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APPLICATION FOR REHEARING
BY
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July 16, 2021

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APPLICATION FOR REHEARING
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OFFICE OF THE OHIO CONSUMERS' COUNSEL

This case continues the trend of the PUCO's inequitable settlement process that favors utilities and special interests over consumers. As former PUCO Commissioner Roberto once wrote about a particular dysfunction in PUCO settlements, the "balance of power" in negotiations for electric security plans favors Ohio's utilities.[1] This results in parties negotiating not a just and reasonable settlement but rather "the best that they can hope to achieve"[2] when faced with the power of the utility to effectively veto[3] any successes that a party may achieve in the PUCO's order.

Good public policy demands that signatures on settlements not be exchanged for cash and cash equivalents. Yet these types of deals have once again found a home in this PUCO-approved settlement.

The settlement in this case also continues the trend that settlements put before the PUCO must include the utility. Broad-based consumer advocates like OCC are not deemed essential to the settlement process. That is evidenced by the PUCO's approval of the settlement over OCC's objections. Yet one would be hard-pressed to find an example of a PUCO-approved settlement that did not include the utility as a signatory party.

The settlement harms consumers by requiring them to pay another $300 million in subsidies to DP&L's shareholders, denying consumers $150 million in refunds after paying significantly excessive profits to DP&L, and imposing $100 million in new charges for a "smart grid" that is expected to provide precious few tangible benefits for consumers.

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[1] *See In re Application of [FirstEnergy] to Establish a Standard Serv. Offer*, Case No. 08-935-EL-SSO, Second Opinion & Order, Opinion of Commissioner Cheryl L. Roberto at 2 (Mar. 25, 2009).

[2] *Id.*

[3] *See* R.C. 4928.143(C)(2)(a) (giving the utility the unilateral authority to veto a PUCO ruling amending the utility's electric security plan by withdrawing from the plan).

The PUCO's approval of the settlement was unlawful and unreasonable. It should be rejected on rehearing. Accordingly, the PUCO's June 16, 2021 Opinion and Order (the "Order") was unlawful, unreasonable, unjust, and unwarranted for the following reasons:

> Assignment of Error 1. The PUCO erred in ruling that DP&L's Rate Stabilization Charge is lawful, which contradicts R.C. 4928.143 and Ohio Supreme Court precedent.
>
> A. The PUCO violated Ohio Supreme Court precedent and R.C. 4903.09 by approving the Rate Stabilization Charge to consumers as a purported charge for provider of last resort obligations.
>
> B. The PUCO violated Ohio Supreme Court precedent by approving the Rate Stabilization Charge, which is an unlawful financial integrity charge to consumers.
>
> Assignment of Error 2. The PUCO erred by approving the Settlement, in which the PUCO modified ESP I, which the PUCO lacks authority to do under R.C. 4928.143.
>
> Assignment of Error 3. The Order violates R.C. 4903.09 and Ohio Supreme Court precedent because the PUCO failed to adequately explain its reasoning and wholly ignored OCC's arguments, including arguments that DP&L's smart grid proposal would not be cost beneficial and arguments showing that the numerous harms to consumers in the Settlement were far greater than any small benefits to consumers.
>
> Assignment of Error 4: The PUCO erred in denying OCC's claim for rejection of the Settlement based on DP&L's paying of cash and cash-equivalents to signatory parties (the "redistributive coalition"), given the PUCO's failure on this issue to "file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact" per R.C. 4903.09.
>
> A. The PUCO's summary, three-sentence discussion of the alleged benefits to consumers under the Settlement is inadequate under R.C. 4903.09, particularly in a complex proceeding involving a 53-page settlement, five days of hearings, and more than 500 pages of briefing.
>
> B. The PUCO's findings on the alleged benefits of the Settlement violate R.C. 4903.09 because they are without record support.
>
> i. AES's payments to DP&L are not part of the Settlement, so they cannot be a benefit of the Settlement.
>
> ii. The PUCO adopted the signatory parties' view that Smart Grid Plan 1 would be cost-beneficial to consumers instead of OCC witness Alvarez's contrary testimony that the plan would cost more than the potential benefits to consumers. But the PUCO made no effort whatsoever to explain why it rejected witness Alvarez's testimony.

iii. The PUCO failed to explain the rationale for its decision to allow DP&L to charge consumers for the SmartGrid Plan under the Infrastructure Investment Rider, which was never tariffed under DP&L's current electric security plan, ESP I.

iv. The record contradicts the PUCO's finding that DP&L filing its next electric security plan "is expected to terminate all rate stability charges."

C. In rejecting OCC's consumer protection arguments regarding the redistributive coalition, the PUCO cited no record evidence for its erroneous conclusion that "many of the negotiated concessions contained in the Stipulation benefit all customer classes." To the contrary, because the Settlement is the product of a redistributive coalition, the record does not support the PUCO's conclusion that it benefits customers and the public interest.

Assignment of Error 5. The Order violates R.C. 4928.143(F) because it denies consumers refunds under the Significantly Excessive Earnings Test despite a PUCO finding that DP&L's profits were significantly excessive as compared to comparable companies to the tune of $61 million.

Assignment of Error 6. The Order violates R.C. 4928.143(F) because it provides consumers with an "offset" to smart grid charges instead of a refund for significantly excessive profits, which undermines the consumer protection purpose of the statute and allows the utility to profit, on an accelerated basis, through its Infrastructure Investment Rider.

Assignment of Error 7: The PUCO's Order permitting DP&L to charge consumers through the Infrastructure Investment Rider violates R.C. 4928.143(C)(2)(b) because the rider was not a provision, term, or condition of DP&L's most recent standard service offer.

Under R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the PUCO should abrogate the Order. On rehearing, the PUCO should reject the October 23, 2020 Stipulation and Recommendation ("Settlement"), terminate the Rate Stabilization Charge ("RSC"), reject DP&L's proposed charges to consumers for smart grid investments, and order $61.1 million in prompt refunds to consumers resulting from DP&L's significantly excessive profits.

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

This case continues the trend of the PUCO's inequitable settlement process that favors utilities and special interests over consumers. As former PUCO Commissioner Roberto once wrote about a particular dysfunction in PUCO settlements, the "balance of power" in negotiations for electric security plans favors Ohio's utilities.[4] This results in parties negotiating not a just and reasonable settlement but rather "the best that they can hope to achieve"[5] when faced with the power of the utility to effectively veto[6] any successes that a party may achieve in the PUCO's order.

Moreover, ingrained in the settlement process is the notion that there can't be a settlement without the utility participating as a signatory party. That also provides unfair bargaining power for the utility. In this settlement, like so many others, the PUCO Staff (who are employees of the judge) have signed the stipulation. Many other signatories agreed to accept cash and cash-equivalent payments in exchange for their sign-off on the deal. The deal will cost all consumers, residences, and businesses (most of whom are not favored by DP&L's handing out of cash) hundreds of millions of dollars. All these ingredients are baked into a Settlement that the PUCO approved as a "package." The PUCO's settlement approach protects utilities and special interests by enabling certain settlement terms that otherwise would be objectionable (even unlawful) if reviewed on a stand-alone basis. And indeed, they are highly objectionable even in the context of the larger Settlement.

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[4] *See In re Application of [FirstEnergy] to Establish a Standard Serv. Offer*, Case No. 08-935-EL-SSO, Second Opinion & Order, Opinion of Commissioner Cheryl L. Roberto at 2 (Mar. 25, 2009).

[5] *Id.*

[6] R.C. 4928.143(C)(2)(a) (giving the utility the unilateral authority to veto a PUCO ruling amending the utility's electric security plan by withdrawing from the plan).

The PUCO, in its Order, approved the Settlement. In doing so, it approved four more years of charges to consumers under DP&L's unlawful Rate Stabilization Charge—projected to be more than $300 million. It also denied consumers refunds for DP&L's significantly excessive profits. And it required consumers to pay for DP&L's smart grid investments with virtually no accountability required by DP&L for delivering consumer benefits. These rulings were unlawful and unreasonable.

Virtually everything in the Settlement benefits the utility or the special interests of the limited parties who signed the Settlement to the detriment of DP&L's consumers. All consumers are left to pay the bill.

