Office of the Ohio Consumers' Counsel

December 5, 2019

Ms. Tanowa Troupe
The Public Utilities Commission of Ohio
180 E. Broad St., 12th Floor
Columbus, Ohio 43215

Re: Case Nos. 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC, 16-0395-EL-SSO, 16-0396-EL-ATA & 16-0397-EL-AAM

Dear Ms. Troupe,

Yesterday, the Office of the Ohio Consumers' Counsel, The Ohio Manufacturers' Association Energy Group, The Kroger Company, and IGS Energy (the "Parties") timely filed a Memorandum Contra DP&L's Motions to Withdraw Its Application and Implement Previously Authorized Rates (To Increase Charges to Consumers) ("Memorandum Contra") in the foregoing dockets. A heading within the Memorandum Contra transitioning from one argument to another was inadvertently omitted.

The Parties would like to correct the filing of December 4, 2019 by substituting the attached Memorandum Contra that includes the heading that was inadvertently omitted. The Corrected Memorandum Contra includes heading C in both the table of contents and within the Recommendations (on page 5). Other than including the heading, the attached Memorandum Contra is the same as the one filed December 4, 2019. No party will be prejudiced by this substitution of pleadings.

Please contact me with any questions or to discuss.

Regards,

/s/ William J. Michael

Cc: Parties of Record

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan.	)))	Case No. 08-1094-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 08-1095-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code Section 4905.13.	))))	Case No. 08-1096-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of its Amended Corporate Separation Plan.	))))	Case No. 08-1097-EL-UNC
In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan.	)))	Case No. 16-0395-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 16-0396-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13.	))))	Case No. 16-0397-EL-AAM

CORRECTED MEMORANDUM CONTRA DP&L'S MOTIONS TO WITHDRAW ITS APPLICATION AND IMPLEMENT PREVIOUSLY AUTHORIZED RATES (TO INCREASE CHARGES TO CONSUMERS)
BY
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THE KROGER COMPANY
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TABLE OF CONTENTS

PAGE

I. INTRODUCTION 1

II. RECOMMENDATIONS 3

A. DP&L's Anti-Consumer Motion to Withdraw its Application should be rejected because it has not followed the proper procedure under the approved settlement in this case. 3

B. DP&L's proposed frustration of consumer protection by withdrawal of its application violates the plain language of R.C. 4928.143(C)(2)(a) because the statute only allows withdrawal following modification of an *application*, not modification of a *settlement*. 4

C. DP&L's Anti-Consumer proposal to revert back to its first electric security plan violates the plain language and intent of R.C. 4928.143(C)(2)(b) because the statute requires the PUCO to "continue" the most recent electric security plan, which is impossible when the most recent plan has already expired. 5

D. DP&L's proposal to circumvent consumer protection by reverting to its first electric security plan violates the plain language of R.C. 4928.143(C)(2)(b), which requires only that the PUCO continue the utility's "most recent standard service offer," not that the PUCO continue the utility's entire previous electric security plan. 7

E. DP&L seeks to defy the PUCO's decision, and the Supreme Court of Ohio's decision in *Ohio Edison*, and deprive its consumers of lower rates. 9

F. DP&L should not be permitted the extraordinary result of depriving consumers of a rate reduction by withdrawing and terminating its electric security plan application at this late time. 10

G. DP&L's proposed extraordinary result of depriving consumers of a rate reduction by withdrawing and terminating its electric security plan and returning to prior rates is impossible. 12

H. DP&L's Anti-Consumer Motion to Withdrawal is improper and should be denied because DP&L is attempting an unlawful partial withdrawal of its current electric security plan application. 13

III. CONCLUSION 14

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MEMORANDUM CONTRA

I. INTRODUCTION

500,000 customers of DP&L should be receiving long overdue rate decreases as a result of a Supreme Court decision overturning PUCO-authorized subsidies. But DP&L wants to increase monthly rates for customers. The PUCO should reject DP&L's

regurgitated scheme to continue collecting unlawful subsidies from customers by reinstating select portions of old rates from its first electric security plan ("ESP"), its second ESP, and its third ESP that continue to collect unlawful subsidies from customers.[1]

