BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Dayton Power and Light Company to Increase its Rates for Electric Distribution.	)))	Case No. 20-1651-EL-AIR
In the Matter of the Application of the Dayton Power and Light Company for Accounting Authority.	)))	Case No. 20-1652-EL-AAM
In the Matter of the Application of Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 20-1653-EL-ATA

REPLY IN SUPPORT OF MOTION TO DISMISS DP&L'S APPLICATION FOR A RATE INCREASE BY OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

In 2009, the Office of the Ohio Consumers' Counsel ("OCC"), the Staff of the Public Utilities Commission of Ohio ("PUCO"), and the Dayton Power and Light Company ("DP&L"), and others, agreed to the terms of a settlement (the "ESP I Settlement").[1] Among other terms of the ESP I Settlement package, OCC agreed that DP&L could continue charging consumers under its "Rate Stabilization Charge" until December 31, 2012, and in exchange, DP&L agreed to freeze its base distribution rates, also until December 31, 2012.[2]

Twelve years later, DP&L is still charging consumers under the Rate Stabilization Charge (despite the end date of December 31, 2012 under ESP I) —about $79 million per year—but consumers are not getting the benefit of the bargain in the form of the rate freeze. To the

[1] *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case No. 08-1094-EL-SSO (the "ESP I Case"), Stipulation and Recommendation (Feb. 24, 2009) (the "ESP I Settlement").

[2] ESP I Settlement ¶¶ 3, 18.

contrary, DP&L circumvented the ESP I settlement by obtaining a distribution rate increase while a different electric security plan, ESP III, was in effect, and then reverted (for the second time) to ESP I, with all of the ESP I charges to consumers continuing, but with increased distribution rates, contrary to the rate freeze provision of ESP I.[3] Now, having received one base rate increase in 2018, DP&L wants to squeeze yet another base rate increase from its consumers, violating the terms of the PUCO-approved settlement resolving DP&L's ESP I.

The lack of justice for consumers is apparent, where DP&L continues to reap *its* rewards under the ESP I Settlement in the form of the Rate Stabilization Charge—at consumer expense—while consumers are not receiving the benefit of *their* bargain in the form of a rate freeze. DP&L said it best when, in arguing for the stability charge to continue during the ESP I period, it pled, "The Commission should not permit the Joint Movants to elect to take the benefits of a settlement package, but to rid themselves of the corresponding obligations. The Commission should thus continue the entire package—not just part of it—until a new ESP is approved."[4]

The PUCO should protect consumers by granting OCC's Motion to Dismiss.[5]

II. REPLY

A. The PUCO has a duty to enforce the rate freeze, regardless of anything that OCC has or has not done.

The general theme of DP&L's memorandum contra is that the PUCO should decline to enforce the rate freeze found in ESP I because, according to DP&L, OCC has done or not done various things in the last 12 years, thus causing OCC to waive the right to enforce the rate

[3] *In re Application of the Dayton Power & Light Co. to Increase its Rates for Elec. Distribution*, Case No. 15-1830-EL-SSO (the "2015 Rate Case"), Opinion & Order (Sept. 26, 2018) (the "2015 Rate Case Order").

[4] *In re Application of the Dayton Power & Light Co. for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Motion of Applicant the Dayton Power and Light Company to Continue Briefly Current Rates until Implementation of Terms of a Commission Order at 14-15(Nov. 7, 2012).

freeze.[6] What all of these arguments overlook is that (i) DP&L must follow the PUCO's orders, regardless of anything OCC does or does not do, and (ii) the PUCO must enforce its orders, regardless of anything OCC does or does not do.

Under R.C. 4905.54, every public utility, which includes DP&L, "shall comply with every order, direction, and requirement of the public utilities commission made under authority of this chapter and Chapters 4901., 4903., 4907., and 4909. of the Revised Code, so long as they remain in force." The PUCO can likewise assess a forfeiture if the utility "fails to comply with an order, direction, or requirement of the commission that was officially promulgated."[7] Thus, even if OCC had chosen to do nothing at all, DP&L had an affirmative duty to comply with the PUCO's ESP I Order by complying with the distribution rate freeze. By filing this rate case while ESP I is in effect, DP&L failed to comply with the PUCO's order approving the rate freeze.

