BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Dayton Power and Light Company for Approval of its Plan to Modernize its Distribution Grid.	))))	Case No. 18-1875-EL-GRD
In the Matter of the Application of the Dayton Power and Light Company for Approval of a Limited Waiver of Ohio Adm. Code 4901:1-18-06(A)(2).	))))	Case No. 18-1876-EL-WVR
In the Matter of the Application of the Dayton Power and Light Company for Approval of Certain Accounting Methods.	)))	Case No. 18-1877-EL-AAM
In the Matter of the Application of the Dayton Power and Light Company for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm. Code 4901:1-35-10 for 2018.	))))))	Case No. 19-1121-EL-UNC
In the Matter of the Application of the Dayton Power and Light Company for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm. Code 4901:1-35-10 for 2019.	))))))	Case No. 20-1041-EL-UNC
In the Matter of the Application of The Dayton Power and Light Company for a Finding that its Current Electric Security Plan Passes the Significantly Excessive Earnings Test and the More Favorable in the Aggregate Test in R.C. 4928.143(E).	))))))	Case No. 20-680-EL-UNC

REPLY BRIEF FOR CONSUMER PROTECTION
BY
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(PUBLIC VERSION)

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I. INTRODUCTION

DP&L's Settlement suffers from a failure of proof. What is proven is that the Settlement advances the *special interests* of the utility and the signatory parties, instead of the *public interest* that should be paramount. DP&L has failed to prove, even under the 2008 law that has been interpreted so favorably to utilities, that its current electric security plan ("ESP") is more favorable in the aggregate than a market rate offer ("MRO"). The evidence demonstrates the opposite—that a market rate offer would be substantially more favorable to Dayton-area consumers, and all the more so during their struggles with the pandemic and financial crisis.

DP&L and others signing the settlement (who OSU Professor Hill calls the "redistributive coalition," for their redistributing of wealth to themselves) want to reframe the responsibility of the PUCO and commissioners as being to them, the *special interests*. But the responsibility of the PUCO and its commissioners is to the *public interest*, meaning all consumers. Contrary to what the wealth redistributors like DP&L want, the PUCO and its commissioners are not to be beholden (in settlements or in anything) to those like the utilities who know how to work PUCO settlements, to those like utilities who have cash to throw around in settlements, and to the relative few with the knowledge and resources to show up at 180 East Broad Street. The PUCO is supposed to regulate for *everybody* in Ohio. That should mean rejecting the DP&L settlement.

DP&L has failed to prove that its electric security plan is not substantially likely to result in significantly excessive profits over the next three years. The evidence demonstrates the opposite—that continuation of the ESP, and especially continuation of the unlawful "rate stabilization charge," would result in significantly excessive profits. DP&L has failed to prove that its profits were not significantly excessive in 2018 and 2019. The evidence demonstrates the

opposite—that DP&L owes customers more than $150 million in refunds based on the significantly excessive profits it has earned.

And the signatory parties have failed to prove that the Settlement meets the PUCO's three-part test. The evidence demonstrates the opposite—that the Settlement fails all three parts because it was not the product of serious bargaining, it does not benefit customers or the public interest, and it violates important regulatory principles and practices.

The PUCO should (i) find that DP&L's ESP is less favorable in the aggregate than an MRO, (ii) find that DP&L's ESP is substantially likely to result in significantly excessive profits, (iii) terminate DP&L's ESP and order DP&L to transition to an MRO, (iv) order DP&L to pay customers $150 million in refunds for DP&L's significantly excessive profits in 2018 and 2019, and (v) reject the Settlement, including DP&L's smart grid plan.

It is especially important that the PUCO protect consumers in light of the ongoing pandemic, the financial hardships it has caused, and the abject poverty experienced by Dayton-area consumers, even before the pandemic.[1]

II. REPLY

A. The Settlement is the product of a "redistributive coalition" because it serves primarily as a vehicle for benefitting the signatory parties to the detriment of non-signatories (who are the general public responsible for paying the increased charges on DP&L's customers' bills).

OCC witness and OSU Professor Edward Hill testified that the Settlement is the product of a "redistributive coalition."[2] That means the Settlement takes the money of many people (*i.e.*, residential customers and nonresidential customers that did not sign the Settlement) and

[1] *See* https://www.development.ohio.gov/files/research/p7005.pdf.

[2] OCC Initial Brief at 37-44.

redistributes it to DP&L and various signatory parties who signed on to obtain the largesse. The PUCO not only has condoned this practice (only rarely criticizing it), but it enables it through its settlement standard and rulings.

Several signatory parties challenge our characterization of the Settlement.[3] These attempts to refute Dr. Hill's testimony, however, demonstrate the parties' fundamental misconception about what a redistributive coalition is—and why it harms the public interest (consumers).

The first line of attack from the signatory parties is a claim that the Settlement is not a redistributive coalition because in addition to the cash payments to signatory parties, there are some benefits of the Settlement that accrue to all customers.[4] This misses the point entirely.

Nothing in Dr. Hill's testimony says that a redistributive coalition secures zero benefits for non-signatory parties. Obviously, there are some benefits to non-signatory parties under the Settlement (though they are scant when compared to the massive costs imposed on those same customers). The point is that regardless of any general benefits to customers, the signatory parties have secured cash benefits for themselves while (through their signatures) paving the way for DP&L to charge a lot more money to the many customers who are not involved in pay to play. That is what makes it a redistributive coalition. The result is redistributive, meaning money is being redistributed (and not in a good way for many).

The Ohio Manufacturers' Association ("OMA") is among those opposing OCC and OCC's witness, Professor Hill, for asking the PUCO to stop the practice of utilities using cash or

[3] *See* OMA Brief at 20, Kroger Brief at 9, DP&L Brief at 9.

[4] OMA Brief at 20 (claiming that the Settlement provides a "multitude of benefits ... which will benefit all customers"); Kroger Brief at 9 ("the Signatory Parties secured large concessions from DP&L which will result in benefits to all customers"); DP&L Brief at 9 ("those are benefits to <u>all</u> of DP&L's customers") (emphasis in original).

cash equivalents in PUCO settlements to induce settlement signatures (which is a practice that results in higher utility charges to many others including consumers and other businesses). In response, we commend OMA for its good advocacy, in earlier PUCO cases, against redistributive coalitions and for OMA's use of our very same witness, Professor Hill, to make OMA's case against redistributive coalitions in those earlier cases.[5] We are carrying forward OMA's earlier good work on this issue.

The second argument the signatory parties raise is that because there are many signatory parties, there is no small, homogeneous group, which is required for a redistributive coalition.[6] This again shows the signatory parties' misunderstanding of redistributive coalitions. For example, DP&L says that the signatory party group is not small because only OCC opposes the Settlement.[7] DP&L is seemingly comparing the twenty signatory parties to the one opposing party (OCC) and insinuating that because there are many more signatory parties than opposing parties, the signatory party group is large.

But as Dr. Hill testified, the point is that 20 signatory parties is tiny compared to the total population of DP&L customers.[8] In other words benefits to the few are made at the expense of many. There are hundreds of thousands of residential customers whose statutory advocate (OCC)

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[5] *See In re Application of [FirstEnergy] for Authority to Provide for a Standard Serv. Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing ¶ 221 (Oct. 12, 2016); OCC Ex. 3 (Hill Testimony) at 4 (referencing his testimony on behalf of OMA in that case); *In re Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion & Order (Mar. 31, 2016); OCC Ex. 3 (Hill Testimony) at 4 (referencing his testimony on behalf of OMA in that case).

