BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan.	)))	Case No. 08-1094-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 08-1095-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code Section 4905.13.	)))))	Case No. 08-1096-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of its Amended Corporate Separation Plan.	))))	Case No. 08-1097-EL-UNC

APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

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The Office of the Ohio Consumers' Counsel ("OCC") files to protect consumers who have paid plenty in made-up charges to DP&L since the 2008 energy law and the interim period before it. Moreover, there is financial distress and a poverty level of 35% in the Dayton area. Yet, consumers were required to pay hundreds of millions of dollars in stability charge subsidies to prop up DP&L's uneconomic power plants and to support DP&L's credit (through the infamous "distribution modernization charge.") But even when the Ohio Supreme Court (and then the PUCO) finally stopped the subsidies, there was no relief (or refunds) for customers. Instead, the PUCO has allowed DP&L to play a

game of subsidy shuffle, where the unlawful subsidies overturned by the Court and the PUCO are replaced with more unlawful subsidies and charges.

OCC applies for rehearing of the PUCO's June 16, 2021 Fifth Entry on Rehearing ("Delayed Rehearing Order") that saddles consumers with reinstated unlawful and unreasonable utility subsidies and unauthorized charges and fails to give consumers the benefit of a distribution rate freeze that was an integral part of DP&L's ESP 1. Under R.C. 4903.10, the PUCO's Delayed Rehearing Order was unjust, unreasonable, and unlawful in the following respects:

Assignment of Error 1: The PUCO erred when it approved a $79 million per year provider-of-last-resort charge to consumers without finding it just and reasonable, and without evidentiary support, and in violation of Ohio Supreme Court and PUCO precedent and Ohio law, including R.C. 4903.09, 4905.22, and 4928.02(A).

A. Since 2006 through 2024, as a result of PUCO rulings, DP&L consumers will have paid $1.2 Billion in non-cost-based charges for POLR/Stability.

B. The PUCO failed to determine whether continuing to charge consumers a $79 million per year non-cost based POLR charge is reasonable and lawful. It's not.

1. Approving DP&L's fifteen-year old non-cost based POLR/Stability charge to consumers is inconsistent with 2011 Ohio Supreme Court and PUCO rulings.

2. There is no evidentiary support for allowing DP&L to continue charging consumers $79 million a year for a non-cost based POLR, violating R.C. 4903.09.

Assignment of Error 2: The PUCO erred in concluding that it does not have discretion to make rates and charges subject to refund unless two independent conditions are met, where one of the conditions is that the tariff provision for the rate or charge is "reconcilable." When the PUCO added a reconcilable requirement for consumer refunds, the PUCO unreasonably and unlawfully construed Ohio law (R.C. 4905.32).

Assignment of Error 3: The PUCO erred in concluding that OCC is barred by res judicata and collateral estoppel from challenging DP&L's rate stability charge. When a judgment is issued without jurisdiction, it is void and subject to collateral attack. Because the PUCO had no jurisdiction to order the continuation of DP&L's electric security plan, instead of its standard service offer, its order was void and is subject to collateral attack.

Assignment of Error 4: The PUCO erred in its findings excusing DP&L from its ESP I rate freeze commitment to consumers. In violation of Ohio Supreme Court precedent on this issue, the PUCO's findings are mistaken and misapprehend OCC's claims of error. Consistent with R.C. 4903.09 and Supreme court precedent, the PUCO's findings can and should be disturbed (meaning abrogated).

Assignment of Error 5: The PUCO erred by delaying its rehearing ruling for sixteen months (until June 16, 2021) and by deferring yet more rehearing rulings beyond its June 16, 2021 Order, in violation of R.C. 4903.10, 4903.11, 4903.12 and 4903.13, and, in an abuse of discretion. The PUCO's errors have wrongfully delayed the issuance of a final appealable order.up to June 16, 2021 and beyond because the PUCO is intending for there to be further rehearing rulings, all of which are denying OCC its statutory right of appeal and denying the Court its statutory right of review .

The PUCO should grant rehearing and abrogate or modify its Opinion and Order as requested by OCC.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I INTRODUCTION

This is the second time in three years that the PUCO has permitted DP&L to withdraw from an electric security plan so as to maneuver around a ruling that should have protected consumers from paying an unlawful charge – but then didn't. This time it was the infamous "distribution modernization rider" that was fabricated to subsidize FirstEnergy and DP&L, at consumer expense, until it was thrown out by the Ohio Supreme Court. And like the last time DP&L withdrew, DP&L claims it is Ohio law that allows it to squeeze more money out of its consumers.

This unfortunate situation for consumers is another example of how Ohio's 2008 energy law, especially as the PUCO interprets it, is an obstacle to lower electric bills. Consumers would benefit from repealing the part of the law (R.C.4928.143(C)(2)(a) that

favors electric utilities by allowing them to withdraw from an electric security plan when the plan is modified. In essence, the utilities (unique among any party) can veto a PUCO order and with it veto any consumer recommendations adopted in the order.

II. ARGUMENT

<u>Assignment of Error 1:</u> The PUCO erred when it approved a $79 million per year provider-of-last-resort charge to consumers without finding it just and reasonable, and without evidentiary support, and in violation of Ohio Supreme Court and PUCO precedent and Ohio law, including R.C. 4903.09, 4905.22, and 4928.02(A).

