

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the)	
Dayton Power and Light Company for)	Case No. 18-1875-EL-GRD
Approval of its Plan to Modernize its)	
Distribution Grid.)	

In the Matter of the Application of the)	Case No. 18-1876-EL-WVR
Dayton Power and Light Company for)	
Approval of a Limited Waiver of Ohio Adm.)	
Code 4901:1-18-06(A)(2).)	

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Finding that its Current Electric Security)	
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Aggregate Test in R.C. 4928.143(E).)	

**INITIAL BRIEF FOR CONSUMER PROTECTION
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

For the protection of the public, the PUCO's settlement process is in desperate need of reform by the PUCO or the Ohio legislature. This case's DP&L/PUCO settlement is a prime example why.

It is hard to imagine a worse deal for consumers than the one concocted by DP&L, the PUCO Staff, and others. They signed a settlement that will, if the PUCO adopts it, dramatically increase rates to consumers. This settlement features DP&L's legal maneuverings combined with the PUCO's subsidy culture for yet another fleecing of consumers in the name of corporate welfare for Dayton Power and Light (and its owners). This time, Dayton-area consumers, who suffer from high rates of poverty and food insecurity, will have to ante up \$300 million under the settlement for the misleadingly-named "Rate Stabilization Charge."

Under the settlement scheme, this Stabilization charge would, in essence, continue as a substitute for DP&L's unlawful and terminated distribution modernization charge (yes, the same as that FirstEnergy charge). So the settlement would enable DP&L to lean on its consumers, who are suffering in a pandemic, for yet more subsidies. And at the same time, it would deny consumers the full rate reduction for the illegal modernization charge. Previously and as usual, customers did not get refunds (a couple hundred million dollars) for the illegal modernization charge.

But it gets worse. DP&L is taking another page from scandalous FirstEnergy (in addition to the illegal modernization rider gambit) by advancing a settlement that manipulates consumers out of refunds for significantly excessive profits. That's right out of FirstEnergy's profits playbook in House Bill 166 (in the last legislative session). The 2008 law is terrible enough in its ratemaking bias favoring electric utilities over consumers. But DP&L, like FirstEnergy, is

compelled to undermine even the 2008 law’s meager consumer protections against paying sky-high utility profits. And the state’s regulator, the PUCO Staff, has signed on to this DP&L corporate wish list. Further, consumers would pay more than \$100 million for “grid modernization” investments. Those payments will provide few benefits to consumers with little to no accountability from the utility.

And naturally, a settlement this bad includes DP&L dispensing utility cash for inducing signatures from those who have learned to line up at the PUCO’s door for hand-outs. Here is a partial list of recipients of DP&L’s annual cash or cash equivalents pay-offs (\$30 million here) in exchange for signatures on the settlement.

- i. \$ 107,000 to Honda.
- ii. \$ 112,000 to IEU, for the benefit of its members.
- iii. \$ 26,000 to Kroger.
- iv. \$ 260,000 to OMAEG, for the benefit of its members.
- v. \$ 35,000 to OHA.
- vi. \$ 210,000 to the University of Dayton.

About this use of utility cash in PUCO settlements, OSU Professor Ned Hill testified (for OCC) that parties “intervene in PUCO proceedings so that money paid to the utility ... by other customers (including residential customers) can be *redistributed* to them in the form of cash or other benefits in exchange for their signatures on a settlement.”¹

¹ OCC Ex. 3 (Hill Testimony) at 10 (emphasis in original).

Fortunately for consumers, the law is on their side. The PUCO is required to determine whether DP&L's current electric security plan is more favorable in the aggregate than a market rate offer. It isn't.

The PUCO is required to determine whether DP&L's current electric security plan is substantially likely to result in significantly excessive profits. It is.

The PUCO is required to determine whether DP&L had significantly excessive profits in 2018 and 2019. It did.

The PUCO is required to determine whether DP&L's grid modernization proposals will result in just and reasonable charges to consumers. They won't.

And the PUCO will ultimately determine whether the Settlement passes the PUCO's three-prong test for assessing settlements. It doesn't.

"[T]he purpose of the PUCO ... is to protect the customers of public utilities."² It can do that here by (i) eliminating the Rate Stabilization Charge, (ii) ending DP&L's current ESP and ordering DP&L to operate under a market rate offer, (iii) ordering DP&L to provide customers with \$150 million in refunds for DP&L's significantly excessive profits, and (iv) rejecting the Settlement, including the grid modernization proposals.

II. BACKGROUND

The PUCO has consolidated four matters. First, in Case No. 20-680-EL-UNC (the "ESP Quadrennial Review Case"), the PUCO must determine whether DP&L's current electric security plan ("ESP I") is more favorable in the aggregate than a market rate offer ("MRO") and whether the ESP I is substantially likely to result in significantly excessive profits during the

² *Ohio Consumers' Counsel v. PUCO*, 121 Ohio St.3d 362, ¶ 35 (2009) (Pfeifer, J. dissenting).

remaining term of the plan.³ Second, in Case No. 19-1121-EL-UNC (the “2018 SEET Case,” where SEET means “significantly excessive earnings test”), the PUCO must determine whether customers get a refund for DP&L’s significantly excessive profits in 2018. Third, in Case No. 20-1041-EL-UNC (the “2019 SEET Case”), the PUCO must determine whether customers get a refund for DP&L’s significantly excessive profits in 2019. And fourth, in Case Nos. 18-1875-EL-GRD, 18-1876-EL-WVR, and 18-1877-EL-AAM (collectively, the “Grid Modernization Case”), DP&L is seeking approval of charges to customers for grid modernization investments.

Initially, each of these four cases was pursued as a separate proceeding. The cases were then combined in a global settlement⁴ (“Settlement”) reached by DP&L, the PUCO Staff, and intervenors, excluding the state’s advocate for residential customers, the Office of the Ohio Consumers’ Counsel (“OCC”), and Direct Energy.

The Settlement summarily resolves three of the four cases in question. Regarding the ESP Quadrennial Review Case, the Settlement provides that “DP&L’s ESP I as currently implemented passes the more favorable in the aggregate test and the prospective significantly excessive earnings test in R.C. 4928.143(E).”⁵ This is what DP&L sought in its ESP Quadrennial Review Case application.

Regarding the 2018 SEET Case and 2019 SEET Case, the Settlement provides that certain signatory parties “recommend that the Commission approve DP&L’s applications in those cases.”⁶ If DP&L’s applications in those cases are approved as filed, customers would get no refunds in those cases, which is what DP&L proposed in its applications. (Notably, the

³ R.C. 4928.143(F). Note that this statute refers to “significantly excessive earning.” OCC refers to “earnings” as “profits” throughout this brief for ease of understanding.

⁴ Joint Ex. 1.

⁵ Settlement at 43.

⁶ Settlement at 45.

pathway to no refunds requires the PUCO to ignore the Supreme Court’s recent holding requiring distribution modernization revenues to be included in the profits review test).

The remainder of the Settlement primarily consists of (i) various cash or cash equivalents to be paid to signatory parties in exchange for their signatures, and (ii) proposals in the Grid Modernization Case regarding charges to consumers for grid modernization investments.

III. STATUTORY REQUIREMENTS

The PUCO is required by law to address certain statutory requirements. First, under R.C. 4928.143(E), the PUCO “shall test” DP&L’s ESP to determine whether it “continues to be more favorable in the aggregate” than an MRO.⁷ Second, under R.C. 4928.143(E), the PUCO “shall also determine” whether DP&L’s ESP is “substantially likely” to result in DP&L charging customers for significantly excessive profits in the remaining term of the electric security plan.⁸ These issues are part of the ESP Quadrennial Review Case.

Third, under R.C. 4928.143(F), the PUCO “shall consider, following the end of each annual period,” whether DP&L charged customers for significantly excessive profits. And if it concludes that DP&L did, it “shall require” DP&L “to return to consumers the amount of the excess.”⁹ This issue is part of the 2018 and 2019 SEET Cases.

⁷ This is sometimes referred to as the “more favorable in the aggregate” or “MFA” test, or alternatively, the “ESP vs. MRO” test.

⁸ This is sometimes referred to as the “prospective significantly excessive earnings test” or “prospective SEET.”

⁹ This is sometimes referred to as the “retrospective significantly excessive earnings test” or “retrospective SEET.”

DP&L bears the burden of proof on these issues.¹⁰ Because the PUCO is required by statute to address these issues, they must be considered separate and apart from the Settlement.¹¹ Upon consideration of these issues, the PUCO should conclude that (i) DP&L's ESP I is less favorable in the aggregate than an MRO, (ii) DP&L's ESP I is substantially likely to result in significantly excessive profits in future years, (iii) customers are entitled to a \$62.9 million refund for 2018, and (iv) customers are entitled to an \$87.7 million refund for 2019.

IV. TERMINATION OF DP&L'S ELECTRIC SECURITY PLAN AND TRANSITION TO A MARKET RATE OFFER

A. DP&L's electric security plan is less favorable in the aggregate than a market rate offer.

When a utility's ESP extends beyond three years, the PUCO must "test the plan in the fourth year ... to determine whether the plan ... continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under" an MRO.¹² DP&L's ESP I is substantially less favorable for consumers than an MRO. DP&L thus fails this test.

¹⁰ *In re Filing by [FirstEnergy] of a Grid Modernization Bus. Plan*, Case No. 16-481-EL-UNC, Opinion & Order ¶ 106 ("utilities continue to bear the burden of proof for any application submitted for our consideration"); R.C. 4928.143(E) ("The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility."); R.C. 4928.143(F) ("The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility.").

¹¹ *See In re Ohio Edison Co.*, 2020-Ohio-5450, ¶¶ 62-64 (rejecting utility's argument that statutory issues must be addressed in the context of the PUCO's three-part settlement test).

¹² R.C. 4928.143(E).

1. The electric security plan is less favorable in the aggregate than a market rate offer because it requires customers to continue paying the unlawful Rate Stabilization Charge.

a. The Rate Stabilization Charge is an unlawful financial integrity charge.

A decade of Ohio Supreme Court and PUCO precedent compels a ruling that DP&L's Rate Stabilization Charge ("RSC"), as continued by the Settlement, is unlawful. The PUCO summarized this precedent in a recent ruling involving DP&L's third electric security plan:

The line of cases from *Columbus S. Power Co.*, 2011-Ohio-1788, to *Ohio Edison* demonstrates that nonbypassable riders, established to promote the financial integrity of EDUs, are unlawful and are not authorized by R.C. 4928.143, the statute creating electric security plans.¹³

This language precisely describes the RSC.

In these cases, DP&L seeks continuation of the RSC as a means for promoting its financial integrity. The RSC is no different from its unlawful Distribution Modernization Rider ("DMR"). DP&L might claim otherwise,¹⁴ but its own witnesses persistently testify that they believe the RSC is essential for DP&L (and its parent entities') financial well-being:

- "DP&L would be in a dire financial position absent the RSC. ... The financial condition and integrity of DP&L in this scenario would also suffer further due to the strained financial position of DPL"¹⁵
- "The ESP without the RSC would put DPL in a precarious financial position."¹⁶
- "DP&L's financial integrity would be in jeopardy if the Commission were to invalidate the Rate Stability Charge ('RSC') in this proceeding."¹⁷

¹³ *In re Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Elec. Sec. Plan*, Case No. 16-395-EL-SSO, Supplemental Opinion & Order ¶ 108 (Nov. 21, 2019).

¹⁴ *See, e.g.*, DP&L Ex. 1A (Malinak Initial Testimony) at 41 (claiming that "the RSC is not a financial integrity charge").

¹⁵ DP&L Ex. 1A (Malinak Initial Testimony) at 61.

¹⁶ DP&L Ex. 1A (Malinak Initial Testimony) at 62.

¹⁷ DP&L Ex. 6A (Garavaglia Initial Testimony) at 2.

- There would be “significant deterioration in DP&L’s financial condition” in the “scenario of ... an ESP without the RSC.”¹⁸
- “[A]ny order in this case that invalidated the RSC would have a drastic effect on DP&L and its credit ratings.”¹⁹

In addition to these specific references to the tie between the RSC and DP&L’s financial integrity, it is impossible to overlook the central theme of DP&L’s testimony. DP&L witness Malinak goes on for *97 pages* in his April 2020 testimony, nearly all of which is devoted to DP&L and DPL, Inc.’s credit ratings, debt obligations, and financial condition, all of which drives home a single DP&L argument: DP&L wants more customer-funded subsidies to maintain its financial integrity, so DP&L thinks the PUCO should continue the \$79 million per year RSC charge.

DP&L’s own evidence and characterization of the RSC demonstrates that it is a charge “to promote the financial integrity of” DP&L.²⁰ Therefore, it is functionally the same as DP&L’s DMR, which the PUCO ruled to be “unlawful and [] not authorized by R.C. 4928.143.”

b. Like the unlawful DMR, the RSC “does not provide for the recovery of any identified, specific costs.”

To avoid characterizing the RSC as a financial integrity charge, DP&L instead claims that it is an “important source of funds that enables DP&L” to serve as provider of last resort.²¹ This is quite ironic given that DP&L has repeatedly claimed that the RSC is a charge to promote the financial integrity of DP&L, as discussed above. Nevertheless, DP&L has not identified any specific costs that it actually incurs for provider of last resort (“POLR”). This makes sense

¹⁸ DP&L Ex. 1A (Malinak Initial Testimony) at 27.

¹⁹ DP&L Ex. 6A (Garavaglia Initial Testimony) at 11.

²⁰ *In re Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Elec. Sec. Plan*, Case No. 16-395-EL-SSO, Supplemental Opinion & Order ¶ 108 (Nov. 21, 2019).

²¹ DP&L Ex. 1A (Malinak Initial Testimony) at 65-66. *See also* Tr. Vol. I at 31 (Malinak) (claiming that the RSC provides compensation for “the costs of being provider of last resort, both the risk and the actual cost”).

because it is marketers that provide POLR service under ESP I, not DP&L. And because DP&L does not incur any costs for POLR service, the RSC is unlawful for the same reasons as the DMR.

In its order terminating the DMR, the PUCO noted that “the Court has consistently upheld provisions of ESPs which provide for the recovery of identified, specific costs.”²² But the DMR did not fall under this category of recoverable costs because it “does not provide for the recovery of any identified, specific costs.”²³

The RSC is no different. As with the DMR, DP&L has not identified any specific costs that are tied to the \$79 million per year RSC. In every relevant respect, the current incarnation of the RSC, which the signatory parties seek to perpetuate by agreeing to its continuation in the Settlement, is the same as the DMR (other than being slightly less costly for consumers). It is unlawful for all the same reasons as the DMR. DP&L’s ESP is less favorable in the aggregate than an MRO because it allows DP&L to continue charging customers for an unlawful financial integrity charge that bears no relation whatsoever to any of DP&L’s costs.

2. The electric security plan is more costly for consumers than a market rate offer because it requires them to pay \$79 million per year under the RSC, which they would not pay under an MRO.

Even if the RSC were lawful, an MRO is still more favorable for consumers because it would not include the \$79 million annual RSC charge. An MRO would not include such a charge, so the ESP is substantially more costly, and therefore less favorable for consumers.

There is no dispute that the ESP includes the \$79 million per year RSC.²⁴ Nor is there any dispute that an MRO would not include a \$79 million per year RSC. To overcome the clear

²² *Id.*

²³ *Id.*

²⁴ DP&L Ex. 1A (Malinak Initial Testimony) at 10.

financial superiority of an MRO, DP&L offered the testimony of two witnesses who claim that an MRO would be more expensive because the PUCO would approve a “Financial Integrity Charge” (“FIC”) that is substantially *higher* than \$79 million per year in a hypothetical MRO case.²⁵ In fact, DP&L claims that this hypothetical MRO charge would be even greater than DP&L’s unlawful \$105 million per year DMR.²⁶

OCC witness Matthew Kahal explained why DP&L’s theory that an MRO would include an FIC of more than \$105 million is fiction. As Mr. Kahal explained, DP&L derived the low-end estimate for its theoretical Financial Integrity Charge by assuming that in an MRO, the Financial Integrity Charge would include (i) the same amount as the RSC (\$79 million per year) *plus* (ii) additional funds to make up for the fact that in an ESP, DP&L’s parent company (AES) would provide \$150 million in equity to DP&L, but in an MRO, AES would refuse to do so.²⁷

Mr. Kahal explained the many reasons that this assumption makes no sense. First, it would be a twisted application of public policy to allow DP&L’s parent company to hold the PUCO hostage by saying that it will only invest in DP&L if the PUCO gives AES what it wants—continuation of the ESP so that DP&L can continue to collect the RSC from customers.²⁸ As OCC witness Kahal explained:

[T]he only reason why the lower bound FIC exceeds the RSC (and it does to substantially) is because Mr. Malinak assumes the FIC must provide revenues, at consumer expense, to “make up” for the fact that AES refuses to provide DP&L with a financially beneficial and presumably needed equity infusion. The PUCO would have to be convinced by DP&L in an MRO filing that AES Corporation’s financial decisions dictate to the PUCO the magnitude of the rate increase for an FIC that DP&L is entitled to receive from consumers.

²⁵ See DP&L Exs. 1A (Malinak Initial Testimony), 6A (Garavaglia Initial Testimony).

²⁶ Tr. Vol. I at 53-54 (Malinak).

²⁷ OCC Ex. 1 (Kahal Initial Testimony) at 33-34.

²⁸ OCC Ex. 1 (Kahal Initial Testimony) at 44.

*I cannot imagine any Commission standing for that kind of parental intransigence and then rewarding that intransigence with a rate increase to cover the parent's financial obligation at consumer expense. In any event, the PUCO should not be dictated to or controlled by the actions or inactions of AES of DPL, Inc. The PUCO should protect consumers.*²⁹

The PUCO should give no weight to DP&L's claim that the PUCO would approve a higher Financial Integrity Charge in an MRO to make up for AES's refusal to invest in DP&L.

Second, Mr. Kahal explained that if the PUCO were to approve a Financial Integrity Charge in the amounts claimed by DP&L, it would result in "absurdly high [returns on equity] at consumer expense."³⁰ These returns on equity (a measure of profits) would substantially exceed what is reasonable and would result in significantly excessive profits for DP&L. As OCC witness Kahal concluded, DP&L's claimed MRO results "are simply not credible, and it is unreasonable to assume that the PUCO would approve something like this at consumer expense."³¹

Third, with respect to DP&L's high-end estimate for its hypothetical Financial Integrity Charge, OCC witness Kahal notes that DP&L assumes that such a charge would require customers to pay for the vast majority of DP&L's capital spending, but also that customers would be required to fund 100% of DP&L's parent entity's (DPL, Inc.) debt interest expense.³² Mr. Kahal concludes that this assumption "departs so drastically from sound ratemaking principles and is so transparently unreasonable and unfair ... that [he] cannot imagine a utility even proposing it in an MRO proceeding, let alone the PUCO approving it."³³

²⁹ OCC Ex. 1 (Kahal Initial Testimony) at 35 (emphasis added).

³⁰ OCC Ex. 1 (Kahal Initial Testimony) at 34.

³¹ OCC Ex. 1 (Kahal Initial Testimony) at 35.

³² OCC Ex. 1 (Kahal Initial Testimony) at 36.

³³ OCC Ex. 1 (Kahal Initial Testimony) at 36.

Fourth, DP&L's position is that the Financial Integrity Charge in an MRO would be bypassable, meaning only standard service offer ("SSO") customers would pay it.³⁴ It is unreasonable to assume that the PUCO would burden SSO customers with a financial integrity charge at all, let alone one greater than \$105 million per year, when such charge has absolutely nothing to do with the standard service offer. OCC witness Kahal explained that it is "completely unrealistic" to assume that the PUCO would allow SSO costs to increase so substantially in an MRO case.³⁵

Fifth, as OCC witness Kahal testified, the annual interest expense on DPL, Inc.'s long-term debt is about \$36 million.³⁶ Even if the PUCO were to conclude that customers should pay a subsidy to keep DPL, Inc. from defaulting on its long-term debt (which it absolutely should not), those charges would need to be no more than \$36 million annually—substantially lower than DP&L's hypothetical Financial Integrity Charge and less than half of the current RSC. DP&L's claim that a Financial Integrity Charge would need to be substantially in excess of the \$79 million RSC is unfounded.

Sixth, OCC witness Kahal explained that there would be no need for a huge Financial Integrity Charge in an MRO case because there are other alternatives for DP&L and its parent companies to solve their debt problem. That includes (i) filing a base rate case (which DP&L in fact did in late 2020) and (ii) AES paying DPL, Inc.'s interest expense or moving DPL, Inc.'s debt to its own balance sheets.³⁷

³⁴ DP&L Ex. 1A (Malinak Initial Testimony) at 82.

³⁵ OCC Ex. 1 (Kahal Initial Testimony) at 37.

³⁶ OCC Ex. 1 (Kahal Initial Testimony) at 40.

³⁷ OCC Ex. 1 (Kahal Initial Testimony) at 43-44.

