

**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.)

**APPLICATION FOR REHEARING FROM THE SUPPLEMENTAL OPINION
AND ORDER
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Office of the Ohio Consumers' Counsel ("OCC") files this Application to protect consumers from paying the Dayton Power & Light Company ("DP&L") millions of dollars for charges such as a Reconciliation Rider that requires customers to subsidize coal-fired power plants.¹ In its Supplemental Opinion and Order of November 21, 2019 ("Supplemental Opinion and Order"), the Public Utilities Commission of Ohio ("PUCO") "further modified and approved" the Amended Stipulation and Recommendation ("Settlement") filed in this case that includes a number of unlawful and unreasonable customer charges, including the so-called Reconciliation Rider. Further, the PUCO thwarted consumer protections in the significantly excessive profits test by ruling that

¹ See R.C. 4903.10 and O.A.C. 4901-1-35.

certain revenues (Distribution Modernization Rider revenues) will be excluded from the annual test.

The Opinion and Order harms customers and is unreasonable and unlawful in the following respects:

ASSIGNMENT OF ERROR 1: The PUCO lacked jurisdiction to authorize DP&L to charge customers for power plant subsidies using a charge called the Reconciliation Rider. The PUCO's decision was unlawful because DP&L's Reconciliation Rider is preempted by the Federal Power Act. The PUCO's exercise of state authority in violation of the federal act runs afoul of the Supremacy Clause of the U.S. Constitution, Article 6. *Hughes v. Talen Energy Marketing LLC*, 136 S.Ct. 1288 (2016).

ASSIGNMENT OF ERROR 2: The PUCO's Opinion and Order is unreasonable and unlawful because, under it, distribution modernization revenues will be excluded when determining whether customers have funded significantly excessive earnings and deserve a refund under R.C. 4928.143(F) and Supreme Court of Ohio precedent. This limits the potential refund to customers for significantly excessive earnings under a utility's electric security plan.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

DP&L has already charged Ohioans over \$830 million in “stability” charges to bolster its financial integrity.² Notwithstanding the enormous transfer of wealth from Ohioans to DP&L, DP&L is in a “financial crisis.”³ By its own admission, it did not get there as a result of sound management.⁴ DP&L came back and asked the PUCO to authorize it to charge consumers even more money under a Settlement. Unfortunately for consumers, the PUCO modified and approved the Settlement in its Supplemental Opinion

² See *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order at 11 (December 28, 2005) (approximately \$158 million); *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, Opinion and Order at 5 (June 24, 2009) (approximately \$380 million); *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Entry Nunc Pro Tunc at 2 (September 6, 2013) (approximately \$293 million).

³ Direct Testimony of Sharon Schroder (DP&L Exs. 3 and 4) filed March 22, 2017 (“Schroder Testimony”) at 3:17.

⁴ Hearing Transcript, Vol. I at 32:1-3.

and Order.⁵ The PUCO's Supplemental Opinion and Order is unlawful and unreasonable. The PUCO should grant rehearing on OCC's claims of error and modify or abrogate its Supplemental Opinion and Order because it will harm customers.

The Settlement violates important regulatory principles and practices because it contains a charge that the PUCO has no jurisdiction to authorize. The PUCO's Supplemental Opinion and Order is unlawful and unreasonable because in adopting the Settlement it approved a charge – the Reconciliation Rider (“OVEC Subsidy Charge”) – that it did not have the jurisdiction to approve. The PUCO's jurisdiction was preempted by the Federal Power Act. Further, the Settlement violates important regulatory principles and practices because under it, Distribution Modernization Rider revenues will be excluded from the significantly excessive profits test. This violates R.C. 4928.143(F) and Supreme Court of Ohio precedent. Therefore, the PUCO's Supplemental Opinion and Order is unreasonable and unlawful because it adopted the Settlement with the provision that will exclude Distribution Modernization Rider revenues from the annual significantly excessive profits test.

The PUCO should ensure that its Supplemental Opinion and Order is reasonable and lawful. Unfortunately for consumers, it is not. To protect consumers and the public interest, it should reconsider its Supplemental Opinion and Order as described herein. Upon reconsideration of any one of those decisions, the PUCO should find that the

⁵ The Ohio Supreme Court in *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123, 126 (1992), 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 stipulation parties?; 2) Does the settlement, as a package, benefit customers and the public interest?; and 3) Does the settlement violate any important regulatory principles or practices?