Likewise, the PUCO has an independent duty to enforce its own rulings. Under R.C. 4903.10(B), the PUCO can "abrogate or modify" one of its orders if, after a party applies for rehearing, the PUCO "is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted." In the absence of a timely application for rehearing, there is no statute allowing the PUCO to go back and modify its prior orders—for example, to remove the rate

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[5] Motion to Dismiss DP&L's Application for a Rate Increase by Office of the Ohio Consumers' Counsel (Aug. 5, 2021).

[6] *See generally* The Dayton Power and Light Company d/b/a AES Ohio's Memorandum in Opposition to Motion to Dismiss Application for a Rate Increase by the Office of the Ohio Consumers' Counsel (Aug. 20, 2021) (the "DP&L Memo Contra") (arguing that OCC's motion is barred as a collateral attack, OCC's motion is untimely, that OCC forfeited arguments regarding the rate freeze by not making them in the past, and that OCC's motion is inconsistent with other proceedings).

[7] R.C. 4905.54.

freeze that was lawfully approved as part of ESP I.[8] Thus, whether OCC may have "waived" its right to enforce the rate freeze is irrelevant—the PUCO should be enforcing it on its own.

B. OCC's Motion to Dismiss is timely.

DP&L argues that the PUCO should deny OCC's motion to dismiss because "OCC waited 248 days after AES Ohio filed its application in this proceeding before filing a motion to dismiss."[9] According to DP&L, OCC should have filed its motion within 28 days of the Application in this case, relying on Rules of Civil Procedure 1(B) and 12(A)(2).[10]

DP&L's timeliness argument fails. Rule of Civil Procedure 1(B) does not apply. In its attempt to turn this civil rule into a PUCO rule, DP&L cites R.C. 4903.082, which states that "the Rules of Civil Procedure should be used wherever practicable."[11] But R.C. 4903.082 is a *discovery* statute. It states, in its entirety, "All parties and intervenors shall be granted ample rights of discovery. The present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties. Without limiting the commission's discretion, the Rules of Civil Procedure should be used wherever practicable." The reference to the Rules of Civil Procedure, therefore, is related to parties' discovery rights, not motion practice. Motion practice before the PUCO is governed by O.A.C. 4901-1-12. And there is no requirement under O.A.C. 4901-1-12 that a party file a motion to dismiss within 28 days of a utility's application. Likewise, DP&L cited no case in which the PUCO has relied on Ohio's Rules of Civil Procedure to deny a motion to dismiss as untimely.

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[8] *See In re Ohio Edison Co.*, 2020-Ohio-5450, ¶ 20 ("The commission is a creature of statute and may act only under the authority conferred on it by the General Assembly."); R.C. Chapter 4903 (no provision allowing the PUCO to abrogate or modify a prior order in the absence of an application for rehearing).

[9] DP&L Memo Contra at 6.

[10] *Id.* at 6-7.

[11] *Id.* at 6.

Further, the timing of OCC's motion to dismiss makes sense in the context of OCC's other advocacy before the PUCO. In DP&L's recently litigated quadrennial review case, OCC recommended that DP&L's ESP I be terminated, and that DP&L be required to pursue a market rate offer ("MRO") instead.[12] Had OCC succeeded in that argument, ESP I would have ended and there would be no rate freeze to enforce. Thus, it was in the interests of administrative efficiency that OCC wait for that case to be resolved before filing a motion to dismiss this rate case.

Any untimeliness has been brought on by DP&L itself, aided and abetted by the PUCO's failure to issue a final, appealable order on OCC's rehearing request. OCC timely raised the rate freeze issue in its January 17, 2020 request for rehearing that followed the PUCO's year end 2019 ruling allowing DP&L to revert to ESP I with stability charges intact but no corresponding rate freeze.[13]

For sixteen months, the PUCO delayed ruling on the issue, all the while allowing DP&L to charge customers for the 2018 increased base distribution rates and the $79 million annual stability charge. DP&L did not wait for the PUCO to resolve OCC's objection. Instead, on November 30, 2020, DP&L filed an application to increase distribution rates to consumers during the ESP I rate period. DP&L was aware that OCC was contesting its increased distribution rates to DP&L consumers but yet chose to forge forward with another rate increase for its unlucky consumers.