A. Since 2006 through 2024, as a result of PUCO rulings, DP&L consumers will have paid $1.2 Billion in non-cost-based charges for so-called POLR/Stability.

The rate stabilization charge that the PUCO has allowed DP&L to once again resurrect dates back some fourteen years to 2006, when DP&L consumers were ordered to pay a "rate stabilization surcharge" to DP&L under its pre-ESP rate plan.[1] The rate stabilization surcharge rider was originally described (in 2003) as relating to increased costs of production, physical security, and cybersecurity for power plants owned by DP&L and its affiliates.[2] (Those power plants were completely divested by DP&L as of 2017).

The PUCO, in Case No. 05-276-EL-AIR, adopted a rate plan for DP&L (agreed to by settlement[3]) which included a provision that consumers pay the rate stabilization surcharge through December 31, 2010. Annually, consumers were to pay a per kwh

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[1] *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order (Dec. 28, 2005) (adopting stipulation with rate stabilization charge).

[2] *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, Stipulation at 13-14, ¶IX E (May 28, 2003).

[3] OCC was not a signatory and opposed the stipulation.

charge that produced approximately $76 million per year in revenue for DP&L.[4] The rate stabilization charge was described in the settlement (which the PUCO adopted over OCC's objection) as a charge to "compensate DP&L for providing stabilized rates for customers and Provider of Last Resort service."[5]

The amount of the rate stabilization charge to DP&L consumers was arbitrarily set "subject to a limit equal to 11% of DP&L's generation rate; that 11% limit on the RSS equates to a revenue requirement of approximately $76 million."[6] DP&L produced no evidence of actual out of pocket costs or any estimates of the cost to be the POLR and carry the POLR risks.

Instead, it argued that the annual rate stabilization charge to consumers was reasonable because (1) it was less than an unrelated revenue requirement for "increasing fuel, environmental, security and tax costs" and (2) it was less than the value to customers for the option to shop, based on the outputs from a trading options model (known as the Black-Sholes model.) DP&L's witness Strunk testified that the value of the shopping option to customers (produced under the Black Sholes model) greatly exceeded the $76 million annual charge that customers would pay under the stability charge.[7]

The PUCO approved the rate stabilization rider charge[8] (equal to 11% of DP&L's January 1, 2004, tariffed generation rates) to customers as part of a settlement (that OCC

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[4] *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order at 11 (Dec. 28, 2005).

[5] *Id.*, Stipulation and Recommendation at 5 ¶C (November 3, 2005).

[6] *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Testimony of Dona Seger Lawson In support of the Stipulation and Recommendation at 4 (Nov. 4, 2005).

[7] *Id.*, Testimony of Kurt G. Strunk In Support of the Stipulation and Recommendation (Nov. 4, 2005).

[8] *Id.*, Opinion and Order (Dec. 28, 2005).

opposed). That stability charge was collected from consumers for two years **($178 million**) before it wormed its way into DP&L's very first electric security plan, Case No. 08-1094-EL-SSO.

In that case (DP&L ESP 1) parties (including OCC) reached a settlement in 2009, with one of terms being that the rate stabilization charge to consumers continue as part of DP&L's first electric security plan.[9] The PUCO approved that settlement [10] and DP&L's electric security plan remained in place from 2008 through 2013. During that time DP&L consumers paid an additional $**380 million** to DP&L for the rate stabilization charge (<u>which continued, unchanged as a $76 million per year charge to consumers equal to 11% of DP&L's January 1, 2004, tariffed generation rates).</u>

In 2012 when DP&L filed its application for a market rate offer to replace its ESP 1, it sought to continue its rate stabilization charge to consumers, but decided to change the name to an "electric service stability charge" ("ESSC"). In its application it noted that the ESSC charge would "equal the rate formerly charged as the rate stabilization charge."[11] DP&L described the rate as compensating it "for maintaining electric service stability for the Company and its customers."[12]

Later that year, DP&L withdrew its application for a market rate offer and filed an ESP with a "service stability rider" ("SSR") to "permit DP&L to maintain its financial health" claiming that without the service stability rider charge "DP&L's financial

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[9] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Stipulation and Recommendation at ¶3 (Feb. 24, 2009).

[10] *Id*., Opinion and Order (June 24, 2009).

[11] *In the Matter of the Application of the Dayton Power & Light Company for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO *et al.,* Book I, Application, Rate Blending Plan at 9 (Mar. 30, 2012).

[12] *Id*.

integrity will be threatened."[13] Ostensibly, that proposed service stability charge was no different than the rate stabilization charges DP&L had been authorized to collect from consumers since 2006. However, the service stability charge that DP&L sought as part of its ESP II was almost double its predecessors– DP&L asked to charge its consumers $137.5 million per year throughout its ESP II term.[14]

The PUCO once again authorized DP&L to collect a stability charge from its consumers, though reducing the service stability charge to $110 million annually.[15] Consumers paid the stability charges from 2013 to 2016, paying **$293.3 million** before the Ohio Supreme Court in 2016 struck down DP&L's service stability rider charge (with no refunds to consumers for the unlawful charges they paid.)[16]

Undaunted, DP&L found a work-around the Court's decision, allowing it to continue to collect stability charges from its consumers. DP&L withdrew from its second ESP in response to the Court's decision.[17] The PUCO approved DP&L's withdrawal despite vigorous objections from OCC and others.[18] And the PUCO allowed DP&L to reinstitute the rate stabilization charge that DP&L had collected from consumers under its

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[13] *Id.*, Application at ¶6 (Oct. 5, 2012).