On rehearing, the PUCO should abrogate the Order. It should reject the Settlement. It should eliminate the unlawful Rate Stabilization Charge. It should order DP&L to refund its significantly excessive profits to consumers. It should nullify the settlement process as being void as against public policy, where DP&L pays cash to parties that sign its settlement. And it should protect consumers from paying for DP&L's flawed smart grid plan.

II. STANDARD OF REVIEW

After an order is entered, an intervenor in a PUCO proceeding has a statutory right to apply for rehearing "in respect to any matters determined in the proceeding."[7] An application for rehearing must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[8]

In considering an application for rehearing, R.C. 4903.10 provides that the PUCO may grant and hold rehearing if there is "sufficient reason" to do so. After such rehearing, the PUCO

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[7] R.C. 4903.10.

[8] R.C. 4903.10(B). *See also* Ohio Admin. Code 4901-1-35(A).

may "abrogate or modify" the order in question if the PUCO "is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted."[9]

III. ASSIGNMENTS OF ERROR

Assignment of Error 1. The PUCO erred in ruling that DP&L's Rate Stabilization Charge is lawful, which contradicts R.C. 4928.143 and Ohio Supreme Court precedent.

By approving the Settlement, the PUCO allowed DP&L to charge consumers $79 million per year under the Rate Stabilization Charge ("RSC"). In doing so, the PUCO rejected OCC's arguments that continuing the RSC is unlawful. Instead, the PUCO ruled, "we find that the RSC charge remains lawful."[10] In particular, the PUCO ruled that the RSC is lawful because it "includes amounts attributable to the POLR risks and costs incurred by the Company."[11] The PUCO's ruling that the RSC is lawful violates binding Ohio Supreme Court precedent.

A. The PUCO violated Ohio Supreme Court precedent and R.C. 4903.09 by approving the Rate Stabilization Charge to consumers as a purported charge for provider of last resort obligations.

Under binding Ohio Supreme Court precedent, the PUCO cannot approve a provider of last resort ("POLR") charge to consumers as a cost-based charge where there is no evidence of the actual POLR costs incurred by the utility.

In *In re Columbus Southern Power Co.*,[12] the PUCO had approved $500 million in POLR charges to AEP consumers.[13] The PUCO ruled that these charges were "based on the cost" to the

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[9] R.C. 4903.10(B).

[10] Order ¶ 57.

[11] Order ¶ 78. *See also* Order ¶ 57 ("the RSC charge has applications beyond the Company's generic financial integrity in that it relates to the Company's continuing obligation to operate as a POLR, which imposes continuing risk on the Company").

[12] 2011-Ohio-1788.

[13] 2011-Ohio-1788, ¶¶ 22, 24.

utility of being the provider of last resort.[14] The Court ruled, however, that there was no support for the PUCO's conclusion that AEP would incur $500 million in costs as the provider of last resort.[15] As the Court stated, "we can find no evidence suggesting that AEP's POLR charge is related to any costs it will incur."[16] Likewise, the Court concluded that "the manifest weight of the evidence contradicts the commission's conclusion that the POLR charge is based on cost."[17] The PUCO had erred because the Court has previously ruled that the PUCO must "'carefully consider what costs it is attributing' to 'POLR obligations.'"[18] Thus, the Court found that the PUCO abused its discretion and reversed.[19]

On remand, the PUCO rejected AEP's non-cost-based justification for POLR charges to consumers.[20] The PUCO found that AEP's use of a financial model was insufficient to justify charges to consumers for alleged POLR costs because it "fails to provide a reasonable measure of the Companies' POLR costs."[21] Here, with respect to DP&L, neither DP&L nor any of the other signatory parties made any attempt to justify the amount of the RSC on any basis, whether it be based on actual costs or a financial model that sets a non-cost based value for POLR. The record contains no evidence whatsoever justifying the PUCO's approval of the $79 million amount of the RSC. To the contrary, the amount of the RSC is based on an arbitrary historical amount equal to 11% of DP&L's 2004 tariffed generation rates, which have no bearing on

[14] 2011-Ohio-1788, ¶ 24.

[15] 2011-Ohio-1788, ¶¶ 24-29.

[16] 2011-Ohio-1788, ¶ 25.

[17] 2011-Ohio-1788, ¶ 29.

[18] 2011-Ohio-1788, ¶ 29.

[19] 2011-Ohio-1788, ¶ 29 ("Ruling on an issue without record support is an abuse of discretion and reversible error. Therefore, we reverse the provisions of the order authorizing the POLR charge.").

[20] *In re the Ohio Power Company*, Pub. Util. Comm. No. 08-917-EL-SSO, Order on Remand (Oct. 3, 2011).

[21] *Id.*

DP&L's current costs.[22] DP&L has no current generation costs and lacks a tariffed generation rate.

The Order, by approving continued charges under the RSC, contradicts this precedent. Just as the PUCO did in *Columbus Southern*, the PUCO has approved charges to consumers—about $314 million[23]—for purported POLR obligations. But there is no evidence in the record demonstrating that DP&L will incur anywhere near $314 million as provider of last resort. To the contrary, DP&L offered no evidence that it will spend even a single dollar for out-of-pocket costs associated with being the provider of last resort. This makes sense because when a supplier defaults and a consumer needs default generation service, that service is provided by marketers—not DP&L—through the standard service offer.[24] Indeed, despite the PUCO's statement that the RSC "includes amounts attributable to the POLR risks and costs incurred by the Company," it cited no record evidence of any such costs.[25] Accordingly, just as the Court ruled in *Columbus Southern*, the PUCO erred by approving more than $314 million in charges to consumers for the RSC.

For similar reasons, this ruling violates R.C. 4903.09. R.C 4903.09 requires the PUCO to create a "complete record of all of the proceedings" and to "file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." The Supreme Court of Ohio has interpreted this to mean that

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[22] *See In re Application of the Dayton Power & Light Co. for the Creation of a Rate Stabilization Surcharge Rider & Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion & Order at 3 (Dec. 28, 2005) ("DP&L will implement an unavoidable RSS equal to 11 percent of DP&L's January 1, 2004, tariffed generation rates."); *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case No. 08-1094-EL-SSO, Opinion & Order (June 24, 2009) (continuing the RSS but changing the name to RSC).

[23] OCC Ex. 2 (Kahal Supplemental Testimony) at 10.

[24] OCC Ex. 2 (Kahal Supplemental Testimony) at 24 ("POLR obligations were shifted to the marketers who bid in competitive auctions to supply the standard service offer to DP&L's customers").

[25] Order ¶ 78.

the PUCO abuses its discretion when it "renders an opinion on an issue without record support and a supporting rationale."[26] The PUCO approved a $79 million per year charge to consumers under the Rate Stabilization Charge. But there is no record support for such a charge in the amount of $79 million (or any other amount).

As explained, the amount of the charge to consumers under the RSC is based on DP&L's long-defunct generation rates. Given that DP&L is now a distribution-only utility, it has no generation rates on which to base the RSC. The PUCO's ruling, which approves continuation of the RSC based on non-existent generation rates, lacks record support and thus violates R.C. 4903.09.

B. The PUCO violated Ohio Supreme Court precedent by approving the Rate Stabilization Charge, which is an unlawful financial integrity charge to consumers.

The PUCO also erred by approving the Rate Stabilization Charge because it is an unlawful financial integrity charge to consumers that is not tied to any costs that DP&L incurs. The Ohio Supreme Court has consistently rejected attempts by the PUCO to approve charges to consumers that are not tied to specific costs.

In its most recent ruling in *In re Ohio Edison Co.*,[27] the Ohio Supreme Court overturned the PUCO's approval of FirstEnergy's distribution modernization rider ("DMR"). There, the PUCO had approved a DMR for FirstEnergy "to provide credit support" for FirstEnergy.[28] Despite being called a "distribution modernization rider," the Court found that none of the DMR funds were required to be used for distribution modernization. To the contrary, the utility would

[26] *Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, 2020-Ohio-5221, ¶ 19 (citation omitted).

[27] 2019-Ohio-2401.

