

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Dayton)
Power and Light Company for Extension) Case No. 19-0162-EL-RDR
of Its Distribution Modernization Rider.)

**MOTION TO PROTECT CONSUMERS BY DENYING DAYTON POWER &
LIGHT’S REQUEST TO EXTEND ITS SO-CALLED DISTRIBUTION
MODERNIZATION RIDER
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

Since the PUCO approved Dayton Power and Light Company’s (“DP&L”) current electric security plan less than two years ago, DP&L’s 465,000 residential customers have paid about \$4.25 million monthly for its so-called Distribution Modernization Rider (“Charge”). DP&L’s Application in this case –which remains pending despite recent developments against it – seeks to increase what residential customers pay for the Charge to almost \$8.06 million monthly. With the Charge, a typical DP&L residential customer using 1,000 kWh per month paid \$9.66 or approximately \$115.92 for 12 months. DP&L’s Application in this case would increase the monthly Charge for the same customer to \$18.31 per month or \$219.70 for 12 months (assuming no change in revenue allocation among customer classes).

The Supreme Court of Ohio (“Court”) recently held that FirstEnergy’s nearly identical charge was unlawful.¹ As a result, the PUCO denied FirstEnergy’s Application to extend its unlawful charge as moot.²

¹ *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73 (2019) (“*Ohio Edison*”).

² *In the Matter of the Application of [FirstEnergy] for an Extension of the Distribution Modernization Rider*, Case No. 19-361-EL-RDR, Entry (November 21, 2019).

In Case No. 16-0395-EL-SSO, the PUCO requested supplemental briefs regarding the impact of the Supreme Court's decision in *Ohio Edison* on DP&L's Charge. On November 21, 2019, the PUCO issued an order declaring DP&L's Charge unlawful as well.³ Therefore, there no longer is a charge to "extend" because the PUCO has required that the charge be removed from DP&L's tariffs. The PUCO should deny DP&L's Application as moot.

In light of the Court's decision in *Ohio Edison* and the PUCO's November 21, 2019 decision in Case No. 16-0395-EL-SSO, the Office of the Ohio Consumers' Counsel ("OCC") respectfully requests that the PUCO grant this motion, dismiss this case, and deny DP&L's Application to extract this illegal subsidy from Ohio customers.

Respectfully submitted,

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³ *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, Supplemental Opinion & Order (November 21, 2019) at ¶ 110.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

DP&L’s Application in this case asks the PUCO to allow it to charge consumers even more per month than before, for its so-called Distribution Modernization Rider (“Charge”).⁴ DP&L claims that continuing the Charge will purportedly allow it to “maintain its financial integrity” and to complete grid modernization projects that it claims its customers both want and need.⁵

DP&L’s Charge at issue in the Application is virtually identical to FirstEnergy’s Distribution Modernization Rider charge to customers that the Supreme Court of Ohio (“Court”) recently found unlawful in *Ohio Edison*. Following the Court’s decision in *Ohio Edison*, the PUCO found DP&L’s Charge to be illegal as well. Therefore, DP&L cannot lawfully extend the Charge as it requests in the Application in this case.

⁴ Application, Case No. 19-0162-EL-RDR (January 22, 2019), at 1, 5.

⁵ *Id.* at 1.

II. RECOMMENDATIONS

A. The Court held in *Ohio Edison* that FirstEnergy's Virtually Identical Distribution Modernization Rider was unlawful to charge consumers.

The PUCO's October 20, 2017 Opinion and Order in Case No. 16-0395-EL-SSO ("DP&L ESP Case") modified and adopted a Settlement that allowed the Charge.

DP&L's Charge is virtually identical to the charge that allowed FirstEnergy to collect hundreds of millions of dollars in unwarranted subsidies from its customers that the Court considered (and overturned) in *Ohio Edison*. In *Ohio Edison*, OCC (and others) appealed PUCO rulings that adopted FirstEnergy's charge on various grounds. One basis was that the charge is not a provision allowed in an electric security plan under R.C.

4928.143(B)(2)(h). Under that law, an electric security plan may include "provisions regarding distribution infrastructure and modernization *incentives*." (emphasis added).

While the PUCO approved the rider entitled "Distribution Modernization," there was no requirement by the PUCO that FirstEnergy spend even a penny on distribution modernization for consumers.⁶ Instead, the PUCO-authorized charge was approved as a means of *credit support* for the FirstEnergy utilities and their parent.⁷ OCC and others who sought consumer protection argued to the Court that the charge was not allowed under Ohio law because it did not provide FirstEnergy with any "incentive" to invest in grid modernization.⁸

⁶ *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73,78 (2019).

⁷ *Id.*

⁸ *Id.* at 76.

The Court agreed and ordered the PUCO to “immediately remove the DMR from the ESP.”⁹ Unfortunately for consumers, the Court ruled that customers could not get a refund from FirstEnergy for the half-billion dollars they had paid since 2017, because the PUCO had not made the charges refundable.¹⁰ The PUCO had earlier rejected a motion by OCC and OMA for the charge to be refundable.¹¹ And as the Court pointed out, the PUCO had declined to require a “refund mechanism.”¹² Finally, in a 6 to 1 decision (with Justice Kennedy being the lone dissent in favor of FirstEnergy’s position), the Court rejected FirstEnergy’s request for reconsideration. That ruling finally ended the half-billion-dollar subsidy consumers have been paying to FirstEnergy since 2017.¹³

The Court’s denial of FirstEnergy’s request for reconsideration cleared the way for the PUCO to comply with the Court’s June ruling. On August 22, 2019, the PUCO ordered FirstEnergy to remove the modernization charge from customers’ bills and ordered limited refunds of the charges collected in July and August of this year after the Court’s initial ruling. The PUCO further directed FirstEnergy to file tariffs removing the

⁹ *Id.* at 86.