[14] *In the Matter of the Application of the Dayton Power & Light Company for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO et al., Opinion and Order at 25 (Sept. 4, 2013), citing to Confidential Testimony of C. L. Jackson at 11-13.

[15] *Id.*

[16] *In re: Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490 (with the Court basing its ruling on *In re Application of Columbus S. Power Co.,* 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, striking down AEP's stability charge as an unlawful transition charge). This precedent, **handed down after the 2009 stipulated ESP I,** also calls into question whether the POLR/Stability charge authorized by the PUCO in its Delayed Rehearing Entry is lawful.

[17] *In the Matter of the Application of the Dayton Power & Light Company for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO et al., Notice of Withdrawal (July 1, 2016).

[18] *Id.* Finding and Order (Aug. 26, 2016). OCC appealed the withdrawal by DP&L, but OCC's appeal was rendered moot by the PUCO's approval of a different set of rates –ESP III.

ESP I (despite the fact that the reinstated rate stabilization charge was no different than the unlawful service stability rider charge the Court had struck down two months earlier). Again, customers were stuck with the bill, paying in 2016 and 2017, another $**82 million** in charges for the reinstated rate stabilization charge (equal to 11% of DP&L's January 1, 2004, tariffed generation rates and producing approximately $76 million per year in revenue for DP&L).

DP&L's third electric security plan was approved on October 20, 2017[19] The PUCO adopted DP&L's ESP III that had been agreed to through stipulation, with OCC opposing the stipulation. Although that plan did not have a "rate stabilization charge," it contained a stand in stability subsidy–the distribution modernization charge (supporting DP&L's credit) that did not require DP&L to spend a penny on distribution modernization. That charge to consumers lasted long enough for DP&L to collect $218 million before being overturned by the PUCO[20] (in response to a Supreme Court ruling that struck down FirstEnergy's nearly identical distribution modernization charge).[21] And no refunds were provided to consumers for the $218 million they paid to DP&L for the unlawful modernization charges.

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[19] *In the Matter of the Application of Dayton Power and Light Company to Establish a Standard Service offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, Opinion and Order (Oct. 20, 2017).

[20] *In the Matter of the Application of Dayton Power and Light Company to Establish a Standard Service offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, Supplemental Opinion and Order (Nov. 21, 2019).

[21] *In re Application of Ohio Edison Co.,* 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906.

For the second time in three years, DP&L seized upon a modification of its plan as an opportunity to go back to ESP I, with its favorable annual rate stabilization/POLR charge to consumers. DP&L withdrew.[22] The PUCO approved.[23] Consumers paid.

Under DP&L's ESP I, which was reinstated in 2020[24] and is expected to be in place until 2024,[25] consumers can be expected to pay another **$384.5 million** for the rate stabilization charge (expected to be approximately $79 million per year charge to consumers (again equal to 11% of DP&L's January 1, 2004, tariffed generation rates).[26]

All told, DP&L consumers will have paid over $**1.2 billion** in stability/POLR charges to DP&L (not counting the $218 million in distribution modernization charges) by the end of DP&L's reinstated ESP I. That is what the PUCO should find to be "extraordinary" but not in a good sense, at least for consumers. Extraordinary for consumers to have paid $1.2 billion in non-cost-based charges for stability/POLR charges established in 2005 -- charges that today could not withstand legal challenges, based on 2011 Ohio Supreme Court[27] and PUCO rulings.[28]

B. The PUCO failed to determine whether continuing to charge consumers a $79 million per year non-cost-based POLR charge is reasonable and lawful. Its not.

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[22] *In the Matter of the Application of Dayton Power and Light Company to Establish a Standard Service offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, Notice of Withdrawal (Nov. 26, 2019).

[23] *Id.,* Finding and Order (Dec. 18, 2019).

[24] *Id.*

[25] *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Plan to Modernize its Grid*, Case No. 18-1875-EL-GRD, et al., Opinion and Order at 54 (June 16, 2021) (PUCO order adopted the stipulation with provision 20 a. where DP&L committed to file an ESP IV application in fourth quarter 2023).

[26] Id. at ¶55.

[27] *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512 (2011).

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

More than a decade ago (in 2007) the Ohio Supreme Court cautioned the PUCO that it "should carefully consider what costs it is attributing as costs incurred as part of an electric-distribution utility's POLR obligations."[29] And yet, in this proceeding, the PUCO did the opposite.

The PUCO merely rubber stamped a fifteen-year old non-cost based POLR charge[30] and linked it to DP&L's current "long term" POLR obligations (which don't begin until May 31, 2022). (The PUCO acknowledged that POLR service is currently being provided by auction participants).[31] It did not require DP&L to provide any cost justification for its $79 million per year POLR charge to consumers; nor did DP&L offer up any evidence of out-of-pocket costs it had incurred or expects to incur carrying out its POLR obligations. The PUCO relied instead upon the fact that the POLR charge was ruled reasonable in 2005 and upheld by Supreme Court order in 2007.[32]

The PUCO, however was under no obligation to reestablish DP&L's POLR rate from its 2009 electric security plan.[33] Ohio law merely directs the PUCO to continue the provisions, terms, and conditions of the previous SSO (not the rates). And yet, the PUCO, went forward to reapprove the $79 million annual non-cost based POLR charge to DP&L

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[29] *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 114 Ohio St.3d 340, 346 (2007).

