

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Dayton Power and                    )  
Light Company for Approval to Establish        ) Case No. 20-1708-EL-ATA  
a New Clean Air Fund Rider.                        )

---

**REPLY TO DP&L’S OPPOSITION TO PROTECTING ITS CONSUMERS FROM A  
POTENTIAL DENIAL OF NUCLEAR BAILOUT REFUNDS  
BY  
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

---

**I. INTRODUCTION**

DP&L,<sup>1</sup> a company that in 2019 kept nearly \$218 million without a refund to its consumers after the PUCO invalidated its distribution modernization charge,<sup>2</sup> in this case opposes OCC’s motion to make the nuclear bailout charge subject to refund.<sup>3</sup> And unless House Bill 6 law is repealed or invalidated, DP&L’s 519,000 consumers will be charged \$18.5 million in 2021 for corporate welfare to Energy Harbor. One would hope that DP&L would want to distance itself from the House Bill 6 scandal by joining OCC’s request to protect its customers. But no. OCC now replies.

The nuclear bailout charge that was enacted by H.B. 6 in 2019 has been followed by the indictment of the former Speaker of the Ohio House and others involved in Ohio politics, FirstEnergy’s firings of its corporate leadership including its CEO Mr. Jones, two guilty pleas to

---

<sup>1</sup> The Dayton Power and Light Company.

<sup>2</sup> See *In re the Dayton Power and Light Company to Establish a Standard Service Offer, et. al.*, Case No. 16-395-EL-SSO, et. al., Finding and Order (December 18, 2019).

<sup>3</sup> *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401 (the ruling that led to the PUCO invalidating DP&L’s distribution modernization charge).

crimes involving H.B. 6, and the resignation of the PUCO Chair. There are various legal actions and legislative bills pending to stop the H.B 6 nuclear bailout charge. Standard & Poor's has described the chief proponent of H.B. 6, FirstEnergy, this way:

We believe these violations at the highest level of the company are demonstrative of insufficient internal controls and a cultural weakness. We view the severity of these violations as significantly outside of industry norms and, in our view, they represent a material deficiency in the company's governance . . .<sup>4</sup>

The Ohio Supreme Court has generally not allowed refunds.<sup>5</sup> But refunds are allowed if the PUCO simply makes a charge subject to refund.<sup>6</sup> The Ohio law under which utilities are regulated provides ample authority for the PUCO to do so. Ohioans are still awaiting a sign from the PUCO, their state utility regulator, that it considers the House Bill 6 scandal to be a matter of deep concern and something warranting consumer protection. This case provides another opportunity for some consumer protection from the House Bill 6 scandal.

## **II. ARGUMENT**

### **A. The PUCO should reject DP&L's claim that the consumer refund issue cannot be addressed in this case.**

DP&L asserts that the PUCO, in the case establishing the H.B. 6 charge, rejected making the charge subject to refund.<sup>7</sup> DP&L claims that OCC should there have raised the refund issue in an application for rehearing of the PUCO's denial of.<sup>8</sup> Finally, DP&L asserts that OCC's

---

<sup>4</sup> S&P Global Market Intelligence, "S&P Downgrades FirstEnergy following \$1.95B draw on revolving credit facility" (November 25, 2020), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/s-p-downgrades-firstenergy-following-1-95b-draw-on-revolving-credit-facility-61442506>.

<sup>5</sup> *In re Columbus Southern Power Co.*, 138 Ohio St. 3d 448 (2014).

<sup>6</sup> *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401 ¶23 ("Moreover, despite our finding that the DMR is unlawful, no refund is available to ratepayers for money already recovered under the rider. R.C. 4905.32 bars any refund of recovered rates unless the tariff applicable to those rates sets forth a refund mechanism.") (citation omitted).

<sup>7</sup> See DP&L's Memorandum Contra at 2-3.

<sup>8</sup> See *id.* at 2.

request is untimely and inconsistent with the PUCO's decision in the case establishing the H.B. 6 nuclear bailout charge because it expects the PUCO audits will determine if the appropriate amounts were collected by the Rider through January 21, 2028.<sup>9</sup> DP&L is wrong.