Settlement should be modified by removing the OVEC Subsidy Charge and including Distribution Modernization Rider revenues in significantly excessive profits tests.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.” OCC entered an appearance and filed testimony regarding DP&L’s Application and the Settlement. It participated in the evidentiary hearing on the Settlement.

R.C. 4903.10 requires that an application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” Additionally, Ohio Adm. Code 4901-1-35(A) states: “An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing.”

In considering an application for rehearing, R.C. 4903.10 provides that “the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.” The statute also provides: “[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.”

The statutory standard for abrogating some portions of the Supplemental Opinion and Order and modifying other portions are met here. The PUCO should grant and hold

rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Supplemental Opinion and Order.

III. RECOMMENDATIONS

ASSIGNMENT OF ERROR 1: The PUCO lacked jurisdiction to authorize DP&L to charge customers for power plant subsidies using a charge called the Reconciliation Rider. The PUCO’s decision was unlawful because DP&L’s Reconciliation Rider is preempted by the Federal Power Act. The PUCO’s exercise of state authority in violation of the federal act runs afoul of the Supremacy Clause of the U.S. Constitution, Article 6. *Hughes v. Talen Energy Marketing LLC*, 136 S.Ct. 1288 (2016).

The PUCO’s jurisdiction to authorize the OVEC Subsidy Charge is preempted by the Federal Power Act (“FPA”), 16 U.S.C. § 824 et seq. Under the Supremacy Clause, federal law “shall be the supreme Law of the Land” and “the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. Art. VI. Federal law preempts state legislation and regulatory authority (1) if Congress, in enacting a federal statute, has expressed a clear intent to preempt state law; (2) if it is clear, despite the absence of explicit preemptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has left no room for the states to supplement the federal law; and (3) if compliance with both state and federal law is impossible or when compliance with state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal policies embodied in the laws at issue. *Marketing Research Services, Inc. v. Pub. Util. Comm’n of Ohio*, 34 Ohio St.3d 52, 54 (1987). The PUCO’s jurisdiction was field preempted.

A. The Federal Energy Regulatory Commission has exclusive jurisdiction over wholesale energy transactions as a matter of federal law.

The FPA vests the Federal Energy Regulatory Commission (“FERC”) with exclusive jurisdiction over the “transmission of electric energy in interstate commerce” and the “sale of electric energy at wholesale in interstate commerce[.]” 16 U.S.C. § 824(b)(1); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986). And under the Federal Power Act, a wholesale sale is simply a sale for resale. 16 U.S.C. § 824(d). Rather than directly setting rates, FERC has chosen to achieve its regulatory aims by “protecting the integrity of interstate markets.” *PPL EnergyPlus v. Nazarian*, 753 F.3d 467, 472 (4th Cir. 2014); *see also PPL EnergyPlus v. Solomon*, 766 F.3d 241, 248 (3rd Cir. 2014) (“FERC favors using market mechanisms to produce competitive rates for interstate sales and transmissions of energy.”). To do so, FERC has authorized the creation of regional transmission organizations (“RTOs”) to oversee certain multistate markets – including PJM. *Nazarian*, 753 F.3d at 472. PJM operates energy and capacity markets. *Id.* Both markets “are designed to efficiently allocate supply and demand, a function which has the collateral benefit of incenting the retirement of old inefficient power plants and the construction of new efficient power plants when necessary[.]” via price signals. *Id.* They represent “a comprehensive program of regulation that is quite sensitive to external tampering.” *Id.*

“A wealth of case law confirms FERC’s exclusive power to regulate wholesale sales of energy in interstate commerce” *Id.* at 475 (citations omitted). The FPA “leaves no room either for direct state regulation of the prices of interstate wholesales of [energy], or for state regulations that would indirectly achieve the same result.” *Id.* (citations omitted). States cannot “rely on mere formal distinction in an attempt to evade

preemption and regulate matters within FERC’s exclusive jurisdiction.” *Id.* at 476 (internal quotations omitted).