[30] Delayed Rehearing Order at ¶30.

[31] *Id.* at ¶28.

[32] The PUCO's relies on the Supreme court upholding the initial RSC charge as evidence that the current stability charge has been approved. Fifth Entry on Rehearing at ¶26. This reliance fails to appropriately consider that the initial RSC charge was determined lawful but not adjudicated under the ESP statutes enacted in 2009. Thus, to conclude that the current RSC charge has been upheld by the Supreme Court is mistaken. Rather the Supreme Court has ruled (2016) that a similar stability charge, DP&L's SSR, was unlawful. *See In re: Application of Dayton Power & Light Co.,* 147 Ohio St.3d 166, 2016-Ohio-3490.

[33] *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, Finding and Order at ¶27 (Aug. 26, 2016).

consumers without assessing the continued justness and reasonableness of the charge. That was an error in judgement and violated Ohio law (4905.22, 4928.02(A)).

The PUCO's rationale for reapproving (not changing) the fifteen-year old POLR charge was that the charge had not been adjusted since it was adopted, and that OCC had in 2009 agreed to the charge.[34] But the PUCO's decision failed to consider Ohio Supreme Court rulings and its own rulings in 2011 that changed the lens under which POLR/stability charges are now viewed. The PUCO erred in not lowering DP&L's POLR charge to a level that is supported by record evidence as a just and reasonable charge to DP&L consumers and one that is consistent with the 2011 PUCO and Supreme Court POLR precedent.

1. Approving DP&L's fifteen-year old non-cost based POLR/Stability charge is inconsistent with 2011 Ohio Supreme and PUCO rulings.

In concept, a POLR charge recognizes that consumers are permitted to obtain electric generation service from marketers and then later return to the utility for that service.[35] The POLR charge compensates the utility for risks of standing ready to provide a standard service offer to returning consumers.

And while a POLR charge can be a provision of an electric utility's electric service plan, it must have record support before it can be imposed upon customers. *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512 (2011) (the Ohio Supreme Court overturned a $500 million PUCO-approved POLR charge for AEP, after finding

[34] Delayed Rehearing Order at ¶29.

[35] R.C. 4928.14 ("The failure of a supplier to provide retail electric generation service to customers within the certified territory of an electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer under sections 4928.141, 4928.142, and 4928.143 of the Revised Code until the customer chooses an alternative supplier.").

that there was not sufficient evidence to support it; unfortunately, AEP consumers paid $463 million in unlawful POLR charges, which were never refunded.)

The PUCO, consistent with the Court's 2011 guidance, ruled that POLR charges must be justified either on a cost basis or a non-cost basis before a utility can be compensated for being the POLR.[36] Notably, in the only fully litigated POLR proceeding, the PUCO rejected a non-cost-based approach that AEP offered using the Black Sholes modelling that DP&L's $79 million annual non-cost based POLR charge was justified under.[37]

In that AEP POLR case (that followed the Court's 2011 remand)[38] the PUCO rejected the Black Sholes modelling finding that it "fails to provide a reasonable measure of the Companies' POLR costs."[39] The PUCO concluded that the model simply does not measure POLR costs, determining that value to consumers of the POLR option and the cost to AEP are not the same thing.[40] Further the PUCO questioned AEP's use of modelling to predict costs that are readily measurable and verifiable through more reliable means such as hedging, competitive bidding, or an after the fact calculation of incremental energy and capacity costs incurred to serve returning customers.[41]

Despite this 2011 Ohio Supreme Court and PUCO precedent **–all of which occurred after OCC signed the 2009 stipulation in ESP I**, the PUCO in 2021,

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[36] *In re the Ohio Power Company,* Pub. Util. Comm. No. 08-917-EL-SSO, Opinion and Order at 40 (Mar. 18, 2009).

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

[38] *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 114 Ohio St.3d 340, 346 (2007).

[39] *In re the Ohio Power Company*, Pub. Util. Comm. No. 08-917-EL-SSO, Order on Remand at 32 (Oct. 3, 2011).

[40] *Id.*

[41] *Id.* at 29.

approved the continuation of what amounts to a $79 million per year, non-cost based POLR charge to DP&L consumers. That $79 million yearly charge to DP&L consumers, established years ago, continues as an arbitrary, defunct charge linked to a sixteen year old generation rate for plants that are no longer owned by DP&L.[42] Back in 2005 (and in 2009) DP&L did not provide any evidence of its costs associated with carrying the POLR risks. Nor has it provided evidence in this present proceeding of any costs it has incurred or expects to incur in carrying the POLR risk. Instead, DP&L relied on (continues to rely on) (1) the defunct 2004 generation rate for plants it no longer owns and (2) an options pricing model that the PUCO (and the Supreme Court of Ohio) rejected in 2011.

Given the 2011 rulings by the Court and the PUCO itself, the PUCO should have required DP&L to provide evidence justifying the $79 million per year charge to consumers. According to that precedent, there must be record support for a POLR charge before it can be imposed upon consumers. *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512 (2011). Here there was none. No record at all. The PUCO did not require DP&L to prove that a $79 million annual POLR charge to consumers continues to be just and reasonable in 2021 and beyond (till 2024). Rather it took the easy way out, siding with the utility and blaming OCC for agreeing in 2009 to the POLR charge –"[w]e are reluctant to disturb the stipulated rates based upon the contention of one of the signatory parties, out of many, that circumstances have changed."