OCC's request is timely and cannot be inconsistent with the PUCO's decision in the case establishing the H.B. 6 charge as DP&L claims. In the case establishing the H.B. 6 charge, the PUCO was not presented with the consumer protection justifications for making the charge subject to refund that OCC describes here (the sordid history of H.B. 6, the current efforts to repeal it, and consumers' ability to obtain a refund if one is ordered). Instead, a party (OMAEG) asserted (among other things) that the charge should be made subject to refund "for any surplus that exists in the nuclear generation fund and the renewable generation fund at the end of 2027."<sup>10</sup> Clearly, the PUCO could not have rejected the consumer protections that OCC describes as DP&L asserts.

The PUCO was never presented with these issues for consumer protections, so it cannot be inconsistent with the PUCO's H.B. 6 charge decision. In any event, in a tariff case the PUCO can and should address whether the tariffs will offer the consumer protection of refunds. Indeed, the default requirement in tariff cases should be that tariffs must be filed with refund language included. So, OCC's request is timely and appropriate because this case involves DP&L's tariff.

Every public utility in Ohio is required to file, for PUCO review and approval, tariff schedules that detail rates, charges, and classifications for every service offered.<sup>11</sup> The PUCO has the authority to "prescribe, by order, changes in the form of such schedules."<sup>12</sup> And a utility

---

<sup>9</sup> See *id.* at 3.

<sup>10</sup> See Case No. 20-1143-EL-UNC, Motion to Intervene and Comments of The Ohio Manufacturers' Association Energy Group at 12.

<sup>11</sup> R.C. 4905.30.

<sup>12</sup> See *id.*

must charge rates that are in accordance with tariffs approved by, and on file with, the PUCO.<sup>13</sup>

The PUCO may fix, amend, alter, or suspend rates charged by public utilities to their customers.<sup>14</sup> As the Ohio Supreme Court has said:

There is perhaps no field of business subject to greater statutory and governmental control than that of the public utility. This is particularly true of the rates of a public utility. Such rates are set and regulated by a general statutory plan in which the Public Utilities Commission is vested with the authority to determine rates in the first instance, . . .<sup>15</sup>

Further, with all that’s happening to repeal or stop the House Bill 6 charges that millions of Ohioans should not have to pay, making the charges subject to refund should be the obvious reasonable choice for the PUCO. Given the terrible history of denied refunds for Ohio utility consumers (more than \$1 billion in denied electric refunds just since 2008), that’s the choice that balances utility and consumer interests, with fairness and justice for consumers. DP&L’s anti-consumer position should be rejected and the PUCO should make the charges subject to refund.

**B. The PUCO has the authority to protect consumers by requiring the H.B. 6 charge be collected from customers subject to refund.**

DP&L asserts that the PUCO does not have the authority to revise DP&L’s tariff to include refund language.<sup>16</sup> DP&L also asserts that it will not and cannot retain or return the charges collected under H.B. 6. It is merely a “collection agent” for Ohio’s treasurer.<sup>17</sup> Finally, DP&L asserts that adding refund language could have “unintended consequences” that leave electric utilities “holding the bag” if the H.B. 6 charge is amended or rescinded.<sup>18</sup> Accordingly,

---

<sup>13</sup> R.C. 4905.22.

<sup>14</sup> R.C. 4909.15 and .16.

<sup>15</sup> *Hull v. Columbia Gas*, 110 Ohio St.3d 96, 99 (2006) (internal quotations and citations omitted).

<sup>16</sup> See DP&L’s Memorandum Contra at 3-4.

<sup>17</sup> See *id.* at 3.

<sup>18</sup> See *id.*

DP&L requests that it should be “held harmless” if the PUCO approves OCC’s refund language.<sup>19</sup> DP&L is wrong on all accounts, and the PUCO should deny its request to be held harmless.