[28] 2019-Ohio-2401, ¶ 18.

separately recover all distribution modernization costs through another rider, Rider AMI.[29] Thus, the DMR charges to consumers were not in any way related to any costs that FirstEnergy incurred. The Court reversed the PUCO and remanded with an order requiring the PUCO to remove the DMR from FirstEnergy's electric security plan.[30]

The PUCO recognized this precedent in a recent ruling regarding 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.[31]

Following *Ohio Edison* and similar Supreme Court rulings,[32] the PUCO ordered DP&L to remove its own DMR from its electric security plan because DP&L's DMR was substantially the same as FirstEnergy's.[33] That is, in charging consumers under its DMR, DP&L was not collecting any costs that it incurred to provide distribution service.

The Rate Stabilization Charge is no different. As explained above, DP&L has identified no costs that it incurs related to the Rate Stabilization Charge (POLR costs or otherwise), and the PUCO has cited no evidence of any such costs. There are no such costs anymore. The RSC is a relic, last approved by the PUCO in 2009 at a time when DP&L owned generation and incurred costs that might have justified the annual RSC charge.

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[29] 2019-Ohio-2401, ¶ 18.

[30] 2019-Ohio-2401, ¶ 2 (the Court remands "with instruction to remove the DMR from FirstEnergy's ESP").

[31] *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).

[32] *See In re Columbus S. Power Co.*, 2011-Ohio-1788; *In re Columbus S. Power Co.*, 2016-Ohio-1608; *In re Dayton Power & Light Co.*, 2016-Ohio-3490.

[33] *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 ¶¶ 102-110 (Nov. 21, 2019).

But the question before the PUCO is not whether the RSC was justified in 2009. The question before the PUCO is whether it should approve the RSC *now*, as part of a Settlement that asks the PUCO to continue the RSC for four more years until DP&L's next electric security plan is approved. By approving the Settlement, the PUCO approved $314 million in charges to consumers under the RSC. That was unlawful because DP&L will not incur $314 million—or any amount at all—for POLR obligations or anything else related to the RSC. And there is nothing in the record to support any non-cost-based charge for POLR.

Assignment of Error 2. The PUCO erred by approving the Settlement, in which the PUCO modified ESP I, which the PUCO lacks authority to do under R.C. 4928.143.

It has long been established that the PUCO is a "creature of statute" that "may act only under the authority conferred on it by the General Assembly."[34] Thus, a PUCO ruling is unlawful in the absence of a statute authorizing such ruling. Here, the PUCO exceeded its statutory authority by approving the Settlement because the Settlement modifies DP&L's ESP I, in violation of R.C. 4928.143.

Under R.C. 4928.143(C)(2), a utility is allowed to terminate its electric security plan if the PUCO modifies it.[35] Upon such termination, the PUCO "shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer ... until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code."[36] DP&L withdrew from its ESP III in another case, thereby reverting to ESP I, which the PUCO approved, over OCC objections.[37]

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[34] *In re Ohio Edison Co.*, 2020-Ohio-5450, ¶ 20 (citing *Tongren v. PUCO*, 1999-Ohio-206).

[35] R.C. 4928.143(C)(2)(a) ("If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it...").

[36] R.C. 4928.143(C)(2)(b).

[37] *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. 08-1094-EL-SSO, Second Finding & Order (Dec. 18, 2019).

In that case, parties raised various issues about the manner in which DP&L could revert to ESP I. Despite terminating ESP III and reverting to ESP I, DP&L sought to continue charging consumers under various riders that were created in ESP III.[38] Other parties also sought to continue selected parts of ESP III (that worked to their advantage). Industrial Energy Users-Ohio ("IEU"), the City of Dayton, and Honda all proposed that they continue to receive the benefits of certain "economic development" provisions that were approved in the ESP III case.[39] These included (i) an "economic improvement incentive" available to one member of each of Ohio Energy Group ("OEG"), IEU, and Ohio Hospital Association ("OHA"), (ii) an "automaker incentive" available to one member of OEG, one member of Ohio Manufacturers' Association Energy Group ("OMAEG"), and Honda, (iii) an "Ohio business incentive" available to Honda, two members of OMAEG, Kroger, and one member of IEU, (iv) $2 million in economic development grants for Adams and Brown Counties, (v) an annual $1 million economic development grant, (vi) $145,000 in cash annually to IEU, (vii) $18,000 in cash annually to OMAEG, and (viii) $160,000 in cash annually to Kroger.[40]

In rejecting DP&L's request to keep charging consumers under various ESP III riders, as well as rejecting intervenors' requests to continue receiving monetary benefits under the ESP III settlement, the PUCO noted that it was "bound by the plain language of R.C. 4928.143(C)(2)(b)."[41] The plain language of R.C. 4928.143(C)(2)(b) states that the PUCO "shall issue such order as is necessary to continue the provision, terms, and conditions of the utility's

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[38] *Id.* ¶ 37.

[39] *Id.* ¶ 13 ("IEU-Ohio and Dayton/Honda contend that the economic development provisions in ESP III must be continued if the RSC is approved.").

[40] *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 (Oct. 20, 2017).

[41] *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. 08-1094-EL-SSO, Second Finding & Order ¶ 26 (Dec. 18, 2019).

most recent standard service offer." Accordingly, the PUCO ruled that under this plain language, it "must restore the provision, terms and conditions of ESP I which were in effect prior to the effective date of ESP III."[42] Thus, the PUCO rejected DP&L's request to continue charges under riders created in ESP III.[43] And the PUCO ruled that the economic development provisions were part of ESP III and were thus required to be terminated when DP&L withdrew from ESP III and reverted to ESP I.[44]

Yet now, through the Settlement, the PUCO has done precisely what it said it lacked authority to do in DP&L's ESP withdrawal case: modified ESP I to add economic development (and other cash benefits) to signatory parties. This was unlawful.

As OCC explained in its testimony and briefs, the Settlement includes numerous cash handouts to signatory parties.[45] *Every single party* that lost out on its economic development payments when DP&L withdrew from ESP III signed the Settlement in this case and received new cash or cash equivalent payments in exchange for their signatures.[46] The PUCO has modified ESP I to insert the economic development payments that the signatory parties lost when ESP III was withdrawn. But the PUCO lacks authority to modify ESP I in that regard. As the

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[42] *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. 08-1094-EL-SSO, Second Finding & Order ¶ 27 (Dec. 18, 2019). Note that OCC does not necessarily agree with the PUCO's ruling in this regard and reserves the right to continue to challenge it in Case No. 08-1094-EL-SSO, any appeals of that case, or otherwise.

[43] *Id.* ¶¶ 36-38 (ordering DP&L to file new tariffs eliminating the decoupling rider, uncollectible rider, distribution investment rider, and regulatory compliance rider).

[44] *Id.* ¶ 40 ("the Commission finds that the economic development provisions contained in the amended stipulation are provisions of ESP III and should be terminated with the withdrawal of ESP III").

[45] OCC Initial Brief at 2, 42-43.

[46] *See* Settlement at 33, 35, 36, 37, 41-42 (cash or cash equivalents paid to City of Dayton, OHA, Honda, IEU, Kroger, OMAEG, University of Dayton, Ohio Energy Group, and IGS under the Settlement).

PUCO itself recognized in its prior ruling, the plain language of R.C. 4928.143(C) requires the PUCO to revert to the utility's prior standard service offer—without modification.[47]

The PUCO or opposing parties might respond that the cash handouts under the Settlement are not part of ESP I. These arguments fail for several reasons.

First, many of the economic development payments are explicitly tied to ESP I. For example, the Settlement provides that signatory parties (or their members) OEG, IEU, Honda, OMAEG, Kroger, and OHA will receive credits of $0.004 per kWh "while DP&L operates under the terms and conditions of ESP I."[48] The Settlement provides various benefits to the City of Dayton, including $350,000 in annual cash payments, and those payments "shall expire when ESP I terminates."[49] These are quite obviously replacements for the payments that these parties lost out on when DPL withdrew from ESP III.