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[12] *In re Application of the Dayton Power & Light Co. for a Finding that its Current Elec. Sec. Plan Passes the Significantly Excessive Earnings Test & More Favorable in the Aggregate Test in R.C. 4928.143(E)*, Case No. 20-680-EL-UNC, Initial Brief for Consumer Protection by Office of the Ohio Consumers' Counsel at 18-20 (Feb. 12, 2021).

[13] *In re Application of Dayton Power & Light for Approval of an Electric Security Plan*, Case No. 08-1094-EL-SSO, Second Finding & Order (Dec. 18, 2019).

On June 16, 2021, in apparent response to OCC filing a writ at the Supreme Court,[14] the PUCO finally issued a ruling denying OCC's application for rehearing that sought to reinstate the rate freeze that DP&L had agreed to. OCC sought further rehearing on the rate freeze issue on July 16, 2021. Twenty days later, on August 5, 2021, with the prospects for obtaining a PUCO ruling enforcing DP&L's rate freeze commitment apparently vanquished, OCC filed its motion to dismiss.

Had OCC succeeded in its applications for rehearing, there would have been no need to seek to dismiss DP&L's rate increase application. Again, OCC was acting to promote administrative efficiency in pursing complete resolution of the rate freeze in the ESP I proceeding rather than forcing DP&L and the PUCO to battle the issue on two fronts at the same time.

Finally, OCC's motion to dismiss is timely because we are providing the PUCO with a reasonable opportunity to enforce the ESP I rate freeze (by dismissing DP&L's rate case) and prevent further harm to consumers. [15] This rate case proceeding is pending. No new distribution rates have been determined. Testimony has just been filed and parties, including DP&L, will have an opportunity to rebut and address OCC's position regarding any distribution rate increase, which is presented in OCC's filed testimony. The evidentiary record in this proceeding is very much open and alive. There has been no prejudice to DP&L or any other parties for that matter. DP&L's arguments that OCC's motion to dismiss was untimely should be rejected.

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[14] *State ex rel. Office of the Ohio Consumers' Counsel v. Jenifer French, et al.,* S.Ct. 2021-0456. Complaint in procedendo (Apr. 14, 2021).

[15] *See In the Matter of the Application of Dayton Power & Light for Approval of an Electric Security Plan*, Case No. 08-1094-EL-SSO, Fifth Entry on Rehearing at ¶20 (June 16, 2021) (ruling that OCC's alleged failure to object to DP&L's 2018 rate case while the case was pending wrongly deprived the PUCO of its opportunity to cure its error). (citation omitted).

C. The Rate Freeze was part of ESP I.

R.C. 4928.143(C)(2)(b) says that when a utility terminates its electric security plan, 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." The PUCO has interpreted this law to mean that when a utility withdraws from one ESP and reverts to a previous one, it reverts to the previous one in its entirety: "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."[16]

DP&L attempts to get around this statute by arguing that the rate freeze is not currently part of ESP I because it was, in fact, *never* part of ESP I.[17] DP&L's theory is that although the rate freeze was included in a comprehensive settlement that resolved its ESP I case in its entirety, the rate freeze was not actually part of ESP I. According to DP&L, while it is true that the settlement is often referred to as the "ESP 1 Stipulation," "that does not mean that every term in that Stipulation is an ESP term. Only those terms that were authorized by the ESP statute can be ESP terms."[18]

DP&L's theory is flawed. DP&L claims that "[o]nly those terms that were authorized by the ESP statute can be ESP terms."[19] But DP&L cites no authority for this claim because there is none. DP&L cannot point to a single case in which the PUCO has found that a term in an approved settlement in an ESP case was not part of the ESP.

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[16] Case No. 12-426-EL-SSO, Entry on Rehearing (Feb. 13, 2013). OCC does not concede that the law required DP&L to revert to the entire ESP, only that the utility to revert to its most recent *standard service offer*. It remains an open issue in Case No. 08-1094-EL-SSO, where OCC argued that the Rate Stabilization Charge was part of ESP I but not part of DP&L's standard service offer. OCC reserves all rights on that issue in that case and any related cases, including appeals.