[6] OMA Brief at 20 (arguing that the signatory parties are not a small group because they "include twenty separate entities, which represent diverse interests"); Kroger Brief at 10 ("the Signatory Parties represent the diverse interests of a large, heterogenous group of DP&L customers across a wide range of customer classes"); DP&L Brief at 9 ("[H]is definition of a redistributive coalition as a small group misses the mark here. Only one party, OCC, challenges the Stipulation.").

[7] DP&L Brief at 9.

[8] *See* OCC Ex. 3 (Hill Testimony) at 7 ("The members of a redistributive coalition are small in number *relative to the rest of the population*.") (emphasis added).

actively opposes the Settlement, and thousands of small and large businesses who are not represented by any party in this proceeding. It is *that* group against whom the size of the redistributive coalition is compared. Thus, when properly measured, the signatory party group is exceedingly small and easily satisfies the condition that a redistributive coalition be small in relation to the general population. And because of their small size and narrow self-interest, they do not represent the public interest at large.

The third signatory party challenge is that there is no redistributive coalition because PUCO proceedings are open to all and the PUCO did not prevent anyone from participating.[9] OMA argued, "Unless OCC asserts that the Commission should direct parties to participate, or that interested parties should actively seek benefits from competitors without contribution, there is nothing preventing an interested party from participating in the proceeding or subsequent negotiations."[10] This argument fails.

The PUCO may not have actively prohibited any party from intervening. But there are material, functional limits on people's ability to participate in PUCO proceedings. As Dr. Hill testified, it is difficult for outsiders to join the redistributive coalition because joining requires time, money, expert knowledge, and access to attorneys who know about PUCO proceedings and how they work.[11] In fact, the redistributive coalition works precisely *because* the process is, on its face, open to everyone. This gives it the *veneer* of openness when in practice, only a select

[9] OMA Brief at 20 ("there is nothing preventing an interested party from participating in the proceeding or subsequent negotiations").

[10] OMA Brief at 20.

[11] OCC Ex. 3 (Hill Testimony) at 8-9 (it is "difficult and expensive to organize" a redistributive coalition, which prevents outsiders from joining; coalitions make proposals that are "as opaque and technical as possible," thus making it "harder for others to join the coalition"; the "cost of obtaining and understanding the information [] keeps the policy arena an insider's game").

few are realistically able to access the process and secure benefits like the ones secured by some of the signatory parties.

Fourth, OMA argues that there is no redistributive coalition because the payments to signatory parties come from DP&L's shareholders, not customers.[12] OCC explained in its initial brief why this claim is false. DP&L's characterization of the Settlement cash not coming from consumers is pure artifice. The $30 million in cash or cash equivalents to the signatory parties were offered *only* because the signatory parties agreed that DP&L can continue to collect from customers $79 million per year Rate Stabilization Charge for four more years.[13] Without the RSC, DP&L would not have agreed to the $30 million in payments to signatory parties. DP&L no doubt adds and subtracts before it makes settlement offers. DP&L is nothing more than a conduit to this single transaction, taking $300 million in customer money under the RSC and transferring $30 million of that to certain signatory parties.

Finally, Kroger argues that Dr. Hill's testimony on the redistributive coalition is "flawed in principle" because, according to Kroger, "no stipulation—even one that was totally uncontested—would ever satisfy the test for approval."[14] This is not Dr. Hill's testimony at all. Dr. Hill's testimony is that the PUCO should not, as a matter of public policy, approve settlements that include cash or cash equivalent payments to signatory parties.

One counterexample would be the settlement in DP&L's most recent base rate case. In that settlement—signed by Kroger, OCC, and others, and unopposed by OMA and others—parties reached agreement on numerous issues that affect *all* customers, including rate of return,

[12] OMA Brief at 21.

[13] OCC Initial Brief at 74.

[14] Kroger Brief at 10.

rate base, operating income, tax issues, rider caps, decoupling, the fixed customer charge, and other issues, but *without* any cash or cash equivalent payments to signatory parties.[15]

Our above example is about the *public interest*, not about the *special interests* like Kroger and DP&L. This is the Kroger that for its signature obtained from DP&L a special benefit for its supermarkets, and not a benefit for supermarkets generally in the Dayton area.

The wealth redistributors like DP&L, Kroger and others want to reframe the responsibility of the PUCO (and its commissioners) as being to them, the *special interests*. As stated, they are part of what OSU Professor Hill calls the "redistributive coalition," for their redistributing of wealth to themselves. But the responsibility of the PUCO and its commissioners is to the *public interest*, meaning all consumers. Contrary to what the wealth redistributors like DP&L want, the PUCO and its commissioners are not to be beholden (in settlements or in anything) to those like the utilities who know how to work PUCO settlements, to those like utilities who have cash to throw around in settlements, and to the relative few with the knowledge and resources to show up at 180 East Broad Street. The PUCO is supposed to regulate for *everybody* in Ohio. That should mean rejecting the DP&L settlement.

If the PUCO approves the Settlement, it will perpetuate bad public policy by allowing redistributive coalitions to thrive and harm the public interest.

[15] *In re Application of the Dayton Power & Light Co. for an Increase in its Elec. Distrib. Rates,* Case No. 15-1830-EL-AIR, Opinion & Order (Sept. 26, 2018).

B. Customers deserve $150 million in refunds based on DP&L's significantly excessive profits in 2018 and 2019.

1. The Ohio Supreme Court's ruling in Ohio Edison does not give the PUCO discretion to exclude DP&L's DMR revenues when assessing DP&L's profits derived from its electric security plan

In its initial brief, DP&L argues that when the PUCO conducts its review of DP&L's electric security plan profits for 2018 and 2019, it should exclude the $105 million (before tax) revenues per year coming from the Distribution Modernization Rider.[16] The PUCO must reject this argument for at least two reasons.

First, it contradicts Ohio Supreme Court precedent. As OCC explained in its initial brief, the Court ruled, in a recent opinion affecting Ohio Edison (a FirstEnergy company), that the PUCO was *required* to include Distribution Modernization revenues authorized under a utility's electric security plan when assessing profits under Ohio law.[17]

The Court could not have been more clear: "On remand, we instruct the commission to conduct a new SEET proceeding *in which it includes the DMR revenue in the analysis*, determines the SEET threshold, considers whether any adjustments under R.C. 4928.143(F) are appropriate, and makes any other determinations that are necessary to resolve this matter."[18] Thus, while the Court left open the possibility of the PUCO making other adjustments under R.C. 4928.143(F), the Court explicitly prohibited an adjustment that excludes the DMR from the analysis. And as OCC explained in its initial brief, the PUCO has already ruled that DP&L's DMR is no different than FirstEnergy's DMR.[19]

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[16] DP&L Initial Brief at 33-40.

[17] OCC Initial Brief at 24-27.

[18] *In re Ohio Edison Co.*, 2020-Ohio-5450, ¶ 65 (emphasis added).

[19] OCC Initial Brief at 25-26.

Second, even if the PUCO had discretion to exclude the DMR from the profits review (which it does not), DP&L's alleged justifications for doing so have no basis in law or precedent. For example, DP&L claims that its DMR earnings are not an "earned return" because DP&L could not use the money to pay dividends to its ultimate parent, AES.[20] But as OCC witness Dr. Daniel Duann testified, DP&L did paid dividends to its direct parent, DPL Inc., including $43.8 million in 2018 and $95 million in 2019.[21] What DPL Inc. does with that money after it leaves DP&L's hands is not determinative of whether DP&L's profits were significantly excessive. And DP&L cites no precedent for this argument because there is none.

The statutory test focuses on revenues approved under a utility's electric security plan. If revenues are approved under a utility's electric security plan, they must be included in the profits review. It is that simple.