The PUCO's failure to assess the justness and reasonableness of a $79 million non-cost-based charge to consumers was a violation of R.C. 4905.22 that requires all

[42] *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al. (ESP II Case), Finding and Order (Aug. 26, 2016).

charges for utility services, including POLR, to be just and reasonable. The PUCO also violated R.C. 4928.02(A) which establishes the electric service policies in the state to include ensuring "reasonably priced retail electric service." The PUCO's duty is to carry out those policies. R.C. 4928.06. The PUCO failed to fulfill these duties.

The PUCO's failure to assess the justness and reasonableness of continuing the POLR charge at a $79 million level, especially given the changed law (beyond the "changed circumstances") as expressed in the 2011 holdings of the Court and its own AEP POLR holding, was also unreasonable. As the PUCO so aptly noted in its order in this case, it should respect its precedents in order to assure predictability which is essential in administrative law.[43] Yet, it failed to do so here when it plainly ignored the 2011 rulings requiring more than a wink and a nod for authorizing a multi-million dollar non-cost based POLR charge to consumers.

2. There is no evidentiary support for allowing DP&L to continue to charge customers $79 million for a non-cost based POLR, violating R.C. 4903.09.

R.C. 4903.09 requires the PUCO to set forth "findings of fact and written opinions setting forth the reason prompting the decisions arrived at, based upon said findings of fact." When the PUCO does not set forth detailed findings, it fails to comply with the requirements of this section and its order is unlawful.[44] Here the PUCO failed to provide record support for a continued, $79 million per year, non-cost based POLR charge to DP&L consumers.

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[43] Delayed Rehearing Order at ¶41 (citation omitted).

[44] *Ideal Transportation Co. v. Pub. Util. Comm.,* 42 Ohio St.2d 195 (1975).

As explained, the PUCO DP&L's rate stabilization surcharge has not been justified, with evidence, as a POLR charge –either as a cost-based charge or a non-cost-based charge. The PUCO's reliance and acceptance of the 2006 Black Sholes modelling to set DP&L's annual POLR charge to customers in 2021 is plainly at odds with its own 2011 ruling in the AEP POLR case[45] and at odds with the 2011 Supreme Court ruling.[46] And that is all the PUCO is left with because DP&L (like AEP in the POLR case) espoused no other theory to support charging consumers $79 million per year for a non-cost based POLR. At no stage during any of the prior proceedings, and at no time in DP&L's recent filing, did DP&L produce any cost-based evidence related to its POLR costs.

The PUCO should, consistent with R.C. 4903.09, reject DP&L's $79 million rate stabilization charge. It should on rehearing assess the reasonableness of continuing the POLR charge, and determine what level of charge, if any, is justified by evidence.

<u>Assignment of Error 2:</u> The PUCO erred in concluding that it does not have discretion to make rates and charges subject to refund unless two independent conditions are met, where one of which conditions is that the tariff provision for the rate or charge is "reconcilable." When the PUCO added a reconcilable requirement for consumer refunds, the PUCO unreasonably and unlawfully construed Ohio law (R.C. 4905.32).

The PUCO granted rehearing on OCC's claim that it erred by unreasonably approving DP&L's tariffs without making them subject to refund.[47] The PUCO approved new tariff language providing that DP&L's rate stabilization charge shall be refundable to

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

[46] *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512 (2011).

[47] Delayed Rehearing Order at ¶44.

consumers "to the extent permitted by law."[48] The PUCO noted that with that provision in its tariffs, OCC should be able to appeal the PUCO's decision.[49]

And while we are appreciative of the PUCO's new-found concern that OCC has raised about the rigged system of justice for consumers (where appeals are delayed, refunds are denied, and rates are replaced, rendering appeals moot), the PUCO nonetheless failed consumers by creating an impediment to refunds that does not otherwise exist. That impediment is the PUCO's faulty notion that it has no discretion to order a refund unless the tariff provision for the rate or charge is "reconcilable."

The PUCO manufactures this restriction by reading the *River Gas* case as requiring riders to be reconcilable to permit consumer refunds.[50] The PUCO reads too much into the *River Gas* holding. *River Gas* simply stands for the proposition that in order to have retroactive ratemaking, there must be ratemaking (as the Court defined) in the first instance. River Gas should not be read to impose an additional condition or restriction (beyond tariff language) on the PUCO precluding it from ordering refunds to consumers.

Instead of looking for an excuse to protect utilities from having to refund money to consumers, the PUCO should have been looking to the controlling law, R.C. 4905.32. R.C. 4905.32 is the statute on which the *Keco* decision is based. R.C. 4905.32 provides that:

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[48] *Id.* at ¶64.

[49] *Id.*

[50] *Id.* at ¶56-60.