Since November 1, 2017, DP&L has taken approximately $218.75 million in subsidies from customers in the Dayton area – where there is financial distress and a poverty level of 35% -- through its so-called Distribution Modernization Rider ("Rider DMR"). After the Supreme Court of Ohio invalidated the same rider that the PUCO approved for FirstEnergy, the PUCO ordered DP&L to stop charging customers for Rider DMR because it is an unlawful charge that customers should not be paying.[2] This vast sum of money was taken from consumers by DP&L (and the PUCO) with no allowance of a refund.

But, on November 26, 2019, DP&L filed a plan that defies the PUCO's ruling – and by necessary extension, the Supreme Court's ruling in *Ohio Edison*. DP&L proposed that the PUCO allow it to continue collecting from customers an unlawful above-market transition charge, under a different name (the Rate Stability Charge), from customers. DP&L seeks to withdraw and terminate its over two-year old Electric Security Plan (under R.C. 4928.143(C)(2)(b)). DP&L's maneuvering is a *heads I win, tails you lose* for consumers. For consumer protection, DP&L's unlawful efforts should be rejected.

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[1] Contemporaneously herewith, OCC has filed a Motion to Reject DP&L's Proposed Tariffs to Increase Consumer Rates in Case Nos. 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, and 08-1097-EL-UNC.

[2] *See* Supplemental Opinion and Order.

II. RECOMMENDATIONS

A. DP&L's Anti-Consumer Motion to Withdraw its Application should be rejected because it has not followed the proper procedure under the approved settlement in this case.

The electric security plan approved in this case is the product of a settlement.[3] The settlement describes a process – agreed to by DP&L – for withdrawing from the settlement (and hence the electric security plan).[4] It provides that if the PUCO does not adopt the settlement without material modification upon rehearing, or if the PUCO makes a material modification to any order adopting the settlement based on any reversal, vacation, or remand by the Supreme Court of Ohio, then DP&L may terminate and withdraw from the settlement by filing a notice.[5] It also provides that DP&L may not file such notice "without first negotiating in good faith with the other Signatory Parties to achieve an outcome that substantially satisfies the intent of the" settlement.[6]

So where, as here, the PUCO has modified the settlement based upon the Court's decision, DP&L must do at least two things before it can attempt to withdraw from the electric security plan settlement. First, it must apply for rehearing of a PUCO decision materially modifying the settlement. Second, it must negotiate in good faith with the other Signatory Parties.

Here, DP&L has done neither. It has not applied for rehearing of the Supplemental Opinion and Order. Instead, it filed its Notice of Withdrawal of its Application under R.C. 4928.143(C)(2)(a) a mere five days after the Supplemental

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[3] *See* Amended Stipulation and Recommendation (March 14, 2017).

[4] *See id.* at XI5.

[5] *See id.*

[6] *See id.*

Opinion and Order. Further, DP&L does not even make a representation that it has negotiated in good faith with the other Signatory Parties.

Additionally, interested stakeholders have taken a course deliberately intended to avoid DP&L from withdrawing its ESP and reverting to ESP I or to some blended plan: they entered into a settlement that prevents any of the signatories, including DP&L, from doing so without a full hearing on the matter. DP&L has freely entered into the settlement, which provides that "the [PUCO] *will convene an evidentiary hearing* to afford that Signatory Party the opportunity to contest the Stipulation" if that party wishes to withdraw from the case.[7] As such, DP&L may not withdraw its current ESP and adopt some prior ESP on its own accord, because it has agreed not to do so by stipulation.