DP&L then argues that the DMR should be excluded from the profits review because it was limited in duration to three years and thus an "extraordinary and one-time item."[22] The PUCO should reject this claim because it would effectively render the entire SEET meaningless. *All* ESP charges are limited in duration to the length of the ESP (or shorter). As OCC witness Duann testified, if the PUCO were to adopt DP&L's logic, every ESP charge in every case would be a "one-time item," so the entire ESP would have to be excluded from the SEET.[23] This plainly violates the consumer protection of the SEET as found in R.C. 4929.143(F). And again,

[20] DP&L Initial Brief at 33-37.

[21] OCC Ex. 5 (Duann Supplemental Testimony) at 15.

[22] DP&L Initial Brief at 37-39.

[23] *See* OCC Ex. 5 (Duann Supplemental Testimony) at 18 ("every ESP approved by the PUCO has a fixed term...If the DMR as a provision of an approved ESP is considered as a special, non-recurring item, then all provisions in an ESP can be claimed as special items and not be included in earnings for SEET review").

DP&L cites no cases in which the PUCO has found that a core provision of an ESP is nonetheless an "extraordinary" item that can be excluded from the SEET.

Finally, DP&L claims that its DMR revenues should be excluded from the profits review because they constitute a "capital charge," meaning that they were "targeted at altering DP&L's capital structure."[24] But as OCC witness Duann testified, "capital charge" appears to be a made-up term—it is not a recognized term in economics or finance.[25] Indeed, the SEET statute, R.C. 4928.143(F) makes no reference to excluding a "capital charge," and the PUCO has never found that a utility's profits should be excluded from the SEET because they constitute a "capital charge." DP&L, once again, cites no precedent for this argument.

In sum, two things are true. The PUCO has already ruled that DP&L's DMR is the same as FirstEnergy's. And the Supreme Court of Ohio has already ruled that FirstEnergy's DMR must be included for purposes of the SEET. It therefore follows that DP&L's DMR must be included for purposes of the SEET. The PUCO has no choice but to follow the law. The law, as interpreted and applied by the Supreme Court, requires all electric security plan provisions to be considered in the profits review.

2. The PUCO should reject DP&L's and the Staff's proposals to use a return on equity threshold higher than 12.0%.

There is no dispute that ESP III included a SEET threshold of 12.0%, meaning any profits above a 12.0% return on equity would be considered significantly excessive and refundable to customers. Nor is there any dispute that DP&L operated under ESP III for the entirety of 2018 and all but the final two weeks of 2019. Despite this, DP&L and the PUCO Staff

[24] DP&L Initial Brief at 39-40.

[25] OCC Ex. 5 (Duann Supplemental Testimony) at 16.

argue that the 12.0% threshold should not be used for 2018 or 2019.[26] The PUCO should reject these arguments.

DP&L's first justification for using a higher threshold is that "the ESP III Stipulation has been terminated."[27] This is irrelevant. The SEET is, by its very nature, a retrospective test. It looks at what took place in the past. In 2018, ESP III was in place for the entire year. In 2019, ESP III was in place for the entire year up to December 18, 2019. The fact that the ESP III stipulation was later terminated is meaningless. Indeed, because ESPs are approved for a term of years, they regularly expire. By DP&L's logic, it could similarly agree to a specific SEET threshold as part of an ESP, and if that ESP's term expired before the PUCO got around to the backward-looking profits review, the agreed-upon threshold would no longer apply. This clearly makes no sense. The only thing that makes sense is to look at the ESP as it existed during the year in the profit (SEET) review.

Next, DP&L claims that "DP&L's agreement to that 12% threshold in ESP III was plainly contingent upon the DMR being excluded from the SEET."[28] This is false. The approved ESP III settlement says nothing of the sort. It says that the SEET threshold will be 12%. And in a separate sentence it says that the DMR will be excluded from the SEET. Nowhere does it say that the SEET threshold will be 12% *because* the DMR will be excluded from the SEET. OCC witness Duann testified on this point, explaining that the two are unrelated.[29] Thus, it is logical and consistent for the PUCO to enforce the 12% SEET threshold, which was in effect during

[26] DP&L Initial Brief at 49-50; PUCO Staff Initial Brief at 34-35.

[27] DP&L Initial Brief at 49.

[28] DP&L Initial Brief at 50.

[29] Tr. Vol. V at 897.

2018 and 2019, but to also follow the Supreme Court of Ohio's ruling that the DMR revenues be excluded from the analysis.

The Staff also declines to use the 12.0% threshold. Confusing the issue, the PUCO Staff says, "Under DP&L's ESP I there is not an established SEET threshold for 2018 and 2019."[30] It is not clear what this even means, certainly with respect to 2018, given that ESP I was not in effect at any point in 2018. And ESP I was only in effect for 13 days in 2019. Further, as OCC explained in its initial brief, the PUCO *has* adopted a 12.0% SEET threshold in retrospective SEET cases involving ESP I.[31]

Finally, OMA, while not taking any position on what the SEET threshold should be, claims that it is "unlikely that the Commission would adopt an ROE threshold in this case" of 12.0% because it is lower than what Staff recommends and because it has approved higher SEET thresholds in other cases.[32] It is not clear why approval of a 12.0% SEET threshold would seem so unusual for DP&L. The PUCO has approved a 12.0% SEET threshold in cases involving DP&L's ESP I—and DP&L's ESP II—and DP&L's ESP III.[33] In fact, the PUCO has never adopted a SEET threshold for DP&L of anything *other* than 12.0%. Thus, contrary to OMA's claims that a 12.0% threshold is inconsistent with PUCO precedent, a 12.0% threshold is the *only* one that is consistent with previous SEET cases involving DP&L.

[30] PUCO Staff Initial Brief at 32.

[31] OCC Initial Brief at 34.

[32] OMA Initial Brief at 16-17.

[33] *See* OCC Initial Brief at 34.

3. The PUCO should reject DP&L's self-serving "adjustments" to its 2018 and 2019 earnings because they lack any basis in law or precedent and result in financial harm to consumers.

To avoid the inevitable conclusion that its profits were significantly excessive in 2018 and 2019, DP&L offers a variety of "adjustments" that manipulate the profits review (in favor of DP&L and to the detriment of consumers), none of which the PUCO has ever adopted in more than a decade of SEET proceedings.

First, DP&L claims that it should be allowed to add more than $1 billion in equity to its 2018 and 2019 equity balance because of generation write-offs that occurred between 2012 and 2016.[34] The effect of the adjustment is to reduce, on paper only, DP&L's profits. As OCC explained in its initial brief, this is pure fiction, and DP&L has cited no precedent for it.

DP&L also claims that the PUCO should adopt this adjustment because it has previously found that divestiture of generation is an "extraordinary event" that can be excluded from the SEET.[35] But no such event took place in the years in question, 2018 and 2019. The generation divestitures took place between 2012 and 2016, as DP&L witness Malinak testified. Thus, even if the PUCO were to conclude that these were extraordinary events, they were not extraordinary events in the years in question, so they have no bearing on the 2018 and 2019 profits review.

Second, DP&L argues that it should be allowed to retroactively add $300 million in equity investments ($150 million made in 2020 and $150 million that might be made in 2021) to its equity balances for 2018 and 2019.[36] The effect of the adjustment is to reduce, on paper only, DP&L's profits. As OCC explained in its initial brief, this is a phantom accounting adjustment

[34] DP&L Initial Brief at 41.

[35] DP&L Initial Brief at 42.

[36] DP&L Initial Brief at 44-45.

designed solely to manipulate the SEET in favor of DP&L.[37] DP&L cites no precedent for this adjustment.