¹⁰ *Id.* at 79.

¹¹ *In re Application of [FirstEnergy]*, Case No. 14-1297-EL-SSO, Finding and Order (December 21, 2016). That brings the total of lost refunds for consumers to over \$1 billion since 2009. Consumers have lost out on refunds under Supreme Court of Ohio precedent that allows utilities to keep customer money, even if the Court rules that the charges to customers were unlawful. *See In re Columbus S. Power Co.*, 128 Ohio St.3d 512, ¶¶17-20 (\$63 million); *In re: Columbus S. Power Co.*, 138 Ohio St.3d 448, ¶56 (\$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, ¶23 (\$456 million collected through June 2019).

¹² *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73,78 (2019).

¹³ *In re Ohio Edison Co.*, 2019-Ohio-3331 (August 20, 2019).

charge from its electric security plan once credits to customers had been issued.¹⁴ The PUCO subsequently denied FirstEnergy's Application to extend its unlawful charge as moot.¹⁵

B. Following the *Ohio Edison* decision, the PUCO held that DP&L's Charge is also illegal.

In light of the Court's ruling in *Ohio Edison*, the PUCO reconsidered the fate of DP&L's Charge, which was due to expire next year. In the pending phase of the DP&L ESP Case, the PUCO requested that parties file supplemental briefs regarding the impact of *Ohio Edison* on DP&L's Charge. In its brief, OCC explained how DP&L's Charge is virtually identical to FirstEnergy's illegal charge.¹⁶ OCC further argued that in the event the PUCO permitted DP&L to continue collecting the unlawful charge through its expiration date, the charge should at the very least be collected subject to refund in order to protect customers in the event the charge is later overturned on appeal.¹⁷

On November 21, 2019 the PUCO issued an order in the DP&L ESP Case finding that "in light of the Supreme Court's decision in *Ohio Edison*, the Commission finds that the DMR in DP&L's ESP is unlawful and violates important regulatory practices and principles."¹⁸ The PUCO ordered DP&L to file revised tariffs removing the illegal Charge.¹⁹

¹⁴ *In re Application of [FirstEnergy]*, Case No. 14-1297-EL-SSO, Order on Remand (August 22, 2019) ("The Commission directs [FirstEnergy] to immediately file proposed, revised tariffs that would set [FirstEnergy's] distribution modernization rider to \$0.00. The Commission also directs the Companies to issue a refund to customers for all monies collected through the rider for services rendered after July 2, 2019, before eliminating the rider from its electric security plan.").

¹⁵ *In the Matter of the Application of [FirstEnergy] for an Extension of the Distribution Modernization Rider*, Case No. 19-361-EL-RDR, Entry (November 21, 2019).

¹⁶ See OCC's August 1, 2019 Supplemental Brief in Case No. 16-0395-EL-SSO (at pp. 16-24).

¹⁷ *Id.* at pp. 24-30. *Id.* at pp. 24-30.

¹⁸ DP&L ESP Case, November 21, 2019 Opinion & Order, at ¶110.

¹⁹ *Id.*

C. Because DP&L's Charge is illegal, the Application in this case to extend the collection of the charge from consumers should be denied.

Before the Court issued its ruling in *Ohio Edison*, DP&L initiated this case by filing its Application seeking authority to extend the Charge for another two years. If approved, DP&L would be allowed to charge consumers twice the current charge and collect an additional \$199 million per year.²⁰ DP&L claims in the Application that it needs this money in order to bolster its credit ratings and to implement a host of grid modernization projects.²¹

But the PUCO has since held that DP&L's Charge is illegal.²² Like FirstEnergy's illegal charge, nothing in DP&L's proposal requires DP&L to use the money from the Charge collected from customers for grid modernization. Nor does DP&L's proposal protect customers by making the Charge subject to refund. These were two fatal flaws that the Court identified when it invalidated FirstEnergy's Distribution Modernization Rider charge in *Ohio Edison*.

Accordingly, the PUCO has an easy decision to make in this case. It should protect DP&L's customers by dismissing this case and denying DP&L's Application to extend its unlawful charge for another two years.

III. CONCLUSION

DP&L's Application in this case seeks to continue and increase an unlawful charge to consumers. The Application predated the Court's ruling in *Ohio Edison* and the PUCO's subsequent decision that the Charge is unlawful. In light of these decisions, the

²⁰ Application, Case No. 19-0162-EL-RDR (January 22, 2019), at 1.

²¹ *Id.*

²² DP&L ESP Case, November 21, 2019 Opinion & Order, at ¶110.

PUCO should now deny the Application and dismiss this proceeding, for purposes of consumer protection.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Protect Consumers by Denying Dayton Power & Light's Request to Extend Its So-Called Distribution Modernization Rider was served on the persons stated below via electronic transmission this 20th day of December 2019.

/s/ Angela D. O'Brien
Angela D. O'Brien
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: Motion Motion to Protect Consumers by Denying Dayton Power & Light's Request to Extend Its So-Called Distribution Modernization Rider by The Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of O'Brien, Angela D