Before filing its Notice of Withdrawal, DP&L did not comply with the settlement. The PUCO should enforce the requirement that DP&L follow the steps that it agreed to in the settlement in this case. As such, it should reject DP&L's Motion to Withdraw out of hand.[8]

B. DP&L's proposed frustration of consumer protection by withdrawal of its application violates the plain language of R.C. 4928.143(C)(2)(a) because the statute only allows withdrawal following modification of an *application*, not modification of a *settlement*.

In its Notice of Withdrawal, DP&L cites R.C. 4928.143(C)(2)(a) as the statutory authority for its claimed right to withdraw.[9] The plain language of the statute, however, does not support withdrawal in this case.

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[7] *See* Settlement at 38-39 (italics added).

[8] It is noteworthy that DP&L made this very argument in response to IGS Energy's Notice of Withdrawal from the Amended Stipulation and Recommendation. *See* DP&L's Motion to Strike Notice of Withdrawal from the Amended Stipulation (October 26, 2018).

[9] Notice of Withdrawal at 1.

Under R.C. 4928.143(C)(2)(a), "the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer" only if "the commission modifies and approves an *application*" for an electric security plan. (emphasis added). Here, the PUCO did not modify and approve an application – it modified and approved a settlement.

R.C. 4928.143(C)(2)(a) says nothing at all about a utility's right to withdraw when the PUCO modifies a settlement. A settlement and an application are not the same thing. If the General Assembly intended to allow a utility to withdraw its electric security plan application upon modification of a settlement, it would have said so. But it did not. DP&L's attempt to withdraw its application in response to an order modifying a settlement that has been in effect for almost three years does not comply with the plain language of R.C. 4928.143(C)(2)(a), and thus, it must be rejected.[10]

C. DP&L's Anti-Consumer proposal to revert back to its first electric security plan violates the plain language and intent of R.C. 4928.143(C)(2)(b) because the statute requires the PUCO to "continue" the most recent electric security plan, which is impossible when the most recent plan has already expired.

When a utility properly exercises its right to withdraw an electric security plan application, R.C. 4928.143(C)(2)(b) requires the PUCO to "issue such order as is necessary to *continue* the provisions, terms, and conditions of the utility's most recent standard service offer." (emphasis added). Here, however, DP&L is proposing that the PUCO *reinstate* a long-expired electric security plan, which is different than *continuing* one.

[10] *See, e.g., Risner v. Ohio Dept. of Nat. Resources,* 144 Ohio St.3d 278 2015) (statutory interpretation begins with a statute's plain language and a statute's must be applied as written where, as here, it is clear and unambiguous).

Under R.C. 4928.141, electric distribution utilities in Ohio are required to provide a standard service offer. A standard service offer is a default rate that is available to all customers, ensuring that they will have access to electric generation, even if they choose not to shop with a competitive supplier. The utility can provide such a standard offer either through a market rate offer or an electric security plan.[11]

Regardless of that choice, however, the point is that the requirement to provide a standard service offer is ongoing. Thus, when a utility has an electric security plan in place, and that plan is set to expire, the utility must file an application with enough lead time such that the new application can be approved before the old plan expires. Otherwise, there could be a gap in the availability of a standard service offer, which would violate the requirement under R.C. 4928.141 that electric distribution utilities must provide a standard offer.

In this context, the intent of R.C. 4928.143(C)(2)(b) is clear. The General Assembly expected a utility's application for a new electric security plan to be ruled upon *before* the old plan expired (to avoid the gap mentioned above). Thus, if the PUCO modified the application for the new electric security plan, the PUCO would simply "continue" the most recent plan under R.C. 4928.143(C)(2)(b), which would not yet have expired and would be in place until the PUCO ordered approval of the new application and final tariffs were filed implementing the new ESP (again, to avoid any gap). This is the only reasonable interpretation of the General Assembly's decision to use the word "continue."[12]

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[11] R.C. 4928.141.

[12] *See, e.g., Risner*, supra note 10.