Third, DP&L asks the PUCO to reduce its 2019 earnings by $18 million because of a "tax event" associated with the Tax Cuts and Jobs Act of 2017.[38] As with DP&L's other adjustments, this lowers DP&L's profits on paper only. DP&L cites no precedent for this type of adjustment. Further, as OCC witness Duann explained, DP&L provided no support for the calculation of the $18 million figure, and this type of adjustment is "a normal part of doing business" for DP&L.[39] Thus, it is not the type of extraordinary event that can be excluded from the SEET.

Finally, DP&L argues that if the DMR earnings are included for 2018 and 2019, the PUCO should then subtract more than $60 million in each year in hypothetical Rate Stabilization Charge earnings.[40] But as OCC witness Duann explained, this argument makes no sense because there were no such Rate Stabilization Charge earnings in 2018, and Rate Stabilization Charge earnings for 2019 were negligible because that charge did not go back into effect until December 19, 2019.[41] Further, RSC revenues have always been included in the SEET, so there is no basis to start excluding them now.[42] And DP&L cites no case in which the PUCO has made this type of adjustment.

In sum, as explained here and in OCC's initial brief, none of DP&L's SEET adjustments have any basis in law or precedent. They are all designed to manipulate the profits review by

[37] OCC Initial Brief at 27-29.

[38] DP&L Initial Brief at 46.

[39] OCC Ex. 5 (Duann Supplemental Testimony) at 26-27.

[40] DP&L Initial Brief at 46-47.

[41] OCC Ex. 5 (Duann Supplemental Testimony) at 27-28.

[42] OCC Ex. 5 (Duann Supplemental Testimony) at 27-28.

artificially reducing, on paper only, DP&L's profits. If DP&L's profits are reduced enough, there will be no refunds to customers. If the PUCO were to adopt these adjustments, it would be substituting its judgment for that of the General Assembly, effectively ruling that utilities can evade the consumer protection of the SEET through creative accounting that rewrites the past and the future.

C. The Settlement is an explicit agreement among the signatory parties to allow DP&L to continue charging customers for the Rate Stabilization Charge.

Two signatory parties, OMA and Industrial Energy Users-Ohio ("IEU"), attempt to distance themselves from the Settlement provision allowing the $79-milllion-per-year Rate Stabilization Charge to continue for four more years. For example, OMA claims that "[c]ustomers will pay the RSC for the next four years with or without the Settlement."[43] This is false. Under R.C. 4928.143(E), the RSC will only continue if the PUCO rules that DP&L's ESP I (currently in place) is more favorable in the aggregate than an MRO, and the PUCO rules that ESP I is not likely to result in significantly excessive profits. That is the very question that the PUCO is *required by law* to address in Case No. 20-680-EL-UNC. IEU similarly claims that the "Signatory Parties here are not recommending ... extension of the RSC."[44] Again, this is simply not true. The Settlement is an explicit agreement among the signatory parties that the RSC will continue and that customers will continue to pay $79 million annually under this charge. The RSC is the quid pro quo.

The Settlement does not mention the Rate Stabilization Charge by name. Nor does it cite the annual cost of the Rate Stabilization Charge: $79 million per year. Nor does it explicitly state

[43] OMA Initial Brief at 18.

[44] IEU Initial Brief at 2.

that under its terms, the $79 million charge will continue for around four more years following the filing of the Settlement (through late 2024). But that is exactly what the Settlement does.

As OCC explained in its initial brief, the key issue in Case No. 20-680-EL-UNC is whether DP&L's ESP I should continue, including the $79 million RSC.[45] If the ESP is found to be less favorable in the aggregate than a market rate offer, then the PUCO can order DP&L to terminate its ESP and transition to an MRO, thus eliminating the RSC and the $79 million annual charge that comes with it. But under the Settlement, the parties agreed that DP&L's ESP I is *more* favorable in the aggregate than an MRO, meaning the $79 million RSC continues, per agreement of the parties.[46] The Settlement is an explicit agreement among the signatory parties that the RSC will continue. And because DP&L will not file an application for its next ESP until October 2023, the RSC will continue until late 2024.[47]

The PUCO should reject the signatory parties' claims that the Settlement is not an agreement to continue the RSC. It is. No amount of obfuscation can change that. Nor can the signatory parties' claim change the fact that DP&L's ESP I is significantly less favorable in the aggregate than an MRO (primarily because of the RSC) and that it is substantially likely to result in significantly excessive profits (again because of the RSC).[48]

D. The Settlement does not ensure the termination of the collection of the Rate Stabilization Charge from consumers or similar financial integrity charges.

Several signatory parties argue that the Settlement benefits customers because it *guarantees* an end to the Rate Stabilization Charge or similar charges. Ohio Energy Group, for

[45] OCC Initial Brief at 6-20.

[46] Joint Ex. 1 (Settlement) at 43 ("the Signatory Parties agree that ... DP&L's ESP I as currently implemented passes the more favorable in the aggregate test and the prospective significantly excessive earnings test").

[47] OCC Ex. 2 (Kahal Supplemental Testimony) at 27 (new ESP will not be in place until "late 2024").

[48] *See* OCC Initial Brief at 6-20.

example, states that the Settlement "effectively ends the most controversial part of DP&L's ESP – the Rate Stability Charge ('RSC') – once the current ESP concludes."[49] Kroger claims that the Settlement "will ensure the elimination of the nonbypassable rate stabilization charge (RSC) or any similar successor charge."[50] OMA claims that the Settlement "ensures the elimination of the rate stabilization charge (RSC), and any similar or related charge in the company's next electric security plan."[51] And IEU similarly says that the Settlement "will end DP&L's collection of nonbypassable non-cost-based-charges like the current RSC."[52]

These statements do not accurately reflect what the signatory parties agreed to. First, as OCC explained in its initial brief, the only requirement is that DP&L's *application* in its next ESP case not include the RSC or a similar nonbypassable charge.[53] The Settlement does not prohibit DP&L from including an RSC or similar charge in a settlement in that ESP case.[54] Further, as Kroger and IEU point out, the Settlement only prevents DP&L from proposing a *nonbypassable* financial integrity charge. This might provide sufficient protection for large nonresidential customers who predominantly shop for their electricity, but it leaves open the door for DP&L to propose an onerous bypassable financial integrity charge, which would be paid by the hundreds of thousands of residential and small business customers that receive their generation from the competitively-bid SSO.

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[49] OEG Initial Brief at 4.

[50] Kroger Initial Brief at 5.

[51] OMA Initial Brief at 5. *See also* OMA Initial Brief at 12 ("the Settlement benefits customers by ensuring that they will no longer pay the RSC, or any substantially similar charge"); OMA Initial Brief at 14 (the Settlement "ensures that DP&L will not continue the RSC or replace the RSC with a new charge").

[52] IEU Initial Brief at 5.

[53] OCC Initial Brief at 72-73.

[54] *Id.*

The PUCO should reject any claim that the Settlement benefits customers by ending the RSC. To the contrary, it harms customers because the signatory parties agreed that customers—including residential customers—will continue to pay the RSC for another four years, totaling more than $300 million. And it leaves too much room for DP&L to continue financial integrity charges in 2024 and beyond.

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

DP&L's argument that its ESP is more favorable than an MRO relies almost entirely on the assumption that under an MRO, the PUCO would approve a "financial integrity charge" that is substantially larger than the $79 million per year RSC.[55] As OCC explained at length in its initial brief, this is a patently unreasonable assumption.[56] The most absurd assumption underlying DP&L's claim is that in an MRO, DP&L's parent company would refuse to make the promised $150 million equity infusion in 2021, but then the PUCO would step in and make DP&L's customers pay that same $150 million to ensure DP&L's financial integrity.[57] The idea that a utility's parent company could intentionally refuse to provide financial support for its utility subsidiary, and then expect the PUCO to require a customer-funded bailout to cover the parent company's intransigence is appalling. As OCC witness Kahal testified, DP&L's claim that an MRO would be more expensive than an RSC, based on the assumed financial integrity charge in an MRO, is unfounded.[58]

[55] DP&L Initial Brief at 53-56.

