the Attorney Examiners had the authority to issue the Entry.<sup>36</sup> Under O.A.C. 4901-1-31, attorney examiners specifically have the authority to "permit or require the filing of briefs or memoranda at any time during a proceeding." Not surprisingly, DP&L does not argue that the Attorney Examiners were without authority to issue the Entry, either in its supplemental brief or in its Motion.

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<sup>30</sup> See OCC's Supplemental Brief (August 1, 2019).

<sup>31</sup> See Supplemental Briefs of IGS and Environmental Group (August 1, 2019).

<sup>32</sup> See DP&L's Supplemental Brief (August 1, 2019). DP&L also asserted additional grounds for its charge. See *id.*

<sup>33</sup> See *id.* Doing so is a little far-fetched. Parties could not have waived the right to argue for the applicability of a new development in the law to this proceeding that occurred *after* initial briefing but *while* this proceeding is ongoing.

<sup>34</sup> See O.A.C. 4901-1-15.

<sup>35</sup> See Entry.

<sup>36</sup> See, e.g., O.A.C. 4901-1-14 (attorney examiners have the authority to rule on procedural matters); O.A.C. 4901-1-27 (attorney examiners have broad authority to manage hearings).

In the Entry, the Attorney Examiners permitted briefing “narrowly focused on the issue of the applicability” of *Ohio Edison*.<sup>37</sup> Under O.A.C. 4901-1-31, attorney examiners specifically have the authority to permit or require briefing “limited to one or more specific issues.” DP&L does not argue otherwise, either in its supplemental brief or in its Motion. OCC’s supplemental brief – as well as those of IGS and the Environmental Group – was narrowly focused on the issue of the applicability of *Ohio Edison* as permitted by the Entry. DP&L does not argue otherwise, either in its supplemental brief or in its Motion.

It is undisputed that the Attorney Examiners had the authority to issue the Entry and that OCC (and others) complied with the Entry. The Motion has no merit. It should be denied outright.

**B. The PUCO should protect consumers and reject DP&L’s Motion because in reality it is a late-filed interlocutory appeal of the Entry; and it is also a procedurally improper reply brief.**

While this proceeding has been pending, the Supreme Court of Ohio issued its decision in *Ohio Edison*, reversing the PUCO’s approval of FirstEnergy’s Charge and remanding with instructions to remove the charge from FirstEnergy’s electric security plan.<sup>38</sup> *Ohio Edison* is a new development in the law. Before *Ohio Edison*, the Opinion and Order in this case involving DP&L adopted a Settlement that included a Charge similar to FirstEnergy’s Charge later held unlawful in *Ohio Edison*.

That Settlement, and all of its terms, was put back at issue during the rehearing process as a result of IGS’s Notice of Withdrawal. Due to its successful withdrawal, IGS

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<sup>37</sup> See Entry.

<sup>38</sup> See Entry at 3.

was permitted the opportunity to contest the Settlement and brief all issues for the PUCO to decide.<sup>39</sup> All parties were permitted to file supplemental initial and reply briefs, including based on evidence at the original phase of this case, on any issue.<sup>40</sup> Under Ohio law all parties will have the right to seek rehearing of the PUCO Order to be issued in the pending proceeding on IGS' withdrawal. Then ultimately parties may take appeals to the Supreme Court of Ohio,<sup>41</sup> after PUCO's final decision in this matter, in what the Attorney Examiners have described as this "do-over hearing."<sup>42</sup>

Because this case is ongoing, and given the Court's ruling in *Ohio Edison*, which created "new law," it is not surprising that the Attorney Examiners found "that parties should have the opportunity to brief the impact of *Ohio Edison* on this proceeding."<sup>43</sup> The Attorney Examiners therefore permitted parties to file supplemental briefs "narrowly focused on the issue of the applicability" of *Ohio Edison*.<sup>44</sup> Parties did so on August 1, 2019.<sup>45</sup> The Entry did not provide for reply briefs.<sup>46</sup>

Nevertheless, DP&L is attacking the Entry through what amounts to a late filed interlocutory appeal. Alternatively, DP&L's filing can be considered an impermissibly filed reply brief. Either way, it should not be considered by the PUCO.

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<sup>39</sup> See Amended Stipulation and Recommendation (March 13, 2017) at 39.

<sup>40</sup> See Prehearing Conference Transcript (December 5, 2018) at 10.

<sup>41</sup> See R.C. 4903.10 ("After *any* order has been made by the public utilities commission, *any* party . . . may apply for a rehearing . . ."); *In re Application of Columbus Southern Power Co.*, 2011-Ohio-958 (2011).