[17] DP&L Memo Contra at 13.

[18] DP&L Memo Contra at 13-14.

[19] DP&L Memo Contra at 14.

To the contrary, the PUCO has consistently and repeatedly treated the terms of an ESP settlement as part of an electric security plan. The PUCO has never separated stipulation provisions into "ESP" provisions and "non-ESP" provisions. Rather, the PUCO has approached ESP stipulations as a whole, adopting those stipulations in place of the utility's ESP application.[20]

The PUCO described DP&L's 2009 ESP I Stipulation this way: "On June 24, 2008, the Commission issued an Opinion and Order in Case No. 08-1094-EL-SSO, *In the matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan, et. al*, adopting the stipulation and recommendation of the parties to the case to establish an ESP."[21] The PUCO (in discussing the storm rider provision of the ESP I stipulation) explained that under the 2009 stipulation it approved, DP&L was authorized to request the rider, "therefore, the storm cost recovery rider is a provision, term or condition of ESP 1, and DP&L should be permitted to continue" it.[22] Likewise, the distribution rate freeze commitment was a provision, term or condition of the ESP I stipulation. The PUCO approved the stipulation, therefore the rate freeze is a provision, term, or condition of ESP I.

DP&L's ESP I Settlement was no different than any other stipulation that sets the terms and conditions of an electric security plan.[23] The PUCO adopted the Settlement to resolve DP&L's rate plan, extending it through 2012. DP&L agreed to the rate freeze as a term of the

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[20] *In the Matter of the Application of Dayton Power & Light Company to Establish an ESP*, Case No. 08-1094-EL-SSO, Finding and Order at ¶26 (Aug. 26, 2016).

[21] *Id.,* Entry at ¶ 5 (Dec. 19, 2012).

[22] *Id.* Finding and Order at ¶26 (Aug. 26, 2016).

[23] *In the Matter of the Application of Dayton Power & Light Company to Establish an ESP*, Case No. 08-1094-EL-SSO, Stipulation at ¶13 (Feb. 24, 2009) ("DP&L will support this Stipulation in part by sponsoring testimony showing that the extension of the rate plan through 2012 is reasonable because its pricing and all other terms and conditions, including any deferrals and future recovery of deferrals, is more favorable I the aggregate as compared to the expected result that would otherwise apply under Section 4928.142 Revised Code')(footnote omitted).

ESP I Settlement. Thus, when the PUCO approved the ESP I Settlement, the rate freeze became, with DP&L's consent, part of ESP I. The PUCO should reject DP&L's unprecedented and unsubstantiated claim that the terms of its approved ESP settlement are not part of its ESP.

Additionally, DP&L's recently adopted view does not comport with how the PUCO has described DP&L's ESP I or how D&L itself has described terms of the ESP I stipulation. For example, in a case involving DP&L's storm damage costs, the PUCO described DP&L's ESP I as including the rate freeze:

> On June 24, 2009, the Commission modified and approved an application filed by DP&L for a standard service offer (SSO) in the form of an electric security plan (ESP). *The ESP, as approved, froze DP&L's distribution base rates* through December 31, 2012, subject to DP&L's right to seek the cost of storm damage. *In re The Dayton Power and Light Co.*, Case No. 08-1094-EL-SSO, et al. (ESP I Case), Opinion and Order (June 24, 2009) at 5-6, 13.[24]

And DP&L, in pleadings defending continuation of the storm rider created under the settlement, stated as follows: "The Stipulation and Recommendation in ESP I specifically authorized a Storm Rider. Feb. 24, 2009 Stipulation and Recommendation, ¶18 b. R.C. 4928.143(C)(2)(b) provides that the provisions and terms of DP&L's prior SSO 'shall' be implemented, so a Storm Rider is permitted."[25]

As another example, in DP&L's ESP III case, DP&L signed a settlement that included, among other things, payments from DP&L's shareholders for low-income customer programs.[26] Under DP&L's theory, these shareholder payments would not be part of the ESP because nothing in the ESP statute would allow the PUCO to order DP&L's shareholders to fund programs. Yet

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[24] *In re Application of the Dayton Power & Light Co. for Authority to Recover Certain Storm-Related Service Restoration Costs*, Case No. 12-3062-EL-RDR, Opinion & Order at 2 (Dec. 17, 2014) (emphasis added).