AES can certainly afford it. AES has an enterprise value of \$33 *billion* and total assets of \$35 *billion*.³⁸ Its dividend payments were expected to be about \$380 million in 2020 and increasing to \$430 million in five years.³⁹ Its return on equity is expected to increase from 18.5% in 2020 to more than 34% in five years.⁴⁰ Further, according to data provided by PUCO Staff witness Buckley, AES's adjusted net income in 2018 was more than \$880 million, good for a 27.25% return on equity.⁴¹ This was by the far the highest in the country in Mr. Buckley's sample, and an amount that Mr. Buckley acknowledged was significantly excessive. AES had another successful year in 2019 with \$302 million in net income.⁴²

Finally, under R.C. 4928.142(D)(4), the PUCO can “adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity....” DP&L has not come close to showing that it would meet this standard—an *emergency*—in an MRO. DP&L has no emergency because, as explained above, AES has numerous paths toward fixing its debt problems without customers bailing AES out.

In short, AES can easily solve the debt problem by effectively guaranteeing the DPL, Inc. debt obligation.⁴³ Of course, AES would prefer that customers keep paying the RSC so that it does not have to use its own money to solve the debt problem that it created. The PUCO can put an end to the DP&L debt saga by simply refusing to allow the RSC to continue, thus forcing

³⁸ OCC Ex. 1 (Kahal Initial Testimony) at 23.

³⁹ OCC Ex. 1 (Kahal Initial Testimony) at 23.

⁴⁰ OCC Ex. 1 (Kahal Initial Testimony) at 23.

⁴¹ PUCO Staff Ex. 1 (Buckley Testimony) at Attachment #1.

⁴² PUCO Staff Ex. 1 (Buckley Testimony) at Attachment #2.

⁴³ OCC Ex. 1 (Kahal Initial Testimony) at 25.

AES to finally accept responsibility for its own mess, rather than continually expecting customers to bail AES out for its bad business decision-making.

3. The qualitative attributes of DP&L's ESP I do not outweigh the substantial burden of the \$79 million annual RSC.

DP&L claims that even if ESP I is more expensive for consumers than an MRO, it has other qualitative benefits that still make it more favorable in the aggregate.⁴⁴ OCC witness Kahal explained why DP&L is wrong.

First, DP&L says that AES would make a \$150 million equity investment in 2021 under an ESP but not under an MRO.⁴⁵ As explained above, AES should not be allowed to hold a gun to the PUCO's head, dangling a promise of \$150 million to DP&L only if the PUCO rules to AES's liking. This would effectively allow any utility to pass the more favorable in the aggregate test at will by simply having their parent company declare, in a non-legally binding and self-serving fashion, that it will invest in the utility in an ESP but not an MRO.

Second, DP&L claims that an ESP is more favorable than an MRO because refunds under the significantly excessive earnings test are not available under an MRO.⁴⁶ This argument fails for several reasons. The idea that customers will get refunds under an ESP appears illusory. DP&L's customers have never gotten a refund. And even in this case, where DP&L's return on equity exceeds 20% for both 2018 and 2019, DP&L and the PUCO Staff seek to deny customers any refund.⁴⁷ Further, the reason that there is no significantly excessive earnings test under an

⁴⁴ See DP&L Ex. 1A (Malinak Initial Testimony) at 81-83.

⁴⁵ DP&L Ex. 1A (Malinak Initial Testimony) at 81.

⁴⁶ DP&L Ex. 1A (Malinak Initial Testimony) at 81.

⁴⁷ PUCO Staff Ex. 1 (Buckley Testimony).

MRO is because an MRO is inherently more protective of customers.⁴⁸ Because a utility cannot load customers' bills up with numerous single-issue-ratemaking "riders" in an MRO, the risk of utilities collecting charges from consumers that would lead to significantly excessive earnings in an MRO is much lower.

Third, DP&L claims that an ESP is more favorable than an MRO because it allows the PUCO the flexibility to continue approving ESPs in the future, whereas once a utility moves to an MRO, it cannot implement a future ESP.⁴⁹ This claim also fails. For one, by this logic, every ESP would necessarily be more favorable than an MRO because this applies to every assessment of an ESP vs. an MRO.⁵⁰ Moreover, experience has shown that ESPs are harmful to customers; it would be absurd to conclude that it is beneficial to consumers to retain the option of more ESPs in the future instead of MROs.

Fourth, DP&L claims that an ESP is better than an MRO because the RSC is nonbypassable, whereas a Financial Integrity Charge in an MRO would be bypassable.⁵¹ According to DP&L, the unduly high Financial Integrity Charge on SSO customers would cause SSO customers to leave the SSO in favor of shopping, the proverbial "death spiral" argument.⁵² But as explained above, this does not make an ESP more favorable than an MRO—it simply shows why it would be unreasonable for the PUCO to approve a bypassable Financial Integrity Charge in an MRO.

⁴⁸ See OCC Ex. 1 (Kahal Initial Testimony) at 45 (explaining that the "best protection for customers is not the SEET, but rather an MRO with the scrutiny of costs and earnings that result from a base rate case").

⁴⁹ DP&L Ex. 1A (Malinak Initial Testimony) at 81.

⁵⁰ See OCC Ex. 1 (Kahal Initial Testimony) at 45.

⁵¹ DP&L Ex. 1A (Malinak Initial Testimony) at 82.

⁵² DP&L Ex. 1A (Malinak Initial Testimony) at 82.

Fifth, DP&L claims that an ESP is more favorable than an MRO because the presence of single-issue ratemaking under an ESP makes rate increases more gradual, compared to infrequent and “lumpy” rate increases through base distribution rate cases.⁵³ This argument fails because it is nothing more than a collateral attack of traditional ratemaking in general.⁵⁴ There is no evidence that customers prefer constant, automatic, annual rate increases rather than periodic rate increases in a base rate case where costs are carefully scrutinized.⁵⁵ And again, if the mere existence of single-issue ratemaking makes an ESP more favorable than an MRO, then every ESP would, by definition, be more favorable than every MRO, and the statute requiring the PUCO to determine which is more favorable would be nullified.

In sum, customers would not willingly pay \$79 million per year for these alleged qualitative benefits of an ESP as compared to an MRO. The PUCO should reject any claim that they show that DP&L’s ESP is more favorable in the aggregate than an MRO.

B. DP&L is substantially likely to have significantly excessive profits in the future if it continues charging customers under ESP I.

Under R.C. 4928.143(E), DP&L is required to prove that the continuation of its ESP is not “substantially likely” to result in DP&L charging customers for significantly excessive profits.⁵⁶ DP&L cannot meet this burden. If ESP I continues including the \$79 million annual RSC, then DP&L’s profits will almost certainly be significantly excessive.

DP&L argues that its profits should only be deemed significantly excessive for purposes of this prospective profits review if they exceed a 16.6% return on equity.⁵⁷ But as OCC witness

⁵³ DP&L Ex. 1A (Malinak Initial Testimony) at 82.

⁵⁴ OCC Ex. 1 (Kahal Initial Testimony) at 46.

⁵⁵ OCC Ex. 1 (Kahal Initial Testimony) at 46-47.

⁵⁶ This is sometimes referred to as the “prospective SEET.”

⁵⁷ DP&L Ex. 1A (Malinak Initial Testimony) at 85.

Kahal explained, this 16.6% threshold is “an outlandish increase compared to the more reasonable threshold of 12.0 percent.”⁵⁸ In fact, it is nearly 70% greater than DP&L’s current approved return on equity of 9.999%, which is already higher than a typical utility.⁵⁹

A more reasonable approach would be to adopt a 12.0% return on equity threshold.⁶⁰ The PUCO has consistently used a 12.0% return on equity threshold in determining whether DP&L’s profits are significantly excessive. The PUCO used a 12.0% return on equity for ESP I.⁶¹ The PUCO used a 12.0% return on equity for ESP II.⁶² And the PUCO used a 12.0% return on equity for ESP III.⁶³

Using a 12.0% return on equity threshold, OCC witness Kahal testified that it is substantially likely that DP&L’s profits in 2021 through 2023 will exceed that threshold, meaning DP&L’s profits will be significantly excessive.⁶⁴ First, DP&L’s returns on equity in 2018 and 2019 exceeded 20%.⁶⁵ The return on equity in future years might be slightly lower to account for the difference between the DMR (\$105 million per year) which was in effect in 2018 and 2019 and the RSC (\$79 million per year), which would be in effect in future years if ESP I

⁵⁸ OCC Ex. 1 (Kahal Initial Testimony) at 49.

⁵⁹ OCC Ex. 1 (Kahal Initial Testimony) at 49.

⁶⁰ OCC Ex. 1 (Kahal Initial Testimony) at 49.

⁶¹ *In re Applications of the Dayton Power & Light Co. for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) & Ohio Adm. Code 4901:1-35-10 for 2016 and 2017*, Case Nos. 17-1213-EL-UNC, 18-873-EL-UNC, Opinion & Order ¶ 10 (July 31, 2019) (finding that DP&L did not have significantly excessive earnings in 2016 and 2017—which includes earnings from ESP I in both years—because its profits were “well below DP&L’s approved SEET threshold of 12 percent”).

⁶² *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case No. 12-426-EL-SSO, Opinion & Order at 26 (Sept. 4, 2013) (“the Commission finds that a significantly excessive earnings test (SEET) threshold of 12 percent should be established”).

⁶³ *In re Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Elec. Sec. Plan*, Case No. 16-395-EL-SSO, Opinion & Order ¶ 14 (“DP&L’s SEET threshold will remain at 12 percent”) (Oct. 20, 2017).

⁶⁴ OCC Ex. 1 (Kahal Initial Testimony) at 50-51.

⁶⁵ OCC Ex. 1 (Kahal Initial Testimony) at 20 (ROE of greater than 22% in 2018 and greater than 26% in 2019); OCC Ex. 4 (Duann Testimony) at 13, 18 (same).

continues. But as OCC witness Kahal testified, even when accounting for this difference, DP&L's profits are substantially likely to be greater than 12.0%, and potentially even greater than DP&L's proposed 16.6% threshold.⁶⁶

DP&L cannot meet its burden of proving that it is unlikely to have significantly excessive profits as a result of continuing its ESP. It fails the prospective SEET under R.C. 4928.143(E).

C. The PUCO should terminate ESP I and order DP&L to transition to the more advantageous alternative—a market rate offer.

Under R.C. 4928.143(E), if a utility's ESP is less favorable in the aggregate for consumers than an MRO, *or* if it is substantially likely to result in customers paying significantly excessive profits, the PUCO may "terminate the electric security plan." In doing so, it "may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative."⁶⁷

The Settlement attempts to hedge its bets. On the one hand, it says that ESP I is more favorable in the aggregate than an MRO and that it is not substantially likely to result in significantly excessive earnings.⁶⁸ For the many reasons explained above, this is incorrect. Then the Settlement says that even if ESP I fails one of the statutory tests, the PUCO should approve the Settlement anyway because it provides for a "transition" to another ESP.⁶⁹ The Settlement misinterprets R.C. 4928.143(E). This statute does not allow a transition to another electric security plan. By its plain language, the transition to "the more advantageous alternative" must mean a transition to an MRO.

⁶⁶ OCC Ex. 1 (Kahal Initial Testimony) at 51-52.

⁶⁷ R.C. 4928.143(E).

⁶⁸ Joint Ex. 1 (Settlement) at 43.

⁶⁹ Joint Ex. 1 (Settlement) at 43 ("This Stipulation provides for an orderly transition to such a plan, as DP&L has committed to filing a new ESP application (ESP IV) by October 1, 2023," which, among other things, will "provide for a reasonable and lawful transition to ESP IV that satisfy the requirements of R.C. 4928.143(E).").

The “more advantageous alternative” under R.C. 4928.413(E) is necessarily an MRO because the General Assembly used the definite article “the” in the statute instead of the indefinite article “a/an.” Ohio’s Statutory interpretation rules provide that words and phrases shall be read in context and construed according to the rules of grammar and common usage.⁷⁰ The rules of grammar and common usage indicate that the definite article “the” is used to refer to a specific noun (*e.g.*, the red car, the blue boat, the more advantageous alternative), whereas the indefinite article “a/an” is used to refer to a general or non-specific noun (*e.g.*, a boat, a car, a more advantageous alternative).⁷¹ Moreover, a universal rule of statutory construction is that “the courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”⁷²

United States Supreme Court precedent confirms that use of the definite article is significant and intentional,⁷³ singular,⁷⁴ limiting,⁷⁵ or restrictive.⁷⁶ The Supreme Court of Ohio

⁷⁰ See R.C. 1.42.

⁷¹ See *Nielsen v. Preap*, 139 S.Ct. 954, 965, 203 L.Ed.2d 333 (2019) (“Because “[w]ords are to be given the meaning that proper grammar and usage would assign them....the “rules of grammar govern” statutory interpretation “unless they contradict legislative intent or purpose”); see also *Costello v. INS*, 376 U. S. 120, 122-126 (1964).

⁷² See *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992).

⁷³ See *Comm’r of Patents v. Whiteley*, 71 U.S. 522, 530, 18 L. Ed. 335 (1866) (the Court found that “had it been the intention of Congress to restrict the remedy, it would have been easy to use words of limitation, or to have used the restrictive and definite article ‘the’ instead of the distributive pronoun ‘any,’ before the word ‘assignment.’”

⁷⁴ See *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S.Ct. 1507, 1514, 203 L.Ed.2d 791 (2019) (“...the statute refers to “the” official “charged with responsibility to act in the circumstances...Regardless of precisely which official or officials the statute is referring to, §3731(b)(2)’s use of the definite article “the” suggests that Congress did not intend for any and all private relators to be considered “the official of the United States.””); see also *Rumsfeld v. Padilla*, 542 U. S. 426, 434, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004) (explaining that the “use of the definite article . . . indicates that there is generally only one” person covered); see also *Work v. United States*, 262 U.S. 200, 208, 43 S.Ct. 580, 67 L.Ed. 949 (1923) (If it was “intended to authorize a new appraisal of the surface reservations, the language would not have been “the” appraisalment but “an” appraisalment. The use of the definite article means an appraisalment specifically provided for”).

⁷⁵ See *Rapanos v. United States*, 547 U.S. 715, 716, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006) (“the use of the definite article ‘the’ and the plural number ‘waters’ show plainly that § 1362(7) does not refer to water in general, but more narrowly to water ‘[a]s found in streams,’ ‘oceans, rivers, [and] lakes.’”).

⁷⁶ See *Gibbons v. Ogden*, 22 U.S. 1, 85, 6 L. Ed. 23 (1824) (the Court concluded that the omission of the “definite article *the*” was not accidental but “studiously made”).

has followed this precedent. In *Judy v. BMV*, the Supreme Court of Ohio found that “[i]n construing a statute, the definite article ‘the’ particularizes the subject which it precedes and is a word of limitation as opposed to the indefinite or generalizing force of ‘a’ or ‘an.’” Further, “[b]ased on the ... rules of statutory interpretation ... the legislature was trying to particularize or limit.”⁷⁷

The Ohio legislature included the definite article “the” when drafting R.C. 4928.143(E). Thus, it was referring to a specific “alternative” when it said, “the more advantageous alternative.” And because the entire point of R.C. 4928.143(E) is to protect consumers by assessing whether an ESP is more favorable than an MRO, the only reasonable interpretation of the phrase “the more advantageous alternative” is that it is an MRO, not another ESP. To allow the utility to continue using an electric security plan *after* its electric security plan is found to be less favorable than a market rate offer would defeat the consumer-purpose protection of the statute (in addition to violating the plain language of the statute, as explained above). Accordingly, the PUCO should terminate ESP I and order DP&L to transition to “*the* more advantageous alternative,” an MRO.

V. REFUNDS TO CUSTOMERS FOR \$150 MILLION OF DP&L’S SIGNIFICANTLY EXCESSIVE PROFITS

A. Customers deserve a refund of \$62.9 million for 2018 and \$87.7 million for 2019 because DP&L’s profits were significantly excessive.

Because ESPs allow utilities to engage in single-issue ratemaking, there is risk that they will cause customers to pay unjust and unreasonable rates. The ESP statute, however, contains provisions that are intended to protect consumers from paying electric security plan rates that are

⁷⁷ See *Judy v. BMV*, 100 Ohio St.3d 122, 2003-Ohio-5277, 797 N.E.2d 45, ¶ 22.

too high. One of those is R.C. 4928.143(F). Under this law, customers are entitled to a refund if, in a given year, the utility earns “significantly excessive” profits. This is commonly referred to as the “significantly excessive earnings test” or “SEET.” (Notably, the statute only protects customers from charges for “significantly excessive” profits, which means that there is no consumer protection from “excessive” profits.)

The process for determining whether the utility had significant excessive profits (as measured by return on equity or “ROE”) involves several steps:

1. A profits “threshold” is established. The threshold is the dividing line for determining whether profits are significantly excessive.
2. The utility’s annual earnings (profits) are calculated for purposes of the SEET.
3. The value of the utility’s equity is established for the year in question.
4. The earnings are divided by the equity to establish a “return on equity” percentage.
5. If the utility’s return on equity is above the profit’s threshold, then the utility has significantly excessive profits.

All witnesses who testified on this issue agree that this is the basic process for establishing whether a utility has significantly excessive profits.⁷⁸ They disagree on the calculations and assumptions involved in each step. And they disagree on whether customers should get a refund. But the process is the same.

Using this procedure, OCC witness Dr. Daniel Duann testified to the following assessment of DP&L’s profits for 2018 and 2019:⁷⁹

⁷⁸ See OCC Ex. 4 (Duann Initial Testimony) at 13-14, 18 (calculating earnings, equity, and ROE, and establishing a 12.0% threshold), DP&L Ex. 3 (witness Garavaglia and Malinak’s calculations of earnings, equity, and ROE); DP&L Ex. 2 (Malinak Supplemental Testimony) at 51-62 (establishing various recommended ROE thresholds); Staff Ex. 1 (Buckley Testimony) at 5-10 (calculating earnings, equity, ROE, and a SEET threshold).

⁷⁹ OCC Ex. 4 (Duann Initial Testimony) at 13-20.

		2018	2019
(1)	Earnings	\$96,412,000	125080000
(2)	Common Equity	\$392,722,000	469059500
(3) = (1)/(2)	Return on Equity	24.55%	26.67%
(4)	SEET Threshold	12.00%	12.00%
(5) = (2)*(4)	Allowed Earnings at 12% Threshold	\$47,126,640	\$56,287,140
(6) = (1)-(5)	Significantly Excessive Profits	\$49,285,360	\$68,792,860
(7)	Tax Gross-up Factor	1.2755	1.2755
(8) = (6)*(7)	Refund	\$62,863,477	\$87,745,293

Dr. Duann arrived at these calculations through reasonable assumptions that are consistent with R.C. 4928.143(F) and controlling Supreme Court and PUCO precedent. In particular, Dr. Duann (i) included DP&L's distribution modernization revenues, as required by the Ohio Supreme Court in *In re Ohio Edison Co.*,⁸⁰ (ii) accepted DP&L's proposal to make slight adjustments to DP&L's earnings in 2018 and 2019 based on one-time events related to a penalty payment and asset retirement losses recorded during those two years,⁸¹ (iii) made corresponding adjustments to DP&L's equity to account for those adjustments,⁸² (iv) calculated DP&L's average common equity based on DP&L's books and the aforementioned adjustments,⁸³ and (v) used a 12.00% return on equity threshold because that threshold was approved by the PUCO for both ESP I and ESP III, which were collectively in effect for the entirety of 2018 and 2019.⁸⁴

In contrast, DP&L's and the PUCO Staff's witnesses used unlawful and unreasonable assumptions in calculating DP&L's profits and recommending no refunds for customers. Their

⁸⁰ 2020-Ohio-5450.

⁸¹ OCC Ex. 4 (Duann Initial Testimony) at 13 (\$17,000 increase to earnings for penalty, \$9.7 million increase to earnings for retired assets in 2018), 18 (\$38,000 increase to earnings for retired assets in 2019).

⁸² OCC Ex. 4 (Duann Initial Testimony) at 13 (\$17,000 increase to equity for penalty, \$9.7 million increase to equity for retired assets in 2018), 18 (\$17,000 increase to equity for penalty and \$9,738,000 increase to equity for retired assets in 2019).

⁸³ OCC Ex. 4 (Duann Initial Testimony) at 13, 18.

⁸⁴ OCC Ex. 4 (Duann Initial Testimony) at 18-19.

assumptions manipulate the profits review to avoid the proper conclusion that customers deserve a refund of more than \$150 million for 2018 and 2019.