[56] OCC Initial Brief at 10-11.

[57] OCC Ex. 1 (Kahal Initial Testimony) at 35.

[58] *Id.*

Next, DP&L claims that its ESP is more favorable than an MRO because "MRO blending is no longer feasible."[59] DP&L argues that under an MRO, generation rates would be initially set such that the SSO auction would only account for 10% of the load in DP&L's service territory, with the remaining 90% based on DP&L's historical SSO rates.[60] But DP&L itself explains why this would not be feasible: that construct was designed to address the transition from utility-owned generation to market-based generation.[61] In fact, DP&L has previously acknowledged that SSO costs under an ESP and MRO would be the same—a position that the PUCO adopted.[62] Thus, if the PUCO were to order DP&L to move to an MRO, nothing would change with respect to DP&L's SSO auctions, which would continue to be 100% auction based. DP&L's "MRO blending" argument should be rejected.

DP&L also argues that it could charge customers for certain environmental costs under an MRO, thus making an ESP more favorable.[63] First, even if DP&L could include these environmental charges in an MRO, they do not outweigh the substantial costs that customers would pay for the RSC under an ESP. Second, under R.C. 4928.142(D) (the statute that DP&L relies upon), such a charge would not be allowed in an MRO if it would result in DP&L charging customers for significantly excessive profits. DP&L has failed to show that its profits would not be significantly excessive. To the contrary, with DP&L's proposed financial integrity charge and

[59] DP&L Initial Brief at 56-57.

[60] DP&L Initial Brief at 56-57.

[61] DP&L Initial Brief at 57.

[62] Case No. 16-395-EL-SSO, Opinion & Order ¶ 85 (Oct. 20, 2017) ("According to the Company, the SSO rates would be the same under either scenario."); ¶ 92 ("the SSO cost would be the same under either an ESP or an MRO").

[63] DP&L Initial Brief at 58.

the alleged environmental charges, DP&L's profits could be even greater than they are under its ESP, which has already been shown to be significantly excessive.

Finally, DP&L cites various qualitative factors that it believes support an ESP over an MRO.[64] OCC explained in its initial brief why these qualitative factors do not benefit customers. For example, DP&L's first qualitative factor is the $150 million investment that AES intends to make in 2021, but which AES will refuse to make if DP&L transitions to an MRO.[65] Counting this as a qualitative benefit for customers effectively tells utility parent companies that they can hold a gun to the PUCO's head, promising to make financial investments in Ohio utilities only if the PUCO does as the parent company says.[66]

DP&L also claims that customers benefit from an ESP because under an ESP, they might receive refunds under the SEET, whereas the SEET is not available under an MRO.[67] This argument is ironic, given that customers deserve $150 million in refunds in this very case, and DP&L has contorted the law and facts so wildly as to turn those $150 million in refunds to $0.

Broadly speaking, no amount of qualitative benefits makes up for the fact that under an ESP, customers will continue to pay DP&L $79 million per year in bailouts for DP&L's parent companies, thus making it worse for customers than an MRO.

F. Continuation of DP&L's electric security plan is substantially likely to result in DP&L earning significantly excessive profits.

DP&L argues that continuation of its electric security plan is not likely to result in significantly excessive profits.[68] According to DP&L, its average return on equity for years 2020

[64] DP&L Initial Brief at 58.

[65] DP&L Initial Brief at 58.

[66] *See* OCC Initial Brief at 14.

[67] DP&L Initial Brief at 58.

[68] DP&L Initial Brief at 60-63.

to 2023 under ESP I is projected to be [redacted] which would be below any applicable threshold for significantly excessive earnings under the SEET.[69] OCC witness Kahal explained why this claimed [redacted] return on equity is not credible. The primary flaw is that it suggests that DP&L's profits in 2020-2023 would be dramatically lower than they were in 2018 and 2019, with no evidence supporting such a theory.

As OCC witness Kahal testified, DP&L's return on equity was greater than 20% in each of 2018 and 2019.[70] And while DP&L's return on equity in 2020-2023 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 2020-2023, that alone cannot cause DP&L's profits to drop so precipitously from more than 20% to less than [redacted].[71] Thus, the PUCO should give no weight to DP&L's claim that its return on equity would be just [redacted] from 2020 to 2023. DP&L has failed to meet its burden of proving that its profits resulting from the continuation of ESP I would not be significantly excessive.[72]

G. DP&L can provide safe and reliable service to customers without the RSC—and it is required to do so by law.

DP&L claims that it "could not provide safe and reliable service to its customers without the RSC."[73] The PUCO should reject this claim as unsupported by the record and contrary to the law.

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[69] DP&L Initial Brief at 60 ("DP&L's ROE averages [redacted] over the 2020-2023 forecast period.").

[70] OCC Ex. 1 (Kahal Testimony) at 20.

[71] OCC Ex. 1 (Kahal Testimony) at 17-18 (ROE might be "slightly lower" because of the difference between the DMR and the RSC).

[72] 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.").

[73] DP&L Initial Brief at 18.

First, DP&L is required by law to provide safe reliable service. Under R.C. 4905.22, "Every public utility shall furnish necessary and adequate service and facilities." It is DP&L's job to figure out how to do this. It cannot simply refuse to provide adequate service and facilities if the PUCO rejects its unlawful Rate Stabilization Charge.

Second, there is an easy fix for DP&L's debt problem (by all indication any debt problem is limited to DPL, Inc. and not DP&L) if there were no RSC: AES accepts responsibility for the debt, as it should. As OCC Kahal testified, AES can—and should—either pay the interest expense on DPL, Inc.'s debt or move DPL, Inc.'s debt to its own balance sheets, rather than continuing to seek bailout from DP&L's customers.[74] From DP&L's perspective, this would solve the debt problem, thus eliminating any claim that DP&L cannot provide safe and reliable service without the RSC.

H. The PUCO lacks jurisdiction to approve a provision in a settlement that violates a statute, even if the PUCO thinks that despite the statutory violation, the Settlement benefits customers as a package.

IEU registers concern that the PUCO refrain from modifying the Settlement because it considers settlements as a package and because modifying the Settlement "would discourage significant collaboration and negotiation required to resolve the complex issues in the case and would spurn unnecessary litigation at the Commission and in appeals before the Ohio Supreme Court."[75] IEU's position is without merit and should be rejected. For one, the PUCO should certainly reject or modify settlements that harm consumers as badly as this one does: $450 million in windfall for DP&L's shareholders.[76]

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[74] OCC Ex. 1 (Kahal Initial Testimony) at 43-44.

[75] IEU Initial Brief at 8.

[76] OCC Ex. 2 (Kahal Supplemental Testimony) at 12 (the Settlement "imposes an unwarranted cost penalty on utility customers on the order of roughly $450 million over four years").

Moreover, where a settlement violates a statute, the PUCO lacks jurisdiction or discretion to nonetheless consider the settlement as a package and decline to resolve the statutory violation. It is well established that the PUCO is a "creature of statute" that may "act only under the authority conferred on it by the General Assembly."[77] Thus, when the General Assembly enacts a statute, the PUCO is required to follow it. It cannot rule that a settlement violates a statute but nonetheless approve the settlement because the settlement "package" outweighs the harm done by the statutory violation.

The Ohio Supreme Court's recent ruling in a case involving Ohio Edison Company is instructive. There, OCC appealed a PUCO ruling, claiming a statutory violation under a settlement.[78] The utility argued that OCC waived the statutory argument because OCC did not couch its appeal in terms of the PUCO's three-prong test.[79] The Court rejected this reasoning, ruling that where there is a violation of a statute, a party need only identify the statutory violation and need not assess that violation in the context of the three-part test for settlements. In other words, a settlement is per se unlawful if it violates a statute, and application of the three-part test cannot be used to overcome a statutory violation.