<sup>42</sup> See Prehearing Conference Transcript at 9.

<sup>43</sup> See Entry.

<sup>44</sup> See *id.*

<sup>45</sup> Parties filing supplemental briefs included DP&L, OCC, IGS, and the Environmental Group. See Docket.

<sup>46</sup> See Entry.

If DP&L thought that parties had waived their rights to argue the applicability of *Ohio Edison*, then supplemental briefs would have been unnecessary. Obviously the PUCO disagreed with DP&L on the need for supplemental briefs. If DP&L wanted to contest the filing of supplemental briefs it should have filed an interlocutory appeal<sup>47</sup> of the Entry. It did not and cannot do so now.<sup>48</sup> The PUCO should reject DP&L's Motion.

Given that parties, including OCC, had previously argued that DP&L's charge was not authorized by R.C. 4928.143(B)(2)(h), surely DP&L knew that parties would describe how DP&L's charge is unlawful under *Ohio Edison*.<sup>49</sup> And given that DP&L itself relied in its initial briefing so heavily on the PUCO's decision approving FirstEnergy's Charge, surely DP&L knew that parties would describe how DP&L's Charge is unlawful under *Ohio Edison* where the Ohio Supreme Court held that the PUCO was wrong.<sup>50</sup>

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<sup>47</sup> See O.A.C. 4901-1-15.

<sup>48</sup> See *id.* at (C) (identifying time in which interlocutory appeal must be filed as five days after the ruling appealed from is issued); *In the Matter of the Complaint of Westside Cellular, Inc.*, Case No. 93-1758-RC-CSS, March 23, 1995 Entry (denying late filed interlocutory appeal).

<sup>49</sup> See, e.g., OCC's Reply Brief (May 15, 2017) at 6-8 (DP&L's "technical defenses" of the DMR under R.C. 4928.143(B)(2)(h) are inadequate and should be rejected to protect consumers); ("The DMR proposed by DP&L is not authorized under R.C. 4928.143(B)(2)(h) . . . and should be rejected to protect consumers"); see also Application for Rehearing of the Opinion and Order, Entered October 20, 2017, by the Ohio Environmental Council and Environmental Defense Fund (November 17, 2017) at 12-14; OCC's Application for Rehearing (November 20, 2017) at 5 (by arguing that DP&L's charge was an illegal transition charge, OCC was by necessity affirming that it could not have been legally authorized under R.C. 4928.143(B)(2)(h)); IGS's Supplemental Post-Hearing Brief (May 15, 2019) at 30 ("The DMR is not justifiable under R.C. 4928.143(B)(2)(h)."). The application for rehearing filed by the Ohio Environmental Council and Environmental Defense Fund confirms that OCC, IGS, ELPC, and Sierra Club have *not* waived the argument that DP&L's charge is not an "incentive" authorized by R.C. 4928.143(B)(2)(h). As the Ohio Supreme Court has explained, "R.C. 4903.10 does not require that [an] error be alleged in the *appellant's* application for rehearing; it can be in an application for rehearing filed by a *nonappellant* intervening party." See *In re Application of Columbus Southern Power Co.*, 2011-Ohio-958, ¶ 16. So the argument that DP&L's charge is not an "incentive" authorized by R.C. 4928.143(B)(2)(h) is and has been preserved, in the most granular fashion, for all parties.

<sup>50</sup> See DP&L's Initial Brief (May 5, 2017) at 27-29.

Clearly, DP&L could have taken the position (however wrong it is) in its supplemental brief that *Ohio Edison* is inapplicable here because parties waived the right to challenge the DP&L Charge under it (or lacked standing to challenge it). It did not.<sup>51</sup> Under the Entry, reply briefs were not contemplated, so DP&L should not be allowed to file what is a reply brief by calling it a motion.

DP&L's Motion should not be considered by the PUCO. It should be rejected to protect consumers.

**C. If it considers the Motion (which it should not), the PUCO should deny it on the merits to protect consumers because OCC has not waived the right to challenge DP&L's charge under R.C. 4928.143(B)(2)(h).**

DP&L's Motion, filled with inconsistencies and inaccuracies,<sup>52</sup> boils down to its assertion that because "OCC, IGS, ELPC, and Sierra Club have never argued that the DMR is not an 'incentive' until now, they have waived the issue."<sup>53</sup> "By failing to specifically challenge the legality of the DMR under subsection (B)(2)(h), OCC waived that argument in this proceeding."<sup>54</sup> DP&L asserts that OCC did not challenge DP&L's Charge under R.C. 4928.143(B)(2)(h) in either its initial briefing or on rehearing, and

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<sup>51</sup> See DP&L's Supplemental Brief. That it did not is revealing in-and-of itself. It shows that DP&L does not have the conscience of its convictions.