These witnesses' recommendations suffer from the following errors, each of which is explained in more detail below:

1. DP&L excluded distribution modernization revenues when calculating its earnings for 2018 and 2019, which substantially reduces its profits (on paper only), thus denying customers a refund.⁸⁵
2. DP&L inflated its equity balance by adding \$150 million in equity investments from AES that occurred in 2020 and another \$150 million in equity investments that AES *might* make in 2021, which substantially reduces DP&L's profits (on paper only), thus denying customers a refund.⁸⁶
3. DP&L inflated its equity balance by adding more than \$1 billion in write-offs that occurred *before* 2018 and thus are no longer part of DP&L's actual equity balance, which substantially reduces DP&L's profits (on paper only), thus denying customers a refund.⁸⁷
4. The PUCO Staff artificially increased DP&L's equity balance by using a hypothetical capital structure instead of DP&L's actual capital structure, which substantially reduces DP&L's profits (on paper only), thus reducing the refund that customers would otherwise be entitled to.⁸⁸
5. The PUCO Staff concluded that DP&L had more than \$61 million in significantly excessive profits but nonetheless recommended that customers get zero refund, reasoning that such refunds should be denied because of the \$150 million AES equity investment in 2020 and the potential \$150 million AES equity investment in 2021.⁸⁹
6. DP&L and the PUCO Staff proposed unreasonably high return on equity thresholds of 14.53% to 23.4%, which contradict DP&L's own SEET applications and the Settlement, and are inconsistent with prior rulings by the PUCO adopting a 12.0% threshold for DP&L.⁹⁰

⁸⁵ DP&L Ex. 3 (Schedules 1, 2, 6, 7).

⁸⁶ DP&L Ex. 3 (Schedules 1, 4, 6, 9).

⁸⁷ DP&L Ex. 3 (Schedules 1, 3, 6, 8).

⁸⁸ PUCO Staff Ex 1 (Buckley Testimony) at 6.

⁸⁹ PUCO Staff Ex. 1 (Buckley Testimony) at 11.

⁹⁰ DP&L Ex. 2 (Malinak Supplemental) at 59-60; PUCO Staff Ex. 1 (Buckley) at 8-9.

Each of these unjustified recommendations has the effect of artificially lowering DP&L's profits on paper and either outright denying or lowering the amount of the refunds to which customers are entitled under R.C. 4928.143(F). They should be rejected for the reasons described below. OCC witness Daniel Duann's recommendation for more than \$150 million in refunds should be adopted as the only lawful recommendation.

B. The Ohio Supreme Court's ruling in Ohio Edison requires the PUCO to include DP&L's DMR revenues when assessing whether DP&L's profits were significantly excessive.

A critical question in this proceeding is whether DP&L's DMR revenues will be included in 2018 and 2019 when determining whether DP&L had significantly excessive profits in those years. DP&L earned \$82.6 million from the DMR in 2018 and \$70.6 million from the DMR in 2019, as each witness testifying on that issue concurred.⁹¹ There likewise is no dispute that DP&L's profits in those years would change substantially depending on whether the DMR revenues are included or excluded from the analysis. For example, under DP&L's analysis found in Schedule 2 to DP&L Exhibit 3, DP&L calculates a return on equity of 3.3% when the DMR is excluded. Including the DMR, but without any other changes to DP&L's calculations would increase its return on equity to 23.3%.⁹² The DMR alone makes the difference between modest and reasonable profits (3.3%) and wildly excessive profits (23.3%).

Fortunately for consumers, the Ohio Supreme Court put this issue to rest. In a recent case involving Ohio Edison (a FirstEnergy utility), the Court ruled that FirstEnergy's DMR could not

⁹¹ OCC Ex. 4 (Duann Initial Testimony) at 13, 18; DP&L Ex. 3 (schedules sponsored by DP&L witnesses Malinak and Garavaglia) at Schedules 1 and 6; Staff Ex. 1 (Buckley Testimony) at 6.

⁹² Add \$82,570,000 to the \$13,842,000 adjusted earnings for common in line 11 and then divide by adjusted common equity of \$413,509,000 found in the last column of line 22.

be excluded from its earnings in determining whether the utility had significantly excessive profits under R.C. 4928.143(F):

OCC maintains that the DMR is a provision of the ESP and constitutes an “adjustment” under R.C. 4928.143(F). OCC therefore contends that ... the commission was *required* to consider whether the DMR—as an adjustment to the ESP—resulted in excessive earnings.

OCC is correct.

...

There is no question that the DMR constituted a change in rates when compared to the rates in the electric utility’s preceding rate plan. ... Therefore, the DMR constitutes an “adjustment” under R.C. 4928.143(F) and the commission was *required* to include the DMR when determining whether the plan resulted in excessive earnings.

Accordingly, we hold that the commission’s actions in this case—removing DMR revenue from the calculation used to determine whether the ESP resulted in excessive earnings—violated R.C. 4928.143(F).⁹³

DP&L claims that despite this ruling, the PUCO should nonetheless exclude DP&L’s DMR earnings from its 2018 and 2019 profits review, thus artificially lowering DP&L’s profits (return on equity) on paper, which would deny customers any refund.⁹⁴ But the *Ohio Edison* ruling is binding. The PUCO must follow the *Ohio Edison* ruling and include DP&L’s DMR revenues when assessing its 2018 and 2019 profits.

The *Ohio Edison* ruling is binding because the PUCO has already ruled that DP&L’s DMR is substantially the same as FirstEnergy’s. In an earlier Ohio Supreme Court opinion, the Court ruled that FirstEnergy’s DMR was unlawful.⁹⁵ Following that ruling, the PUCO asked

⁹³ *In re Ohio Edison Co.*, 2020-Ohio-5450, ¶¶ 25-27 (emphasis added).

⁹⁴ See DP&L Ex. 3 (schedules 1 and 6 recommending that the PUCO adopt a return on equity for 2018 and 2019 that does not include earnings from the DMR).

⁹⁵ *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73 (2019).

parties to address whether the Court’s invalidation of FirstEnergy’s DMR would also require DP&L’s DMR to be eliminated.⁹⁶ In response, DP&L argued that its distribution modernization rider was different from FirstEnergy’s.⁹⁷

The PUCO rejected DP&L’s arguments, stating that they “miss the forest for the trees.”⁹⁸ As the PUCO recognized, FirstEnergy’s and DP&L’s distribution modernization riders were “fundamentally similar,” namely, they were both “nonbypassable riders, established to promote the financial integrity of EDUs.”⁹⁹ The PUCO went further, noting that even if DP&L were to modify its DMR, it “would do nothing to address [the] fundamental point” that it is an unlawful charge to promote DP&L’s financial integrity, just like FirstEnergy’s DMR.¹⁰⁰ Accordingly, the PUCO relied on the Supreme Court’s ruling and ordered the elimination of DP&L’s charges to consumers under its DMR.¹⁰¹ In sum, when the Supreme Court ruled that FirstEnergy’s DMR was unlawful, the PUCO in turn ruled that DP&L’s DMR was also unlawful because the two DMRs were substantially the same.

That same reasoning applies here. The Supreme Court has ruled that FirstEnergy must include its DMR earnings for purposes of the significantly excessive earnings test. That ruling applies to DP&L’s DMR earnings, meaning they must be included in determining whether

⁹⁶ *In re Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Elec. Sec. Plan*, Case No. 16-395-EL-SSO, Entry (July 2, 2019).

⁹⁷ Case No. 16-395-EL-SSO, Supplemental Opinion & Order ¶ 94 (Nov. 21, 2019).

⁹⁸ *Id.* ¶ 102.

⁹⁹ *Id.* ¶¶ 107-08.

¹⁰⁰ *Id.* ¶ 108.

¹⁰¹ *In re Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Elec. Sec. Plan*, Case No. 16-395-EL-SSO, Supplemental Opinion & Order (Nov. 21, 2019).

DP&L had significantly excessive profits. Notably, the PUCO Staff included the DMR for purposes of the significantly excessive earnings test.¹⁰²

And as explained above, when the DMR earnings are included, as properly done by OCC witness Dr. Duann, DP&L had significantly excessive profits in the amount of \$62.9 million in 2018 and \$87.7 million in 2019, driven in large part by its now unlawful DMR earnings.

Further, consider what it would mean if the DMR revenues were excluded in the calculations. The Supreme Court ruled that FirstEnergy's DMR was unlawful, and the PUCO then ruled, based on that precedent, that DP&L's DMR was unlawful. Because of Ohio's no-refund rule, DP&L gets to keep every cent of DMR money paid by customers (more than \$105 million per year). Now, it wants to double-down on that unfairness by arguing that those same DMR revenues should not be considered in the profits review. In other words, it wants to keep significantly excessive profits instead of returning them to customers, while those very profits are the product, almost exclusively, of the unlawful DMR revenues that customers paid. Consumers have law and precedent on their side in this case, and they should be protected from such an unlawful outcome.

C. The PUCO should reject DP&L's proposal to artificially increase its 2018 and 2019 equity balances by \$300 million because these are phantom increases that did not occur (if they will ever occur at all) until after the end of 2019 and are thus entirely unrelated to DP&L's 2018 and 2019 profits.

It is hard to believe that OCC must explain that a company's 2018 and 2019 profits cannot possibly be affected by equity investments made in 2020 and 2021. Yet here we are.

DP&L's parent company (AES) invested \$150 million in equity in DP&L in 2020. Because this happened in 2020, it happened after 2018 and 2019, both of which ended before

¹⁰² See PUCO Staff Ex. 1 (Buckley Testimony) at 6 (including all DMR revenues for purposes of calculating DP&L's profits in 2018 and 2019).

2020 began. Likewise, AES has announced that it plans to invest another \$150 million in 2021, but it has made no binding commitment to do so through the Settlement or otherwise.

Despite this, DP&L claims that the PUCO should pretend that these two \$150 million investments occurred in 2018 and 2019 and adjust its equity balances accordingly.¹⁰³ It is in DP&L's interest to inflate its equity balance in 2018 and 2019 because the greater the equity balance, the lower its return on equity (profits). But the PUCO should not be complicit in DP&L's make-believe accounting adjustments.

The law, R.C. 4929.143(F), says that the PUCO shall retrospectively consider, *each year*, whether the utility's electric security plan resulted in significantly excessive profits. The purpose of the retrospective review is to determine, on an after the fact basis, whether the profits earned under the electric security plan were too high. And the PUCO has consistently looked at electric security plans, year-by-year, assessing the profits attributable to that year—not taking into account equity investments that might occur *after* the year in question.¹⁰⁴ There is no basis for the PUCO to depart from the lawful and reasonable approach of evaluating profits based on activity that occurred in the year that is being evaluated. While DP&L's mixed-up approach might be permissible under traditional regulation, where rates are being set for a future period, the approach is out of place in the retrospective profits review statute.

¹⁰³ See DP&L Ex. 2 (Malinak Supplemental Testimony) at 9; DP&L Ex. 3, Schedules 1 and 6.

¹⁰⁴ See, e.g., *In re Determination of the Existence of Significantly Excessive Earnings for 2012 Under the Elec. Sec. Plan of the Dayton Power & Light Co.*, Case No. 13-1495-EL-UNC, Opinion & Order (Feb. 13, 2014); *In re Determination of Significantly Excessive Earnings for 2013 Under the Elec. Sec. Plan of the Dayton Power & Light Co.*, Case No. 14-831-EL-UNC, Opinion & Order (Oct. 1, 2014); *In re Determination of Significantly Excessive Earnings for 2014 Under the Elec. Sec. Plan of the Dayton Power & Light Co.*, Case No. 15-298-EL-UNC, Opinion & Order (Dec. 16, 2015); *In re Determination of the Existence of Significantly Excessive Earnings for 2015 Under the Elec. Sec. Plan of the Dayton Power & Light Co.*, Case No. 16-920-EL-UNC (Opinion & Order Sept. 6, 2017); *In re Applications of the Dayton Power & Light Co. for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm. Code 4901:1-35-10 for 2016 and 2017*, Case Nos. 17-1213-EL-UNC, 18-873-EL-UNC, Opinion & Order (Sept. 6, 2018).

As before, the PUCO Staff did not agree with DP&L's approach and declined to add DP&L's proposed \$300 million to its equity balance.¹⁰⁵ Likewise, when DP&L filed its applications in the 2018 and 2019 SEET Cases, it did not include this \$300 million in equity investments, and the Settlement states that DP&L is standing behind those applications as filed.¹⁰⁶ Even DP&L witness Malinak, the proponent of this \$300 million adjustment, previously testified in this very case that equity investments should only be counted in the year they are actually made, not retroactively.¹⁰⁷

Adopting DP&L's approach of adding equity based on investments made after the end of the year in review would set a dangerous precedent and fundamentally conflicts with the purpose of the retrospective review. A utility's parent company could easily manipulate the significantly excessive earnings test by announcing that they "plan" to make an equity investment, thus artificially lowering the utility's profits during the year under review and thwarting refunds for customers. The PUCO should reject DP&L's attempt to do so here.

The profits review law requires the PUCO to look at what actually occurred in 2018 and 2019 (the years under SEET review). Either DP&L had significantly excessive profits in those years or it did not. Whether AES made or makes equity investments in 2020 and 2021 does not affect what happened in 2018 and 2019.¹⁰⁸ The PUCO should reject DP&L's self-serving recommendation to retroactively give it credit for future equity investments.

¹⁰⁵ PUCO Staff Ex. 1 (Buckley Testimony) at 6.

¹⁰⁶ OCC Ex. 17 (DP&L's 2018 SEET Application), OCC Ex. 18 (DP&L's 2019 SEET Application), Joint Ex. 1 (Settlement).

¹⁰⁷ See DP&L Ex. 1A (Malinak Initial Testimony) at Exhibit RJM-29 (calculating DP&L's equity balance for 2019 without adding any of the \$300 million in AES equity investments, and calculating DP&L's equity balance for 2020 with only the \$150 million investment made that year); Tr. Vol I at 98-99 (Malinak) (confirming this information on the public record).

¹⁰⁸ *Accord Cincinnati Gas & Elec. Co. v. PUCO*, 86 Ohio St.3d 53 (1999) (rejecting as unlawful the PUCO's attempt to "impute" revenues into a year in which those revenues did not actually occur).

D. The PUCO should reject DP&L's proposal to artificially increase its 2018 and 2019 equity balances by more than \$1 billion based on write-offs that occurred before 2018 because no such equity existed in 2018 and 2019.

In another self-serving attempt to artificially lower its 2018 and 2019 profits, DP&L claims that the PUCO should add more than \$1 billion to its 2018 and 2019 equity balances based on asset write-offs that occurred before 2018.¹⁰⁹ Just as DP&L did not have \$300 million in equity in 2018 and 2019 based on equity investments from 2020 and 2021, DP&L did not have \$1 billion in equity in 2018 and 2019 because those generation assets were written off before 2018.

As DP&L witness Malinak explained, DP&L wrote off certain assets between 2012 and 2016.¹¹⁰ This caused DP&L's equity to decrease. DP&L, however, recommends that the PUCO undo the write-off on paper by adding more than \$1 billion to DP&L's equity balance for 2018 and 2019. As with the \$300 million equity investment from AES, this is a phantom equity adjustment. DP&L had no such \$1 billion in equity in 2018 or 2019—it was written off between 2012 and 2016. Adding it to the 2018 and 2019 equity balance is pure fiction.

Once again, the PUCO has not adopted this type of adjustment in the past, instead requiring a utility's equity balance to be assessed based on the year in question.¹¹¹ Once again, the PUCO Staff's witness in this case did not agree with DP&L's \$1 billion equity adjustment and did not adopt it when calculating DP&L's 2018 and 2019 profits.¹¹² Once again, DP&L did

¹⁰⁹ DP&L Ex. 2 (Malinak Supplemental Testimony) at 15-16.

¹¹⁰ Tr. Vol. I at 87 (Malinak).

¹¹¹ *See supra*.

¹¹² PUCO Staff Ex. 1 (Buckley Testimony) at 6-7.

not include this adjustment when it filed its applications in the 2018 and 2019 SEET Cases, and the Settlement says that DP&L is standing behind those applications.¹¹³

There is no precedent whatsoever for DP&L's proposal to add \$1 billion to its equity balance that simply did not exist in 2018 or 2019. The PUCO should reject DP&L's adjustment.

E. The PUCO should not adopt the Staff's use of a "hypothetical" capital structure because it serves no purpose other than the artificially reduce DP&L's profits (on paper only), thus reducing the refund that customers would otherwise receive.

The PUCO Staff's witness proposed a novel approach to assessing whether DP&L had significantly excessive profits in 2018 and 2019—one that the PUCO has never adopted. According to the PUCO Staff's witness, rather than using DP&L's actual capital structure for 2018 and 2019, the PUCO should use "the same hypothetical capital structure used in the previous rate case of 52.48 percent debt and 47.52 percent equity."¹¹⁴ The impact of this adjustment is to artificially increase DP&L's equity balance because DP&L's actual capital structure in 2018 and 2019 was significantly more debt heavy. And the higher a utility's equity, the lower its profits (return on equity), all else equal. That means that the PUCO Staff's proposal lowers the amount of refunds for customers. Using the PUCO Staff's calculations, customers would be entitled to a \$3.7 million refund in 2018 and a \$57.4 million refund in 2019.¹¹⁵ (As discussed below, these refunds are also lower than they should be because Staff used an unreasonably high SEET threshold.)

The PUCO should reject the Staff's recommendation for several reasons. First, there is no precedent for it. The PUCO Staff's witness cites no cases in which the PUCO adopted a

¹¹³ OCC Ex. 17 (DP&L's 2018 SEET Application), OCC Ex. 18 (DP&L's 2019 SEET Application), Joint Ex. 1 (Settlement).

¹¹⁴ PUCO Staff Ex. 1 (Buckley Testimony) at 6.

¹¹⁵ PUCO Staff Ex. 1 (Buckley Testimony) at 8.

“hypothetical” capital structure in this manner, and he has never recommended this approach before.¹¹⁶

Second, on cross examination, the PUCO Staff’s witness admitted that he only made this adjustment to try to lower the utility’s profits (on paper), not because there is some principled basis for making the adjustment. According to the witness, if the utility’s actual earnings, based on FERC or SEC filings, are *below* the applicable SEET threshold, he does no further analysis and declares that there are no significantly excessive profits and no refunds for customers.¹¹⁷ But if the utility’s actual earning are *above* the threshold and customers might get a refund, he then does further analysis to see if there are ways to lower the utility’s profits (on paper) and reduce or eliminate customer refunds.¹¹⁸ In this case, the witness accomplished this by using a hypothetical capital structure that artificially increased DP&L’s equity balance, thus lowering refunds for customers. The Staff witness himself referred to this as “manipulating capital structures,” something he has never done in the past.¹¹⁹

The PUCO should reject this one-sided manipulation of the SEET test. As the PUCO Staff’s witness admitted, he never makes adjustments to capital structure to *increase* profits or to *increase* customer refunds. If customer refunds are zero, he simply accepts the actual capital structure and recommends no refund. It is only when customers might pay a refund that the PUCO Staff witness would go in search of adjustments—like his unprecedented use of a hypothetical capital structure—to find ways to help the utility by lowering refunds.

¹¹⁶ Tr. Vol. II at 377-78 (Buckley).

¹¹⁷ Tr. Vol. II at 378 (Buckley) (“[O]ne of the first things ... I typically do when I look at a SEET case is look at the filed initial numbers, either FERC or SEC filed numbers, and do a quick calculation. If they are below that SEET threshold, then I stop.”).

¹¹⁸ Tr. Vol. II at 378 (Buckley).

¹¹⁹ Tr. Vol. II at 378 (Buckley).

F. The PUCO should rule that any profits above a 12.0% return on equity should be deemed significantly excessive because the PUCO has approved a 12.0% return on equity threshold for both ESP I and ESP III.

As explained above, the PUCO has consistently found that a utility's profits are significantly excessive if they exceed a particular return on equity "threshold." The lower the threshold, the more likely the utility will be required to pay refunds, and the higher any such refunds will be. The higher the threshold, the easier it is for the utility to avoid paying refunds.

The issue of the appropriate return on equity threshold in these cases is a settled matter: the appropriate threshold is 12.0%.

In 2018, DP&L operated under ESP III for the entire year.¹²⁰ Under ESP III, DP&L agreed to, and the PUCO approved, a return on equity threshold of 12.0%.¹²¹ In its application in the 2018 SEET case, DP&L compared its return on equity to "the 12 percent SEET threshold."¹²² In its testimony supporting that application, DP&L's witness stated, "the appropriate threshold against which to compare DP&L's earnings for 2018 in order to establish that significantly excessive earnings after adjustments did not occur is 12%."¹²³ And in the Settlement that DP&L filed in these consolidated proceedings, DP&L agreed to stand by its application as filed.¹²⁴ Consistent with all of this, OCC witness Duann recommended a 12.0% return on equity threshold for determining whether DP&L had significantly excessive profits in 2018.¹²⁵

¹²⁰ PUCO Staff Ex. 1 (Buckley Testimony) at 5.

¹²¹ *In re Application of the Dayton Power & Light Co. to Establish a Standard Serv. Offer in the Form of an Elec. Sec. Plan*, Case No. 16-395-EL-SSO, Opinion & Order ¶ 14 (Oct. 20, 2017).

¹²² OCC Ex. 17 (DP&L Application, Case No. 19-1121-EL-UNC).

¹²³ OCC Ex. 17 (Testimony of DP&L witness Forestal).

¹²⁴ Settlement at 45 ("the Signatory Parties who have intervened or moved to intervene in Pub. Util. Comm. Nos. 19-1121-EL-UNC and 20-1041-EL-UNC recommend that the Commission approve DP&L's applications in those cases").

¹²⁵ OCC Ex. 4 (Duann Initial Testimony) at 14; OCC Ex. 5 (Duann Supplemental Testimony) at 11.