Second, parties might claim that the payments are made by shareholders and thus are not part of ESP I. But it is only through sleight-of-hand that DP&L claims that shareholders are funding these payments. As OCC explained in its briefs, DP&L estimates that these alleged shareholder payments will total around $30 million, whereas the new charges to consumers under the RSC are expected to total more than $300 million over the same period.[50] The $300 million in charges under the RSC are not related to any costs that DP&L will incur, so that money goes directly to shareholders. Under the Settlement, shareholders then turn around and

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[47] *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. 08-1094-EL-SSO, Second Finding & Order ¶ 26 (Dec. 18, 2019). Again, OCC disputes the PUCO's interpretation of "standard service offer" and does not concede that an electric security plan *is* a standard service offer; rather, a standard service offer is *part of* an electric security plan. OCC reserves all rights on this issue in Case No. 08-1094-EL-SSO or otherwise.

[48] Settlement at 36.

[49] Settlement at 32-33.

[50] OCC Initial Brief at 74.

immediately pay $30 million to various signatory parties. The Settlement is a single transaction where (i) A pays $300 million to B, and then (ii) B pays $30 million to C. It is nonsense to claim that consumers (A) are not paying $30 million to signatory parties (C).

After all, the centerpiece of DP&L's case is that DP&L is allegedly in a precarious financial condition and needs a bailout from consumers to pay its debts.[51] How, then, can its shareholders afford $30 million in handouts to signatory parties, if not for the $300 million RSC? DP&L's own witness admitted on cross examination that the $30 million in "shareholder" payments was an explicit quid pro quo for the $300 million in charges to consumers under the RSC:

> 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.[52]

Claims that shareholders are paying the cash handouts to signatory parties are spurious.

Third, if these payments are not part of ESP I, then what are they? This proceeding is the combination of four cases: (i) the PUCO's quadrennial review of DP&L's electric security plan, (ii) DP&L's 2018 significantly excessive earnings test, (iii) DP&L's 2019 significantly excessive earnings test, and (iv) DP&L's smart grid case. The payments clearly are not part of the significantly excessive earnings test. Nor do they have anything to do with DP&L's smart grid plan. Thus, they must be part of the quadrennial review case, where the PUCO was required to assess whether DP&L could continue charging consumers under ESP I.

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[51] *See* OCC Initial Brief at 7-8 (summarizing DP&L's testimony about its poor financial condition).

[52] Tr. Vol. II at 326 (Garavaglia).

By approving the Settlement, the PUCO allowed ESP I to continue but with new bells and whistles added to it for the benefit of signatory parties. As explained above, the cash handouts under the Settlement are plainly intended as replacements for the cash handouts that signatory parties lost when DP&L withdrew from ESP III. It is impossible, therefore, for the PUCO to escape the conclusion that the cash payments to signatories are modifications of ESP I, which is unlawful for the reasons explained above.

Assignment of Error 3. The Order violates R.C. 4903.09 and Ohio Supreme Court precedent because the PUCO failed to adequately explain its reasoning and wholly ignored OCC's arguments, including arguments that DP&L's smart grid proposal would not be cost beneficial and arguments showing that the numerous harms to consumers in the Settlement were far greater than any small benefits to consumers.

and

Assignment of Error 4: The PUCO erred in denying OCC's claim for rejection of the settlement based on DP&L's paying of cash and cash-equivalents to signatory parties (the "redistributive coalition"), given the PUCO's failure on this issue to "file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact" per R.C. 4903.09.

R.C. 4903.09 requires the PUCO to create "a complete record of all of the proceedings" and to "file, with the records of such cases, findings of fact and written opinions setting for the reasons prompting the decisions arrived at, based upon said findings of fact." The Ohio Supreme Court has interpreted this law to impose three requirements on the PUCO.

First, a PUCO order "must contain sufficient detail for [the] court to determine the factual basis and reasoning relied on by the commission."[53] In other words, R.C. 4903.09 "prohibits summary rulings and conclusions that do not develop the supporting rationale or record."[54] If the order lacks sufficient detail for appellate review, then it violates R.C. 4903.09.

[53] *Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, 2020-Ohio-5221, ¶ 19.

[54] *In re Commission Review of the Capacity Charges of Ohio Power Co.*, 2016-Ohio-1607, ¶ 53 (citation omitted).

Second, to comply with R.C. 4903.09, the PUCO must address parties' arguments and explain why it found one party's argument more compelling than another's. In *In re Capacity Charges of Ohio Power Co.*, the PUCO Staff offered expert testimony, which the utility challenged.[55] The PUCO adopted the Staff proposal without explanation and ignored the arguments underlying the utility's challenge.[56] The Court ruled that this violated R.C. 4903.09 and remanded to the PUCO with an instruction to "substantively address" the utility's arguments.[57] It is not enough for the PUCO to say that it finds one party's arguments compelling without explaining *why* that party's arguments are more compelling than competing arguments.

Third, to comply with R.C. 4903.09, the evidentiary record must actually support the PUCO's conclusions. Where the PUCO "renders an opinion on an issue without record support and a supporting rationale," it abuses its discretion.[58]

The PUCO violated R.C. 4903.09 because (i) its ruling approving the Settlement provides little or no insight regarding its reasoning for purposes of appellate review, (ii) it wholly ignored OCC's arguments and failed to explain why it did not adopt them, and (iii) the PUCO rendered an opinion without record support.

A. The PUCO's summary, three-sentence discussion of the alleged benefits to consumers under the Settlement is inadequate under R.C. 4903.09, particularly in a complex proceeding involving a 53-page settlement, five days of hearings, and more than 500 pages of briefing.

The second prong of the PUCO's settlement standard requires it to determine whether the Settlement, as a package, benefits consumers and the public interest. The following is the entirety of the PUCO's discussion regarding the second prong:

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[55] 2016-Ohio-1607.

[56] *Id.*

[57] *Id.* ¶ 57.

[58] *Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, 2020-Ohio-5221, ¶ 19 (citation omitted).

> Here, we reject OCC's individual claims contra the settlement benefits. Further, we emphasize our determination that the major provisions of the settlement are overwhelmingly customer beneficial, including obtaining AES Corporation's commitment to provide $300 million in capital contribution to DP&L to improve its infrastructure and modernize its grid; approving the modified SGP; and requiring that DP&L must pursue its next ESP, which is expected to terminate all rate stability charges, by 2023. Accordingly, we conclude that even assuming arguendo that some of OCC's claims contra the settlement benefits are accepted, the settlement as a whole remains beneficial to ratepayers and the public based on its inclusion of these major commitments from the Company.[59]

This three-sentence summary does not come close to meeting the requirements of R.C. 4903.09. In the first sentence, the PUCO says, without explanation, that it rejects OCC's individual claims regarding the alleged benefits of the Settlement. The PUCO then proceeds to state, without citing any record evidence, that the "major provisions" are "overwhelmingly customer beneficial." Despite this bold pronouncement, the PUCO identifies just three alleged benefits to customers under the Settlement: (i) AES's $300 million contribution to DP&L, (ii) the smart grid plan, and (iii) the commitment by DP&L to file another electric security plan by 2023 that is "expected to terminate all rate stability charges." The PUCO made no effort whatsoever to explain how these three benefits outweigh the numerous harms to consumers.

In its briefs, OCC spent 25 pages explaining why any alleged benefits to consumers under the Settlement are outweighed by numerous harms to consumers, including (i) harm to consumers from the smart grid charges, (ii) denying consumers the benefits of operation and maintenance costs, (iii) failing to provide adequate reliability benefits to consumers, (iv) requiring customers to bear all the risk of DP&L's smart grid investments, (v) allowing DP&L to charge consumers for a second phase of smart grid investments before showing that the

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[59] Order ¶ 50.

first phase was successful, (vi) denying consumers $150 million in refunds, (vii) allowing DP&L to continue charging consumers $79 million per year under the RSC, (viii) failing to make charges refundable, (ix) allowing DP&L to continue to seek financial integrity charges in its next electric security plan, and (x) providing cash or cash equivalents to signatory parties.[60] At no point did the PUCO explain why the three alleged benefits of the Settlement outweigh all of the various harms to consumers identified by OCC. But the PUCO was required to do this analysis under R.C. 4903.09 and the Supreme Court's ruling in *Ohio Power Co.*[61] Accordingly, the Order was unlawful.

B. The PUCO's findings on the alleged benefits of the Settlement violate R.C. 4903.09 because they are without record support.