[25] *In the Matter of the Application of Dayton Power & Light Company to Establish an ESP*, Case No. 08-1094-EL-SSO, DP&L Memorandum in Opposition to Motion to Reject DP&L's Tariffs at 18 (Dec. 10, 2019).

[26] *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 ¶ 27 (Oct. 20, 2017).

in that case, DP&L cited these very same shareholder payments as evidence that the pricing and all other terms and conditions of the ESP were more favorable in the aggregate than an MRO,.[27] Thus, DP&L admitted that even though such payments could not be compelled by the ESP statute, they were nonetheless a "term" of the ESP because they were included in the ESP III settlement. *See also In re Application of Ohio Power Co. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Elec. Sec. Plan*, Case No. 16-1852-EL-SSO, Opinion & Order ¶ 268 (Apr. 25, 2018) (finding that utility shareholder contributions to a bill-payment assistance program through a settlement were part of the ESP).

In cases involving other utilities, the PUCO has also treated the terms of ESP settlements, whether explicitly provided for in the ESP statute of not, as part of the ESP. This includes rate freezes in settlements—the very topic at issue here.

In FirstEnergy's 2010 ESP case, FirstEnergy agreed, as part of a settlement, to freeze its base rates.[28] In assessing the benefits of FirstEnergy's ESP as compared to an MRO, the PUCO cited the fact that the settlement "froze base distribution rates through May 31, 2014, except for emergencies and increases in taxes."[29] Thus, the PUCO considered this stipulated rate freeze to be part of the utility's ESP.

The PUCO made a similar ruling in FirstEnergy's next two ESP cases as well. In the 2012 ESP case, once again, the PUCO assessed the benefits of the ESP for purposes of

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[27] *Id.* ¶ 86.

[28] *In re Application of [FirstEnergy] for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Sec. Plan*, Case No. 10-388-EL-SSO, Stipulation and Recommendation at 13 (Mar. 23, 2010).

[29] *Id.*, Opinion & Order at 44 (Aug. 25, 2010).

comparing it to an MRO, and it concluded that continuation of the distribution rate freeze ("stay out") was a qualitative benefit of the ESP.[30] Same in FirstEnergy's 2014 ESP case.[31]

The PUCO has already rejected similar legal arguments by intervenors who opposed the stability charge when DP&L sought to reinstate it in 2019. [32] The intervenors (Dayton/Honda) argued that the PUCO should approve for continuation only those provisions, terms, and conditions that are lawful for inclusion in an ESP. The PUCO rejected those arguments, noting that the "notwithstanding" clause of R.C. 4928.143(B) exempts provisions in an ESP from "any other provision of Title XLIX of the Revised Code to the contrary."

Accordingly, the PUCO should reject DP&L's arguments. DP&L's arguments are contrary to numerous rulings by the PUCO on the ESP I Settlement and contrary to DP&L's past pleadings. DP&L's unsubstantiated premise does not square with how the PUCO has evaluated settlements that have been presented to resolve utilities' electric security plans. The "stipulation" cannot be separated from the "electric security plan."

D. The rate freeze has survived DP&L's various legal maneuverings over the last decade.

DP&L argues that the rate freeze expired, claiming that "OCC has four opportunities to argue that the rate freeze continued beyond [December 31, 2012], but never did."[33] According to DP&L, these four opportunities were (i) when the PUCO extended the initial term of ESP I beyond December 31, 2012, (ii) when DP&L terminated ESP II and reverted to ESP I,

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[30] *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Sec. Plan*, Case No. 12-1230-EL-SSO, Opinion & Order at 56 (July 18, 2012).

[31] *In re Application of [FirstEnergy] for Authority to Provide a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO, Opinion & Order at 119 (Mar. 31, 2016).

[32] *In the Matter of the Application of Dayton Power & Light Company to Establish an ESP*, Case No. 08-1094-EL-SSO, Second Finding and Order at ¶35 (Dec. 18, 2019).

[33] DP&L Memo Contra at 7.