In 2019, DP&L operated under ESP III for almost the entire year: from January 1, 2019 through December 18, 2019.¹²⁶ Thus, the arguments above for applying the 12.0% return on equity threshold apply for the vast majority of 2019. Further, DP&L operated under ESP I for the remaining 13 days of 2019 (from December 19 through December 31). The PUCO previously adopted a 12.0% threshold when assessing DP&L's profits under ESP I.¹²⁷ So during the entire year of 2019, DP&L was operating under electric security plans for which a 12.0% SEET threshold applied. Incidentally, the return on equity threshold for DP&L's ESP II was *also* 12.0%,¹²⁸ meaning that the PUCO has adopted a 12.0% SEET threshold for all of DP&L's ESPs.

In supplemental testimony, the PUCO Staff and DP&L advocate for higher thresholds, ranging from 14.7% to 21.1% for 2018¹²⁹ and from 14.53% to 23.4% for 2019.¹³⁰ These recommendations should be rejected because they are inconsistent with the above authority. They are also inconsistent with the Settlement, which explicitly says that DP&L and the applicable signatory parties support DP&L's as-filed applications. DP&L and the PUCO Staff should not be allowed to revise history in an effort to deny consumers refunds they are entitled to receive.

¹²⁶ PUCO Staff Ex. 1 (Buckley Testimony) at 5.

¹²⁷ See *In re Applications of the Dayton Power & Light Co. for Administration of the Significantly Excessive Earnings Test under R.C. 4928.143(F) & Ohio Adm. Code 4901:1-35-10 for 2016 and 2017*, Case Nos. 17-1213-EL-UNC, 18-873, Opinion & Order (July 31, 2019) (adopting a 12.0% SEET threshold for 2016 and 2017, both years in which ESP I was in effect for at least part of the year).

¹²⁸ *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case No. 12-426-EL-SSO, Opinion & Order at 26 (Sept. 4, 2013) ("the Commission finds that a significantly excessive earnings test (SEET) threshold of 12 percent should be established").

¹²⁹ DP&L Ex. 2 (Malinak Supplemental Testimony) at 59 (14.7% to 21.1%); PUCO Staff Ex. 1 (Buckley Testimony) at 9 (15.73%).

¹³⁰ DP&L Ex. 2 (Malinak Supplemental Testimony) at 60 (14.7% to 23.4%); PUCO Staff Ex. 1 (Buckley Testimony) at 9 (14.53%).

The PUCO should adopt a 12.0% return on equity threshold, meaning that if DP&L's profits exceed 12.0%, customers get a refund for any profits above that amount. And as explained above, OCC witness Duann calculated a \$62.9 million refund for customers in 2018 and an \$87.7 million refund for customers in 2019 when the appropriate 12.0% threshold is used.

G. The PUCO should reject the Staff's recommendation that even though DP&L had significantly excessive profits, customers get no refund.

The PUCO Staff's witness testified that DP&L had significantly excessive profits in 2018 (\$3.7 million) and in 2019 (\$57.4) million.¹³¹ Despite calculating significantly excessive profits of more than \$60 million (which is understated, as described above¹³²), the PUCO Staff recommends no refund for customers.¹³³ The sole justification provided for denying customers refunds is that DP&L's parent company has committed "to provide a capital contribution of \$300 million to DP&L to improve its infrastructure and modernize its grid," which the Staff considers to be more than "what would be customary to maintain its system."¹³⁴ The Staff's proposal is unlawful.

Under R.C. 4928.143(F), "If the commission finds that such adjustments, in the aggregate, did result in significantly excessive earnings, it shall require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments." Because the statute uses the word "shall," the PUCO lacks discretion to deny customers a refund if it

¹³¹ PUCO Staff Ex. 1 (Buckley Testimony) at 8.

¹³² These numbers are too low because the witness (i) used an unreasonable "hypothetical" capital structure, thus artificially deflating DP&L's profits on paper and (ii) used a return on equity threshold above the 12.0% threshold that has already been determined appropriate for ESP I and ESP III.

¹³³ PUCO Staff Ex. 1 (Buckley Testimony) at 11.

¹³⁴ PUCO Staff Ex. 1 (Buckley Testimony) at 11.

concludes that the utility's profits were significantly excessive.¹³⁵ If there are significantly excessive earnings, the PUCO cannot consider other factors and deny customers a refund.

The statute does provide the PUCO with some discretion in determining whether significantly excessive profits exist in the first place (*i.e.*, in the comparables analysis). For instance, R.C. 4928.143(F) provides that consideration "shall be given to the capital requirements of future committed investments in this state." But the PUCO has never relied upon this language as the basis for wholesale denial of refunds to customers where the utility in fact had significantly excessive profits. To the contrary, the PUCO has considered future committed investments as one factor in determining what the proper SEET threshold should be.

In *In re Application of Columbus Southern Power Co. & Ohio Power Co. for Administration of the Significantly Excessive Earnings Test*, the PUCO considered the statutory requirement that it consider "capital requirements of future committed investments" in Ohio. The PUCO found that based in part on the utility's planned investments, it was appropriate to adopt the PUCO Staff's SEET threshold, which was higher than the one proposed by consumer advocates but lower than the one proposed by the utility.¹³⁶ Further, in that case, the utility proposed to invest more than \$1.6 billion in Ohio, far more than the \$300 million that AES says it will provide to DP&L.¹³⁷ Despite that, the PUCO ordered the utility to provide customers with more than \$42.6 million in refunds.¹³⁸

PUCO precedent, therefore, shows that the PUCO can, under certain circumstances, make adjustments to the *calculation* of significantly excessive profits in light of the utility's

¹³⁵ See *Ohio Edison*, 2020-Ohio-5450, ¶ 20 ("The commission is a creature of statute and may act only under the authority conferred on it by the General Assembly.").

¹³⁶ Case No. 10-1261-EL-UNC, Opinion & Order at 26-27 (Jan. 11, 2011).

¹³⁷ *Id.* at 31.

¹³⁸ *Id.* at 35.

future committed capital investments. But it goes too far for the PUCO to ignore significantly excessive profits and outright deny refunds, simply because the utility plans to make future capital investments.

Further, under R.C. 4928.143(F) as it existed for all of 2018 and most of 2019 (the periods in question here), the PUCO was prohibited from considering, “directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company” of the utility.¹³⁹ The PUCO Staff’s proposal violates this law by recommending denial of customer refunds not based on anything DP&L has done but based on investments made by DP&L’s parent company, AES. The PUCO cannot use AES’s spending decisions as the basis for denying customers refunds for significantly excessive earnings.

The law says that customers “shall” get a refund if there are significantly excessive profits. The PUCO Staff’s witness calculated significantly excessive profits of \$60.3 million (which should be much higher once the Staff’s errors are corrected, as described above). The PUCO, as a creature of statute,¹⁴⁰ lacks jurisdiction to deny customers profits based on the Staff’s reference to AES’s \$300 million equity investment in DP&L.

VI. CASH FOR SIGNATURES – THE REDISTRIBUTIVE COALITION

A. The PUCO’s job is to promote good public policy for consumers through its decision-making.

The PUCO’s regulatory process is a government process that should be administered in a way that promotes good public policy for Ohio consumers. The dynamic, at its core, should be straightforward. A utility requests something (typically higher rates). Parties with varying

¹³⁹ See Am. Sub. H.B. 166, amending R.C. 4928.143, effective October 17, 2019.

¹⁴⁰ *In re Ohio Edison Co.*, 2020-Ohio-5450, ¶ 20.

interests participate in the process to explain to the PUCO why the utility's proposal is or is not just and reasonable. The PUCO makes a decision that fairly balances the interests of consumers, the public, and the utility, consistent with statutory requirements.

To illustrate, if the utility proposes a new charge, parties might oppose the request. While often couched in terms of the party's individual interests (*e.g.*, "my rates will be too high under the utility's proposal"), what they are really saying is more like, "it is bad public policy to allow a utility to implement this new charge." In turn, good public policy would demand that the PUCO reject the proposal.

Where things go haywire is when the PUCO acknowledges the problem (*e.g.*, an unreasonable proposal for a new charge) but then fixes the problem *only for those who agree to a settlement with the utility*. That is essentially what the PUCO's settlement process accomplishes. The parties to the proceeding identify problems with the utility's proposal. Then they negotiate a settlement that offers a solution, but primarily for those who sign the settlement. In the illustrative rate of return example, parties who do not sign the stipulation would be left paying the new charge—even though it is unreasonable. Allowing the problem to be fixed only for signatory parties is bad public policy. It is the government (the PUCO) picking winners (those who happen to have enough money and knowledge to participate in PUCO proceedings) and losers (those who do not). There is no broader public policy aim achieved through this type of government decision-making.

B. The government’s facilitation and validation of redistributive coalitions is bad public policy and bad for consumers.

OCC witness Dr. Edward Hill is an expert on public policy, particularly in the areas of economic development, city and regional planning, and utilities regulation.¹⁴¹ He is Professor of Economic Development at the John Glenn College of Public Affairs at the Ohio State University, Senior Research Associate of Ohio State’s Manufacturing Institute, and has devoted his 35-year career to the development of good public policy in Ohio.¹⁴² Ohio’s leaders—including Governors DeWine, Kasich, Strickland, and Taft—have depended on Dr. Hill’s expertise, appointing him to various state commissions and boards dealing with economic development and public finance.¹⁴³

Dr. Hill refers to the problem described above as a “redistributive coalition.”¹⁴⁴ A redistributive coalition exists where a small group of parties uses a political or regulatory process to “secure benefits that cannot be earned in the competitive market.”¹⁴⁵ The members of the coalition use “political power and knowledge of regulatory process” to increase their revenues or pursue other goals, thus giving them an advantage over competitors who are not part of the coalition. The coalition is termed “redistributive” because the benefits gained by the coalition members are paid for by others—those who are not in the coalition—with the endorsement of the government.¹⁴⁶

¹⁴¹ OCC Ex. 3 (Hill Testimony) at 1.

¹⁴² OCC Ex. 3 (Hill Testimony) at 1-2.

¹⁴³ OCC Ex. 3 (Hill Testimony) at 3.

¹⁴⁴ OCC Ex. 3 (Hill Testimony) at 5.

¹⁴⁵ OCC Ex. 3 (Hill Testimony) at 6.

¹⁴⁶ OCC Ex. 3 (Hill Testimony) at 7.

In the PUCO context, redistributive coalitions form through the PUCO’s settlement process. As Dr. Hill explained, parties “intervene in PUCO proceedings so that money paid to the utility ... by other customers (including residential customers) can be *redistributed* to them in the form of cash or other benefits in exchange for their signatures on a settlement.”¹⁴⁷ What makes the coalition effective is a problematic dichotomy. On the one hand, the coalition *appears* to represent a broad, diverse set of interests, including nonresidential customer groups, environmental organizations, municipalities, colleges, low-income service providers, energy marketers, and others. On the other hand, the coalition has a common goal of supporting each other in the settlement process so that each one receives benefits that their competitors do not.¹⁴⁸

According to Dr. Hill, the “key is that they support each other in pursuit of the desired *package* of rewards for coalition members—rewards that are ultimately paid by non-coalition members, including residential customers.”¹⁴⁹ They are not seeking a single, overarching public policy that is mutually shared. Instead, they “unite around the dominant objective ... of the coalition’s organizer” (the utility), providing the utility what it wants (typically rate increases), and each member is given some reward that is only loosely tied to the settlement in exchange for their signature.¹⁵⁰ It creates a “legally binding *quid pro quo*” in the form of a settlement.¹⁵¹

A critical concern with redistributive coalitions is that they create the “*veneer* of widespread support,”¹⁵² even though in reality, the proposals set forth in the settlement benefit a small group of coalition members and not the broader public. The PUCO frequently cites the

¹⁴⁷ OCC Ex. 3 (Hill Testimony) at 10 (emphasis in original).

¹⁴⁸ OCC Ex. 3 (Hill Testimony) at 7.

¹⁴⁹ OCC Ex. 3 (Hill Testimony) at 7 (emphasis in original).

¹⁵⁰ OCC Ex. 3 (Hill Testimony) at 8.

¹⁵¹ OCC Ex. 3 (Hill Testimony) at 8.

¹⁵² OCC Ex. 3 (Hill Testimony) at 8 (emphasis added).

“diverse interests” represented in a settlement, as demonstrated by the perceived breadth of the signatory parties’ interests.¹⁵³

But the reality is much different. Dr. Hill’s assessment of the issues summarizes the concern:

Each of the business, commercial, and governmental signatories represent no interests other than their own. They do not represent a broader group and do not show, let alone prove, that the Settlement is good public policy for Ohio and its utility consumers. The business, commercial, and governmental signatories do not attempt to secure benefits through the PUCO process for other similarly situated entities. They only secure limited benefits for themselves and their members.

The signatures mean just one thing: that those particular signatories were able to extract benefits in exchange for their signatures, benefits that flow to their own bottom lines, members, or constituents. These are benefits that are either directly or indirectly paid for by DP&L’s residential and commercial customers, with the exception of those that are members of the coalition.¹⁵⁴

The PUCO should be assessing the broader implications of the settlement and its effects on the Ohio economy and consumers. What public policy goal is achieved by providing benefits to signatory parties while denying those very same benefits to similarly situated entities?

The lesson is this: Far from representing broad, diverse interests, the redistributive coalition does precisely the opposite. It favors a small group of interests, by design, so that the small group gains a competitive advantage over the truly diverse parties that are not part of the coalition. The PUCO, in concluding that settlements have broad support from many signatory parties, is getting it backwards. It should instead consider the millions of parties in Ohio that are *not* part of the settlement. That often includes residential customers, but they are far from the only party being harmed by the settlement process. Countless businesses throughout Ohio lack

¹⁵³ See, e.g., Case No. 16-395-EL-SSO, Opinion & Order ¶ 21 (Oct. 20, 2017); Case No. 09-872-EL-FAC, Order ¶ 107 (Feb. 23, 2017).

¹⁵⁴ OCC Ex. 3 (Hill Testimony) at 12-13 (emphasis added).

the knowledge, expertise, funding, and access to the utility bar to be able to meaningfully participate in PUCO proceedings.¹⁵⁵ The PUCO should protect *these* consumers and businesses by rejecting attempts by redistributive coalitions to secure benefits for only themselves. The broader population of non-coalition members needs the PUCO to protect them *from* the Settlement, rather than erroneously endorsing the Settlement as being in their best interest.

C. The Settlement is the product of a redistributive coalition that requires non-signatory parties to provide cash or cash equivalents to signatory parties in exchange for their signatures.

Redistributive coalitions can succeed by making their proposals “as opaque and technical as possible,” thus making it harder for others to join the coalition, and harder for members of the general public to understand how harmful the coalition is.¹⁵⁶ That is true of the DP&L Settlement, at least in part. For example, the Settlement includes numerous payments to nonresidential customers in the amount of \$0.004 per kWh. It is difficult or impossible for the public (or even the PUCO) to meaningfully evaluate the magnitude of these payments because quantifying these payments would require one to know (i) precisely who is getting the payments (which is not always disclosed or discernable in the Settlement) and (ii) that customer’s energy usage (which is not disclosed because the parties receiving the payments claim their usage is a trade secret).¹⁵⁷

¹⁵⁵ See OCC Ex. 3 (Hill Testimony) at 11 (“[T]he redistributive coalition is open to all parties that have knowledge about the opportunity to intervene and have access to lawyers who regularly practice before the PUCO. Those who don’t have the sophistication, funding, or awareness of the PUCO’s process are left out.”).

¹⁵⁶ OCC Ex. 3 (Hill Testimony) at 9.

¹⁵⁷ See OCC Ex. 3 (Hill Testimony) at 16 (“These per kWh payments are opaque and not transparent. ... [I]t is not publicly known how much these discounts are worth to each signatory party, or, in many cases, even what company will ultimately benefit.”).

But some of the handouts to signatory parties are not so hard to understand. To the contrary, in some instances, the Settlement boldly announces the cash payments to be made to various parties in exchange for their signatures:

- \$800,000 to the City of Dayton¹⁵⁸
- \$440,000 to the Ohio Hospital Association¹⁵⁹
- \$428,000 to Honda¹⁶⁰
- \$448,000 to Industrial Energy Users-Ohio¹⁶¹
- \$104,000 to Kroger¹⁶²
- \$1.04 million to Ohio Manufacturers' Association Energy Group¹⁶³
- \$840,000 to the University of Dayton¹⁶⁴
- \$1 million for Interstate Gas Supply¹⁶⁵

In total, DP&L has estimated that these and other payments to signatory parties are expected to total around \$30 million.¹⁶⁶ It is hard to see how these payments benefit anyone other than the signatory parties who receive them. The City of Dayton benefits from customer-funded cash payments, but what about the City of Greenville? What about the City of Trotwood? What public policy does the PUCO further by taking customer money and redistributing it to the City of Dayton but not to other cities in DP&L's service territory? The Ohio Hospital Association and

¹⁵⁸ Settlement at 33 (\$200,000 per year over the four-year term of the Settlement).

¹⁵⁹ Settlement at 35 (\$150,000 in each of 2023 and 2024); Settlement at 37 (\$35,00 per year over the four-year term of the Settlement).

¹⁶⁰ Settlement at 37 (\$107,000 per year over the four-year term of the Settlement).

¹⁶¹ Settlement at 37 (\$112,000 per year over the four-year term of the Settlement).

¹⁶² Settlement at 37 (\$26,000 per year over the four-year term of the Settlement).

¹⁶³ Settlement at 37 (\$260,000 per year over the four-year term of the Settlement).

¹⁶⁴ Settlement at 37 (\$210,000 per year over the four-year term of the Settlement).

¹⁶⁵ Settlement at 41-42.

¹⁶⁶ OCC Ex. 3 (Hill Testimony) at 16 (based on DP&L's SEC 10-Q filing).

its members benefit from the cash payments they receive under the Settlement. But what about other hospitals? Why are they less deserving of money? Why does Honda deserve government-sponsored subsidies, but other auto manufacturers do not? Why does the University of Dayton get a subsidy instead of Wright State? Why does Kroger get cash, but Meijer and Giant Eagle do not? Why does IGS get \$1 million to support solar energy but other marketers get nothing?

If the Settlement is approved, it would be tantamount to a declaration that the State of Ohio finds these businesses more worthy, more deserving than their competitors. And it would perpetuate the culture of redistributive coalitions as a substitute for the rational, policy-based decision-making that the PUCO should be engaged in.

VII. THE SIDE DEAL

The 2018 and 2019 SEET Cases were resolved as part of a side deal settlement between a limited number of signatory parties. So if the PUCO considers those cases under its three-prong test, it should consider them part of a separate settlement from the larger Settlement.

As explained above, the PUCO has a statutory obligation to address the 2018 and 2019 SEET cases on the merits, independent of the Settlement. But even if the PUCO does address these cases under its three-prong test, it should consider these cases part of a separate side deal settlement between DP&L and a small subset of signatory parties. Accordingly, it should apply the three-prong test to this side deal on a standalone basis.

Despite purporting to resolve four complex cases, the Settlement devotes just a single sub-paragraph to two of those cases combined. The entirety of the Settlement of these two cases is found in Paragraph 19.c.ii of the Settlement:

In consideration of this Stipulation as a package and only for that purpose, the Signatory Parties who have intervened or moved to intervene in Pub. Util. Comm. Case Nos. 19-1121-EL-UNC and 20-1041-EL-UNC recommend that the Commission approve DP&L's applications in those cases conditioned on the

Commission's approval of this Stipulation without modification. The Signatory Parties who have not intervened or moved to intervene in those cases shall not intervene or move to intervene in those cases and take no position on DP&L's applications in those cases.¹⁶⁷

As this language shows, the vast majority of the signatory parties have no interest whatsoever in the 2018 and 2019 SEET cases. Among the signatories, just four intervened in the 2018 SEET case, and just three intervened in the 2019 SEET case. Each of these intervening parties represents nonresidential customers.¹⁶⁸ The remaining signatory parties went out of their way to state that they have no interest in these two cases: the Settlement explicitly prohibits them from intervening in the 2018 and 2019 SEET cases and states that they "take no position on DP&L's applications in those cases."¹⁶⁹ Even the Staff is not a party to this side agreement. As quoted above, the Settlement states that "Signatory Parties who have not intervened or moved to intervene in those cases ... take no position on DP&L's applications in those cases." The Staff does not intervene in cases. Thus, under the plain language of this Settlement term, the Staff takes no position in the Settlement on those issues.¹⁷⁰

As it pertains to the 2018 and 2019 SEET Cases, therefore, the Settlement is between only DP&L and four nonresidential customer parties (OMAEG, OEG, IEU, and Kroger). And the upshot of the side-agreement is that the *non-residential* customers have agreed that there should be no refunds to any customers—including *residential* customers. While the non-

¹⁶⁷ Joint Ex. 1 (Settlement) at 45.

¹⁶⁸ See Case No. 19-1121-EL-UNC (motions to intervene filed by OEG, OMAEG, Kroger, and IEU); Case No. 20-1041-EL-UNC (motions to intervene filed by OMAEG, Kroger, and IEU).

¹⁶⁹ Settlement at 45.