As explained, in finding that the Settlement benefits consumers and the public interest, the PUCO cited just three alleged benefits: (i) AES's $300 million contribution to DP&L, (ii) the smart grid plan, and (iii) DP&L's commitment to file a new ESP by 2023 "which is expected to terminate all rate stability charges."[62] The record does not support the PUCO's conclusion that any of these three things is a benefit to consumers under the Settlement.

i. AES's payments to DP&L are not part of the Settlement, so they cannot be a benefit of the Settlement.

AES's $300 million contribution is not part of the Settlement. It is simply inaccurate for the PUCO to conclude that this is a benefit of the Settlement. Before the Settlement was even signed, AES had already made $150 million of the $300 million investment. AES made the

[60] *See* OCC Initial Brief at 49-75.

[61] 2016-Ohio-1607.

[62] Order ¶ 50.

initial $150 million investment on June 26, 2020[63] and the Settlement was signed October 23, 2020.[64] It is therefore logically impossible for that $150 million to be a benefit of the Settlement.

Further, nothing in the Settlement requires AES to pay a cent to DP&L. For one, AES is not a signatory party to the Settlement, so the Settlement does not legally bind AES to do anything, much less pay $150 million more to DP&L. Further, the only reference to the $300 million payments is found in the recitals of the Settlement.[65] But recitals provide background information and are not binding.[66]

Neither AES nor the $300 million is mentioned as a term of the Settlement itself. In other words, if AES were to simply refuse to provide the additional $150 million, it would have no bearing on the Settlement and neither the PUCO nor anyone else could compel AES to make the payment. Indeed, to date, it does not appear that AES has made the second $150 million payment to DP&L, even though the Settlement was approved a month ago.[67] The PUCO's conclusion that AES's $300 million contribution is a benefit to consumers under the Settlement contradicts the record and therefore violates R.C. 4903.09.

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[63] PUCO Staff Ex. 1 (Buckley) at 10.

[64] Settlement at 53.

[65] Settlement at 3 ("WHEREAS, the ultimate parent of DP&L, The AES Corporation, provided a capital contribution of $150 million to DP&L, on June 26, 2020 to enable DP&L to improve its infrastructure and modernize its grid while maintaining liquidity. In addition, as more fully described in DP&L's June 17, 2020 8-K filing, AES has provided a statement of intent to contribute an additional $150 million to DPL or DP&L in 2021 to enable smart grid investment.").

[66] *United States v. Community Health Sys.*, 666 Fed. Appx. 410, 417 (6th Cir. 2016) ("recitals generally do not create binding obligations") (citation omitted).

[67] A review of AES's and DP&L's SEC filings reveals no report regarding a second $150 million investment in 2021.

ii. The PUCO adopted the signatory parties' view that Smart Grid Plan 1 would be cost-beneficial to consumers instead of OCC witness Alvarez's contrary testimony that the plan would cost more than the potential benefits to consumers. But the PUCO made no effort whatsoever to explain why it rejected witness Alvarez's testimony.

The PUCO's Order violates R.C. 4903.09 because it fails to explain why it rejected substantial evidence presented by OCC that the Settlement primarily benefits DP&L and the signatory parties, rather than consumers. In the Order, the PUCO found that the Settlement as a whole benefits consumers and the public interest.[68] But that conclusory finding does not negate the PUCO's obligation under R.C. 4903.09 to explain the rationale for its decision.[69] The PUCO should grant rehearing to properly address the evidence presented by OCC and provide the rationale for the PUCO's determination that the Settlement benefits consumers over the evidence presented by OCC.

OCC witness Mr. Alavarez presented extensive testimony demonstrating that DP&L's cost-benefit analysis for Smart Grid Plan 1 ("SGP 1") focuses on the benefits to DP&L, rather than the benefits to consumers who will be forced to pay.[70] Mr. Alvarez used DP&L's own data to analyze the costs and benefits of SGP 1 and concluded that the charges to consumers for SGP 1 will far exceed the benefits to consumers. Specifically, Mr. Alvarez testified that consumers will receive just $0.45 in benefits for every $1 they pay for SGP 1.[71] Mr. Alvarez also identified other defects with SGP 1 that are harmful to consumers including, but not limited to: foregone benefits due to DP&L's rate case timing; expiration of the benefit offset to capital expenditures

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[68] Order, at ¶50.

[69] *See e.g. Interstate Gas Supply Inc. v. PUC*, 148 Ohio St.3d 510, 2016-Ohio-7535, ¶¶ 16-23 (reversing a PUCO order for failure to explain sufficiently the PUCO's rationale for its determination).

[70] OCC Initial Brief at 52-53.

[71] *Id.*

after SGP 1 year 4; reliance on indirect benefits that do not justify direct costs; and the overstatement of benefits from anticipated SGP 1 reliability improvements.[72]

The Order ignores all this evidence. While the PUCO did acknowledge that OCC disputed DP&L's claims regarding SGP 1's purported benefits to consumers,[73] nowhere in the Order does the PUCO discuss Mr. Alvarez's testimony or explain why the PUCO rejected his recommendations. The PUCO's conclusory statements that the Settlement as a whole benefits consumers is not enough.[74] The PUCO must properly address the issues and provide a rationale for its decision under R.C. 4903.09. The PUCO should grant rehearing of the Order.

iii. The PUCO failed to explain the rationale for its decision to allow DP&L to charge consumers for the SmartGrid Plan under the Infrastructure Investment Rider, which was never tariffed under DP&L's current electric security plan, ESP I.

The PUCO's Order permits DP&L to charge consumers for SGP 1 through the IIR even though OCC presented unrefuted[75] evidence that DP&L never filed an IIR tariff as a part of ESP I[76] and despite the fact that DP&L withdrew its ESP I filing of AMI and Smart Grid business cases—which the PUCO accepted.[77] The PUCO also ignored evidence presented by OCC that DP&L misrepresented to the PUCO that a placeholder IIR tariff did in fact exist as a part of ESP I when DP&L filed its Notice of Filing Proposed Tariffs after withdrawing from ESP III.[78] The

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[72] OCC Initial Brief. at 53-68.

[73] Order ¶ 49.

[74] *Interstate Gas Supply Inc. v. PUC*, 148 Ohio St.3d 510, 2016-Ohio-7535, ¶ 23 (When the PUCO fails to sufficiently explain the reasons for its decision to enable the reviewing court to determine how the decision was reached, the order must be set aside.).

[75] DP&L admitted in its post-hearing brief that there was no zero-placeholder IIR tariff filed after the ESP I Settlement was approved. *See* DP&L Initial Brief at 67.

[76] Order, at ¶75.

[77] *In re Application of the Dayton Power & Light Co. for approval of the Electric Security Plan*, Case No. 08-1094-EL-SSO, Entry ¶ 5-6 (Jan. 5, 2011).

[78] OCC Ex. 21 (DP&L Notice of Filing Proposed Tariffs, Nov. 25, 2019); OCC Initial Brief at 80.

PUCO's failure to explain the basis for its decision to permit charges to consumers through the IIR violates R.C. 4903.09. Consumers deserve transparency from the PUCO, and the PUCO should grant rehearing to explain the basis for its decision.

Further, the PUCO should explain how DP&L can now lawfully charge consumers under the IIR if that tariff did not exist under ESP I. Indeed, if there was no IIR tariff filed and approved in accordance with the ESP I settlement, DP&L cannot now, consistent with the filed-rate doctrine, charge consumers through the IIR.[79] DP&L chose to operate under ESP I, which means it must operate with no IIR cost recovery mechanism unless DP&L satisfies specific requirements set forth in the ESP I settlement.

Importantly, DP&L, in its October 19, 2010 filing in ESP I withdrew any IIR plans it had to comply with the ESP I stipulation. DP&L complained that were factors that caused it to withdraw plans for Smart Grid, including challenging economic conditions.[80] DP&L asked that the PUCO issue an order closing the ESP I proceeding. The PUCO accepted DP&L's withdrawal but noted that it expected DP&L to continue to explore the benefit of future investment in AMI and Smart Grid and expected that "DP&L will, when appropriate, file new AMI and/or Smart Grid proposals in a new docket."[81] That ended any DP&L proposal under ESP I to go forward with a Smart Grid plan.