Accordingly, a state program under which a participant in PJM receives a state-determined fixed sum for capacity and energy that clears the PJM market is preempted, *even if the state program does not fix the rate paid by PJM to the market participant. See id.* at 476-77. So is a state program under which a PJM market participant receives the rate paid by PJM to the market participant plus an additional amount. *See Solomon*, 766 F.3d at 254. “The fact that [a state program] does not formally upset the terms of a federal transaction is no defense, because the functional results are precisely the same.” *Nazarian*, 753 F.3d at 477. Nor is a state program saved where it incorporates, rather than repudiates, PJM clearing prices. *Solomon*, 766 F.3d at 254.

Where, as here, federal law vests exclusive jurisdiction over matters in another body, the state is without subject matter jurisdiction. *See, e.g., Longshoremen’s Ass’n v. Davis*, 476 U.S. 380-88 (1986); *Shawnee Twp. v. Allen County Budget Comm’n*, 58 Ohio St.3d 14, 15 (1991); *H.R. Options v. Zaino*, 100 Ohio St.3d 373, 374 (2004). A ruling made without subject matter jurisdiction is void. *See, e.g., State v. Blair*, 2010 Ohio 6310, para. 13 (Hamilton 2010).

B. A state program like the OVEC Subsidy Charge is preempted.

In *Hughes v. Talen Energy Marketing LLC*, the United States Supreme Court affirmed a lower court decision finding that a state commission’s order guaranteeing a “cost-based” wholesale price is preempted by the Federal Power Act. *Hughes v. Talen Energy Marketing LLC*, 136 S.Ct. 1288 (2016). In *Talen*, the Maryland Public Service Commission (“Maryland Commission”) had required the incumbent distribution utilities

to enter into 20-year contracts with a generation company proposing to construct a new plant in the state. *Talen*, 136 S.Ct. at 1294-95. The contract guaranteed that the generator would receive the contract price for capacity and not the wholesale price. *Id.* at 1295. It provided that if the wholesale price “[fell] below the price guaranteed in the contract,” the utilities would pay the generator the difference and then “pass the costs of these required payments along to Maryland consumers in the form of higher retail prices.” *Id.* And it provided that if the wholesale capacity price “exceed[ed] the price guaranteed in the contract,” the generator would pay the utilities the difference and the utilities would “then pass the savings along to consumers in the form of lower retail prices.” *Id.*

The United States Supreme Court (“Court”) found that the contract “guarantees [the generator] a rate distinct from the clearing price [in the PJM capacity auction] for its interstate sales of capacity to PJM” and thus concluded that the Maryland Commission had “set[] an interstate wholesale rate.” *Id.* at 1297. The Court also found relevant that the contract for differences at issue in the Maryland program operated inside the PJM auction structure, rather than outside that structure as would a traditional bilateral sale of capacity between two parties. *Id.* at 1299. The Court reasoned that “[d]oubting FERC’s judgment, Maryland – through the contract for differences – requires CPV to participate in the PJM capacity auction but guarantees CPV a rate distinct from the clearing price for its interstate sales of capacity to PJM.” *Id.* The Court found in no uncertain terms that “[b]y adjusting an interstate wholesale rate, Maryland’s program invades FERC’s regulatory turf.” *Id.* at 1297.

Because the Maryland Commission had set the wholesale rate, the United States Supreme Court affirmed the lower court decisions finding that the Maryland

Commission’s order was preempted by the FPA. Congress had intended, by legislating comprehensively, to occupy an entire field of regulation and left no room for the states to supplement the federal law. Relying on its previous decisions in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988) and *Nantahala*, the Court explained: “States interfere with FERC’s authority by disregarding interstate wholesale rates FERC has deemed just and unreasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation.” *Id.* at 1299.⁶

Just recently, FERC held on the authority of *Talen* that a New Hampshire program similar to the OVEC Subsidy Charge was preempted. *See New England Ratepayers Association*, 168 F.E.R.C. P61,169 (September 19, 2019). The decision is important not only for its result – holding a state program similar to the OVEC Subsidy Charge preempted – but also for its explanation of *Talen*. In explaining *Talen*, FERC described Maryland’s program this way: “If the generator’s energy or capacity cleared in the relevant PJM auction and the auction set a rate above that predetermined rate, the generator would refund the excess revenue to Maryland utilities. On the other hand, if the auction set a rate below that predetermined rate, the same Maryland utilities would pay the generator the difference between the auction rate and the predetermined rate.” *See id.* at ¶ 42, n. 112 (citation omitted). “The Court held that the Maryland program was

⁶ The Court’s reliance in *Talen* on *Mississippi Power & Light Co.* is instructive regarding the appropriate boundary between permissible and impermissible state regulation. The Court in *Mississippi Power & Light Co.* explained that “Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to ensure that agreements affecting wholesale rates are reasonable.” *Mississippi Power & Light Co.*, 487 U.S. 374. This underscores that where, as here, state action intrudes on federal authority regarding wholesale rates, the state action is preempted.

preempted” in *Talen*, FERC noted, “because it impermissibly set an interstate wholesale rate, contravening the FPA’s division of authority between state and federal regulators.” *See id.* at ¶ 42 (internal quotations and citations omitted).