<sup>52</sup> See, e.g., Motion at 2 (on one hand, asserting that IGS had the opportunity to contest the DMR as not being an "incentive" after it withdrew from the settlement, while on the other hand saying that IGS does not have standing to challenge the DMR); Motion at 3 (citing to the PUCO's Third Entry on Rehearing to support assertion that the PUCO should not tolerate a second bite at the apple, where the cited paragraph in the Third Entry has nothing to do with the assertion). The PUCO should take note of the inconsistencies and inaccuracies in DP&L's Motion.

<sup>53</sup> See Motion at 2 (underline in original).

<sup>54</sup> See *id.* at 4.

therefore waived the argument.<sup>55</sup> DP&L is wrong and its Motion should be denied to protect consumers for three, independent reasons.

**1. DP&L's Motion should be denied to protect consumers because this case is still ongoing.**

DP&L has to come to grips with the fact that this case is not yet over. Due to its successful withdrawal, IGS was permitted the opportunity to contest the Settlement and brief all issues for the PUCO to decide.<sup>56</sup> All parties were permitted to file supplemental initial and reply briefs, including based on evidence at the original phase of this case, on any issue.<sup>57</sup> By operation of law, all parties will have the right to apply for rehearing, and appeal to the Supreme Court of Ohio,<sup>58</sup> after a PUCO decision on what the Attorney Examiners have described as this “do-over hearing.”<sup>59</sup>

During the pendency of the case, a new legal development occurred – *Ohio Edison*. There it reversed the PUCO's approval of FirstEnergy's Charge and remanded the case to the PUCO with instructions to remove the charge from FirstEnergy's electric security plan.<sup>60</sup> The Court held that FirstEnergy's charge was not authorized by R.C. 4928.143(B)(2)(h).<sup>61</sup> Integrating *Ohio Edison* into the record for the PUCO's consideration makes sense. And the Attorney Examiners specifically permitted the parties

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<sup>55</sup> *See id.*

<sup>56</sup> *See* Amended Stipulation and Recommendation (March 13, 2017) at 39.

<sup>57</sup> *See* Prehearing Conference Transcript (December 5, 2018) at 10.

<sup>58</sup> *See* R.C. 4903.10 (“After *any* order has been made by the public utilities commission, *any* party . . . may apply for a rehearing . . . .”); *In re Application of Columbus Southern Power Co.*, 2011-Ohio-958 (2011).

<sup>59</sup> *See id.* at 9.

<sup>60</sup> *See Ohio Edison* at 3.

<sup>61</sup> *See Ohio Edison*.

to do so in their Entry.<sup>62</sup> Striking briefs specifically permitted by the Entry in an ongoing case would be unprecedented.

**2. DP&L's Motion should be denied to protect consumers because parties have raised the incentive issue under R.C. 4928.143(B)(2)(h) before.**

The authority that DP&L cites to support its argument that OCC waived its right to argue the applicability of *Ohio Edison* is irrelevant here. *In the Matter of the Application of Columbia Gas of Ohio, Inc.*,<sup>63</sup> which DP&L relies on in its motion, is a rate case where there are rules specifically governing waiver of certain matters in certain instances.<sup>64</sup> This is not a rate case. *Ohio Consumers' Counsel v. PUC*,<sup>65</sup> *Disc. Cellular, Inc. v. PUC*,<sup>66</sup> *Senior Citizens Coalition v. PUC*,<sup>67</sup> deals with waiver of issues not raised in an application for rehearing. Here, DP&L is arguing that parties have waived the ability to make an argument *before the PUCO* (and in response to an Attorney Examiner Entry, at that) in an ongoing case. DP&L's authority is inapposite.

Notwithstanding the irrelevancy of DP&L's authority, OCC specifically challenged DP&L's charge under R.C. 4928.143(B)(2)(h) in its initial briefing.<sup>68</sup> Among other things, OCC stated specifically:

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<sup>62</sup> It is worth reiterating that DP&L is asking the PUCO to strike briefs that the Attorney Examiners specifically permitted.

<sup>63</sup> Case No. 89-616-GA-AIR; *see* Motion at 4.

<sup>64</sup> *See* O.A.C. 4901-1-28(D).

<sup>65</sup> 111 Ohio St.3d 300 (2006); *see* Motion at 4.