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[79] *See* R.C. 4905.32; *In Re Alternative Energy Rider Contained in the Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, ¶ 15 (the filed-rate doctrine "provides that a utility may charge only the rates fixed by its current commission-approved tariff."); *see also 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.").

[80] *In the Matter of the Application of the Dayton Power and Light Company for approval of the Electric Security Plan*, Case No. 08-1094-EL-SSO, Motion of the Dayton Power and Light Company to Withdraw its Revised Advanced Metering Infrastructure and Smart Grid Business Cases at 2 (Oct. 19, 2010).

[81] Case No. 08-1094-EL-SSO, Entry at 2 (Jan. 5, 2011).

It was DP&L that unilaterally decided to quash plans to go forward with its IIR as part of ESP I. And it was DP&L that chose to withdraw from its ESP III, where it had, consistent with the PUCO's expectations, filed a new AMI/Smart Grid proposal. Once it made the choice to withdraw from ESP III, it reverted, under Ohio law, to its most recent standard service offer. As a matter of law, DP&L cannot simply rename and use the rider that was approved as part of ESP III (the SmartGrid Rider) to charge consumers now that DP&L has chosen to operate under ESP I.

The PUCO ignores all of this, and instead criticizes OCC for failing to challenge "reinstatement" of the IIR (which never existed in the first place) after *DP&L itself misrepresented* to the PUCO and the public that the IIR tariff existed as part of ESP I.[82] It goes without saying that DP&L should not be rewarded by the PUCO for misrepresenting facts to the PUCO and the public. Regardless, whether OCC challenged "reinstatement" of the IIR or not is no justification for the PUCO's failure to support its decision to permit DP&L to charge consumers for SGP 1 through a rider that DP&L admits was *never* tariffed under ESP I. The PUCO also states that OCC agreed to the IIR as part of the settlement in ESP I.[83] That is beside the point, because OCC never agreed to the IIR as a cost recovery mechanism to charge consumers for DP&L's SmartGrid Plan that was filed while operating under ESP III.[84]

In short, the PUCO has an obligation under R.C. 4903.09 to sufficiently explain the rationale for its decisions based on the record evidence. The PUCO failed, and it should grant rehearing. The PUCO should issue an order that explains the basis for its decision to allow

[82] Order ¶75.

[83] Order ¶ 75.

[84] OCC Reply Brief at 29-30.

DP&L to charge consumers millions of dollars through a tariff that was not filed and approved as a part of ESP I.

iv. The record contradicts the PUCO's finding that DP&L filing its next electric security plan "is expected to terminate all rate stability charges."

As explained, the PUCO found that one of the three benefits to consumers under the Settlement is that DP&L must file another electric security plan case by 2023, "which is expected to terminate all rate stability charges."[85] But the record provides no support for the PUCO's conclusion that the new electric security plan is "expected to terminate all rate stability charges." To the contrary, as OCC explained in its briefs, there are numerous ways for DP&L to continue charging consumers for rate stability charges in its next electric security plan.[86]

First, the Settlement only prohibits DP&L from seeking such a charge in its *application* in the next electric security plan case.[87] Nothing prevents DP&L from seeking such a charge through a settlement. So, three years from now, DP&L could comply with the Settlement by filing an application without a financial integrity charge and then immediately demanding 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 could—once again—charge consumers $79 million per year

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[85] Order ¶ 50.

[86] OCC Initial Brief at 72-73.

[87] Settlement at 45 ("DP&L's *Application* 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.").

under the RSC.[88] Contrary to the PUCO's finding that the next ESP is "expected to terminate all rate stability charges," there is a clear path for DP&L to continue charging consumers for rate stability charges in the next ESP. The Order ignored this reasoning and concluded, to the contrary and without record support, that the new electric security plan is "expected to terminate all rate stability charges."

Second, the Settlement only prohibits DP&L from seeking a *nonbypassable* financial integrity charge.[89] 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 consumers, this could be even worse than the current situation, because then only a smaller subset of consumers (those taking generation from the standard service offer) would pay subsidies to boost DP&L or its affiliates' financial integrity. The Order ignores this concern in concluding that all financial integrity charges are expected to end in the next electric security plan case and concluding that the Settlement benefits customers.

Third, the Settlement requires only that DP&L *file* an ESP application by 2023. There is no requirement that DP&L actually pursue that application to completion. For example, DP&L could file an ESP application to comply with the terms of the Settlement and then simply withdraw it. In that case, DP&L would continue under ESP I for as long as it likes—including continuing to charge consumers under the Rate Stabilization Charge.

If this seems unlikely to occur, it isn't unlikely at all—DP&L has repeatedly used the withdrawal tactic to perpetuate its unlawful subsidy charges to consumers.

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[88] OCC continues to believe that the RSC is unlawful and does not concede that it would be lawful for the PUCO to re-implement the RSC if DP&L were to again revert to ESP I.

[89] Settlement at 45.

As part of the ESP I Settlement, DP&L was required to file an application for an ESP or MRO by March 30, 2012 so that a new rate plan could be in effect by January 1, 2013 after the expiration of ESP I.[90] DP&L complied with that requirement by filing an application for an MRO.[91] DP&L then waited six months and unilaterally decided to withdraw that application, thus ensuring that its ESP I would continue beyond the stated expiration date.[92] DP&L's tactic allowed it to deny signatory parties' like the OCC the benefit of their bargain, including the expectation that the Rate Stabilization Charge would not continue past December 31, 2012. There is nothing stopping DP&L from doing precisely the same thing here—complying with the Settlement by *filing* an application for ESP IV and then unilaterally withdrawing that application—in an effort to perpetuate the Rate Stabilization Charge.

Because there is no record support regarding the PUCO's finding that the next ESP is expected to end financial integrity charges to consumers, the PUCO cannot rely on this finding as support for its conclusion that the Settlement benefits consumers. To the contrary, because the Settlement leaves open the distinct possibility of continued financial integrity charges, it actively harms consumers rather than benefiting them.

If the PUCO does not modify the Order to reject the Settlement in its entirety, it should modify the Settlement to ensure that consumers actually realize the half-promised benefit of the Rate Stabilization Charge (and any similar charge) ending. The PUCO could modify the Settlement to provide that (i) DP&L cannot include any nonbypassable *or bypassable* Rate Stabilization Charge or any similar charge in its ESP IV application, and that DP&L cannot

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[90] ESP I Settlement at 5.

[91] *In re Application of the Dayton Power & Light Co. for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO, Application (Mar. 30, 2012).

[92] Case No. 12-426-EL-SSO, Notice of Withdrawal of Market Rate Offer Application (Sept. 7, 2012).

include such a charge in any settlement that it signs regarding ESP IV, and (ii) DP&L cannot withdraw its ESP IV application before the PUCO rules on it. At a minimum, making these changes could close the loopholes identified above, all of which could be exploited by DP&L to continue charging consumers for financial integrity charges for many years to come.

C. In rejecting OCC's consumer protection arguments regarding the redistributive coalition, the PUCO cited no record evidence for its erroneous conclusion that "many of the negotiated concessions contained in the Stipulation benefit all customer classes." To the contrary, because the Settlement is the product of a redistributive coalition, the record does not support the PUCO's conclusion that it benefits customers and the public interest.

OCC explained through the testimony of Ohio State Professor Ned Hill and its briefs that the Settlement does not benefit consumers because it was the product of a redistributive coalition that benefits limited parties (the signatory parties) rather than the broader customer base.[93] Rather than negotiate a settlement that benefits all customers and is in the public interest, some settling parties negotiated for cash or cash equivalents only for themselves (or their members). It is perhaps understandable that parties would negotiate in this manner, given the utility's unfair bargaining power in the settlement process, which results from the utility's ability to withdraw from its electric security plan, as well as the PUCO's de facto rule that a utility must sign every settlement.[94]

In rejecting OCC's argument, the PUCO summarily concluded, "many of the negotiated concessions contained in the Stipulation benefit all customer classes such that claims of bias or

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[93] OCC Ex. 3 (Hill Testimony); OCC Initial Brief at 37-44; 73-75.