The situation here is quite different – and therefore not permitted by the plain language of the statute allowing a previous electric security plan to "continue." It is impossible for DP&L to "continue" its first electric security plan because that plan expired many years ago. The statute simply does not provide for the reinstatement of an electric security plan from many years ago, as opposed to the mere continuation of a plan that remains effective at the time of the PUCO's order on a new ESP.

D. DP&L's proposal to circumvent consumer protection by reverting to its first electric security plan violates the plain language of R.C. 4928.143(C)(2)(b), which requires only that the PUCO continue the utility's "most recent standard service offer," not that the PUCO continue the utility's entire previous electric security plan.

DP&L proposes that it revert to its first electric security plan (but with some "add ons" from its second and third electric security plans), including adding a charge to customers' bills under the Rate Stabilization Charge ("RSC"), which was included as part of the first electric security plan. In so proposing, DP&L again misreads R.C. 4928.143(C)(2)(b).

R.C. 4928.141 requires electric distribution utilities to provide a standard service offer in the form of either a market rate offer or an electric security plan. Specifically, the statute says that such a utility "shall provide customers, on a comparable and nondiscriminatory basis within its certified territory, a standard offer of all competitive retail electric services necessary to maintain essential electric service to customers, including a firm supply of electric generation service." That is, a "standard service offer" is the supply of *generation*, which is a competitive service in Ohio.

R.C. 4928.143(C)(2)(b) provides that when a utility withdraws an electric security plan application, the PUCO "shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer."

Notably, this statutory provision does *not* say that the PUCO must continue the most recent electric security plan.

An electric security plan and a standard service offer are not the same. Rather, a standard service offer is just *one component* of a larger electric security plan. The plain language of R.C. 4928.141 and R.C. 4928.143 bear this out. As described above, under R.C. 4928.141, a standard service offer is a competitive *generation* service. An electric security plan, by contrast, is much broader. An electric security plan, for example, can include numerous types of *distribution* charges:

> The plan may provide for or include, without limitation, any of the following:
>
> (h) Provisions regarding the utility's distribution service, including ... provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility....
>
> (i) Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs....[13]

These types of charges are part of an electric security plan, but they cannot be considered part of a "standard service offer." They are for distribution services, whereas a standard offer is a generation service.

Thus, when R.C. 4928.143(C)(2)(b) says that the PUCO must "continue the provisions, terms, and conditions of the utility's most recent standard service offer," that does not mean that the PUCO must continue the entire previous electric security plan. Therefore, DP&L's proposal to reinstate its first electric security plan, including charges that are not part of its standard service offer, is inconsistent with the plain language of the

[13] R.C. 4928.143(B).

law requiring the PUCO merely to provide that customers will have access to default generation service.[14]

E. DP&L seeks to defy the PUCO's decision, and the Supreme Court of Ohio's decision in *Ohio Edison*, and deprive its consumers of lower rates.

DP&L argues that a version of its standard service offer rates from 2016 approved in its first electric security plan must be put back into effect (pending a PUCO ruling that approves a new standard service offer). Under those previous rates, DP&L's idea would be to increase rates to customers and to charge customers a monthly rate stabilization charge that collects the very sort of transition charges that the Supreme Court of Ohio has previously rejected.[15] Essentially, it replaces one charge – Rider DMR, ordered removed from DP&L's electric security plan by the PUCO – with another charge – the RSC. Rather than seeing a full reduction in their bills as a result of eliminating Rider DMR, consumers will see only a partial reduction (the difference between the monthly reduction for the Rider DMR charge and the monthly increase for the RSC).

Implementing DP&L's previous standard service offer is not the right, reasonable, or lawful answer to the PUCO's Supplemental Opinion and Order or the Court's decision in *Ohio Edison*. The PUCO and the Court protected customers from paying charges like Rider DMR and the RSC. The PUCO should thwart DP&L's proposed work-around for maintaining subsidies in the face of a mandate to eliminate such charges from Ohioans' monthly electric bills. DP&L's proposed above-market rates feature a replacement for

[14] *See, e.g., Risner*, supra note 10.