And as OCC has explained herein and throughout its initial brief, the Settlement violates R.C. 4928.143(F) by denying customers $150 million in refunds and violates Ohio Supreme Court and PUCO precedent by allowing the unlawful RSC to continue for four years. The PUCO should reject IEU's invitation to ignore these statutory violations based on IEU's concern about such a ruling discouraging settlements.

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[77] *In re Ohio Edison Co.*, 2020-Ohio-5450, ¶ 20.

[78] *Id.*

[79] *Id.* ¶¶ 62-63.

I. The PUCO should reject DP&L's Smart Grid Plan Phase 1 under the Settlement.

1. The costs to customers for DP&L's Smart Grid Plan Phase 1 outweigh the potential benefits customers will receive under the Settlement.

DP&L, the PUCO Staff, and other signatory parties to the Settlement tout a laundry list of potential benefits that customers will receive from DP&L's Smart Grid Plan Phase 1 ("SGP 1") as a reason for the PUCO to approve the Settlement. To support their claims that the Settlement should be approved, signatory parties cite testimony from OCC witnesses Alvarez and Williams acknowledging that certain smart grid modifications can be beneficial to customers.[80] To be clear, OCC does not dispute that properly designed smart grid modifications *can* benefit consumers.[81] But that does not mean that the PUCO should approve DP&L's SGP 1 investments without a thorough analysis of the costs to consumers and whether consumers will actually receive benefits from SGP 1. OCC presented ample evidence that the costs of SGP 1 investments will far outweigh the benefits consumers will receive as a result of the Settlement.[82] Through his consumer-focused cost/benefit analysis, OCC witness Alvarez demonstrated that customers would receive only $0.45 in benefits for every $1.00 customers pay.[83] The Settlement will harm customers, and the PUCO should reject it.

Of the signatory parties that filed initial briefs, only two—DP&L and OMA—challenged Mr. Alvarez's analysis. DP&L's and OMA's claims have little merit and should be rejected. OCC's Initial Brief[84] has already addressed most of the issues raised by DP&L and OMA

[80] *See, e.g.,* DP&L Initial Brief at 14; OMA Initial Brief at 11, 15; and ELPC/OEC Initial Brief at 3-6.

[81] OCC Ex. 7 (Alvarez Direct Testimony) at 8-10.

[82] OCC Initial Brief at 49-67.

[83] *Id.* at 50-51.

[84] OCC Initial Brief at 49-68.

regarding Mr. Alvarez's testimony and OCC will not repeat those arguments here. OCC, however, corrects other inaccurate and baseless claims made by DP&L and OMAEG below.

DP&L claims that because Mr. Alvarez has never inspected DP&L's distribution system or technical specifications, he is not qualified to testify regarding the costs and benefits of SGP 1.[85] That is not true. DP&L stated in its brief that "[s]eparate business cases for Smart Grid and AMI were filed with the Application and revised as part of the Stipulation . . ."[86] Mr. Alvarez reviewed this information and the information DP&L provided in discovery.[87] This information formed the basis for Mr. Alvarez's expert opinion that the costs of SGP 1 outweigh the benefits to consumers *and* that customers will not receive millions of dollars in potential benefits from SGP 1 under the Settlement. A physical inspection of DP&L's system was not necessary for Mr. Alvarez to determine that DP&L exaggerated the benefits of SGP I or that customers will not receive benefits from SGP 1 under the Settlement. Further, to the extent technical information regarding DP&L's distribution system is necessary to support a cost/benefit analysis for SGP I, DP&L (which has the burden of proof in this case) failed to present that evidence.

DP&L further criticizes Mr. Alvarez's analysis because it reflects the costs of DP&L's proposed Customer Information System ("CIS") without adding back in the benefits.[88] DP&L says that not adding back CIS benefits to customers "makes no sense."[89] But Mr. Alvarez

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[85] DP&L Initial Brief at 14.

[86] DP&L Initial Brief at 67.

[87] *See* Tr. Vol. 1, 167: 12-17 (Schroder Cross) ("I know that [DP&L] provided the cost/benefit analysis, the business case, the total summary of all that in discovery, and then I know we provided it again, the updated version of schedules and workpapers that were aligned with the cost/benefit analysis with the Stipulation.").

[88] DP&L Initial Brief at 15.

[89] *Id.*

provided a plain explanation during the evidentiary hearing when he testified that he did not include the CIS benefits because "there are no guarantees or – or commitments that certain levels of those benefits will be delivered, so while the Stipulation requires DP&L to implement a CIS, this Stipulation does not implement any enforcements regarding the level of benefits associated with those investments."[90] That is the problem with SGP 1 under the Settlement. Contrary to claims by OMA that benefits under the Settlement are "guaranteed,"[91] the Settlement harms customers by failing to ensure that customers (particularly residential customers) receive the benefits SGP 1 could provide.[92]

Likewise, DP&L attacks and mischaracterizes Mr. Alvarez's testimony regarding the Settlement's provision providing an Operational Benefit Offset through the IIR.[93] DP&L states that Mr. Alvarez "opines" that this benefit will last only four years.[94] But that is exactly what the Settlement provides.[95] Paragraph 3(b) of the Settlement provides 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."[96] And DP&L's witness, Ms. Schroder, testified that this benefit offset expires at the end of the four-year SGP 1 term.[97] Again, nothing in the Settlement provides that these benefits will be passed through to customers beyond SGP 1 year four even though customers will continue to foot the bill for SGP 1 costs for

[90] Tr. Vol. III, 496:1-7.

[91] OMA Initial Brief at 15.

[92] *See* OCC Initial Brief at 55-58.

[93] DP&L Initial Brief at 15.

[94] *Id.*

[95] OCC Initial Brief at 57-58.

[96] Joint Ex. 1 (Settlement) at 5.

[97] Tr. Vol. 1 at 207:1-15.

years after the benefit offset expires.[98] This is yet another way in which the Settlement harms customers.

OMA dismisses Mr. Alvarez's concerns regarding DP&L's rate case timing issue as "unfounded."[99] Under the Settlement, if DP&L does not file a rate case by January 1, 2025, DP&L will be unable to recover costs under the IIR.[100] Thus, in OMA's view, an attempt by DP&L to manipulate a rate case filing to avoid passing benefits on to customers could be costly to DP&L.[101] But OMA's argument ignores the fact that DP&L very recently filed a rate case in Case No. 20-1651-EL-AIR. DP&L witness Ms. Schroder testified that this rate case filing satisfies the provision in the Settlement requiring DP&L to file a rate case by January 1, 2025.[102] Therefore, under the terms of the Settlement, DP&L will be able to collect SGP 1 costs from customers under the IIR indefinitely. On the other hand, DP&L's customers will have to wait potentially years until DP&L files its *next* rate case to receive the benefits of O&M cost savings.[103] Thus, DP&L has in fact manipulated rate case timing to its advantage and to the detriment of customers who now have to wait until DP&L's next rate case to receive cost-saving benefits through potential rate reductions.

Finally, DP&L, the PUCO Staff, and several signatory parties claim that a primary benefit of the Settlement is that it reduces the cost of DP&L's SGP from $866.7 million as proposed in DP&L's initial application to $267.6 million for SGP 1.[104] This argument should be

[98] OCC Ex. 7 (Alvarez Direct) at 22.

[99] OMA Initial Brief at 11.

[100] OMA Initial Brief at 11.

[101] *Id.*

[102] Tr. Vol. I at 203:5-18.