<sup>66</sup> 112 Ohio St.3d 360 (2005); *see* Motion at 4.

<sup>67</sup> 40 Ohio St.3d 329 (1988); *see* Motion at 4.

<sup>68</sup> *See, e.g.*, OCC's Reply Brief (May 15, 2017) at 6-8 (DP&L's "technical defenses" of the DMR under R.C. 4928.143(B)(2)(h) are inadequate and should be rejected to protect consumers); ("The DMR proposed by DP&L is not authorized under R.C. 4928.143(B)(2)(h) . . . and should be rejected to protect consumers").

DP&L cannot show that sufficient resources are dedicated to grid modernization through the DMR and thus does not meet the requirements of R.C. 4928.143(B)(2)(h). In fact, no resources from the DMR are dedicated to grid modernization. DP&L needs all of the DMR funds to pay down debt so that DP&L can maintain its financial integrity.<sup>69</sup>

DP&L's assertions are baseless and should be disregarded.

And the argument that DP&L's charge is not an "incentive" authorized by R.C. 4928.143(B)(2)(h) is and has been preserved, in the most granular fashion, in the application for rehearing filed by the Ohio Environmental Council and Environmental Defense Fund.<sup>70</sup> There, an entire section is devoted to the proposition that "Rider DMR is not an 'incentive' because it fails to require the Company to finance grid modernization initiatives."<sup>71</sup> The Ohio Supreme Court has explained that "R.C. 4903.10 does not require that [an] error be alleged in the *appellant's* application for rehearing; it can be in an application for rehearing filed by a *nonappellant* intervening party."<sup>72</sup> This conclusively confirms that OCC, IGS, ELPC, and Sierra Club have *not* waived the argument that DP&L's charge is not an "incentive" authorized by R.C. 4928.143(B)(2)(h).

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<sup>69</sup> OCC's Reply at 7-8 (italics, internal quotations, and citations omitted).

<sup>70</sup> See Application for Rehearing of the Opinion and Order, Entered October 20, 2017, by the Ohio Environmental Council and Environmental Defense Fund (November 17, 2017) at 12-14.

<sup>71</sup> See *id.*

<sup>72</sup> See *In re Application of Columbus Southern Power Co.*, 2011-Ohio-958, ¶ 16. In light of this well-known and well-established authority, DP&L's assertion that OCC "[b]y failing to set forth this specific ground in its first application for rehearing," has waived the issue is yet another example of the inconsistencies and inaccuracies in DP&L's Motion.



**3. DP&L's Motion should be denied to protect consumers because *Ohio Edison* is new law and it would be unfair and prejudicial to deny consumers the ability to brief its applicability here.**

*Ohio Edison* is new case law on R.C. 4928.143(B)(2)(h) created during the pendency of this case. Parties could not possibly have addressed its applicability here earlier – it had not been decided. Denying consumers the ability to brief *Ohio Edison's* (new law created during the pendency of this case) applicability would be fundamentally unfair and prejudicial.<sup>73</sup> It would require of parties a clairvoyance that they simply cannot possess.

#### **IV. CONCLUSION**

DP&L has moved to strike briefs specifically permitted by the Entry. For that reason alone, its Motion should be denied. But it should not even be considered, and should be stricken, because it is a late-filed interlocutory appeal of the Attorney Examiners' Entry through an impermissibly filed reply brief.

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<sup>73</sup> See *In the Matter of the Complaint of Suburban Natural Gas Company*, Case No. 92-1876-GA-CSS, Entry (January 12, 1993) (denying memorandum contra motion to file surreply where the PUCO was “concerned, given the novelty of the legal issues presented in these proceedings, that the[] issues be fully explored. [A surreply] should tend to enhance the Commission’s resolution of the issues involved.”); *Pub. Util. Comm. v. Pollak*, 343 U.S. 451, 465 (1952) (The PUCO meets due process requirements only when it’s authority “is not arbitrarily and capriciously exercised.”); *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 2006-Ohio=1386 at ¶53 (Due process requires ample notice, an opportunity to present evidence, cross-examine witnesses, introduce exhibits, post-hearing briefs, and challenges through applications for rehearing.).

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the Memorandum Contra was served upon the following parties via electronic transmission this 5<sup>th</sup> day of September 2019.

/s/ William J. Michael

William J. Michael  
Assistant Consumers' Counsel

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

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Summary: Memorandum Memorandum Contra Dayton Power and Light Company's Motion to Strike Supplemental Briefs by The Office of the Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of Michael, William J.