¹⁷⁰ The Staff's testimony (Staff Ex. 1) also shows that Staff is not part of this Settlement term. The side deal says that the signatory parties to that deal recommend approval of DP&L's filed applications. Staff's testimony, however, makes recommendations that contradict those applications (including Staff's position that DMR funds should be included in the SEET analysis), so the Staff is not endorsing this provision in the Settlement and is not part of the side deal settlement.

residential customers should be able to waive their own rights to a refund, it seems extraordinarily wrong for the PUCO to allow them to speak for residential customers and waive residential customers' right to a refund. Because the other 14 signatory parties opted out of this portion of the Settlement, it should not be considered part of the Settlement "package" for purposes of the three-prong test. And when viewed as the separate side agreement that it is, it overwhelmingly fails the three-prong test.

Under the first prong, there was no serious bargaining in this side agreement because there was no bargaining at all. DP&L's litigation position was that customers should get no refund, and the Settlement provides that DP&L's litigation position should be adopted, precisely as filed. If any bargaining occurred between this small subset of parties on these issues, it cannot have been serious because it resulted in zero concessions from the utility.¹⁷¹

Further, this side agreement lacks diversity as it was signed by only the utility and nonresidential customers. As the PUCO has said, "the diversity of the signatory parties may be a consideration in determining whether a settlement is a product of serious bargaining among capable, knowledgeable parties under the first prong of the PUCO's test."¹⁷² There is no diversity in this side agreement between the utility, nonresidential customer groups, and no one else.

Under the second prong, this side agreement provides no benefits whatsoever for customers. To the contrary, DP&L's applications in these cases propose zero refunds for customers, and the Settlement proposes wholesale adoption of the applications. This contrasts

¹⁷¹ See OCC Ex. 2 (Kahal Supplemental Testimony) at 16-17 ("[T]wo other key portions of the Settlement pertain to the ESP I continuation case and the SEET 2018 and 2019 review dockets. It is hard to see in these two areas of the Settlement where there is any compromise or DP&L conceding on anything. It appears for these dockets that the Utility will receive every dollar that it is requesting, with the dollars at issue in these cases much larger than the Phase I Smart Grid Plan.").

¹⁷² *In re Application of [FirstEnergy] for Approval of [its] Energy Efficiency and Peak Demand Reduction Program Portfolio Plans*, Case No. 16-743-EL-POR, Opinion & Order ¶ 61 (Nov. 21, 2017).

with OCC witness Duann’s testimony that customers deserve a \$150 million refund and PUCO Staff witness Buckley’s testimony that DP&L had more than \$60 million in significantly excessive profits. The nonresidential customer parties negotiated no benefits whatsoever.

It is hard to imagine a less productive settlement than one in which all the non-utility parties to the settlement represent a similar interest (nonresidential customers), and the agreement is that customers—including residential customers—get nothing and the utility gets exactly what it wanted, which is to keep its significantly excessive profits. The side agreement is manifestly unjust and unreasonable and should be rejected in favor of Dr. Duann’s recommended refunds for customers.

VIII. THE SETTLEMENT

A. The Settlement is not the product of serious bargaining.

Because the Settlement was shaped by a redistributive coalition, it was not the product of serious bargaining. In fact, the redistributive coalition, by its very design, suppresses serious bargaining. As OCC witness Dr. Hill explained, “parties in opposition are pressed to join the redistributive coalition.”¹⁷³ This is especially true once the PUCO Staff begins to signal that it supports the proposed settlement and negotiating parties realize that “the window on bargaining is about to close.”¹⁷⁴ At that point, they can either oppose the settlement, knowing that it is likely to be approved, “or they can join in and extract some direct benefit.”¹⁷⁵ This causes parties not to seriously bargain but to instead accept whatever little bit they can get out of a settlement.

¹⁷³ OCC Ex. 3 (Hill Testimony) at 20.

¹⁷⁴ OCC Ex. 3 (Hill Testimony) at 20.

¹⁷⁵ OCC Ex. 3 (Hill Testimony) at 20.

Because the PUCO is likely to support the proposal,¹⁷⁶ parties have an incentive to settle for very little rather than getting nothing through litigation.

As Dr. Hill also explained, “[s]erious bargaining would involve the utility making material concessions for the benefit of *all* customers.”¹⁷⁷ Instead, “DP&L got basically most of what it wanted.”¹⁷⁸ OCC witness Kahal echoed this concern, especially with regard to the ESP Quadrennial Review Case and the 2018 and 2019 SEET Cases: “It appears for these dockets that the Utility will receive every dollar that it is requesting.”¹⁷⁹ The PUCO’s settlement standard requires not just bargaining but *serious* bargaining. Lack of concessions shows that bargaining was not serious.

Dr. Hill also explained that the redistributive coalitions might give the settlement “the *veneer* of widespread public support,”¹⁸⁰ but the reality is that even when many parties sign a settlement, the settlement lacks diversity because it fails to include the interests of the many thousands of parties that did not sign the settlement and for whom the settlement offers no protection.

Further, as Dr. Hill explained, the first prong is inherently problematic because it requires settlements to be negotiated only by “knowledgeable” parties.¹⁸¹ By asking whether a settlement was bargained for by knowledgeable parties only, customers who are not knowledgeable are explicitly excluded from the process. According to Dr. Hill, the “knowledgeable” requirement

¹⁷⁶ OCC Ex. 3 (Hill Testimony) at 21.

¹⁷⁷ OCC Ex. 3 (Hill Testimony) at 21 (emphasis added).

¹⁷⁸ OCC Ex. 3 (Hill Testimony) at 21.

¹⁷⁹ OCC Ex. 2 (Kahal Testimony) at 16-17.

¹⁸⁰ OCC Ex. 3 (Hill Testimony) at 8.

¹⁸¹ OCC Ex. 3 (Hill Testimony) at 20.

“suggests that less sophisticated parties do not have a place in PUCO settlements,” which “further solidifies the redistributive coalition’s hold over the PUCO process.”¹⁸²

Because the Settlement is the product of a redistributive coalition, it did not involve serious bargaining. Instead, it involved self-serving bargaining for the benefit of the few (the signatory parties) at an unjust and unreasonable cost to the many (non-signatory parties, including residential customers).

B. The Settlement does not benefit customers or the public interest.

1. The Settlement’s proposal allowing DP&L to spend \$267.6 million within four years for grid modernization does not benefit customers or the public interest.

The Settlement, if approved by the PUCO, will permit DP&L to implement its Smart Grid Plan (“SGP”), which is the distribution infrastructure modernization plan initially presented in the Application filed in Case No. 18-1875-EL-GRD on December 21, 2018¹⁸³ as modified by the Settlement.¹⁸⁴ The Settlement provides that the SGP will be divided into phases, with SGP Phase 1 (“SGP 1”) being the four year period beginning on the date the PUCO approves the Settlement.¹⁸⁵ DP&L (and the other signatory parties to the Settlement) failed to demonstrate that benefits from SGP 1 justify the charges that residential customers will be forced to pay. The Settlement does not benefit customers, or the public interest and it should be rejected.

The cost of SGP 1 is steep. Under the Settlement, DP&L is permitted to spend \$267.6 million in capital investments and operational and maintenance (“O&M”) expenses over a four-

¹⁸² OCC Ex. 3 (Hill Testimony) at 20.

¹⁸³ OCC Ex. 74 (Smart Grid Application).

¹⁸⁴ DP&L Ex. 4 (Schroder Direct) at 4.

¹⁸⁵ Joint Ex. 1 (Settlement) at 4.

year period.¹⁸⁶ DP&L's return on and of the capital investments and operation and maintenance expenses will be through DP&L's infrastructure investment rider ("IIR").¹⁸⁷ For the four-year term of SGP 1, DP&L plans to charge customers over \$108 million through the IIR.¹⁸⁸ These charges will subsidize concessions to the Settlement's signatory parties and programs that have nothing to do with the provision of safe and reliable electric distribution service. Further, DP&L would be allowed to begin charging customers through the IIR as soon as the PUCO approves the Settlement,¹⁸⁹ before technology is deployed and functional. More egregiously, the Settlement also permits DP&L to initiate the second phase of its smart grid plan ("SGP 2") before SGP 1 investments can be demonstrated to be successful and prudent.¹⁹⁰

DP&L claims that SGP 1 will generate \$2.46 in benefits for every \$1 DP&L spends.¹⁹¹ But OCC presented evidence (largely unrefuted) that DP&L's cost-benefit summary is fundamentally flawed. As further explained below, DP&L's cost-benefit summary, among other things, unreasonably focuses on the benefits that SGP 1 will provide to DP&L, rather than benefits to the customers who will have to pay for SGP 1 through the IIR.

OCC witness Paul Alvarez analyzed the costs and benefits of SGP 1 using DP&L's own data and made numerous adjustments to correct for DP&L's overstatement of benefits and failure to consider significant costs customers will pay for SGP 1 over DP&L's 20-year benefit period. Mr. Alvarez concluded that the costs of SGP 1 far exceed the benefits to customers, who

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 5.

¹⁸⁸ *Id.* at Ex. 2 (IIR Revenue Requirement, Line 28).

¹⁸⁹ *Id.* at 5.

¹⁹⁰ *Id.* at 5.

¹⁹¹ OCC Ex. 7 (Alvarez Direct Testimony) at 33-34.

will receive just \$0.45 in benefits for every \$1 they pay for SGP 1.¹⁹² Mr. Alvarez’s adjustments, which are further discussed below, are summarized in the following table:¹⁹³

BENEFITS & COSTS (\$ in millions)	NOMINAL VALUE	PRESENT VALUE
BENEFITS per DP&L	1255.3	697.3
OCC Adjustments		
Rate Case Timing	(85.1)	(36.2)
Discontinued Benefit Offset	(146.0)	(60.0)
Exaggerated Benefits	(4.7)	(2.2)
EV Fuel Savings	(229.8)	(83.7)
Economic Impact	(400.1)	(336.8)
GHG Reductions	(41.3)	(13.5)
BENEFITS per OCC	348.1	164.9
COSTS per DP&L	387.9	284.0
OCC Adjustments		
Carrying Charges	180.2	21.8
Missing CIS capital & O&M	96.5	58.9
Cust Pmts on Equip Removed	9.2	6.0
COSTS per OCC	673.8	370.7

DP&L (Present Value): \$2.46 in benefits for every \$1 DP&L spends

OCC (Present Value): \$0.45 in benefits for every \$1 Customers Pay

The evidence demonstrates that SGP 1 under the Settlement is a raw deal for consumers—especially residential customers. Despite paying 66.3% of DP&L’s distribution revenue requirement, residential customers will receive only 3.8% of the economic benefits from

¹⁹² *Id.*

¹⁹³ *Id.*

SGP 1's reliability improvements.¹⁹⁴ On the other hand, commercial and industrial customers will pay 33.7%, but receive 96% of the economic benefits from reliability improvements.¹⁹⁵ Mr. Alvarez testified that the PUCO has approved smart grid programs where the costs were more fairly allocated by customer class.¹⁹⁶ The PUCO should reject the Settlement and instead conduct a comprehensive review of DP&L's grid modernization program to verify that benefits to customers exceed costs and that costs are prudently incurred.

a. The Settlement harms customers and it should be rejected because the costs of DP&L's SGP 1 to consumers far exceed the benefits to consumers.

DP&L's cost-benefit summary attached to the Settlement purports to show that SGP 1 will deliver benefits that exceed the costs of that program.¹⁹⁷ But there is little substance to DP&L's one-page summary, and little evidence to explain how DP&L calculated and quantified the benefits and costs of SGP 1. By contrast, OCC's own review of DP&L's cost-benefit summary (using what data DP&L provided in discovery) demonstrates that DP&L's analysis is riddled with flaws. In fact, the costs of DP&L's SGP 1 far exceed the benefits that consumers will see as a result of the Settlement. In addition, customers will forego (and DP&L's shareholders will reap) millions of dollars in operation and maintenance ("O&M") savings that SGP 1 may deliver after the expiration of SGP 1's four-year term.

Using DP&L's own data, OCC witness Alvarez performed a customer-focused (as opposed to utility-focused) cost-benefit analysis that considered costs customers will actually

¹⁹⁴ *Id.* at 35.

¹⁹⁵ *Id.* at 6-7.

¹⁹⁶ *Id.* at 7 (citing *In the Matter of the Application of Ohio Power Company to Initiate Phase 2 of its gridSMART Project and to Establish the gridSMART Phase 2 Rider*, Case No. 13-1939-EL-RDR, Opinion and Order (February 1, 2017)).

¹⁹⁷ Joint Ex. 1 (Settlement) at Ex. 4.

pay as a result of SGP 1 that were not reflected in DP&L's cost-benefit summary.¹⁹⁸ Mr.

Alvarez's customer-focused analysis also appropriately considered direct benefits that customers will actually receive from SGP 1 (such as rate reductions),¹⁹⁹ as opposed to indirect, exaggerated, or societal benefits relied on by DP&L.²⁰⁰ As noted above, Mr. Alvarez's analysis demonstrated that customers will receive just \$0.45 in benefits for every \$1 paid to DP&L for SGP 1 (in present value terms), even with no adjustments for service reliability benefits.²⁰¹ Mr. Alvarez identified numerous shortcomings with DP&L's analysis that undermine DP&L's claims that SGP 1 results in positive benefits to customers.

i. DP&L's cost-benefit summary ignores significant costs to customers under SGP 1.

As an initial matter, Mr. Alvarez testified that DP&L's cost-benefit analysis is flawed because it simply ignores significant real costs that customers will have to pay as a result of DP&L's investments in SGP 1. The PUCO should reject DP&L's claim that SGP 1 results in positive benefits to customers for this reason alone.

First, DP&L's costs do not include charges that customers will pay for SGP 1 over the 20-year benefit period DP&L used in its cost-benefit analysis. These costs, which include DP&L profits, income taxes on those profits, interest expense on debt, and property taxes, are huge. Mr. Alvarez testified that these charges would cost customers \$180 million in nominal value and \$21 million in net present value over the 20-year SGP cost-benefit analysis period.²⁰²

¹⁹⁸ OCC Ex. 7 (Alvarez Direct) at 11-35.

¹⁹⁹ *Id.* at 17-22.

²⁰⁰ *Id.* at 23-27.

²⁰¹ *Id.* at 11.

²⁰² *Id.* at 13-14.

Second, Mr. Alvarez testified that DP&L's cost-benefit analysis excludes \$96.5 million in information technology costs required for foundational smart meter capabilities, in the form of a new Customer Information System ("CIS").²⁰³ DP&L witness Ms. Sharon Schroder testified that DP&L's investment in a new CIS will be one of the benefits of SGP 1.²⁰⁴ And indeed, OCC witness Alvarez testified that the new CIS is essential for enabling customer benefits from smart meters.²⁰⁵ DP&L removed the cost of the CIS, along with corresponding time of use ("TOU") rate and energy conservation benefits, from its cost-benefit analysis.²⁰⁶ But that does not mean that customers will not have to pay for the information technology investments that DP&L commits to making under the Settlement.²⁰⁷ Removing these information technology investments from the cost-benefit analysis further understates SGP 1 costs to customers.²⁰⁸

Third, DP&L's cost-benefit analysis excludes over \$9 million in undepreciated book value of meters removed from service prematurely to make way for smart meters.²⁰⁹ In the Settlement, DP&L agreed that the undepreciated book value of equipment removed from service will be subtracted from gross plant additions, and that this gross plant offset will occur through the IIR as the equipment is retired.²¹⁰ Mr. Alvarez explained that DP&L's cost-benefit analysis reflects four years of such offsets, amounting to \$18.3 million.²¹¹ However, Mr. Alvarez testified that DP&L's workpapers show that the net book value of equipment to be removed from service

²⁰³ *Id.* at 14-15.

²⁰⁴ DP&L Ex. 4 (Schroder Direct) at 16.

²⁰⁵ OCC Ex. 7 (Alvarez Direct) at 14.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 15-16.

²¹⁰ Joint Ex. 1 (Settlement) at 6, para. 3(e)(ii).

²¹¹ OCC Ex. 7 (Alvarez Direct) at 15.

prematurely is \$27.5 million²¹² Therefore, \$9.2 million in book value of equipment that is no longer used and useful will remain in rate base, and customers will pay for both carrying charges and depreciation on that remaining book value over time.²¹³ Customers should not be paying for equipment that is no longer used and useful in the first place. But if a utility plans to charge for such equipment, as DP&L appears to, those costs should be considered in the cost-benefit analysis.²¹⁴

The cost-benefit summary supporting the Settlement grossly understates the costs to customers from SGP 1, and for this reason alone, DP&L's claim that SGP 1 results in positive benefits to consumers should be dismissed. The PUCO should reject the settlement because it does not benefit customers or the public interest.

ii. The Settlement harms customers because customers will forego (and DP&L will reap) millions of dollars in benefits from SGP 1 O&M savings.

OCC witness Alvarez testified that the Settlement harms customers and is not in the public interest because while DP&L may recognize O&M related savings from SGP 1, customers will be forced to forego direct benefits in the form of rate reductions as a result of those savings unless and until DP&L files a rate case, which could be as long as 20 years from now.²¹⁵ Mr. Alvarez explained that the traditional way utilities recover rising costs is through rate increases to consumers. As long as rate bases hold steady, when costs are falling and revenues are rising, utilities are unlikely to file a rate case, because doing so would transfer the benefits of falling costs and growing revenues from shareholders to customers in the form of rate

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 16-18.

reductions.²¹⁶ Thus, in order to transfer the benefits of O&M savings from SGP 1 to customers in the form of a rate reduction, DP&L would need to do it through a base rate case.

Paragraph 3(c) of the Settlement appears to address this issue by requiring DP&L to file a distribution rate case by January 1, 2025 or risk losing the ability to recover SGP 1 costs through the IIR.²¹⁷ But now, that provision of the Settlement is largely meaningless and provides little if any protection to consumers because DP&L very recently satisfied the provision by filing a base rate case.

One week after the Settlement was filed, DP&L filed a notice of intent to file an application for a rate increase in Case No. 20-1651-EL-AIR, followed by a rate case application filed on November 30, 2020. During the evidentiary hearing, DP&L's Managing Director of Regulatory Affairs, Ms. Sharon Schroder, confirmed that this rate case filing satisfies the provision in paragraph 3(c) of Settlement requiring DP&L to file a rate case by January 1, 2025.²¹⁸ Therefore, under the terms of the Settlement, DP&L will be able to recover SGP costs under the IIR (or a replacement rider established as a result of a new ESP) indefinitely. But DP&L will now not have to file a base rate case (where SGP 1 O&M cost savings would be passed on to consumers) for years.²¹⁹

Because of this rate case timing issue, Mr. Alvarez estimated that customers will forego \$85 million of benefits, which will create a windfall to DP&L's shareholders.²²⁰ To make this determination, Mr. Alvarez testified that DP&L will likely not file another rate case for the

²¹⁶ *Id.* at 17.

²¹⁷ Joint Ex. 1 (Settlement) at 6 ("If DP&L does not file a distribution rate case by January 1, 2025, then the recovery of the costs associated with this Stipulation shall cease recovery and the IIR shall be set to zero.").

²¹⁸ Tr. Vol. I at 203:5-18.

²¹⁹ OCC Ex. 7 (Alvarez Direct) at 18.

²²⁰ *Id.* at 20-21.

duration of the SGP cost-benefit analysis period, *i.e.* through 2040.²²¹ This is because DP&L just filed a new rate case, which DP&L admitted satisfied the requirement in the Settlement to file a rate case in order to avoid discontinuation of the IIR.

In addition, Mr. Alvarez testified that shareholders benefit when DP&L avoids filing a rate case during times of falling costs and growing revenues.²²² Mr. Alvarez then considered benefits that will accrue to DP&L's shareholders instead of its customers until captured in the next rate case's test year. Mr. Alvarez also considered benefits that are not tied to defined outcome metrics in the Settlement (*i.e.*, benefits that DP&L does not have to deliver by a certain time). These benefits include: 1) customer contact center headcount reductions; 2) meter services (not meter reading) headcount reductions; 3) field crew headcount reductions; and 4) unbilled pole attachments.²²³ In years 5-20 of DP&L's cost-benefit analysis, these benefits (which will accrue to shareholders and not customers) amount to \$4.5 million annually to start and grow over time due to inflation.²²⁴ This will result in customers ***losing \$85 million*** in benefits if DP&L does not file another rate case until 2040. DP&L presented no evidence to rebut Mr. Alvarez's conclusions in this regard.

Paragraph 3(b) of the Settlement does provide for a benefit offset to the costs of SGP 1 by providing that "DP&L's recovery of its capital investments and expenses through the IIR shall be offset by the estimated operational benefits."²²⁵ However, that benefit offset expires at the end of the four-year SGP 1 term. Ms. Schroder confirmed this during the evidentiary

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Joint Ex. 1 (Settlement) at 5.

hearing.²²⁶ Mr. Alvarez testified that significant costs related to SGP 1 will continue for years past the SGP 1 four-year term.²²⁷ Yet nothing in the Settlement provides that these benefits will be passed through to customers beyond SGP 1 year four. Because of this separate benefit offset issue, Mr. Alvarez testified that consumers will forego other benefits beyond SGP 1 year four, including improvements in 1) meter reading; 2) meter accuracy; 3) residential theft; 4) small C&I theft; and 5) usage on inactive meters.²²⁸ These benefits, which will also accrue to shareholders rather than customers (due to expiration of the benefit offset), amount to \$6.6 million annually to start and grow over time due to inflation. For cost-benefit analysis years 5-20, Mr. Alvarez calculated that customers will *miss out on \$146 million* of benefits DP&L includes in its cost-benefit analysis.²²⁹

iii. The Settlement harms customers because DP&L exaggerates the benefits to consumers in its analysis.