[103] OCC Ex. 7 (Alvarez Direct) at 18.

[104] DP&L Initial Brief at 26; PUCO Staff Initial Brief at 18; OMAEG Initial Brief at 2,3; Kroger Initial Brief at 4; IEU Initial Brief at 6-7.

rejected. The $866.7 million as initially proposed was for a *20 year* period, and the $267.6 million under the Settlement is for the *four year* period for SGP 1.[105] The Settlement will allow DP&L to file an application for SGP Phase 2 spending before the end of the SGP 1 four-year term.[106] While $267.6 million is obviously less money than $866.7 million, no Signatory Party explains (because they can't) how $267.6 million over four years is more beneficial to customers than $866.7 million over 20 years. From a customer benefit standpoint, the reduction in SGP spending under the Settlement as compared to DP&L's initial application is meaningless.

In short, the evidence in this case demonstrates that DP&L's SGP 1 in the Settlement is raw deal for consumers (particularly residential consumers) who will pay more to subsidize programs the benefits of which they may never realize. The PUCO should reject the Settlement and instead require DP&L to file comprehensive business plans consistent with ESP I that demonstrate positive benefits for consumers.

2. The Settlement, if adopted, would violate DPL's current electric security plan, ESP I.

DP&L currently operates under the electric security plan approved by the PUCO in Case No. 08-1094-EL-SSO ("ESP I"). DP&L voluntarily chose to revert to operation under ESP I when it voluntarily withdrew from its previous electric security plan, ESP III. This means that, as a matter of law and regulatory policy, DP&L's SGP 1 must comply with the settlement approved by the PUCO in the ESP I case ("ESP I Settlement").[107] DP&L and other signatory parties ignore this. Instead, they try to shoehorn features of DP&L's distribution modernization plan, which

[105] *Id.*; Joint Ex. 1 (Settlement) at 4.

[106] Joint Ex. 1 (Settlement) at 4.

[107] *See* OCC Initial Brief at 78-79.

was filed when DP&L operated under ESP III, into SGP 1 under the Settlement. That is wrong, and it violates Ohio law and regulatory principles.[108]

As OCC explained in its initial brief, one of the primary ways SGP 1 violates ESP I is by collecting investment costs from customers through the infrastructure investment rider ("IIR") tariff, which was not approved by the PUCO following the ESP I Settlement.[109] While DP&L claims the IIR tariff was a part of ESP I,[110] the plain language of the ESP I Settlement states:

> DP&L will delay implementation of the Infrastructure Investment Rider (IIR) until reviewed by the Commission's Staff and approved by the Commission. Staff will endeavor to complete its review in the fourth quarter of 2009 so that the rider may be implemented January 1, 2010. This IIR rate will recover any prudently incurred costs related *solely to the Company's AMI and/or Smart Grid approved plans.* Prudently incurred costs and IIR revenues will be trued up on a two-year basis and the levelized IIR rate design will be eliminated. The Company will be entitled to recover those prudently incurred AMI and/or Smart Grid costs net of the Company's capital and operational savings solely due to their investment.[111]

Consistent with the evidence presented by OCC,[112] DP&L admits in its brief that there was no zero-placeholder IIR tariff filed after the ESP I Settlement was approved.[113] If there was no IIR tariff filed and approved in accordance with the ESP I Settlement, DP&L cannot now (legitimately) collect SGP 1 costs from customers through the IIR.[114] Moreover, DP&L cannot

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[108] OCC Initial Brief at 78-85.

[109] OCC Initial Brief at 79-81.

[110] DP&L Initial Brief at 67.

[111] OCC Ex. 8 (ESP I Settlement), at 5, ¶ 4(c) (emphasis added).

[112] *See* OCC Initial Brief at 80; OCC Ex. 63 (DP&L ESP I June 19, 2009 Tariff Filing).

[113] DP&L Initial Brief at 67.

[114] *See e.g. Cleveland Electric Illuminating Co. v. Public Utilities Comm'n*, 46 Ohio St.2d 105, 116 (1976) ("The heart of this statutory plan is that the only proper rate is that set out in the approved rate schedule on file with the commission and open to public inspection, and that this schedule can be changed only by an order of the commission.").

simply replace the Smart Grid Rider, which was approved as part of ESP III and referenced in DP&L's initial application,[115] with the IIR.

When DP&L withdrew from operating under ESP III and reverted to operation under ESP I, DP&L attempted to correct this problem by filing a Notice of Filing Proposed Tariffs in the ESP I case on November 25, 2019.[116] That filing inaccurately represented to the PUCO that a zero-placeholder IIR tariff did in fact previously exist.[117] DP&L claims that its statements in the November 25, 2019 Notice of Filing Proposed Tariffs were correct, but that claim is baseless given DP&L's own admission that no zero-placeholder IIR tariff previously existed.[118]

The Settlement also violates ESP I by allowing DP&L to collect costs from customers through the IIR for investments in programs that have nothing to do with AMI and Smart Grid programs under ESP I or the provision of safe, reliable, and reasonably priced electric service.[119] For example, OCC witness Williams testified that the Settlement's Electric Vehicle ("EV") Rebate program and provisions regarding Smart Thermostats are not programs that are eligible for funding under ESP I.[120] While these programs may have been permissible under DP&L's ESP III distribution modernization plan initially proposed in this case, they are not appropriate under the Settlement in ESP I.[121] Moreover, according to OCC witness Williams, these programs involve after the meter products and services that are available to consumers in the competitive

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

[116] OCC Ex. 21 (DP&L Notice of Filing Proposed Tariffs).

[117] OCC Initial Brief at 80; OCC Ex. 21 (DP&L 11/25/19 Notice of Filing of Proposed Tariffs, Case No. 08-1094-EL-SSO).

[118] *See* DP&L Initial Brief at 67 ("there simply was not a zero-placeholder tariff filed at that time.").

[119] *See e.g.* OCC Ex. 6 (Williams Direct) at 10, 14, 28-29.

[120] OCC Ex. 6 (Williams Direct) at 28-31.

[121] *Id.*

market.[122] Customers who do not want Smart Thermostats or EV charging services should not be forced to subsidize these programs for customers who do want them.[123]

Sierra Club, ELPC and OEC (collectively the "Environmental Parties") all claim that the Settlement should be approved because the Smart Thermostat and EV charging rebate programs will benefit customers.[124] To support their position, ELPC and OEC claim that OCC witness Williams acknowledged that these types of programs could provide benefits to customers.[125] But again, the issue is not whether Smart Thermostats or EV charging could provide benefits to consumers. The issue is whether the costs for these programs can be collected from customers under ESP I, and as OCC witness Williams testified, they cannot.[126]

ELPC and OEC claim that OCC witness Williams "takes an unreasonably narrow view" of DP&L's service obligations and grid modernization.[127] Yet it is DP&L that voluntarily chose to operate under ESP I, and it is therefore bound to operate within the parameters of the ESP I Settlement approved by the PUCO. Mr. Williams testified that DP&L cannot collect costs from customers for Smart Thermostats and EV charging services under ESP I.[128] Nor can DP&L (or any other signatory party) improperly pick and choose features of DP&L's ESP III distribution modernization plan to include in DP&L's SGP under ESP I. But that is exactly what DP&L and other signatory parties are attempting to do through the Settlement. For these reasons, the Settlement violates ESP I and it should be rejected.

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[122] *Id.*

[123] *Id.*

[124] Sierra Club Initial Brief at 3-8; ELPC/OEC Initial Brief at 3-7.

[125] ELPC/OEC Initial Brief at 3-6.

[126] OCC Ex. 6 (Williams Direct) at 10, 14, 28-29.

[127] ELPC/OEC Initial Brief at 2, 7, 9.