[94] *Accord In re Application of [FirstEnergy] to Establish a Standard Serv. Offer*, Case No. 08-935-EL-SSO, Second Opinion & Order, Opinion of Commissioner Cheryl L. Roberto at 2 (Mar. 25, 2009) (recognizing the utility's unfair bargaining power in settlements and the incentive it gives parties to sign settlements that are not necessarily in the public interest).

lack of protection as to residential customers are simply inaccurate."[95] This violates R.C. 4903.09 for several reasons.

It is a bare claim without any record support; the PUCO cites no record evidence for this conclusion. Further, the PUCO did not even identify the "many ... negotiated concessions" that it claims to benefit all customer classes. On appeal, the Ohio Supreme Court would have to guess what the PUCO is referring to here, which violates R.C. 4903.09.

Further, the record directly contradicts the PUCO's claim that many of the provisions in the Settlement benefit all customer classes. As Dr. Hill testified, by taking cash and cash equivalents, the signatory parties create only the "*veneer* of widespread support," even though in reality, the proposals set forth in the settlement benefit a small group of coalition members and not the broad public.[96] The Settlement is replete with provisions that are directed to individual signatory parties (or their members) and no one else. There is no customer class that benefits from the City of Dayton receiving $800,000 under the Settlement.[97] There is no customer class that benefits from OHA receiving $440,000 under the Settlement.[98] There is no customer class that benefits from Honda receiving $428,000 under the Settlement.[99] There is no customer class that benefits from IEU receiving $448,000 under the Settlement.[100] There is no customer class that benefits from Kroger receiving $104,000 under the Settlement.[101] There is no customer class

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[95] Order ¶ 72.

[96] OCC Ex. 3 (Hill Testimony) at 10 (emphasis in original).

[97] Joint Ex. 1 (Settlement) at 33. Arguably, residents in the City of Dayton could indirectly benefit from this money. But residents of a single city are not a customer class. Residential consumers in other cities and towns throughout DP&L's service territory do not benefit from these payments.

[98] *Id.* at 35.

[99] *Id.* at 37.

[100] *Id.*

[101] *Id.*

that benefits from OMAEG receiving $1.04 million under the Settlement.[102] There is no customer class that benefits from the University of Dayton receiving $840,000 under the Settlement.[103] There is no customer class that benefits from IGS receiving $1 million under the Settlement.[104] There is no customer class that benefits from OHA, OEG, IEU, Honda, OMAEG, and Kroger receiving credits of $0.004 per kWh under the Settlement.[105] There is no customer class (or even a single customer) that benefits from customers being denied refunds under the Settlement despite DP&L's significantly excessive earnings. There is no customer class (or even a single customer) that benefits from DP&L continuing to charge customers $79 million per year under the RSC.

With so many provisions in the Settlement that either (i) harm customers, or (ii) limit benefits to a small subset of customers, it is not clear what provisions the PUCO could possibly be referring to when it claims that "many" of the Settlement's provisions benefit "all customer classes." The PUCO therefore had no basis to reject Dr. Hill's testimony regarding the ill effects of the redistributive coalition and the lack of benefits to *all* consumers under the Settlement. The PUCO's conclusion violated R.C. 4903.09 both because it is too vague for the Ohio Supreme Court to review and because it contradicts the record.

Assignment of Error 5. The Order violates R.C. 4928.143(F) because it denies consumers refunds under the Significantly Excessive Earnings Test despite a PUCO finding that DP&L's profits were significantly excessive as compared to comparable companies to the tune of $61 million.

Under R.C. 4928.143(F), the PUCO is required each year to determine whether an electric utility had "significantly excessive earnings" ("earnings" being another word for

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[102] *Id.*

[103] *Id.*

[104] *Id.* at 41-42.

[105] *Id.* at 36-37.

"profits"). To determine whether a utility's profits were significantly excessive, the PUCO "shall consider" the utility's earned return on common equity compared to the "return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate."[106] In comparing the utility's return on equity to that of other comparable companies, "[c]onsideration also shall be given to the capital requirements of future committed investments in this state."[107] If the utility's profits were significantly excessive, then the PUCO "*shall* require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments."[108]

For more than a decade, the PUCO has adhered to the following process in determining whether a utility had significantly excessive profits:[109]

1. A profits threshold is established.
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. The return on equity percentage from step 4 is compared to the profits threshold from step 1.

In following these steps, the PUCO has consistently ruled that when the return on equity percentage is lower than the profits threshold, there are no significantly excessive earnings and

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[106] R.C. 4928.143(F).

[107] R.C. 4928.143(F).

[108] R.C. 4928.143(F) (emphasis added).

[109] All parties' witnesses followed these same steps in assessing DP&L's profits under the significantly excessive earnings test. *See* OCC Ex. 4 (Duann Initial Testimony) at 13-14, 18; DP&L Ex. 3 (witness Garavaglia and Malinak's calculations); DP&L Ex. 2 (Malinak Supplemental Testimony) at 51-62; Staff Ex. 1 (Buckley Testimony) at 5-10.

no refunds for consumers.[110] The PUCO's analysis instantly ends when the return on equity is lower than the profits threshold, resulting in a favorable ruling for the utility.

Yet now, in the rare case where the PUCO finds that the utility's profits were *above* the profits threshold by more than $60 million, it still reached the same utility-friendly result: no refunds for consumers. To accomplish this result, the PUCO relied on language in R.C. 4928.143(F) that "[c]onsideration also shall be given to the capital requirements of future committed investments in this state."[111]

The PUCO has essentially interpreted this language to mean that the PUCO has absolute authority to wipe out consumer refunds whenever the utility commits to making future capital investments in Ohio. But the PUCO's interpretation in this regard is unreasonable and unlawful.

First, if a utility's commitment to future capital investments can erase refunds for consumers under the significantly excessive earnings test, then the PUCO would effectively be legislating the earnings test out of existence. Electric utilities are capital-intensive businesses; their very existence (and profitability) relies on large-scale, constant capital investments. It will *always* be the case that an electric utility expects to make future capital investments in Ohio, so there will never be a situation where the PUCO would be unable to deny refunds to consumers under this justification.[112]

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[110] *See, e.g., In re Application of Dayton Power & Light Co. for Admin. of the Significantly Excessive Earnings Test*, Case No. 17-1213-EL-UNC, Opinion & Order (July 31, 2019) (no refund for 2016 where return on equity was 9.4% and SEET threshold was 12%; no refund for 2017 where return on equity was 4.5% and SEET threshold was 12%); *In re Application of Ohio Power Co. for Admin. of the Significantly Excessive Earnings Test for 2017*, Case No. 18-989-EL-UNC, Opinion & Order (July 17, 2019) (no refund for 2017 where return on equity was 9.87% and SEET threshold was below safe harbor).

[111] R.C. 4928.143(F); Order ¶ 68 (citing R.C. 4928.143(F)).

[112] *See* OCC Ex. 2 (Kahal Supplemental) at 12 ("If capital requirements of future committed investments in the state can be used to completely deny SEET refunds to customers, then the protection that the statute provides to customers would be undermined. Every utility could avoid ever paying a SEET refund to customers by simply declaring that they intend to make capital investments in the future.").

Further, the PUCO's statutory interpretation contradicts PUCO precedent. In *In re Application of Columbus Southern Power Co. & Ohio Power Co. for Administration of the Significantly Excessive Earnings Test*,[113] the PUCO addressed the statutory language in R.C. 4928.143(F) that "[c]onsideration also shall be given to the capital requirements of future committed investments in this state."[114] The PUCO took into account the utility's future capital investments only for purposes of determining the proper SEET *threshold*.[115] The PUCO ruled that because the utility had committed to making future capital investments, it was appropriate to use a slightly higher SEET threshold.[116] This interpretation follows the words and placement of the "future committed investment" language. The future committed investment sentence immediately follows the comparable analysis language and links back to the analysis by reiterating that the PUCO must "also" consider future committed investment in its comparable analysis. The placement of the language was intentional. The language does not allow the PUCO to consider future committed investment in the last step of the profits test, when the PUCO is merely applying the threshold to the profits and setting the refund to consumers.