The PUCO should reject the Settlement because DP&L exaggerates the benefits to consumers from SGP 1 in numerous ways. For example, OCC witness Alvarez explained that DP&L utilizes a 20-year benefit period for its analysis.²³⁰ However, some components of SGP I, such as smart meters, do not last nearly that long. Smart meters are only expected to last 12-15 years.²³¹ And Mr. Alvarez testified that Duke Energy is replacing all its Ohio smart meters after only 5-7 years of operation, while the Settlement in this case requires DP&L to depreciate smart meters over 15 years.²³² Because of this, it is appropriate to remove the anticipated benefits from

²²⁶ Tr. Vol. 1 at 207:1-15.

²²⁷ OCC Ex. 7 (Alvarez Direct) at 22.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 23.

²³¹ *Id.*

²³² *Id.*

smart meters in years 16-20 from the analysis.²³³ Similarly, DP&L claims its geographic information system (“GIS”) software will substantially increase pole attachment revenues over 20 years.²³⁴ However, software packages like GIS are only expected to last 5-10 years before requiring replacement.²³⁵ Again, in this case, it would be appropriate to remove anticipated benefits from GIS from at least years 10-20. DP&L did not do this.

Moreover, DP&L claims its SGP will reduce capital for equipment inventory annually for 20 years.²³⁶ But Mr. Alvarez explained that, as a working capital item, equipment inventory is something that can be reduced only once, and such reductions do not repeat or grow annually as DP&L’s benefit estimate suggests.²³⁷ As another example, Mr. Alvarez testified that the O&M savings estimate DP&L calculates from smart meters’ remote disconnect/reconnect capabilities assumes that DP&L’s request for a waiver of the “door knock requirement” has been approved.²³⁸ But that waiver may not ultimately be approved (and it certainly is not in the best interest of customers). Mr. Alvarez testified that these exaggerations account for \$63.7 million of the benefits in DP&L’s cost-benefit analysis.²³⁹ Mr. Alvarez testified that his adjustments to DP&L’s cost-benefit summary account for these exaggerations to benefits.²⁴⁰

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 24.

²³⁹ *Id.*

²⁴⁰ *Id.*

iv. The Settlement harms customers because DP&L’s positive benefit analysis relies on indirect benefits, which do not justify the direct costs customers will pay for SGP 1.

Mr. Alvarez testified that another problem with DP&L’s cost-benefit summary is that it relies heavily on indirect benefits such as electric vehicle (“EV”) fuel savings, greenhouse gas emission reductions, and economic benefits related to DP&L’s spending, without also considering indirect costs.²⁴¹ For example, for many DP&L customers, particularly low-income customers, electric rate increases will result in reduced food or medical purchases, reduced health and productivity, and a reduction in quality of life.²⁴² These indirect costs are not included in DP&L’s cost-benefit analysis.

Moreover, Mr. Alvarez explained that while indirect benefits are nice for customers, a dollar of indirect benefits is simply not equivalent to a dollar of direct benefits. Put another way, a dollar of indirect benefits does not offset a dollar of direct costs (*e.g.*, rate increase).²⁴³ Thus, while the “Societal Benefits” identified in DP&L’s cost-benefit summary²⁴⁴ may be a good thing, they do not pay the rate increase in the customer’s electric bill. That is why indirect benefits are not suitable to offset direct costs to customers. Indirect benefits are also not an appropriate substitute for the significant direct benefits the Settlement fails to deliver to customers (*e.g.*, rate reductions from O&M savings).

Mr. Alvarez testified that EV cost savings should also be excluded from the cost-benefit analysis because DP&L’s charger rebate program is not likely to be a significant driver of EV

²⁴¹ *Id.* at 24-27.

²⁴² *Id.* at 24.

²⁴³ *Id.*

²⁴⁴ Joint Ex. 1 (Settlement) at Exhibit 4.

adoption.²⁴⁵ According to Mr. Alvarez, EV prices and the cost of gasoline are far larger factors in a customer's decision to purchase an EV, and multiple studies indicate that 95% of EV charging occurs at home.²⁴⁶ In addition, market forces will intervene with or without DP&L's charger rebate program. For example, Mr. Alvarez testified that a multi-family building landlord will install charging stations when a lack of charging stations results in a lack of tenants, similar to how landlords build garages or car ports for tenants' vehicles today.²⁴⁷ Finally, Mr. Alvarez testified that EV cost savings should be excluded because only some customers will actually benefit from charger rebates.²⁴⁸ Indeed, it is fundamentally unfair to require all customers, particularly low-income customers, to subsidize customers who have the means to purchase new electric vehicles. This is a clear violation of the cost-causation principle.²⁴⁹

Likewise, DP&L's purported favorable "economic impacts" should be excluded from the cost-benefit summary. Mr. Alvarez testified that it is inappropriate to include a benefit without also considering corresponding costs.²⁵⁰ DP&L's benefits include the favorable impact of its spending on the local economy, but the costs SGP 1 also include the detrimental impact to the local economy of 15-50 years of SGP-related rate increases, which DP&L does not consider in the analysis. Mr. Alvarez testified that electric rate increases can manifest in many ways throughout a region's economy. For example, retailers must raise prices; governments must raise taxes or reduce services; businesses may look elsewhere for expansion; some business shift

²⁴⁵ OCC Ex. 7 (Alvarez Direct) at 25.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 26.

production to other facilities; and some businesses become more likely to close.²⁵¹ The negative impact of SGP 1 rate increases could in fact offset or even exceed the secondary economic benefits DP&L relies on in its cost-benefit summary. The PUCO should disregard the favorable economic impact benefits DP&L includes in its cost-benefit analysis.

Mr. Alvarez testified that it is also appropriate to exclude from the cost-benefit analysis indirect benefits of greenhouse gas emission reductions.²⁵² Such indirect benefits do not offset the direct costs of SGP 1. But also, Mr. Alvarez explained that there is an inherent variability in valuation of greenhouse gas emissions that make including reduction benefits in the cost-benefit summary unreliable.²⁵³ Mr. Alvarez further testified that the Settlement excludes direct benefits from time-of use rates and energy conservation from the cost-benefit analysis. Thus, it would be improper to include a potential indirect benefit like greenhouse gas reductions in the cost-benefit analysis.

v. The Settlement harms customers because DP&L overstates the economic benefits resulting from SGP 1 reliability improvements.

DP&L claims that SGP 1 will provide economic benefits to customers through reliability improvements. OCC witness Alvarez testified that the reliability improvement benefits in DP&L's cost-benefit analysis are overstated.²⁵⁴ Mr. Alvarez explained that utilities quantify the economic benefits associated with reliability improvements by estimating customer interruption frequency (counts) and duration (minutes), or using associated SAIFI and CAIDI metrics,

²⁵¹ *Id.*

²⁵² *Id.* at 27.

²⁵³ *Id.*

²⁵⁴ *Id.* at 28.

respectively.²⁵⁵ Utilities will then translate estimated reliability improvements into economic benefits, using outage cost data published by the U.S. Department of Energy (“DOE”).²⁵⁶ Mr. Alvarez testified that the SAIFI and SAIDI improvements specified in the Settlement are unrealistic, and that the DOE outage cost data is fundamentally flawed, resulting in overstated economic benefits from SGP 1.²⁵⁷

Specifically, the Settlement specifies that DP&L will add distribution automation capabilities to 88, or 20%, of DP&L’s circuits.²⁵⁸ The Settlement also clarifies that the cost-benefit analysis DP&L supplied for the Settlement assumes a 15% improvement in system-wide SAIFI and a 14% improvement in system-wide SAIDI.²⁵⁹ Mr. Alvarez explained that for DP&L to deliver a 14% improvement in SAIDI system wide, the 20% of circuits with distribution automation would need to deliver five times that amount, or a 70% improvement.²⁶⁰ Mr. Alvarez testified that the distribution automation capabilities DP&L is proposing have been shown to be incapable of delivering improvements of that magnitude.²⁶¹ Mr. Alvarez also testified that the inclusion of substation automation and smart meters provide only minimal improvements in service reliability.²⁶²

²⁵⁵ *Id.* SAIFI is an abbreviation of System Average Interruption Frequency Index; SAIDI is an abbreviation of System Average Interruption Duration Index; CAIDI is an abbreviation of Customer Average Interruption Duration Index.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Joint Ex. 1 (Settlement) at 11, Section 6(b).

²⁵⁹ *Id.* at 42, Section 17(a).

²⁶⁰ OCC Ex. 7 (Alvarez Direct) at 29.

²⁶¹ *Id.*

²⁶² *Id.* at 29-30.

Moreover, Mr. Alvarez testified that the DOE's outage cost data, which is used by utilities to convert service reliability improvements into economic benefits, is unreliable.²⁶³ Mr. Alvarez explained that the DOE outage cost data is outdated, was not collected in an appropriate manner, and was never intended to estimate the economic impact of outages over a defined geography.²⁶⁴ In other words, the DOE outage cost data is inappropriate for use in making grid investment decisions in this case costing hundreds of millions of dollars.

b. The Settlement harms customers because they bear all the risk of DP&L's SGP investments, and the performance measurements in the Settlement are inadequate to guarantee delivery of SGP benefits to customers.

OCC witness Alvarez testified that the Settlement harms customers and is not in the public interest because customers will bear 100% of the risk of DP&L's SGP 1 investments.²⁶⁵ Once the PUCO approves DP&L's SGP 1, customers will have no choice but to pay the charges imposed on them for the program through the IIR. On the other hand, delivery of SGP 1 benefits to consumers will depend solely on DP&L's compliance with the performance measures set forth in the Settlement, which Mr. Alvarez testified are inadequate.²⁶⁶ Worse, as further explained below, the Settlement allows DP&L to initiate SGP phase 2 even if benefits are not delivered to consumers under SGP 1.²⁶⁷

The Settlement states, "No later than 60 months following an Order in this case, DP&L shall file an application for revised standards that incorporate the proposed reliability

²⁶³ *Id.* at 30.

²⁶⁴ *Id.* at 31-32.

²⁶⁵ *Id.* 35-37.

²⁶⁶ *Id.*

²⁶⁷ Joint Ex. 1 (Settlement) at 5.

improvement.”²⁶⁸ These proposed reliability improvements include a 15% improvement in system-wide average interruption frequency (“SAIFI”) and a 14% improvement in system-wide average interruption duration (“SAIDI”).²⁶⁹ Mr. Alvarez testified that these measures are inadequate because the structure is inconsistent with the current Ohio rules related to system-wide reliability standards,²⁷⁰ which specify SAIFI and CAIDI, not SAIFI and SAIDI.²⁷¹ Mr. Alvarez explained that because the current Ohio reliability standard does not include SAIDI, DP&L can easily meet its new CAIDI standard, based on the Settlement’s reliability commitments, without actually improving the system average interruption duration.²⁷²

Moreover, the Settlement’s reliability metrics will not be updated for more than five years after the Settlement is approved.²⁷³ Mr. Alvarez testified that a more appropriate measurement approach would be to hold DP&L responsible for incremental improvements over time, concurrent with distribution automation and smart meter roll-out timing.²⁷⁴ For example, if distribution automation is 30% deployed by the end of year two, then 30% of the ultimate reliability improvement expected should be in force for year three.²⁷⁵

Mr. Alvarez also testified that the performance metrics under the Settlement are inadequate.²⁷⁶ Specifically, the Settlement sets forth 42 metrics for measuring DP&L’s

²⁶⁸ *Id.* at 42, Section 17(a).

²⁶⁹ *Id.*

²⁷⁰ Ohio Adm. Code 4901:1-10-10(B)(1).

²⁷¹ SAIFI, SAIDI, and CAIDI are related. CAIDI is the average duration of an interruption, but only of customers who experienced at least one. CAIDI is calculated by dividing SAIDI by SAIFI.

²⁷² OCC Ex. 7 (Alvarez Direct) at 38-39.

²⁷³ Joint Ex. 1 (Settlement) at 42, Section 17(a).

²⁷⁴ OCC Ex. 7 (Alvarez Direct) at 40.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 41.

performance.²⁷⁷ This may seem like a lot, but Mr. Alvarez explained that only seven of the metrics are *outcome* metrics that measure a result from which a customer would actually benefit.²⁷⁸ The seven-outcome metrics are 1) Count of internal meter readers, 2) Count of contract meter readers, 3) AMI meter tampering case outcomes, 4) Customer minutes saved, 5) Customer interruptions avoided, 6) MW Saved from CVR, and 7) MWh Saved from CVR.²⁷⁹ In contrast, the other 35 metrics are *process* metrics that measure deployment status, or some other indicator of a potential benefit (such as a headcount reduction) rather than direct benefits delivered to customers from SGP 1.²⁸⁰

Mr. Alvarez also noted that none of the metrics include quantified targets.²⁸¹ This makes it difficult to evaluate DP&L's performance.²⁸² Moreover, some significant benefits do not even have a process measure, let alone an outcome measure. For example, Mr. Alvarez explained that DP&L will use its new GIS system to identify, and commence billings on, previously unidentified pole attachments, which will purportedly increase pole attachment billings over 20 years.²⁸³ However, the Settlement includes no metrics at all for this benefit.

Given the numerous shortcomings of the performance metrics in the Settlement, Mr. Alvarez recommended a post-deployment benefit evaluation audit to ensure that SGP 1 actually delivers benefits to consumers.²⁸⁴ Requiring such an audit would be consistent with the PUCO's

²⁷⁷ Joint Ex. 1 (Settlement) at Exhibit 3.

²⁷⁸ OCC Ex. 7 (Alvarez Direct) at 41.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 42

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 40-41.

Power Forward investigation, which recognized the need for such audits to 1.) evaluate whether the capital deployed resulted in grid functionality that is in accordance with the company's grid modernization plan; 2.) evaluate whether (performance-based ratemaking) metrics are being achieved; and 3.) include a prudency review.²⁸⁵ Mr. Alvarez testified that none of these concepts are reflected in the Settlement's audit provisions, which focus on accounting issues, not performance issues.²⁸⁶ For these additional reasons, the Settlement harms customers and is not in the public interest.

The reliability standards and performance metrics in the Settlement are insufficient, and there are no real consequences to DP&L if it fails to deliver benefits to consumers that exceed the costs of SGP 1. Customers bear all of the risk of DP&L's SGP 1 investments if the PUCO approves the Settlement. Therefore, the Settlement is not in the public interest, and the PUCO should reject it.

c. The Settlement harms customers and the public interest by allowing DP&L to invest in (and charge customers for) the second phase of the SGP before DP&L can demonstrate the success of SGP 1.

In addition to the reasons discussed above, the PUCO should reject the Settlement because it expressly permits DP&L to initiate SGP phase 2 within three years of the PUCO's decision in this case, before the expiration of the SGP 1 four-year term.²⁸⁷ OCC provided ample evidence through the testimony of Mr. Alvarez demonstrating that SGP 1 will not deliver customer benefits in excess of customer costs (see discussion above). Similarly, Mr. Alvarez testified that the performance measures in the Settlement are inadequate to gauge DP&L's

²⁸⁵ *Id.* at 40-41; OCC Ex. 66 (Power Forward Final Report) at 27.

²⁸⁶ OCC Ex. 7 (Alvarez Direct) at 41.

²⁸⁷ Joint Ex. 1 (Settlement) at 5.

success with SGP 1 in the first place.²⁸⁸ So, under the Settlement, not only will customers be on the hook for charges from DP&L for SGP 1 that far exceed the benefits customers will receive, DP&L will be allowed to initiate –and potentially charge customers for—hundreds of millions of dollars in new smart grid programs before DP&L can even demonstrate the functionality and success of SGP 1. That is plainly not in the public interest.

Mr. Alvarez testified that PUCO approval of the Settlement will signal that any grid investment is prudent grid investment (so long as the utility claims there are positive benefits), with no evidence required to support that investment.²⁸⁹ This is inconsistent with the PUCO’s own Power Forward investigation, which states that “the Commission’s expression of governmental will to allow the [utilities] to invest in grid modernization for the betterment of customers *is not a blank check*. Performance will be evaluated and tied in some circumstances to recovery”²⁹⁰ If the PUCO approves the Settlement allowing DP&L to initiate SGP phase 2 before the performance of SGP 1 can be evaluated, the PUCO will essentially be issuing a blank check to DP&L to bankroll at the customers’ expense future investments in the name of grid modernization that may not be prudently incurred or provide benefits to customers. Therefore, the PUCO should reject the Settlement.

2. The Settlement harms customers because it denies them \$150 million in refunds that they are entitled to under R.C. 4928.143(F).

As explained above, OCC witness Dr. Daniel Duann testified that DP&L had significantly excessive profits of \$62.9 million in 2018 and \$87.7 million in 2019. Thus, customers deserve a refund for these amounts totaling \$150.6 million. PUCO Staff witness

²⁸⁸ OCC Ex. 7 (Alvarez Direct) at 40-42.

²⁸⁹ *Id.* at 46-47.

²⁹⁰ OCC Ex. 66 (Power Forward Final Report) at 27 (emphasis added).

Buckley testified that DP&L had more than \$60 million in significantly excessive profits in 2018 and 2019 combined, though he recommended no refund. The Settlement, in contrast, provides that customers get no refund.²⁹¹ Customers do not benefit when a law requires \$150 million in refunds, but the Settlement gives them \$0 instead.

3. The Settlement harms customers because it resolves the more favorable in the aggregate test and the prospective SEET test in DP&L's favor and requires customers to keep paying DP&L \$79 million per year under an unlawful financial integrity charge called the Rate Stabilization Charge.

In an apparent attempt to obscure the true cost of the Settlement, it does not mention DP&L's RSC, even though the entire ESP Quadrennial Review Case revolves around whether the RSC should continue. But make no mistake the Settlement directly results in the continuation of the RSC and more than \$300 million in charges to customers.

Under paragraph 19.a of the Settlement, the Signatory Parties “agree that this Stipulation satisfies the requirements of R.C. 4928.143(E) and recommend that the Commission find that R.C. 4928.143(E) is satisfied and that DP&L's ESP I as currently implemented passes the more favorable in the aggregate test and the prospective significantly excessive earnings test in R.C. 4928.143(E).”²⁹² What it means for DP&L to pass the more favorable in the aggregate test and the prospective significantly excessive earnings tests under R.C. 4928.143(E) is that DP&L gets to continue charging customers under its ESP I, which includes the \$79 million per year RSC.²⁹³

²⁹¹ Joint Ex. 1 (Settlement) at 45 (providing that DP&L's 2018 and 2019 SEET applications shall be approved as filed, with those applications stating that customers get no refund).

²⁹² Joint Ex. 1 (Settlement) at 43.

²⁹³ See OCC Ex. 2 (Kahal Supplemental Testimony) at 10 (“Although the Settlement does not mention the Rate Stabilization Charge and its \$314 million cost to consumers, the signatory parties, by agreeing that ESP passes the more favorable in the aggregate and SEET tests, are agreeing to allow DP&L to continue charging the Rate Stabilization Charge for at least three to four more years.”).

As explained above, however, DP&L's ESP I is *less* favorable in the aggregate than an MRO and is likely to result in significantly excessive profits, so DP&L fails those tests under R.C. 4928.143(E).²⁹⁴ And because it fails those tests, the PUCO should order DP&L to immediately terminate ESP I—including the RSC—and transition to an MRO. Such MRO would not include the RSC. The market rate offer establishes a standard service offer price. Nothing more, nothing less. Thus, the Settlement, by allowing the unlawful RSC to continue, harms customers to the tune of \$79 million per year, or more than \$300 million over the approximately four-year term of the Settlement.²⁹⁵ The PUCO should find that the ESP I is not more favorable in the aggregate and should be replaced with an MRO.

4. The PUCO should add language to tariffs that allows refunds to customers for any charges that are ultimately found to be imprudent, unreasonable, or unlawful by the PUCO, the Ohio Supreme Court, or other forum.

It is important for consumer protection that the PUCO approve tariffs in this case that contain subject to refund language. Customers have already been repeatedly harmed by the lack of refund language. In FirstEnergy's case, customers paid hundreds of millions of dollars under FirstEnergy's DMR until it was ruled unlawful by the Supreme Court, and they did not get a refund.²⁹⁶

If the PUCO refuses this request for refund language in DP&L's tariffs, then consumers are doomed to potentially face the same unfortunate outcome as the FirstEnergy DMR case. In the FirstEnergy DMR case OCC and OMA filed a joint motion to protect customers by asking

²⁹⁴ See *supra*.

²⁹⁵ See OCC Ex. 2 (Kahal Supplemental Testimony) at 10.