FERC concluded that the New Hampshire program was preempted because it “does explicitly what the Maryland program in [*Talen*] did implicitly.” *See id.* at ¶ 44. Whereas Maryland’s program (like the OVEC Subsidy Charge) established a wholesale rate by adjusting the revenue that the generator received in the PJM auction to reflect a predetermined rate, the New Hampshire program directly established a predetermined rate and required utilities within the state to offer to purchase electricity at that specific state-established rate. *See id.*

C. The PUCO is without jurisdiction to approve the OVEC Subsidy Charge because the Rider sets the revenue for wholesale capacity and energy that DP&L receives.

The Court in *Talen* provided guidelines for determining whether future state action fell within the prohibited sphere of authority left exclusively to FERC, ruling that “[n]othing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures untethered to a generator's wholesale market participation,” so long as “a State does not condition payment of funds on capacity clearing the auction” *Id.* at 1299. DP&L’s OVEC Subsidy Charge falls far short of state action the court would find permissible. Like the *Talen* “contract for differences” that the United States Supreme Court held was preempted by the Federal Power Act, the OVEC Subsidy Charge operates inside the PJM capacity auction, adjusting DP&L’s revenue by charging consumers the difference between the full cost of the power plants under the contract between DP&L and OVEC,

and the wholesale revenues earned for bidding that capacity into the PJM markets. *See In re Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Pub. Util. Comm. No. 16-0395-EL-SSO, Opinion and Order (Oct. 20, 2017) at ¶63; ¶117- ¶119; *see also In re Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement*, 2018-Ohio-4698, ¶¶3-9 (2018). In years in which the power plants' costs exceed the PJM revenue, the OVEC Subsidy Charge would impose a charge on all of DP&L's captive distribution customers and increase DP&L's compensation for its share of the power plants' wholesale capacity and energy that clears PJM. *In re Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Pub. Util. Comm. No. 16-0395-EL-SSO, Opinion and Order (Oct. 20, 2017). In years in which the power plants' costs are less than the PJM revenue, the OVEC Subsidy Charge would be a non-bypassable credit and decrease DP&L's compensation. *Id.*

The Ohio Supreme Court has already recognized that a similar rider, AEP's Power Purchase Agreement Rider, sets the price received by the utility (here, DP&L) for selling OVEC power into the federally regulated wholesale markets. "If the revenue generated from sales to the PJM market is lower than the costs of the power, Ohio Power's customers would pay a surcharge to Ohio Power through the PPA Rider to make up the difference. But if the PJM market rates are higher than the power costs, customers would receive a credit through the PPA Rider." *In re Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement*, 2018-Ohio-4698 at ¶4; *see also In re Application of the Dayton Power and Light*

Company for Approval of its Electric Security Plan, Pub. Util. Comm. No. 16-0395-EL-SSO, Opinion and Order at 63 (Oct. 20, 2017).

By setting the revenue for wholesale capacity and energy that DP&L receives for its interest in the power plants, the revenue that DP&L receives through the OVEC Subsidy Charge is unlawfully “tethered” to the wholesale rate. *Talen*, 136 S.Ct. at 1299. As a result, the PUCO in allowing the OVEC Subsidy Charge has interfered with and invaded a field that is within the exclusive jurisdiction of FERC. Its jurisdiction to do so is preempted.

Federal law cannot be sidestepped even though the OVEC Subsidy Charge would not affect these contractual costs or alter the prices paid by PJM to DP&L. As in *Talen*, the retail revenue that would be charged customers under the OVEC Subsidy Charge adjusts the stream of revenue DP&L receives from PJM for the power plants’ generation, thus guaranteeing a rate (intended to cover all OVEC-related costs) distinct from the clearing price in the PJM markets. “The [Federal Power Act] leaves no room either for direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result.” *Talen*, 136 S.Ct. at 1297 (citation omitted). Nor can federal law be sidestepped based on the alleged positive effects of the continuing operation of the power plants. The PUCO may not disregard the rates established by FERC and supplement them with above-market revenue collected from DP&L’s captive distribution customers. *Talen*, 136 S.Ct. at 1298.