[15] *See In the Matter of the Application of the Dayton Power & Light Company for Approval of its Market Rate Offer,* Case No. 12-426-EL-SSO et al., Supreme Court mandate (July 19, 2016).

Rider DMR, which the Court rejected. This would allow DP&L to collect rates from customers that include an unlawful per month transition charge.[16]

Allowing DP&L to withdraw and terminate its application in response to an unfavorable decision from the PUCO and the Supreme Court of Ohio would also be unreasonable. Under the rules of statutory construction in Ohio, in enacting a statute, it is presumed that, inter alia, a just and reasonable result is intended.[17] What is unreasonable here about DP&L's attempted use of R.C. 4928.143(C)(2)(a) is that parties would be deprived of the remedy the PUCO (and, by extension, the Supreme Court of Ohio) ordered –reduced rates where DP&L's customers do not have to pay Rider DMR. Under DP&L's approach, customers would be denied the lower rates mandated by the PUCO (and by extension, as a result of *Ohio Edison*, the Court). The PUCO's and the Court's decisions would be frustrated. And, the Ohio General Assembly's statute would be thwarted. The PUCO should deny DP&L's Motion to Withdrawal.

F. DP&L should not be permitted the extraordinary result of depriving consumers of a rate reduction by withdrawing and terminating its electric security plan application at this late time.

DP&L nonetheless believes it has a right to implement what it interprets as prior rates (rates that would cost customers more) because the PUCO modified and approved the settlement after a legal challenge and related Court- decisions. In this latest twist on using Senate Bill 221 (Ohio's 2008 energy law) to cost Ohio consumers their hard-earned money, DP&L claims it can withdraw and terminate its electric security plan application filed in 2016, now over two years—almost three years-- into that plan. DP&L advances

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[16] *In the Matter of the Application of the Dayton Power & Light Company for an Electric Security Plan,* Case No. 08-1094-EL-SSO et al., Tariff filing (August 1, 2016).

[17] R.C. 1.47(C).

this argument despite having accepted and enjoyed the financial benefits of the 2016 plan for almost three years. During that time DP&L charged Dayton-area consumers more than $218.75 million just for the unlawful Rider DMR (among other charges).

In this context, the intent of R.C. 4928.143(C)(2)(b) is clear. The General Assembly expected a utility's application for a new electric security plan to be ruled upon *before* the old plan is replaced. Thus, if the PUCO modified the application for the new electric security plan, the PUCO would simply "continue" the most recent plan under R.C. 4928.143(C)(2)(b). And it would be in place until the PUCO ordered approval of the new application and final tariffs were filed implementing the new ESP. This is the only reasonable interpretation of the General Assembly's decision to use the word "continue."[18]

Having accepted the 2016 plan and having charged consumers plenty for that acceptance, DP&L should be precluded from withdrawing in response to the PUCO's directive (itself the necessary result of *Ohio Edison*). DP&L has reaped the financial benefits of increased revenues under the plan. Now at a time when the PUCO (based on the Ohio Supreme Court's decision in *Ohio Edison*) has determined that charges were unlawful and customers deserve a break in rates, DP&L seeks to terminate the plan, rather than provide customers with reduced rates. DP&L's interpretation of the statute is wrong.

Under DP&L's interpretation of R.C. 4928.143(C)(2)(b), customers will pay increased rates and then be hit with a new set of rates under a new electric security plan. If DP&L's scheme is adopted, stability and continuity of rates for customers under the 2016 electric security plans is undermined. The PUCO should deny DP&L's request.

[18] *See, e.g., Risner,* supra note 10.

G. DP&L's proposed extraordinary result of depriving consumers of a rate reduction by withdrawing and terminating its electric security plan and returning to prior rates is impossible.