DP&L is clearly wrong regarding the PUCO’s authority. The Ohio Supreme Court has described the PUCO’s broad, discretionary authority over public utilities, their rates, and tariffs:

The General Assembly has created a broad and comprehensive statutory scheme for regulating the business activities of public utilities. R.C. Title 49 sets forth a detailed statutory framework for the regulation of utility service and the fixation of rates charged by public utilities to their customers. As part of that scheme, the legislature created the Public Utilities Commission and empowered it with broad authority to administer and enforce the provisions of Title 49. The commission may fix, amend, alter or suspend rates charged by public utilities to their customers. R.C. 4909.15 and 4909.16. Every public utility in Ohio is required to file, for commission review and approval, tariff schedules that detail rates, charges and classifications for every service offered. R.C. 4905.30. And a utility must charge rates that are in accordance with tariffs approved by, and on file with, the commission. R.C. 4905.22.

The General Assembly has by statute pronounced the public policy of the state that the broad and complete control of public utilities shall be within the administrative agency, the Public Utilities Commission. This court has recognized this legislative mandate.

There is perhaps no field of business subject to greater statutory and governmental control than that of the public utility. This is particularly true of the rates of a public utility. Such rates are set and regulated by a general statutory plan in which the Public Utilities Commission is vested with the authority to determine rates in the first instance, . . .<sup>20</sup>

DP&L’s concern for so-called “unintended consequences” and potentially being left “holding the bag” should be viewed skeptically. In 2019, DP&L had net income of \$125 million.<sup>21</sup> Preventing DP&L from refunding consumers’ money charged them under tainted

---

<sup>19</sup> *See id.* at 4.

<sup>20</sup> *Hull*, 110 Ohio St. 3d at 98-99 (internal quotations and citations omitted).

<sup>21</sup> DP&L 10-K (February 27, 2020) at 97.

legislation and sticking consumers with the bill is unjust and unreasonable. . That is contrary to the law.<sup>22</sup>

The fate of House Bill 6 is currently unknown. No one knows how and when a repeal or invalidation of H.B. 6 will take place. Consumers' money collected under the H.B. 6 charge may be ordered initially returned to the utilities that collected it, returned to consumers, or something else. If the money is ordered returned initially to the utilities, there must be a mechanism in DP&L's tariff to ultimately return these illicit charges to consumers. Otherwise, consumers will not be able to receive a refund of the charges they paid under tainted H.B. 6.<sup>23</sup>

Ohioans have been significantly harmed by a failure to refund unlawful charges. Since 2009, electric utility consumers have been denied over \$1 billion in charges to consumers that the Supreme Court of Ohio has later deemed unlawful.<sup>24</sup> This travesty of justice should not be allowed to continue with regard to the House Bill 6 nuclear subsidy charge that has such a dark cloud hanging over its enactment.

### **III. CONCLUSION**

Whatever happens with H.B. 6 – if repealed, modified, enjoined, declared unlawful – consumers should not be left having paid a single penny of these unjust and unreasonable charges without recourse for a refund. The PUCO has the authority to make the H.B. 6 charge subject to refund. To protect consumers, the PUCO should exercise that authority and require DP&L's tariff to be revised to include subject to refund language.

---

<sup>22</sup> R.C. 4905.22.

<sup>23</sup> *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio at ¶23.

<sup>24</sup> See Attached Chart.

Respectfully submitted,

Bruce Weston (0016973)  
Ohio Consumers' Counsel

/s/ William J. Michael  
William J. Michael (0070921)  
Counsel of Record  
Ambrosia E. Wilson (0096598)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
65 East State Street, 7th Floor  
Columbus, Ohio 43215-4213  
Telephone [Michael]: (614) 466-1291  
Telephone [Wilson]: (614) 466-1292  
[William.Michael@occ.ohio.gov](mailto:William.Michael@occ.ohio.gov)  
[Ambrosia.Wilson@occ.ohio.gov](mailto:Ambrosia.Wilson@occ.ohio.gov)  
(willing to accept service by e-mail)

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Reply was served on the persons stated below via electronic transmission, this 18th day of December 2020.