That DP&L and not the PUCO initiated the supplemental payment program at the state level is also of no import. DP&L’s program could not have been implemented absent approval from the PUCO. Any PUCO order sanctioning a program premised on

the sale of OVEC capacity into the PJM market and the displacement of the PJM market clearing price with a price more to the State's liking would have the same fundamentally flawed result as the Maryland program found to be unlawful in *Talen*. In both situations, state action results in displacement of the PJM capacity market clearing price. Both the Maryland program found preempted in *Talen* and the DP&L program operate within the PJM capacity auction to displace the wholesale capacity market clearing price approved by FERC for the PJM markets.

The Settlement violates important regulatory practices because it contains a charge – the OVEC Subsidy Charge – that the PUCO has no jurisdiction to approve. The PUCO's jurisdiction to allow the OVEC Subsidy Charge is preempted by federal law. Accordingly, the PUCO should reverse its decision allowing the OVEC Subsidy Charge and hold that it is without jurisdiction to approve the Rider. It should modify the Settlement by removing the OVEC Subsidy Charge.

The PUCO should grant rehearing on Assignment of Error No. 1.

ASSIGNMENT OF ERROR 2: The PUCO's Opinion and Order is unreasonable and unlawful because, under it, distribution modernization revenues will be excluded when determining whether customers have funded significantly excessive earnings and deserve a refund under R.C. 4928.143(F) and Supreme Court of Ohio precedent. This limits the potential refund to customers for significantly excessive earnings under a utility's electric security plan.

Ohio law requires electric distribution utilities to provide customers with a standard service offer of all competitive retail electric service necessary for essential electric service, including a firm supply of electric generation service. R.C. 4928.141. In this case, DP&L proposed to supply the standard service offer through an electric security plan, under R.C. 4928.143.

R.C. 4928.143 permits utilities to include a number of provisions in their electric security plan. The utility, though, has the burden of showing that its plan is "more favorable in the aggregate" to customers than the expected results of an MRO. R.C. 4928.143(C)(1).

The statute also limits the profits that customers fund for utilities under an electric security plan. These limits are found in R.C. 4928.143(F) and are known as the SEET test. The SEET test is supposed to be a consumer protection. It is meant to protect the public by ensuring that electric security plans are not setting prices for electric service that are too high.

R.C. 4928.143(F) applies to all electric security plans, regardless of the length of the plan. It requires the PUCO to conduct an annual review of the utility's total profits under its electric security plan. In its annual review, the PUCO is required to ("shall") consider "if any such adjustments resulted in excessive earnings." If the PUCO finds that "such adjustments" did result in significantly excessive profits, compared to similar companies, the utility must return the excess to customers. R.C. 4928.143(C).

The Ohio Supreme Court has construed this particular statute in *In re Columbus S. Power Co.*, 134 Ohio St.3d 392 (2012). There, the Court was addressing a challenge from a utility that R.C. 4928.143(F) was unconstitutionally vague (it was not) and addressing whether the PUCO could eliminate non-electric security plan earnings from the review (it could). This led the Court to closely examine the statute.

The Supreme Court of Ohio described the statute as essentially a rate of return statute that entrusts the PUCO with regulating the "increase in earnings and rate of return [to be] allowed" under the electric security plan. *Id.* at 400. The Supreme Court of Ohio

accepted the PUCO's interpretation of the statute as requiring three things: first, it must determine what level of earnings is "excessive;" second, it must decide how high the excessive earnings must be to be considered "significantly excessive;" and third, it "'must eliminate' from earnings any portion that the utility 'has shown not to be tied to the electric security plan [electric security plan]'" under review. *Id.*

The Supreme Court of Ohio ruled that the first two determinations were expressly required under the statute and the third determination "finds support in the statutory language." *Id.* The Court found the statute "requires the commission to find whether 'such adjustments'-- referring to 'the provisions that are included an electric security plan' -- resulted in excessive earnings." *Id.* (emphasis omitted). In other words, the earnings caused by the provisions included in the plan *must be considered* as part of the earnings reviewed in the significantly excessive earnings test.