[128] OCC Ex. 6 (Williams Direct) at 10, 14, 28-29.

J. The Settlement is inconsistent with State policies under R.C. 4928.02.

In their initial briefs, the PUCO Staff and DP&L argue that the Settlement advances state policies contained in R.C. 4928.02.[129] But as OCC explained in its initial brief, both PUCO Staff and DP&L are wrong.

First, PUCO Staff and DP&L argue that the Settlement provides significant support for DP&L's ability to provide reliable and safe electric service.[130] But as OCC explained in its initial brief, the Settlement does not support this state policy because it actually subsidizes DP&L's parent company—and violates Ohio law under R.C. 4928.17 and 4928.02(H).[131] The Settlement not only fails the PUCO's three-part settlement test, but it also violates Ohio law. The PUCO should reject the Settlement for this reason.

Second, the utility and PUCO Staff argue that the Settlement advances the state policy to "[p]rotect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource."[132] But again, OCC explained that this is not correct. The Settlement would allow DP&L to keep $450-470 million in unwarranted charges and to impose substantial additional costs of a Smart Grid Plan. These substantial charges to customers and denial of refunds harm all customers, especially at-risk populations.[133]

Third, PUCO Staff and the utility are incorrect that the Settlement advances the state policy to "facilitate the state's effectiveness in the global economy."[134] As OCC stated in its initial brief, the Settlement forces many Ohioans to provide hundreds of millions of subsidies

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[129] PUCO Staff Initial Brief at 24; DP&L Initial Brief at 65-66.

[130] PUCO Staff Initial Brief at 24; DP&L Initial Brief at 65.

[131] OCC Initial Brief at 86-89.

[132] Staff Initial Brief at 26; DP&L Initial Brief at 66.

[133] OCC Initial Brief at 91-92.

[134] Staff Initial Brief at 28; DP&L Initial Brief at 66.

through an illegal financial stability charge and forfeiture of mandated refunds, to DP&L and its owners.[135] And it favors some businesses over their competitors, thus harming the economy rather than fostering competitive markets.[136]

Contrary to what the PUCO Staff and the utility believe, this Settlement violates important regulatory principles and policies. If approved, which it should not be, the Settlement would result in unjust and unreasonable charges to consumers during an already financially devastating pandemic. But even without the pandemic, the Settlement would harm consumers by subsidizing DP&L's parent company and supporting unregulated activities, to the tune of more than $300 million. This bag of cash is unrelated to any investment or expense incurred by DP&L to provided utility service. The PUCO should protect consumers and reject this harmful Settlement.

K. The Signatory Parties do not support the Settlement as a package but instead have, at best, limited interest in individual Settlement provisions.

In its initial brief, OMA accuses OCC of focusing on individual Settlement provisions rather than considering the Settlement as a package, as is required under the PUCO's three-prong test.[137] This argument is both inaccurate and ironic. It is inaccurate because OCC has mounted a comprehensive attack on virtually every provision in the Settlement, explaining why the whole thing is bad for consumers.[138] There is no doubt, after reading OCC's initial brief, that OCC opposes the entire package. OMA's argument is also ironic because OCC appears to be one of the *only* parties viewing the Settlement as a package. Even a cursory look at parties' initial briefs demonstrates this.

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[135] OCC Initial Brief at 92.

[136] *See generally* OCC Ex. 3 (Hill Testimony).

[137] OMA Initial Brief at 10.

[138] *See generally* OCC Initial Brief.

Eight signatory parties filed no initial brief at all.[139] And while there is no requirement that signatory parties file briefs, and they may choose to file one or not as they please, it is certainly telling that these parties, despite signing the Settlement, apparently have nothing to say regarding their support. Two additional parties filed initial briefs, but only in the docket regarding grid modernization and not in the other three cases.[140] Another four parties filed briefs in all the cases but addressed only smart grid issues.[141] Again, this is their right, and is not a criticism of these parties. But it makes clear that they are not really interested in the entire Settlement package.

All told, 14 of the 20 signatory parties said nothing at the initial briefing stage about (i) the Settlement provision allowing the RSC to continue for four more years at a cost of more than $300 million to customers or (ii) whether DP&L's customers should get a refund for DP&L's significantly excessive profits in 2018 and 2019. And as OCC explained in its initial brief, 15 of the 20 signatory parties explicitly took no position on the 2018 and 2019 SEET cases.[142] It is *these* parties who signed the Settlement not because it is a comprehensive package benefiting customers but because they had limited interests in narrow aspects of the Settlement.

When viewing the Settlement as a package—as OCC has done—it does not come close to passing the PUCO's requirement that the package be beneficial to customers. Any limited

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[139] This includes Armada Power, City of Dayton, Ohio Hospital Association, Honda, University of Dayton, the Smart Thermostat Coalition, ChargePoint, and Natural Resources Defense Council.

[140] *See* Initial Brief of Ohio Partners for Affordable Energy (filed in Case Nos. 18-1875-EL-GRD, 18-1876-EL-WVR, and 18-1877-EL-AAM); Initial Post-Hearing Brief of the Sierra Club (filed in Case No. 18-1875-EL-GRD).

[141] *See* Initial Brief of the Environmental Law & Policy Center & the Ohio Environmental Council (addressing only smart thermostats, electric vehicle charging, and customer data access); Initial Brief of Mission:Data Coalition (addressing customer data access only); Initial Brief of Interstate Gas Supply, Inc. and IGS Solar, LLC (addressing the benefits of the Settlement as it pertains to solar energy and grid modernization benefits for the retail market).

[142] OCC Initial Brief at 44-47 (explaining that only DP&L, OEG, OMA, Kroger, and IEU signed the Settlement as it pertains to these two cases).

benefits to customers are substantially outweighed by the massive costs ($300 million for the RSC, $150 million in SEET refunds denied, and $100 million in smart grid charges) imposed on customers.

III. CONCLUSION

The redistributors like DP&L and others who signed the settlement want to reframe the responsibility of the PUCO (and its commissioners) as being to them, the *special interests*. As stated, they are part of what OSU Professor Hill calls the "redistributive coalition," for their redistributing of wealth to themselves. But the responsibility of the PUCO and its commissioners is to the *public interest*, meaning all consumers. Contrary to what the redistributors like DP&L want, the PUCO and its commissioners are not to be beholden (in settlements or in anything) to those like the utilities who know how to work PUCO settlements, to those like utilities who have cash to throw around in settlements, and to the relative few with the knowledge and resources to show up at 180 East Broad Street. The PUCO is supposed to regulate for *everybody* in Ohio. That should mean rejecting the DP&L settlement.

Most everything about the case that DP&L and the signatory parties have put forth is anti-consumer and furthers the pro-utility special interests. They want to continue charging customers $79 million annually for unlawful subsidies (the RSC). They want to allow DP&L to keep $150 million in significantly excessive profits. That amount would be on top of the hundreds of millions in customer money that DP&L has been allowed to keep because of Ohio's unconscionably punitive "no refund" rule (which in fact the PUCO itself could remedy by making utility tariffs subject to refund). And they want customers to pay for DP&L's smart grid plan with little or no accountability for the utility, and virtually no chance that the plan delivers the benefits that it says it will.

The PUCO says that its mission is "to assure all residential and business consumers access to adequate, safe and reliable utility services at fair prices, while facilitating an environment that provides competitive choices."[143] It can live up to that mission by following the law and adopting OCC's consumer protection recommendations instead of the settlement by DP&L and other redistributors of wealth.

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[143] https://puco.ohio.gov/wps/portal/gov/puco/about-us/resources/mission-and-commitments.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this (Public Version) Reply Brief was served on the persons stated below via electronic transmission this 8th day of March 2021.

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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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