The PUCO abandoned that precedent in the current case. Had it followed that precedent, it could have slightly increased the SEET threshold to account for DP&L's future capital investments. But it did not do that. Instead, it ruled that all refunds would be wiped out simply because DP&L has committed to invest $249 million in capital expenditures for smart grid (investments for which it would be allowed to charge consumers, including charges for profits,

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[113] Case No. 10-1261-EL-UNC.

[114] *Id.*, Opinion & Order (Jan. 11, 2011).

[115] *Id.* at 25-27.

[116] *Id.* at 26-27.

on an accelerated basis).[117] This result is particularly confusing, given that in *Ohio Power*, the utility's commitment to capital investments was substantially larger: nearly $1.7 billion. It is not clear how the PUCO could conclude that a $249 million investment by DP&L warrants complete elimination of refunds, when a $1.7 billion investment by Ohio Power still resulted in refunds for consumers.

It appears that there is no hope that consumers will ever get a refund, no matter how significantly excessive a utility's earnings are. The PUCO has turned the test into a heads-I-win-tails-you-lose proposition for the utility. When a utility's earnings are below the adopted SEET threshold, there are no refunds. And when a utility's earnings are above the adopted SEET threshold, the PUCO offers the utility a get out of jail free card with its "capital investment" justification for denying refunds. On rehearing, the PUCO should modify the Order to provide refunds to consumers in the amount of $61.1 million—the amount that the PUCO Staff's witness calculated as being significantly excessive.

Assignment of Error 6. The Order violates R.C. 4928.143(F) because it provides consumers with an "offset" to smart grid charges instead of a refund for significantly excessive profits, which undermines the consumer protection purpose of the statute and allows the utility to profit, on an accelerated basis, through its Infrastructure Investment Rider.

The significantly excessive earnings test statute provides that if a utility has significantly excessive earnings, the PUCO "*shall* require the electric distribution utility to return to customers the amount of the excess by prospective adjustments."[118] Here, the record supports a finding of at least $61.1 million in significantly excessive earnings, as testified to by PUCO Staff witness Buckley.[119] But rather than order a prospective adjustment—a refund—to consumers, the PUCO

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[117] Order ¶ 68.

[118] R.C. 4928.143(F) (emphasis added).

[119] Staff Ex. 1 (Buckley).

ruled that it is "appropriate to offset, dollar-for-dollar, the excessive earnings against the future committed investment."[120] The PUCO continued, "Therefore, we will offset $3.7 million for 2018 and $57.4 million for 2019 for a total of $61.1 million of the capital expenditures include within the $267.6 million of [Smart Grid Plan] Phase 1 expenditures."[121]

This offset ruling is unlawful for several reasons. First, it violates R.C. 4903.09 because the PUCO failed to adequately explain what it means by "offset." Does the PUCO mean that charges to consumers for smart grid under the Infrastructure Investment Rider ("IIR") will be reduced by $61.1 million? Does the PUCO mean that the amount of capital investments embedded in the revenue requirement calculation will be reduced by $61.1 million? If so, will consumers still pay a return on the full investment ($249 million) or a return on the reduced investment ($249 million minus $61.1 million)? Does the PUCO simply mean that because the capital investments are greater than the would-be refund, the refund is eliminated with no reduction in charges under the IIR? Without further clarification regarding the PUCO's intent with its "offset" ruling, there is no basis for the Ohio Supreme Court to review the Order, which violates R.C. 4903.09.

Further, regardless of the interpretation, it is unlawful because the $61.1 million amount should be refunded to consumers, not used to offset other charges. For one, the statute says that the PUCO *shall* require the utility to "return to customers" the excess profits.[122] Offsetting grid smart costs (whatever that might mean) is not returning money to consumers.

In addition, consumers do not receive the full benefit of the refund if is applied to future smart grid charges. At a minimum, offsetting smart grid charges will substantially delay any

[120] Order ¶ 68.

[121] *Id.*

[122] R.C.4928.143(F).

relief to consumers because it is not clear when DP&L will actually make its smart grid investments and when charges to consumers under the IIR might start. Consumers paid the significantly excessive profits in 2018 and 2019, so they should not be made to wait any longer to receive any potential benefits from the offset. And of course, the utility is already benefiting from the IIR because it allows DP&L to charge consumers, including a return on and of capital investments, on an accelerated basis through single-issue ratemaking. Consumers are already being harmed by the PUCO's approval of charges through the IIR, so using that same rider to "offset" refunds diminishes the consumer protection that is supposed to exist in the significantly excessive earnings test.

On rehearing, the PUCO should modify the Order to eliminate the "offset" language and instead order a full and prompt refund, through a bill credit, to consumers, for all significantly excessive profits.

Assignment of Error 7: The PUCO's Order permitting DP&L to charge consumers through the Infrastructure Investment Rider violates R.C. 4928.143(C)(2)(b) because the rider was not a provision, term, or condition of DP&L's most recent standard service offer.

The PUCO determined in the Order that DP&L's SGP "is consistent with ESP I" and as a result, permitted DP&L to charge consumers for SGP investments through the IIR.[123] However, the IIR, as a tariffed cost recovery mechanism for SGP, was not a part of ESP I. The IIR actually came from ESP III and was known under ESP III as the SmartGrid Rider. This placeholder rider was not in effect prior to ESP III.[124] When DP&L withdrew from operation under ESP III, the PUCO found that DP&L's ESP I was the most recent standard service offer that must be reinstated under R.C. 4928.143(C)(2)(b) and that the PUCO "must restore the provisions, terms,

[123] Order ¶ 75.

[124] OCC Ex. 21 (DP&L Notice of Filing of Proposed Tariffs, Nov. 25, 2019).

and conditions of ESP I which were in effect prior to the effective date of ESP III."[125] Consistent with the PUCO's determination, the PUCO's Order should not have permitted DP&L to charge consumers for SGP through the IIR.

The ESP I settlement does reference an IIR tariff that DP&L could implement at a future point to collect charges for "prudently incurred costs related *solely to the Company's AMI and/or Smart Grid approved plans*."[126] However, the unrefuted evidence demonstrates that DP&L never filed an IIR placeholder tariff after the ESP I settlement.[127] And DP&L unilaterally withdrew the application it filed under ESP I that would have implemented an AMI or Smart Grid program. The PUCO accepted DP&L's withdrawal. Instead, the tariff that DP&L will now use to charge consumers for SGP was filed as part of DP&L's ESP III distribution infrastructure modernization plan.[128] But DP&L no longer operates under ESP III, so that nonexistent cost recovery mechanism cannot now be used to charge consumers under ESP I.[129]

When DP&L filed its Notice of Filing Proposed Tariffs after withdrawing from ESP III, it represented to the PUCO that an IIR placeholder tariff identical to the ESP III SmartGrid Rider had been filed after the ESP I settlement.[130] But that was inaccurate.[131] Nevertheless, the PUCO

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[125] *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan,* Case No. 08-1094-EL-SSO *et al.,* Second Finding and Order (Dec. 18, 2019) ("2019 Tariff Order") ¶ 27.

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

[127] 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).

[128] OCC Initial Brief at 78-80.

[129] OCC Ex. 6 (Williams Direct) at 15-24.

[130] OCC Ex. 21 (DP&L Notice of Filing of Proposed Tariffs, Nov. 25, 2019).

[131] 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).

subsequently approved the IIR, and has now through the Order authorized DP&L to use the IIR to charge consumers for SGP.[132]

The Order is contrary to R.C. 4928.143(C)(2)(b), which requires the PUCO to continue the "provisions, terms, and conditions of the utility's most recent standard service offer." The IIR—in the form set forth in DP&L's Notice of Filing Proposed Tariffs—did not exist as a provision, term, or condition of DP&L's most recent standard service offer. Accordingly, the PUCO cannot lawfully permit DP&L to charge consumers for SGP investments through the IIR. For these reasons, the PUCO should grant rehearing of the Order.

III. CONCLUSION

To protect consumers, the PUCO should grant this Application for Rehearing and abrogate the Order. The PUCO should reject the Settlement, terminate the Rate Stabilization Charge, reject DP&L's proposed charges to consumers for smart grid investments, and order DP&L to refund its significantly excessive profits to consumers.

[132] Order ¶ 75.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission this 16th day of July 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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