> No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part therof, or extend to any person, firm or corporation , any rule, regulation, privilege, or facility *except as such as are specified in such schedule***."*

The Court has read these plain words as barring "any refund of recovered rates unless the tariff applicable to those rates sets forth a refund mechanism." *In re Application of Ohio Edison Co*., 157 Ohio St.3d 73, 2019-Ohio-2401, ¶23 citing *In re: Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.,* 153 Ohio St.3d 289, 2018-Ohio-229, 106 N.E.3d 1, ¶15-20 (finding that refunds were barred because the tariff language did not specify a refund process). Note the Court did not require any more conditions for a refund (such as reconcilability) –all that matters is what is "specified in such schedule." In other words, the tariff language filed with the PUCO and in effect at that time is controlling. Period. There is no statutory requirement that the "rate, rental, toll or charge" be reconcilable, as the PUCO asserts.

Ohio Supreme Court Justice Kennedy, though acknowledging the unfairness of the *Keco* no-refund rule, wrote that "[t]his does not mean that unfairness [to consumers] and windfalls [to utilities] are inevitable." *In re Dayton Power & Light Co.,* 154 Ohio St. 3d 237, 2018-Ohio-4009, ¶26 (Kennedy, J. concurring). Focusing on the "plain and unambiguous" words of R.C. 4905.32 she wrote that "[t]he commission therefore has authority to mitigate the unfairness of the no-refund rule and the barriers imposed by the bond requirement, because a refund is possible if there is refund language in the commission's order establishing the rate charged by the utility, R.C. 4905.32. *'[T]he legislature gave the commission the discretionary authority to [order a refund]. All the commission had to do was require a refund clause to be part of the tariff pursuant to R.C. 4905.32."* citing *In re: Rev. of Alternative Energy Rider Contained in Tariffs of Ohio*

Edison Co., 153 Ohio St. 3d 289, 2018-Ohio-229, ¶66 (Kennedy, J. concurring) (emphasis added). The PUCO however, disregards the statute as well as the Supreme Court holding in *Ohio Edison* and Justice Kennedy's judicial opinions.

In adding the condition of reconcilability to charges before they are refundable, the PUCO has engaged in statutory interpretation which is to be avoided if the statute is unambiguous. When statutes are unambiguous like R.C. 4905.32, they should be applied not interpreted. The Ohio Supreme Court has held that "where instead of an ambiguity there is an absence of enactment, courts are without power to supply the deficiency." *State ex rel Foster v. Evatt*, 144 Ohio St. 65, 104, 56 N.E. 2d 265. (1944).

Further, even if the statute is considered ambiguous (it's not), the PUCO may not add or subtract words. A statute may not, under guise of interpretation, be modified or altered as the PUCO has proposed in adding a reconcilability requirement for refunds. "There is no authority, under any rule of statutory construction, to add to, enlarge, supply, expand, extend, or improve the provisions of the statute to meet a situation not provided for, or contemplated, thereby, or to substitute other provisions therefore. Nothing may be read into, or out of, the statute which is not within the manifest intention of the legislature as gathered from the act itself. In matters of construction, "it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used." *Columbus-Suburban Coach Lines v. Publ. Util. Comm.* (1969), 20 Ohio St.2d 125, 127, 254 N.E.2d 8.

The PUCO has the discretion to order a refund and that discretion is triggered so long as there is language in the utility's tariff making the charge subject to refund. Understandably, the utility won't include such language voluntarily, so that language

only appears in the tariff via a PUCO order requiring it. The PUCO erred in finding otherwise and failing to protect consumers. Rehearing should be granted.

<u>Assignment of Error 3:</u> The PUCO erred in concluding that OCC is barred by res judicata and collateral estoppel from challenging DP&L's rate stability charge. When a judgment is issued without jurisdiction, it is void and subject to collateral attack. Because the PUCO had no jurisdiction to order the continuation of DP&L's electric security plan, instead of its standard service offer, its order was void and is subject to collateral attack.

As fully explained in OCC's prior application for rehearing (which was denied by the PUCO), the PUCO is without jurisdiction to continue the terms of DP&L's "electric security plan" rather than continuing the utility's "standard service offer."[51] Simply put, the PUCO must follow the plain words of the statute, R.C. 4928.143(C)(2)(b). The statute requires the PUCO to continue the rates that make up the "most recent standard service offer." But instead, the PUCO allowed the utility to continue its electric security plan rates.

But the PUCO is a creature of statute.[52] It has no power other than that expressly given to it by the Ohio General Assembly. When the PUCO acts without statutory authority it acts without jurisdiction and its judgment is void. When a judgment is issued without jurisdiction, it is void and subject to collateral attack. *Ohio Pyro Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶23; *Coe v.Erb*,(1898), 59 Ohio St. 259, 267-268.

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[51] OCC Application for Rehearing at 1- 6 (Jan. 17, 2020).

[52] *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 620 N.E.2d 835 (1993); *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181, 429 N.E.2d 444 (1981); *Consumers Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 423 N.E.2d 820 (1981).

<u>Assignment of Error 4:</u> The PUCO erred in its findings excusing DP&L from its ESP I rate freeze commitment to consumers. In violation of Ohio Supreme Court precedent on this issue, the PUCO's findings are mistaken and misapprehend OCC's claims of error. Consistent with R.C. 4903.09, and Supreme court precedent, the PUCO's findings can and should be distrubed (meaning abrogated).