In the case at hand, however, the PUCO determined that the Distribution Modernization Rider revenues should be treated differently than any other electric security plan provision revenues. The PUCO said that Distribution Modernization Rider revenues will be excluded from the significantly excessive profits test. Opinion and Order at ¶126. The PUCO found that including the DMR revenue in the SEET test would "introduce an unnecessary element of risk to the Companies and undermine the purpose of providing credit support for the Companies." *Id.* The PUCO's rationale of risk and credit support for excluding this revenue is unlawful and unreasonable.

While the risk to the utilities and the undermining of the credit support may be a concern to the PUCO, it cannot be the basis for excluding these electric security plan revenues from the SEET test. The law precludes it. As a creature of statute, the PUCO

must follow the law. *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535 (1993); *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181 (1981).

The Supreme Court of Ohio recently determined that a similar rider (FirstEnergy's) is illegal,⁷ and the PUCO subsequently issued an opinion and order⁸ declaring DP&L's nearly identical rider illegal. This is a good result for consumers, but this victory does not mean that the PUCO can disregard the roughly \$175 million that consumers paid under the illegal rider. Nor can the PUCO exclude those unlawful revenues from its annual profits review.

The Distribution Modernization Rider is a provision of DP&L's ESP. And although it is illegal and should never been paid by consumers, the fact remains that it was charged to consumers and created revenue for DP&L. It should be included in the significantly excessive profits review. And regardless of its illegality going forward, the rider is an "adjustment" under the electric security plan that contributed to the earnings of DP&L. Under the Court's holding in *In re Columbus S. Power Co.*, 134 Ohio St.3d 392 (2012), because the Distribution Modernization Rider revenues are an electric security plan provision, the revenues must be included in the annual profits review under R.C. 4928.143(F).

The PUCO's ruling illegally avoids a complete review of DP&L's profits under its electric security plan. It does this by pulling out a significant source of profits in DP&L's electric security plan (the Distribution Modernization Rider) -- treating it differently from all other revenues created under the electric security plan.

⁷ *In re Ohio Edison Co.*, 157 Ohio St.3d 73 (2019).

⁸ *In re Application of Dayton Power and Light for Approval of its Electric Security Plan*, Case No. 16-395-EL-SSO, Opinion and Order (November 21, 2019).

Not only is this unlawful, but it is also unreasonable. The PUCO's ruling could deprive customers of refunds they may be otherwise entitled to under the law. If DP&L has significantly excessive profits, as a result of the Distribution Modernization Rider and all other riders and rates established under its electric security plan, then the PUCO must return those excessive profits to customers. R.C. 4928.143(F) does not allow the PUCO to pick and choose what revenues are included in the earnings review. Further, the Distribution Modernization Rider has been found unlawful. Consumers should not be on the losing end of the Distribution Modernization Rider charge two times – paying an unlawful charge and then being deprived of a consumer protection (the SEET test) by excluding that unlawful charge from the annual profit review.

The Settlement violates important regulatory principles and practices because under it, Distribution Modernization Rider revenues will be excluded from the significantly excessive profits test. This violates R.C. 4928.143(F) and Supreme Court of Ohio precedent. Therefore, the PUCO's Supplemental Opinion and Order is unreasonable and unlawful because it adopted the Settlement with the provision that will exclude Distribution Modernization Rider revenues from the significantly excessive profits test. The PUCO should reverse its decision and order that Distribution Modernization Rider revenues must be included in the significantly excessive profits test.

The PUCO should grant rehearing on Assignment of Error No. 2.

IV. CONCLUSION

The PUCO should grant rehearing on OCC's claims of error and modify or abrogate its Supplemental Opinion and Order because it will harm customers. Granting rehearing as requested by OCC is necessary to ensure that DP&L customers are not

subject to unreasonable and unjust charges. Without rehearing, Ohio consumers will end up paying unreasonable and unlawful charges, including, but not limited to, a government ordered subsidy of deregulated, old, inefficient, coal-fired power plants by captive monopoly customers that under the law should be competing in a competitive market.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was served on the persons stated below via electronic transmission, this 23rd day of December 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: App for Rehearing Application for Rehearing From the Supplemental Opinion and Order by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.