/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:

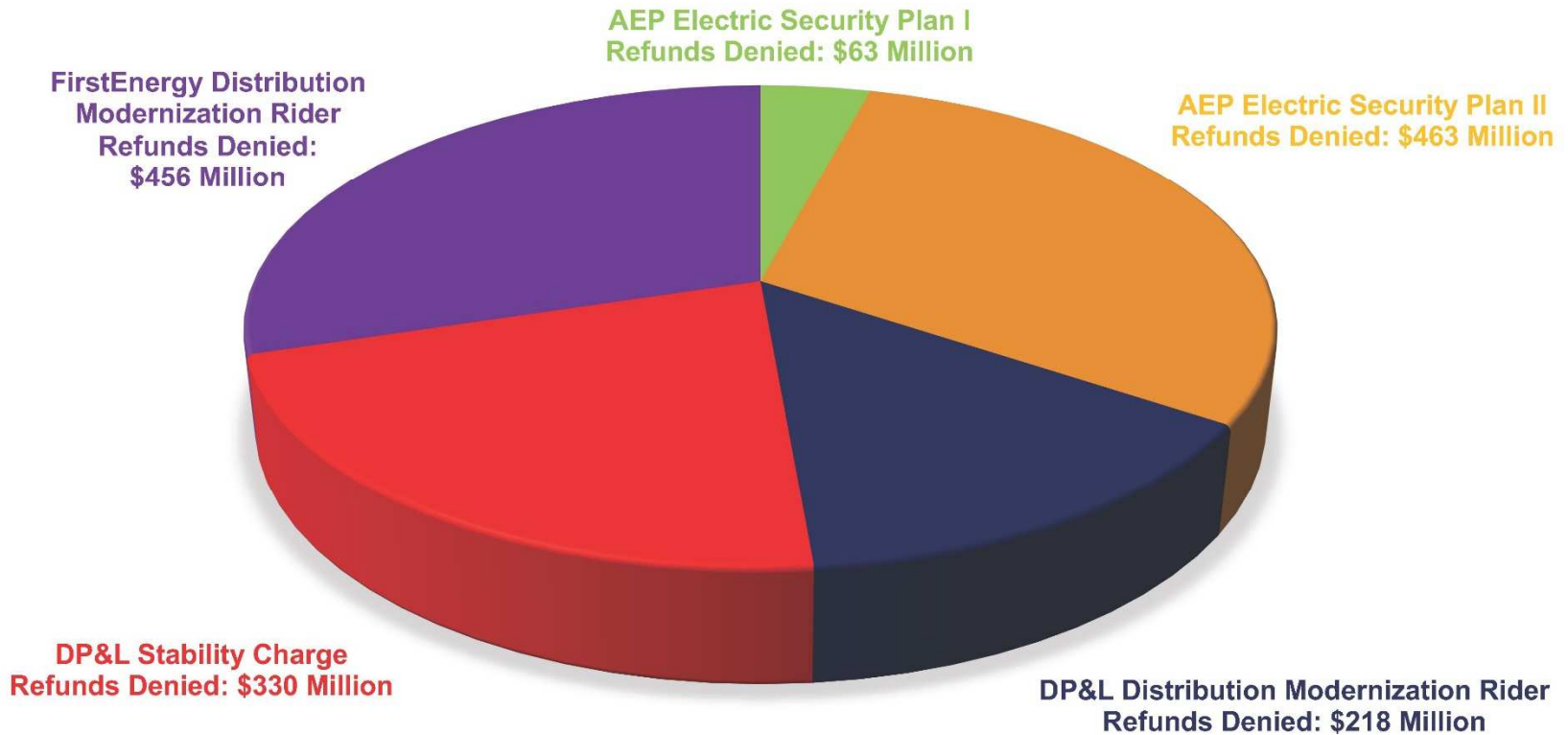
### **SERVICE LIST**

[John.jones@ohioattorneygeneral.gov](mailto:John.jones@ohioattorneygeneral.gov)

[Michael.schuler@aes.com](mailto:Michael.schuler@aes.com)



## OHIOANS DENIED \$1.5 BILLION IN REFUNDS SINCE 2009



**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**12/18/2020 11:09:28 AM**

**in**

**Case No(s). 20-1708-EL-ATA**

Summary: Reply Reply to DPL's Opposition to Protecting its Consumers From a Potential Denial of Nuclear Bailout Refunds by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.