²⁹⁶ *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73 (2019).

the PUCO to make the charges subject to refund.²⁹⁷ , The PUCO denied the OCC/OMA motion to make the charge subject to refund.²⁹⁸ On appeal, the Supreme Court of Ohio held:

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. In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co., 153 Ohio St.3d 289, 2018-Ohio-229, 106 N.E.3d 1, ¶ 15-20.

FirstEnergy's tariffs for the DMR, however, contain no refund mechanism. And as a result, FirstEnergy retained \$468 million in unlawful charges.

The current tariff for the Rate Stabilization Charge does not include any refund language for consumers.²⁹⁹ That means that if the Rate Stabilization charge is later found to be unlawful by the PUCO or the Supreme Court of Ohio, consumers will not get a refund. Likewise, DP&L's customers paid hundreds of millions of dollars under its own DMR before the PUCO ruled that it was unlawful based on the Supreme Court's FirstEnergy ruling.³⁰⁰ Customers are never getting that money back because the DMR tariff did not include refund language. There is no reason to allow the RSC to continue without refund language. If the RSC is found to be lawful, then DP&L gets to keep all of the money. If the RSC is later found to be unlawful, then customers get their money back. This is basic fairness for consumers.

The PUCO should similarly require DP&L to add refund language to the tariff for the Infrastructure Investment Rider to guarantee customers refunds if any charges under this tariff are found to be imprudent, unreasonable, or unlawful.

²⁹⁷ Case No. 14-1297-EL-SSO, Finding & Order (Dec. 21, 2016).

²⁹⁸ Case No. 14-1297-EL-SSO, Finding & Order (Dec. 21, 2016).

²⁹⁹ See DP&L Tariff Sheet No. G12.

³⁰⁰ Case No. 16-395-EL-SSO, Supplemental Opinion & Order (Nov. 21, 2019).

5. The Settlement harms customers because it allows DP&L to seek another financial integrity charge to customers in its next electric security plan.

Under the Settlement, DP&L has agreed to file an application for a new electric security plan (ESP IV) by October 1, 2023.³⁰¹ The Settlement further provides that DP&L’s application in that case “shall not seek to implement any nonbypassable charge to customers related to provider of last resort risks, stability, financial integrity, or any other charge that is substantially calculated based on the credit ratings, debt, or financial performance of any parent or affiliated company of DP&L.”³⁰² DP&L witness Schroder claims that this benefits customers by “eliminating customer exposure to such charges in DP&L’s next electric security plan.”³⁰³

But this is misleading, if not outright false. The prohibition found in this section of the Settlement is so full of holes as to provide little or no protection to customers.

First, the Settlement only prohibits DP&L from seeking a *nonbypassable* financial integrity charge.³⁰⁴ By adding the word “nonbypassable” to this restriction, DP&L appears free to propose a *bypassable* charge, including one identical to the RSC. Rather than benefiting customers, this is even worse than the current situation, because now only a smaller subset of customers (those taking generation from the standard service offer) would pay subsidies to boost DP&L or its affiliates’ financial integrity.

Second, the Settlement only prohibits DP&L from seeking such a charge *in its application*. It in no way prohibits DP&L from seeking such a charge through a settlement. And as any party with even a modicum of experience in PUCO cases knows, the vast majority of

³⁰¹ Joint Ex. 1 (Settlement) at 45.

³⁰² Joint Ex. 1 (Settlement) at 45-46.

³⁰³ DP&L Ex. 4 (Schroder Testimony) at 29.

³⁰⁴ Joint Ex. 1 (Settlement) at 45.

complex cases are resolved by settlement. So, four years from now, DP&L could comply with the Settlement by filing an application that proposes no RSC and then immediately demand such a charge in settlement negotiations. If even a single party agrees to this—as seems likely, given parties’ willingness in this case to allow DP&L to continue the RSC—DP&L can sign a settlement with that party and then demand that the PUCO approve it. And if the PUCO does not approve it, DP&L can simply withdraw from ESP IV. In that situation, DP&L would—once again—revert to ESP I. And DP&L would—once again—charge customers for the \$79 million per year RSC.

In short, any claim that the Settlement puts an end to DP&L’s financial integrity charge saga is fallacious. There are numerous (albeit unlawful) paths for DP&L to continue charging customers for a financial integrity charge. The only path forward that adequately protects consumers is for the PUCO to put a firm end to it now: reject the Settlement and invalidate the unlawful RSC.

6. The Settlement does not benefit customers because it provides cash or cash equivalents to a limited subset of signatory parties, paid by other customers, including residential customers.

As explained above, the Settlement provides cash or cash equivalents to signatory parties in exchange for their signatures. According to DP&L, these are expected to total around \$30 million over four years.³⁰⁵ DP&L claims that these payments will be made by its shareholders and not customers.³⁰⁶ Accordingly, DP&L (and other signatory parties) imply that OCC should not be concerned with these payments because they have no impact on residential customers or

³⁰⁵ See OCC Ex. 2 (Kahal Supplemental Testimony) at 11 (citing DP&L’s SEC filings).

³⁰⁶ See generally Joint Ex. 1 (Settlement) (referring to shareholder payments throughout); DP&L Ex. 4 (Schroder Testimony) (same).

other non-signatory parties. This is false. Customers—including residential customers—are paying the entire \$30 million.

When considering the Settlement as a package—as the PUCO requires under its three-part test—there can be no doubt that residential customers and other non-signatories are funding the \$30 million in handouts to the signatory parties. It is not particularly difficult to see how. Under the Settlement, customers will pay more than \$300 million under the RSC.³⁰⁷ This \$300 million is not related to any cost that DP&L incurs, so it goes directly to shareholders.³⁰⁸ DP&L then turns around and hands \$30 million to signatory parties under the Settlement. This is a single transaction in which (i) A pays \$300 million to B, and (ii) B pays \$30 million to C. It is nonsense to claim that A is not paying \$30 million to C in such a transaction.

In fact, DP&L witness Garavaglia testified that the signatory parties' support for the continuation of the RSC (and the \$300 million charges to customers) was an explicit *quid pro quo* for the \$30 million:

- Q. Will DP&L's shareholders still make this \$30 million in payments if the RSC is eliminated?
- A. [I]f the RSC is eliminated, there is no Stipulation, right? And there is no \$30 million.³⁰⁹

This is consistent with OCC witness's assessment of the reality customers face under the Settlement. OCC witness Kahal testified:

³⁰⁷ OCC Ex. 2 (Kahal Supplemental Testimony) at 6.

³⁰⁸ OCC Ex. 2 (Kahal Supplemental Testimony) at 6.

³⁰⁹ Tr. Vol. II at 326 (Garavaglia).

In fact, calling it “shareholder funding” at all is misleading. The Settlement, if approved, would result in customers paying DP&L more than \$300 million under the stability charge over the next four years. The \$30 million in “shareholder funding” is effectively a redistribution of stability charge revenue, paid by all customers, for the benefit of the few customers who signed the Settlement.³¹⁰

And OCC witness Hill testified:

DP&L’s money for the Settlement payments does not really come from the stockholders. The money comes from DP&L’s customers.

...

The \$300 million generated by rider RSC is termed “shareholders’ money” by the Company. The Settlement calls for 10 percent of the revenue from rider RSC to be diverted to the signatory parties as an inducement to sign the Settlement. DP&L is left with \$270 million in no-strings-attached cash. And those who are not part of the redistributive coalition ... pay for all of it.³¹¹

DP&L cannot change reality by simply declaring that the \$30 million in payments to signatory parties is from “shareholders.” The \$30 million in payments to signatory parties is explicitly tied to the signatory parties’ agreement that DP&L can charge customers \$300 million under the RSC. It does not benefit residential customers and other non-signatory parties to pay \$30 million in subsidies to the signatory parties.

C. The Settlement violates important regulatory principles and practices.

1. The Settlement violates important regulatory principles, including the principle of equity, because it is the product of, and encourages the formation of, redistributive coalitions.

Redistributive coalitions are opportunity-driven.³¹² And unfortunately the PUCO’s regulatory process, involving the three-prong test for adopting settlements provides the

³¹⁰ OCC Ex. 2 (Kahal Supplemental Testimony) at 21.

³¹¹ OCC Ex. 3 (Hill Testimony) at 17-18.

³¹² See OCC Ex. 3 (Hill Testimony) at 25-26.

opportunity for redistributive coalitions.³¹³ The redistributive coalitions that have formed around Electric Security Plans and this Settlement have had one dominant member—the investor-owned utility that is the major beneficiary.³¹⁴

In a 2008 FirstEnergy ESP case, Commissioner Cheryl Roberto wrote in a concurring/dissenting opinion that “because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission.”³¹⁵ The PUCO must consider whether an agreed-upon stipulation arising under an ESP represents what the parties truly view to be in their best interest—or simply the best that they can hope to achieve when one party has the singular authority to reject not only any and all modifications proffered by the other parties but the Commission's independent judgment as to what is just and reasonable.”³¹⁶ Given that essentially all settlements occur only with the utility's approval, Commissioner Roberto's concern has even broader applicability to settlements of PUCO cases, to the detriment of less empowered parties like residential consumers.³¹⁷

Redistributive coalitions are a bad regulatory practice for settlements.³¹⁸ DP&L's Settlement features a redistributive coalition, and that is inconsistent with the third prong of the settlement test.³¹⁹ OCC's expert witness Mr. Hill explained in his testimony why the coalitions are bad for regulatory policy and practice.³²⁰ He also recommends that the PUCO should be

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 25.

³¹⁶ *Id.* at 25-26.

³¹⁷ *Id.* at 26.

³¹⁸ *Id.* at 23.

³¹⁹ *Id.*

³²⁰ *Id.*

observing and enforcing a regulatory principle of equity for participants and outcomes in its processes.³²¹ The Settlement featuring the redistributive coalition is not providing an equitable process or outcome for the general body of consumers.³²² It also violates basic regulatory principles when captive customers subsidize utilities and their unregulated affiliates.³²³ It is also bad public policy because the subsidies that flow to the utilities compensate them for making bad business decisions.³²⁴

Redistributive coalitions are also an example of market abuse.³²⁵ Because membership in the club is exclusive and difficult to obtain for many stakeholders (such as individual residential consumers, small businesses, and others), the PUCO process devolves into a façade, where stakeholders pose as representatives of the public interest at large while actually working against that very same public.³²⁶ This anticompetitive behavior harms competitive markets in several ways, as Dr. Hill explains in this testimony.³²⁷

First, it increases some, but not all, customers' utility bills.³²⁸ This results in unjust and unreasonable rates, especially for residential consumers. Second, the members of the redistributive coalition gain a competitive advantage over similar business that have not yet figured out how to game the system or who lack the resources to do so.³²⁹ This violates the regulatory principle against subsidizing unregulated businesses and advances no conceivable

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.* at 24.

³²⁶ *Id.*

³²⁷ *Id.* at 25.

³²⁸ *Id.*

³²⁹ *Id.*

public policy goals. A much better regulatory practice would be for the PUCO to support and approve settlements that truly represent the broad interests of all customers, not narrow self-interest of signatory parties.³³⁰ The PUCO should discontinue permitting redistributive coalitions from emerging in settlements under the three-prong test because it violates important regulatory practices and principles.

2. The Settlement violates regulatory principles and practices because it allows DP&L to implement a smart grid plan that violates DP&L's current electric security plan, ESP I.

The PUCO should reject the Settlement because it violates Ohio law and regulatory principles and practices. Key components of DP&L's SGP under the Settlement would be permissible only under DP&L's electric security plan approved by the PUCO in Case No. 16-395-EL-SSO ("ESP III"). But DP&L no longer operates under ESP III. DP&L operates under the electric security plan that was approved by the PUCO in Case No. 08-1094-EL-SSO, ESP I. Thus, the settlement approved by the PUCO in ESP I (the "ESP I Settlement") governs DP&L's SGP at issue in this case. And DP&L should not be allowed to avoid its obligations under ESP I through the proposed Settlement in this case.

DP&L witness Schroder testified that the SGP under the Settlement in this case is the plan set forth in DP&L's initial application in Grid Modernization Case (filed on December 21, 2018), as modified by the Settlement.³³¹ When DP&L filed the initial application in the Grid Modernization Case, DP&L proposed a distribution infrastructure modernization plan in accordance with the settlement approved by the PUCO in DP&L's ESP III proceeding ("ESP III Settlement").³³² Subsequently, DP&L voluntarily withdrew from ESP III, thereby reverting to

³³⁰ *Id.* at 23-25.

³³¹ DP&L Ex. 4 (Schroder Direct) at 4.

³³² OCC Ex. 74 (DP&L Application Case No. 18-1875-EL-GRD) at 2.

ESP I.³³³ Therefore, DP&L's SGP at issue in this case must comply with the ESP I Settlement, and DP&L cannot now cherry pick favorable provisions from ESP III (which no longer applies) to implement its SGP.

OCC witness Williams testified that DP&L's SGP violates ESP I in a number of ways. Thus, approval of the Settlement would violate Ohio law and regulatory principles and practices. The Settlement should be rejected.

a. The Settlement's charges to customers for SGP through the IIR are not permitted under ESP I.

The Settlement violates Ohio law and regulatory principles and practices by allowing DP&L to charge customers for capital and operation and maintenance expenditures through the infrastructure investment rider. But the IIR was not approved by the PUCO as a part of ESP I, and DP&L should not be allowed to charge customers through the IIR.³³⁴

OCC witness Williams explained that the IIR is an ESP III concept that cannot now be used to charge customers under ESP I.³³⁵ Specifically, the ESP III Settlement required DP&L to file a distribution infrastructure modernization plan (the predecessor to SGP) following the PUCO's Power Forward initiative.³³⁶ The ESP III Settlement permitted DP&L to charge customers for the costs from the distribution infrastructure modernization plan through a Smart Grid Rider ("SGR"), which was referenced in DP&L's initial application in this case.³³⁷ After DP&L withdrew from ESP III (and reverted to operation under ESP I), the distribution

³³³ See *The Dayton Power and Light Company's Notice of Withdrawal of its Application in Case No. 16-395-EL-SSO Pursuant to R.C. 4928.143(C)(2)(a)*, Case No. 08-1094-EL-SSO *et al.* (Nov. 25, 2019).

³³⁴ Joint Ex. 1 (Settlement) at 5.

³³⁵ OCC Ex. 6 (Williams Direct), at 15-24.

³³⁶ *Id.* at 15, 18.

³³⁷ OCC Ex. 74 (DP&L Application Case No. 18-1875-EL-GRD *et al.*) at 2; OCC Ex. 6 (Williams Direct), at 15-16.

infrastructure modernization plan in the initial application morphed into DP&L's SGP now at issue, and the SGR was renamed as the IIR.

Despite what seems to be a simple name change, DP&L cannot now use the ESP III rider to charge customers for SGP under the Settlement. This is because what is now known as the IIR was *not* approved by the PUCO in ESP I (the ESP under which DP&L now operates). The ESP I Settlement states, in relevant part, that: "DP&L will delay implementation of the Infrastructure Investment Rider (IIR) until reviewed by the Commission's Staff and approved by the Commission."³³⁸ However, Mr. Williams testified that his review of the filed tariffs implementing DP&L's ESP I revealed that there was no tariff filed that implemented the IIR.³³⁹ Nor was there a placeholder rider filed and approved for future collection of smart grid investments through the IIR.³⁴⁰ If the IIR tariff was not approved by the PUCO as part of ESP I, DP&L cannot now use it to charge customers for the SGP under the Settlement.

On November 25, 2019 (the same day that DP&L voluntarily chose to withdraw from operation under ESP III and revert to operation under ESP I), DP&L filed a Notice of Filing Proposed Tariffs in the ESP I case.³⁴¹ In that filing, DP&L represented to the PUCO that the IIR would be implemented "as [it] existed in 2017 *before the Commission's decision in ESP III*."³⁴² Attached to DP&L's filing was Tariff Sheet D29, which showed the ESP III SGR placeholder tariff with language redlined to reflect that the tariff was modified to be the IIR placeholder tariff that DP&L claimed was approved in ESP I.

³³⁸ *Id.* at 23; OCC Ex. 8 (ESP I Settlement) at 5.

³³⁹ OCC Ex. 6 (Williams Direct), at 17; Tr. Vol. 5 at 845-46; *See also* OCC Ex. 63 (DP&L 6/29/09 ESP I Tariff Filing).

³⁴⁰ *Id.*

³⁴¹ OCC Ex. 21 (DP&L 11/25/19 Notice of Filing of Proposed Tariffs, Case No. 08-1094-EL-SSO).

³⁴² *Id.* (emphasis added).

But the unrefuted evidence presented by OCC in this case demonstrates there was no IIR placeholder tariff previously in existence or approved by the PUCO as DP&L claimed in its November 25, 2019 Notice of Filing. Mr. Williams testified that while the PUCO appears to have since approved the IIR placeholder tariff DP&L filed on November 25, 2019, the PUCO could have mistakenly approved the tariff based on DP&L's misrepresentation that the IIR tariff previously existed (when in fact it did not).³⁴³

Because the IIR tariff was never properly filed or approved as part of ESP I, DP&L should not now be permitted to use it to charge customers millions of dollars for the SGP under the Settlement. Likewise, DP&L cannot simply change the name of the SGR (filed as part of ESP III) to "IIR" and use it to charge customers for the Smart Grid Plan. DP&L chose to withdraw from ESP III, and DP&L cannot now shoehorn the ESP III SGR into ESP I. DP&L cannot have its cake and eat it too, particularly where, as here, there is evidence that DP&L misled the PUCO, the PUCO Staff, and the OCC regarding the IIR tariff. The Settlement should be rejected for this reason alone.

b. The Settlement violates regulatory principles and practices because it would allow DP&L to charge customers under the IIR in a manner that contradicts ESP I as approved the by the PUCO.

As noted above, DP&L voluntarily chose to operate under ESP I when it withdrew from ESP III. Thus, the ESP I Settlement approved by the PUCO is still in effect and binding on DP&L. However, the Settlement at issue now, if approved by the PUCO, would allow DP&L to bypass its obligations under the ESP I Settlement. Accordingly, the PUCO should reject the Settlement because it violates regulatory principles and practices.

³⁴³ OCC Ex. 6 (Williams Direct), at 20-21.

OCC witness Williams explained that the ESP I Settlement requires DP&L to file independent business cases for AMI and Smart Grid proposals.³⁴⁴ And under the ESP I Settlement, *only* AMI and Smart Grid business cases that demonstrate a positive benefit-cost analysis can be filed for approval at the PUCO.³⁴⁵ The ESP I Settlement further provides that the “IIR rate will recover prudently incurred costs related *solely* to [DP&L’s] AMI and Smart Grid approved plans.”³⁴⁶

In this case, however, the Settlement provides that “[t]he Signatory Parties *agree* that DP&L’s SGP Phase I produces a positive cost-benefit ratio for its customers on a nominal and net present-value basis, as shown on Exhibit 4.”³⁴⁷ This contradicts the standard in the ESP I Settlement that requires DP&L to present independent business cases for AMI and other Smart Grid proposals and demonstrate a positive cost-benefit before the IIR can be used to charge customers. Exhibit 4 to the Settlement does not demonstrate a separate positive business case for AMI and Smart Grid proposals.³⁴⁸ DP&L should not be allowed to bypass its obligations under the ESP I Settlement simply because the signatory parties to the Settlement in this case have agreed to do so.

The Settlement also allows DP&L to make investments in the SGP before the PUCO approves the Settlement and charge customers for those investments under the IIR.³⁴⁹ The costs must be incurred after December 21, 2018 or be included as part the Grid Mod R&D Asset

³⁴⁴ *Id.* at 24-25; OCC Ex. 8 (ESP I Settlement) at 5.

³⁴⁵ *Id.*

³⁴⁶ OCC Ex. 8 (ESP I Settlement) at 5 (emphasis added).

³⁴⁷ Joint Ex. 1 (Settlement) at 42 (emphasis added).

³⁴⁸ OCC Ex. 6 (Williams Direct) at 25.

³⁴⁹ Joint Ex. 1 (Settlement) at 7 (emphasis added).

deferral.³⁵⁰ This also contradicts ESP I because the collection of costs under ESP I for grid modernization are subject to prior approval by the PUCO.³⁵¹ However, the Settlement fails to identify the purpose of any costs, or the amount of such costs, that would be charged to customers under the IIR before PUCO approval of the Settlement. In addition, under the ESP I Settlement, only prudently incurred costs can be collected from customers.³⁵² The Settlement does not require DP&L to demonstrate prudence. Indeed, Mr. Williams testified that the audit provisions in the Settlement³⁵³ are primarily accounting audit provisions rather than provisions to determine if costs were prudently incurred.³⁵⁴

Mr. Williams also explained that the purpose and scope of the Grid Mod R&D Asset deferral is unclear, yet DP&L included \$10.7 million in the revenue requirement over the four-year SGP 1 term.³⁵⁵ Mr. Williams testified that costs DP&L incurred to prepare its distribution modernization plan filed while DP&L operated under ESP III should not be paid for by customers through the IIR, because DP&L no longer operates under ESP III. Costs associated with the preparation of DP&L's distribution modernization plan under ESP III should be paid for instead by DP&L's shareholders.