The right to withdraw an electric security plan application is not unlimited. The PUCO itself has recognized this when in the past it has determined that the filing of tariffs consistent with its Opinion and Order (modifying the electric security plan) is to be deemed as acceptance of the Order (thereby precluding later withdrawal).[19]

In this case, the return to prior rates is impossible. Under R.C. 4928.143(C)(2)(b), if a utility withdraws an application or if the PUCO disapproves the application, then the provisions, terms, and conditions of the utility's recent standard service offer must be continued. Because DP&L's withdrawal is so late into the term of the electric security plan, it is impossible to go back to the most recent standard service offer. For DP&L that would mean (among other things) going back to a standard service offer that is priced based on DP&L supplying the power, instead of the auction-based standard service.

But DP&L has procured power for standard service through 2021 by way of auctions held much earlier. Those auctions cannot be undone.[20] And DP&L in its tariff filing to implement the proposed rates has not proposed undoing the auctions to get back to the most recent standard service offer.[21] Thus, even DP&L understands that its argument under the statute is flawed.

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[19] *See In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider,* Case No. 14-1693-EL-RDR, Opinion and Order at 106 (March 31, 2016); *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, Opinion and Order at 86 (March 31, 2016).

[20] *See* Notice of Filing Proposed Tariffs at 2 (DP&L states that it "will honor existing contracts with winning competitive bid suppliers through the end of their term (May 2021) and maintain current PJM obligations for all suppliers.").

[21] *See id.*

H. DP&L's Anti-Consumer Motion to Withdrawal is improper and should be denied because DP&L is attempting an unlawful partial withdrawal of its current electric security plan application.

Under certain circumstances (as described above, not present here), a utility may withdraw its electric security plan application under R.C. 4928.143(C)(2)(a). When a utility does so, it withdraws the application in its entirety, "thereby terminating it." The statute, however, does not allow a utility to keep the parts of its new electric security plan that it likes and revert to the parts of an old plan that it also likes, cobbling together a hybrid or blended electric security plan to the utility's advantage. But that is exactly what DP&L has done here.

DP&L cherry-picks charges and provisions from its first, second, and third electric security plans. It does *not* propose a full withdrawal of its third electric security plan and full reinstatement of its first electric security.

Although DP&L claims that it is returning to its first electric security plan, it also proposes keeping competitive solicitations, the Storm Rider, Uncollectible Rider, Regulatory Compliance Rider, Decoupling Rider, and Distribution Investment Rider.[22] *None of these riders or charges were in DP&L's first electric security plan that DP&L is proposing to go back to.*[23] If they were removed from DP&L's tariffs (which they should be), a typical residential consumer would save an additional $5.51 per month.[24] Such cherry-picking of charges to suit DP&L's purposes (charging customers more) underscores that DP&L's Motion to Withdraw does not comply with 4928.143(C)(2).

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[22] *See* Tariffs attached to DP&L's Notice of Filing Proposed Tariffs (November 25, 2019).

[23] *See generally* Notice of Filing Proposed Tariffs.

[24] Storm Rider ($1.01) + Regulatory Compliance Rider ($.45) + Decoupling Rider ($1.30) + Distribution Investment Rider ($2.75). *See id.*

III. CONCLUSION

The PUCO should deny DP&L's Anti-Consumer Motion to Withdraw. The PUCO should reaffirm its Order and direct DP&L to immediately stop collecting the unlawful and unwarranted monthly Rider DMR charge from Dayton-area consumers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Corrected Memorandum Contra was served upon the following parties via electronic transmission this 5th day of December 2019.

/s/ William J. Michael
William J. Michael
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Summary: Memorandum Corrected Memorandum Contra DP&L's Motions to Withdraw Its Application and Implement Previously Authorized Rates (To Increase Charges to Consumers) by The Office of The Ohio Consumers' Counsel, The Ohio Manufacturers' Association Energy Group, The Kroger Company and IGS Energy electronically filed by Mrs. Tracy J Greene on behalf of Michael, William J.