OCC challenged the PUCO's unlawful and unreasonable ruling where it failed to continue, for the benefit of consumers, the distribution rate freeze that was part of DP&L's ESP 1.[53] As the PUCO itself had previously ruled, when a utility withdraws from an electric security plan and reverts to its previous one, "The Commission cannot arbitrarily choose some of the various provisions of the ESP to continue after the termination date of the ESP and choose other provisions of the ESP not to continue." Since DP&L's commitment to freeze distribution rates to consumers was a provision, term, and condition of DP&L's ESP 1, and the PUCO allowed DP&L to revert back to its ESP 1, the PUCO should have implemented a distribution rate freeze during the remaining period of ESP 1.

The PUCO, however, denied OCC's application for rehearing.[54] According to the PUCO, OCC should have raised the rate freeze issue in DP&L's 2015 base distribution rate case, Case No. 15-1830-EL-SSO.[55] ESP 1 rates were placed back into effect from September 1, 2016 (when DP&L withdrew from ESP 2) to October 31, 2017 (when ESP 3 became effective). During that time, DP&L's 2015 rate case was pending.[56] The PUCO ruled that "OCC's failure to raise this issue at an earlier juncture, during the *Distribution*

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[53] Case No. 08-1094-EL-SSO, Application for Rehearing of the Office of the Ohio Consumers' Counsel at 6-10 (Jan. 17, 2020).

[54] Case No. 08-1094-EL-SSO, Fifth Entry on Rehearing (June 16, 2021).

[55] *Id.* ¶ 19.

[56] *Id.*

Rate Case, constitutes a forfeiture of the objection because it deprived the Commission of an opportunity to cure any error when it reasonably could have done so."[57] The PUCO further reasoned that, having approved new base rates for DP&L in the 2015 rate case, it would not be possible to revert to base rates that were in effect at the time ESP 1 was approved (2009).[58]

When the PUCO's opinion and order is unsupported by the record and shows misapprehension or mistake it violates R.C. 4903.09 and can be disturbed. *Cleveland Illuminating Co. v. Pub. Util. Comm.,* 42 Ohio St.2d 403. The PUCO in its Delayed Rehearing Order misapprehended OCC's arguments and made factual findings that were mistaken. Rehearing should be granted.

The PUCO's Entry on rehearing asserts that during the 13-month period that DP&L's ESP 1 was reinstated (Sept. 1, 2016 to Oct. 31, 2017) OCC had the opportunity to raise the rate freeze issue or otherwise preserve its rights in DP&L's distribution rate case. The PUCO is mistaken in its claims. Although DP&L's distribution case was pending, there was no practical ability for OCC to raise the rate freeze issue.

DP&L's ESP 1 rates (which should have included a distribution rate freeze for consumers) were gone before: 1) the Staff Report was filed in the distribution case 2) before objections to the Staff Report were filed, 3) before testimony was due 4) before the evidentiary hearing and 5) before the PUCO order was issued. The distribution rate freeze issue was moot before it could even be raised by OCC in the distribution rate case.

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[57] *Id.* (emphasis in original).

[58] *Id.*

It was not until March 12, 2018, that the Staff Report was issued in DP&L's 2015 base rate case.[59] The PUCO then approved a distribution rate increase to DP&L's consumers on September 26, 2018.[60] In the interim, parties filed objections to the Staff Report, negotiated a settlement, participated in a hearing, and filed briefs—all of which occurred while ESP 3, and not ESP 1—was in effect. At no point during DP&L's 2015 rate case did anything occur that was inconsistent with the rate freeze. Thus, OCC could not practically have done anything different to enforce the rate freeze during the 2015 rate case.

DP&L's distribution rate increase to consumers was allowed because ESP 3 did not include a rate freeze. It was not until more than a year *after* that 2018 distribution rate increase, in December 2019, that DP&L withdrew from ESP 3 and reverted to ESP 1. At that moment, the rate freeze commitment was revived (a decision that was entirely within DP&L's discretion) and became enforceable anew.

The PUCO was also mistaken in its claim that OCC has deprived it of an opportunity to cure its error. OCC has not asked, contrary to the PUCO's assumption otherwise, that the PUCO retroactively modify DP&L distribution rates to the prior ESP I levels. Instead, OCC asked that DP&L's current distribution rates (set in the 2015 rate case) be frozen for the remainder of the ESP I period. Thus, the PUCO does have the ability to cure its error now, as it is reimplementing DP&L's ESP 1 rates. Additionally, as the PUCO is aware, there is a pending DP&L distribution rate case (Case No. 20-1651-EL-AIR) which also gives the PUCO the opportunity to cure its error by ordering the

[59] Case No. 15-1830-EL-AIR, Staff Report (Mar. 12, 2018).

[60] Case No. 15-1830-El-AIR, Opinion & Order (Sept. 26, 2018).

dismissal of the rate case (seeking a $121 million rate increase from consumers) as being inconsistent with the overriding terms of DP&L's ESP I.

Curing the PUCO's error now in this proceeding is the most expedient course of action and will be most protective of customers who are being harmed by the PUCO's unlawful and unreasonable ruling. The PUCO should not allow DP&L to cherry pick provisions of its ESP 1 that continue (i.e., the rate stabilization charge, storm rider, which increase consumer rates) and others that don't (the rate freeze which would prevent distribution increases). The PUCO should grant rehearing and abrogate its order, requiring DP&L to fulfill its rate freeze commitment for the remainder of ESP 1.