³⁵⁰ *Id.*

³⁵¹ OCC Ex. 8 (ESP I Settlement) at 5.

³⁵² *Id.*

³⁵³ Joint Ex. 1 (Settlement) at 7-9.

³⁵⁴ OCC Ex. 6 (Williams Direct) at 26.

³⁵⁵ *Id.*

c. The Settlement’s provisions regarding EV rebates and smart thermostats are beyond the scope of the AMI and Smart Grid programs permitted under ESP I. The Settlement violates regulatory principles and practices and should be rejected.

OCC witness Williams testified that the Settlement charges customers \$5.1 million under the IIR for an Electric Vehicle (“EV”) rebate program.³⁵⁶ The EV rebate program has nothing to do with the purpose of cost-effective independent AMI and Smart Grid proposals that are eligible for funding under IIR.³⁵⁷ According to Mr. Williams, EV charging infrastructure is a behind the meter competitive service that is well beyond DP&L’s responsibility to provide consumers with adequate, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.³⁵⁸ DP&L’s customers (particularly low income customers who cannot afford the high cost of EVs in the first place) should not be forced to subsidize EV incentives that benefit only a few customers who have means to purchase EVs.³⁵⁹ This plainly violates cost causation principles. Moreover, the PUCO has determined that it does not have jurisdiction over Electric Vehicle Charging Services,³⁶⁰ and the PUCO should reject any Settlement that forces DP&L customers to pay for EV rebates.

The Settlement also provides \$50,000 annually (or \$200,000 over the term of the Settlement) towards marketing and educating residential customers about the Smart Thermostat Rebate Program.³⁶¹ Mr. Williams testified that this money will be collected from customers

³⁵⁶ *Id.* at 28-29.

³⁵⁷ *Id.*

³⁵⁸ R.C. 4928.02(A).

³⁵⁹ OCC Ex. 6 (Williams Direct) at 29.

³⁶⁰ *In The Matter of The Commission’s Investigation Into Electric Vehicle Charging Services in the State*. Case No. 20-434-EL-COI, Finding and Order (July 1, 2020).

³⁶¹ Joint Ex. 1 (Settlement) at 30.

through a customer education line item that is part of the new IIR.³⁶² In addition, DP&L agreed to provide \$450,000 annually, funded by DP&L shareholders for four years to offer marketing, administration, and rebate/incentives for smart thermostats.³⁶³ Furthermore, the Settlement includes requirements where DP&L must propose, in any future IIR proceeding, that costs for smart thermostats be collected through the new IIR.³⁶⁴

Mr. Williams testified that smart thermostats are neither AMI nor Smart Grid proposals that qualify for funding under the ESP I IIR.³⁶⁵ Additionally, Mr. Williams explained that smart thermostats are after-the-meter products and services that are readily available at retail outlets on a competitive basis.³⁶⁶ Moreover, smart thermostats are unrelated to DP&L's obligation to provide efficient, safe, reliable, nondiscriminatory, and reasonably priced retail electric service.

Mr. Williams recommended that all costs associated with the smart thermostat rebate program be eliminated from the Settlement and testified that the Settlement should eliminate any provisions that require future DP&L grid modernization proposals to include funding for smart thermostats.³⁶⁷ Captive DP&L customers should not be required to subsidize the costs for smart thermostats for other customers who may have an interest in them. Finally, smart thermostats contribute to energy efficiency and peak demand reduction types of programs that were eliminated in Ohio effective January 1, 2021. Therefore, the Settlement is inconsistent with the Ohio mandate and PUCO Order to end energy efficiency programs by January 1, 2021.³⁶⁸

³⁶² OCC Ex. 6 (Williams Direct) at 29.

³⁶³ Joint Ex. 1 (Settlement) at 18.

³⁶⁴ Joint Ex. 1 (Settlement) at 20.

³⁶⁵ OCC Ex. 6 (Williams Direct) at 30.

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *In The Matter of the Application of The Dayton Power and Light Company For Approval of its Energy Efficiency And Peak Demand Reduction Program Portfolio Plan for 2018 – 2020*. Finding and Order (Nov. 18, 2020).

3. The Settlement violates the fundamental regulatory principle and Ohio policy, R.C. 4928.02, that every public utility shall furnish necessary and adequate service and facilities at just and reasonable prices.

It is the policy of the state of Ohio to ensure the availability of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.³⁶⁹ Sound utility regulatory principles, including those used by the PUCO, require the setting of regulated customer rates based on the cost of providing utility service plus a reasonable return on invested equity.³⁷⁰ The Settlement does not promote reasonably priced retail electric service and a cost-effective smart grid as required under the law.³⁷¹

The Settlement violates the fundamental regulatory principle that utility customers do not pay rates that subsidize non-regulated affiliate activities. The Settlement includes many provisions that do nothing more than continue energy-efficiency related programs.³⁷² For example, EV charging units and smart thermostat programs that have nothing to do with DP&L providing the core functionality of providing safe, reliable, and reasonably priced electric distribution service, or that are common in other smart grid programs approved by the PUCO.³⁷³ The Settlement violates this basic regulatory fundamental principle.³⁷⁴ Specifically, the Settlement approves the continuation of the stability charge for approximately the next four years, thereby charging utility distribution customers more than \$300 million unrelated to any investment or expense incurred by DP&L to provide utility service.³⁷⁵ Consequently, and

³⁶⁹ R.C. 4928.02.

³⁷⁰ See OCC Ex. 2 (Kahal Supplemental Testimony) at 23:1-9.

³⁷¹ See OCC Ex. 6 (Williams Testimony) at 10.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ See OCC Ex. 2 (Kahal Supplemental Testimony) at 23:9.

³⁷⁵ See OCC Ex. 2 (Kahal Supplemental Testimony) at 23:11-14.

contrary to Ohio policy, the Settlement fails to ensure that customers are provided with reasonably priced retail electric service.

a. The Rate Stability charge will lead to substantially higher and unreasonable rates for consumers in violation of R.C. 4905.22.

The Settlement unreasonably allows DP&L to collect the RSC over the next four years and requires customers to forfeit the 2018 and 2019 SEET refunds that the law entitles them.³⁷⁶

The RSC is an unlawful financial stability charge without any cost basis.³⁷⁷ And if the Settlement is approved (which it should not be) with the continuation of RSC for four years and the forfeiture of SEET refunds, it will lead to substantially higher and unreasonable rates for consumers.³⁷⁸

The stated purpose of the RSC is to provide a funding source, paid for by utility customers, needed to service the debt of an unregulated affiliate company—DP&L’s parent.³⁷⁹ DP&L makes it clear in its April 2020 testimony why it believes this charge is needed.³⁸⁰ But DP&L is wrong. The servicing of non-utility debt, totally unrelated to utility service, is not the responsibility of utility customers but rather the ultimate parent, AES Corporation.³⁸¹ The Settlement simply cannot be reconciled with accepted legitimate cost of service utility ratemaking principles.³⁸²

³⁷⁶ See OCC Ex. 4 (Duann Initial Testimony) at 8.

³⁷⁷ *Id.* at 22-24.

³⁷⁸ *Id.* at 8:1-2.

³⁷⁹ See OCC Ex. 2 (Kahal Supplemental Testimony) at 22:14-16.

³⁸⁰ *Id.* at 23:16.

³⁸¹ *Id.* at 12.

³⁸² *Id.* at 23.

Further, the PUCO previously ruled that the RSC was a provider of last resort charge (“POLR”).³⁸³ When it was originally authorized, DP&L owned power plants that were providing power to DP&L customers.³⁸⁴ Because DP&L owned the plants, it was able to provide POLR service to customers.³⁸⁵ Since the approval of DP&L’s ESP II in 2013, however, DP&L has not been providing POLR service. In the ESP II case, POLR obligations were shifted to the marketers who bid in competitive auctions to supply the standard service offer to DP&L’s customers.³⁸⁶ But since January 1, 2014, DP&L has procured 100% of the power for standard service through various rounds of competitive auctions.³⁸⁷ To allow DP&L to collect the RSC from customers now as a POLR charge would result in customers paying twice for POLR service.

DP&L’s standard service offer rate no longer has any relationship to DP&L’s power plants (which it no longer owns) or its generation rate (because it has no generation and thus no generation rate).³⁸⁸ Nor does DP&L provide any POLR service. The PUCO acknowledged this when it ruled in DP&L’s first ESP withdrawal that “POLR service is currently provided by competitive bidding process auction participants.”³⁸⁹ The Settlement, however, requires customers to keep paying DP&L \$79 million a year under the RSC.³⁹⁰ In other words, customers would be paying DP&L \$79 million a year for POLR service that DP&L does not provide.³⁹¹

³⁸³ See OCC Ex. 2 (Kahal Supplemental Testimony) at 24.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ *Id.*

This violates the most basic regulatory principle that utility customers do not pay their utility for a service that the utility does not provide.³⁹² Moreover, while DP&L attempts to justify the retention of the Rate Stabilization Charge for four years on the grounds that it fosters reliable service (and of course it does not), DP&L's testimony does not even seek to support or justify the Settlement provision that requires the forfeiture of customer refunds.³⁹³ Instead, it imposes unreasonable and non-cost-based charges on consumers and at the same time places an unfair cost burden on residential customers.³⁹⁴

b. The Settlement will not “ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service,” but instead subsidizes DP&L’s parent company.

The Settlement is inconsistent with sound regulatory principles and practices in several fundamental ways.³⁹⁵ The Settlement unreasonably departs from fundamental regulatory principles and practices by improperly and unlawfully subsidizing AES Corporation (DP&L's owner) with the rate stability charge.³⁹⁶ Because of the subsidy, the Settlement fails to meet the PUCO's settlement criteria that the Settlement does not violate important regulatory policies and practices.³⁹⁷ The PUCO should not approve this Settlement.

An additional problem is that the Settlement requires that utility customers forego refunds worth approximately \$150 million associated with extreme excess earnings in 2018 and 2019.³⁹⁸ As Dr. Duann demonstrated in his testimony, DP&L's actual return on equity (profits) in those

³⁹² *Id.*

³⁹³ *Id.* at 26:1-4.

³⁹⁴ *See* OCC Ex. 4 (Duann Initial Testimony) at 22.

³⁹⁵ *See* OCC Ex. 2 (Kahal Supplemental Testimony) at 4:13-17.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.*

two years were on the order of about 25%, or egregiously in excess of the cost of equity and the approved SEET ROE threshold of 12%.³⁹⁹ These high earnings were largely the result of DP&L's so-called Distribution Modernization Rider, which was terminated in response to the Supreme Court overturning FirstEnergy's similar charge.⁴⁰⁰ Unfortunately, DP&L customers never were refunded for the \$218 million they paid to DP&L before the charge was terminated.⁴⁰¹

The Settlement would harm customers once again by not providing refund to customers when the refunds are required under Ohio law. This effectively sanctions DP&L (and its parent AES Corporation) retaining these improper monopoly profits.⁴⁰² Regulatory principles require the setting of rates and utility compensation to avoid undue monopoly profits.⁴⁰³ In Ohio, utilities, through electric security plans, can have excessive earnings, just not *significantly* excessive earnings.⁴⁰⁴ The Settlement violates this principle. In both 2018 and 2019, DP&L's earnings were significantly excessive and should be refunded to customers consistent with Ohio law.⁴⁰⁵ The Settlement is inconsistent with the principles that utility rates should be based on the reasonable and necessary costs of providing utility service and avoiding undue or unreasonable monopoly profits.

³⁹⁹ *Id.* at 25.

⁴⁰⁰ *Id.* at 25.

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 25:11-13.

⁴⁰³ *Id.* at 25.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

The Settlement also harms customers by setting rates for the purpose of funding or subsidizing an unregulated affiliate of the utility, contrary to R.C. 4928.17 and 4928.02(H).⁴⁰⁶

The Settlement does just that, and therefore must be rejected under the PUCO's third prong. The fact that the Settlement seems to have garnered support from certain intervening parties by providing some shareholder subsidized rate discounts to a few select customers and certain customer-funded cash and cash equivalent payments, does not salvage the validity of the Settlement.⁴⁰⁷ Accordingly, the PUCO should not approve this Settlement.

It violates basic regulatory principles when captive customers subsidize utilities and their unregulated affiliates. In terms of economic development, power is at the base of every supply chain in the state, cushioning utilities from competition, subsidizing their loss-making decisions, and allowing gold-plating of transmission and distribution assets means increased operating costs, loss in competitive advantage, and economic deterioration. For residential customers the implication is clear, their electricity costs go up and their opportunity for work goes down. This results in residential customers paying unjust and unreasonable utility rates.

4. The Settlement will not protect at-risk populations.

OCC witness Dr. Duann explained in this testimony that it is well known that the economy in DP&L's service territory has been struggling in recent years and the poverty rates in the Dayton area have always been among the highest in Ohio.⁴⁰⁸ And allowing DP&L to keep the \$450-470 million unwarranted charges, to impose substantial additional costs of a Smart Grid Plan and coupled with a pending \$121 million distribution rate increase is no way to protect the

⁴⁰⁶ *Id.* at 23:4-9.

⁴⁰⁷ *Id.* at 26:6-16.

⁴⁰⁸ *See* OCC Ex. 4 (Duann Initial Testimony) at 23.

“at risk” population.⁴⁰⁹ The Settlement therefore violates the important public policy of protecting at-risk populations.

5. The Settlement will not “facilitate the state's effectiveness in the global economy.”

The Settlement forces many Ohioans to provide hundreds of million subsidies, through an illegal financial stability charge and forfeiture of mandated refunds, to DP&L and its owners.⁴¹⁰ Dr. Duann testified that the Settlement, if approved, will adversely affect the livelihood of many Ohioans and the Ohio economy.⁴¹¹ Residential customers, small business owners, and manufacturing plants will be required to pay a higher monthly electricity bills than they otherwise would and the money that could be spending on other daily expenses, investing in new machines, or hiring new employees are diverted to DP&L.⁴¹² There are numerous studies indicating that energy costs are a significant factor in retaining and attracting new business into a particular region.⁴¹³ The dramatic and unjustified additional cost of electric service being imposed on the DP&L’s customers, as a result of the Settlement, will not promote economic development in DP&L’s service territory.⁴¹⁴ Therefore, this Settlement will not advance Ohio’s competitiveness and effectiveness in the new global economy.⁴¹⁵

Further, by denying customers refunds to which they are entitled under the SEET, the Settlement violates R.C. 4928.143(F)—the statute requiring such refunds—and the Supreme Court’s recent ruling that DMR funds are included when calculating a utility’s ROE for purposes

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.* at 23-24.

⁴¹⁵ *Id.*

of the SEET.⁴¹⁶ The Settlement would force many Ohioans to provide hundreds of millions of dollars of subsidies to DP&L through an illegal rate stability charge and forfeiture of mandated refunds.⁴¹⁷ Moreover, the Settlement will adversely affect the livelihood of many Ohioans and the Ohio economy if approved.⁴¹⁸

Any settlement that violates a statute and Supreme Court of Ohio precedent is contrary to the regulatory principle that PUCO decisions must follow the law.⁴¹⁹ And this Settlement will inhibit instead of advancing Ohio's competitive retail electric services set forth in R.C. 4928.02.⁴²⁰ If approved, the Settlement will result in unreasonable and substantially higher utility rates than justified.⁴²¹

The PUCO must protect consumers from overpaying for electric utility services. The PUCO should reject the Settlement because it results in unjust and unreasonable charges.

IX. DP&L'S WAIVER OF TRADE SECRET CLAIMS

A. The PUCO should reverse the Attorney Examiner's ruling that confidential trade secret information revealed by DP&L on the public record during the hearing can nonetheless be redacted from the transcript and hidden from public view.

On the first day of the hearing in these consolidated cases, DP&L witness Malinak revealed, on the public record, the amount of the hypothetical "Financial Integrity Charge" that DP&L believes would be approved in an MRO, and which DP&L had previously marked

⁴¹⁶ *Id.* at 22.

⁴¹⁷ *Id.* at 8.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 22.

⁴²⁰ *Id.*

⁴²¹ *Id.* at 8:5-8.

confidential.⁴²² His statements were made during a hearing that was open to the public and attended by any number of individuals who did not sign a protective agreement or otherwise agree to keep DP&L's trade secrets confidential. Over OCC's objection, the Attorney Examiner ruled that the information would be redacted from the public transcript, even though it was revealed to the public.⁴²³ The PUCO should reverse the Attorney Examiner's ruling because the information was made public by DP&L's own witness and is therefore no longer a trade secret under Ohio law.

There is a "strong presumption" that citizens have a right to access information and documents involving governmental proceedings.⁴²⁴ Under R.C. 4901.12, "all proceedings of the public utilities commission and all documents and records in its possession are public records," with limited exceptions. R.C. 4905.07 similarly says that "all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys," again, subject to limited exceptions. To overcome the strong presumption in favor of public disclosure, the party that seeks to keep information private (here, DP&L) bears the burden of proving that "state or federal law prohibits release of the information."⁴²⁵

⁴²² Tr. Vol. I at 51.

⁴²³ Tr. Vol. I at 52-53.

⁴²⁴ *In re Joint Application of the Ohio Bell Tel. Co. & Ameritech Mobile Servs., Inc. for Approval of the Transfer of Certain Assets*, No. 89-365-RC-ATR, 1990 Ohio PUC LEXIS 1138, at *5 (Oct. 18, 1990).

⁴²⁵ Ohio Adm. Code 4901-1-24(D) (PUCO may redact documents "to the extent that state or federal law prohibits release of the information, including where the information is deemed ... to constitute a trade secret under Ohio law"). See also *In re Application of Jay Plastics Div. of Jay Indus., Inc. for Integration of Mercantile Cust. Energy Efficiency or Peak-Demand Reduction Programs with the Ohio Edison Co.*, Case No. 13-2440-EL-EEC, 2015 Ohio PUC LEXIS 139, at *6 ("an entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy") (Feb. 11, 2015).

Under R.C. 1333.61(D), information is a trade secret only if it satisfies two conditions: “(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use,” and “(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

As the United States Supreme Court has unambiguously stated, “If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished.”⁴²⁶ The Ohio Supreme Court has followed. In *Rea v. Ohio Department of Education*, it concluded that “once material is publicly disclosed, it loses any status it ever had as a trade secret.”⁴²⁷ The PUCO has done the same as well.⁴²⁸ In other words, this precedent stands for the proposition that when a party publicly reveals its trade secrets, it has irreversibly failed to make “efforts that are reasonable under the circumstances to maintain its secrecy,” as required by R.C. 1333.61(D).

That is precisely what happened here. At an administrative hearing before the PUCO, in which the public was allowed to and in fact did attend, DP&L revealed two pieces of information that it had previously claimed were trade secrets (the high and low amounts of its proposed hypothetical Financial Integrity Charge). Under binding Ohio Supreme Court precedent, therefore, the information “loses any status it ever had as a trade secret.”⁴²⁹

⁴²⁶ *Ruckelhaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984).

⁴²⁷ 81 Ohio St.3d 527, 533 (1997) (citing *Ruckelhaus*). See also *State ex rel. Lucas County Bd. of Commissioners v. Ohio EPA*, 88 Ohio St.3d 166, 174-75 (2000) (quoting *Rea*).

⁴²⁸ See, e.g., *In re Joint Application of SBC Commc’ns Inc.*, Case No. 98-1082-TP-AMT, Entry ¶ 4 (July 28, 2003) (information had been “largely publicly disclosed and, therefore, [did] not constitute a trade secret, as defined in Section 1333.61(D), Revised Code”).

⁴²⁹ 81 Ohio St.3d 527, 533 (1997) (citing *Ruckelhaus*).

On rehearing, the PUCO should reverse the Attorney Examiner's ruling that information revealed by DP&L on the public record during the hearing can nonetheless be redacted from the transcript and hidden from public view. It is no longer a trade secret and the disclosure cannot be taken back.

X. CONCLUSION

Customers desperately need their government—the PUCO—to step up and protect them from the raw-deal Settlement. They have paid hundreds of millions of dollars under DP&L's "Distribution Modernization Rider"—an unlawful charge that the PUCO later eliminated. They are never getting that money back. The Settlements piles more on: another \$300 million in unlawful subsidies under a "Rate Stabilization Charge" that is identical to the unlawful Distribution Modernization Rider, just slightly lower (\$79 million per year instead of \$105 million). And the Settlement allows DP&L to keep \$150 million of significantly excessive profits rather than returning them to customers, even though, in a sad twist of irony, those profits are sourced almost entirely from the unlawful Distribution Modernization Rider. On top of this, the Settlement would require customers to pay more than \$100 million over four years for "grid modernization" investments that will not deliver anywhere near that much in benefits.

In short, the Settlement is a sweetheart deal for DP&L, which gets hundreds of millions of dollars in free money, and many signatory parties, which get cash payments in exchange for their signatures. It is an abomination for the many customers—including residential customers—who are stuck footing the bill.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Initial Brief was served on the persons stated below via electronic transmission this 12th day of February 2021.

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Summary: Brief Initial Brief for Consumer Protection by Office of The Ohio Consumers'
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