<u>Assignment of Error 5</u>: The PUCO erred by delaying its rehearing ruling for sixteen months (until June 16, 2021) and by deferring yet more rehearing rulings beyond its June 16, 2021 Order, in violation of R.C. 4903.10, 4903.11, 4903.12 and 4903.13, and, in an abuse of discretion. The PUCO's errors have wrongfully delayed the issuance of a final appealable order up to June 16, 2021 and beyond because the PUCO is intending for there to be further rehearing rulings, all of which are denying OCC its statutory right of appeal and denying the Court its statutory right of review.

In its Delayed Rehearing Order, the PUCO ruled that, after a 16 month delay on its rehearing ruling, it will further delay issuing a final appealable order on rehearing to address the applications for rehearing filed in this case by IEU-Ohio, Dayton/Honda, and OMA and Kroger.[61] The PUCO's February 14, 2020 decision to delay ruling (for sixteen months) on applications for rehearing was bad enough for consumers – it unreasonably and unlawfully blocked OCC's appeal of continuing the unlawful rate stability charge. But now, the PUCO has delayed OCC's appeal even more with its insistence on deferring ruling on applications for rehearing filed by signatory parties to the Quadrennial Review

[61] Delayed Rehearing Order at ¶67.

case. In the Quadrennial Review case these very parties agreed to withdraw their pending applications for rehearing when a final appealable Order is issued in the Quadrennial Review docket.[62]

The PUCO is a creature of statute.[63] It can only exercise that authority which has been expressly granted to it by the Ohio General Assembly. The PUCO must follow the law as written.

Applications for rehearing are governed by R.C. 4903.10. Under R.C. 4903.10, after rehearing is granted, the PUCO "may abrogate or modify the same; *otherwise such order shall be affirmed.*" (Emphasis added). The law thus requires the PUCO to issue an appealable order after granting rehearing that either abrogates or affirms the original order, consistent with parties' right to seek to "reverse, vacate, or modify a final order" of the PUCO, under R.C. 4903.11. R.C. 4903.10 does not allow the PUCO to grant rehearing, abrogate its original order on rehearing and at the same time further delay the issuance of a final, appealable order by not ruling on several pending applications for rehearing.

Sixteen months after granting rehearing (allowing itself more time to consider the issues parties had raised on rehearing)[64] the PUCO issued its Delayed Rehearing Order, In its Delayed Rehearing Order the PUCO largely denied OCC's rehearing application

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[62] *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Plan to Modernize its Grid*, Case No. 18-1875-EL-GRD, *et al.,* Opinion and Order at 53 (June 16, 2021) (citing to the settlement provision which was adopted as part of the PUCO's overall approval of the settlement agreement).

[63] *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 620 N.E.2d 835 (1993); *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181, 429 N.E.2d 444 (1981); *Consumers Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 423 N.E.2d 820 (1981).

[64] Fourth Entry on Rehearing at ¶16 (Feb. 14, 2020).

while slightly abrogating or modifying its Second Finding and Order (issued Dec.18, 2019). That the PUCO had authority to do.

But under R.C. 4903.10, with the issuance of the Delayed Rehearing Order after granting rehearing, the PUCO's original order was otherwise affirmed in all other respects, including with respect to all other issues intervenors raised in their rehearing applications. By law the PUCO's Delayed Rehearing Order must serve as a denial of the intervenors' remaining applications for rehearing –"otherwise such order shall be affirmed." The law does not tolerate the type of further delay the parties and the PUCO seek to impose, where OCC's ability to appeal is thwarted again through the issuance of a non-final order on rehearing. The PUCO had no authority to defer ruling on other applications for rehearing after granting rehearing, holding rehearing and abrogating its order.

It was also unlawful for the PUCO to defer ruling on rehearing after granting rehearing because the additional, unwarranted delay that the PUCO is imposing deprives OCC of its right to appeal under R.C. 4903.13 and deprives the Court of its review under R.C. 4903.12, and 4903.13. It was bad enough that the PUCO waited 16 months after granting rehearing (allowing itself more time) before it issued an order addressing OCC's claims. (The PUCO's inaction prompted OCC to file a writ at the Supreme Court asking the Court to order the PUCO to issue a final appealable order in this case.)[65]

But now, with the PUCO's abrogated decision we have a decision that really isn't final because it defers ruling on other pending applications for rehearing. This means that consumers will have to wait even longer before a final, appealable order is issued. In

[65] *State of Ohio ex rel. Office of the Consumers' Counsel v. Jennifer French, et al*., SCt. No., 2021-456.

essence the PUCO is again controlling (delaying) when OCC can appeal the stability charge and other aspects of DP&L's continued electric security plan by preventing OCC from exhausting its administrative remedies as required for the appeal. All the while during the delay consumers continue to pay charges that OCC would have appealed as unlawful. The PUCO should abrogate its order. The PUCO should find, consistent with R.C. 4903.10, that the remaining applications for rehearing (by IEU-Ohio, Dayton/Honda, and OMA and Kroger) that it deferred ruling on, are denied, with the PUCO's December 19, 2020 Order otherwise affirmed.

III. CONCLUSION

The PUCO should rehear its decision and correct the errors that have led to unjust and unreasonable rates for DP&L's customers. The injustice should end now.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was electronically served via electric transmission on the persons stated below this 16th day of July 2021.

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Summary: App for Rehearing Application for Rehearing by Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of Willis, Maureen R.