(iii) during DP&L's 2015 Rate Case, and (iv) when DP&L terminated ESP III and reverted to ESP I.[34] A closer look at each of these cases shows, however, that the rate freeze survived each one and remains enforceable today.

i. The rate freeze continued when the PUCO continued ESP I beyond its initial December 31, 2012 expiration date.

In the ESP I Case, DP&L, OCC, the PUCO Staff, and others signed a settlement.[35] Under that settlement, ESP I was to be in effect until December 31, 2012.[36] As this date approached, it became clear that there would not be enough time to approve a new ESP or a market rate offer ("MRO") before December 31, 2012 to replace ESP I.[37] Thus, as DP&L notes in its memorandum contra, DP&L filed a motion to continue its "current rates" under ESP I until ESP II was approved.[38]

The PUCO granted DP&L's motion.[39] In its Entry granting DP&L's motion, the PUCO relied on R.C. 4928.141, which requires electric distribution utilities to provide a standard service offer, and 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 ... until a subsequent offer is authorized," whenever an ESP application is terminated by the utility or disapproved by the

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[34] *Id.* at 7-13.

[35] *See* ESP 1 Settlement.

[36] ESP I 2009 Opinion at 7 ("DP&L notes that the Stipulation extends its electric security plan through December 31, 2012..."); ESP 1 Settlement at 3 ("the parties agree to extend DP&L's current rate plan through December 31, 2012, except as modified herein"), at 7 ("DP&L will file a new ESP and/or MRO case by March 31, 2012 to set SSO rates to apply for [the] period beginning January 1, 2013.").

[37] This is because DP&L filed an application for an MRO in March 2012 but then withdrew it in September 2012, thus not leaving sufficient time for the PUCO to approve a replacement for ESP I before December 31, 2012. *See* OCC Motion to Dismiss at 3.

[38] DP&L Memo Contra at 8.

[39] *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case No. 08-1094-EL-SSO, Entry (Dec. 19, 2012).

PUCO.[40] According to the PUCO, "it would be consistent with both Section 4928.141 and Section 4928.143(C)(2)(b), Revised Code, to order that *the terms and conditions of the current ESP should continue until a subsequent offer is authorized*."[41]

Despite this ruling that the entire ESP I was continued beyond December 31, 2012, DP&L now argues that the rate freeze—which was included in the ESP I settlement—was *not* continued beyond December 31, 2012. DP&L claims that the rate freeze was not continued because "not a single party sought to extend the rate freeze along with [DP&L's] then-current rates" and because OCC did not raise the rate freeze issue when it applied for rehearing regarding the PUCO's ruling. Neither of these claims has any merit.

The claim that no party sought to extend the rate freeze is false. To the contrary, DP&L itself sought to extend the rate freeze by asking the PUCO to continue ESP I beyond December 31, 2012, the rate freeze being part of ESP I.[42] Because DP&L itself sought to extend ESP I, and did not propose to change its distribution rates, there was no reason for any party to then make a filing separately asking that the rate freeze continue.

DP&L notes that OCC applied for rehearing regarding the PUCO's Entry but that OCC "did not seek to continue the rate freeze" in its application for rehearing.[43] But again, there was no reason for OCC to mention the rate freeze in its application for rehearing because the PUCO continued *all* of ESP I, which includes the rate freeze, when it ruled that "the terms and

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[40] *Id.* ¶ 5.

[41] *Id.* (emphasis added).

[42] *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan, Case No. 12-426-EL-SSO,* Motion of Applicant the Dayton Power and Light Company to Continue Briefly Current Rates until Implementation of Terms of a Commission Order (Nov. 7, 2012).

[43] DP&L Memo Contra at 8.

conditions of the current ESP should continue until a subsequent offer is authorized."[44] And DP&L filed compliance tariffs, in response to the PUCO order, that continued the prior distribution rates.

ii. The rate freeze continued when DP&L withdrew ESP II and reverted to ESP I.

In July 2016, DP&L filed a motion to withdraw from its second electric security plan ("ESP II") and revert to ESP I.[45] According to DP&L, when it reverted to ESP I, the rate freeze was *not* included because "no party argued that the 2009 rate freeze was part of the Company's 'most recent standard service offer' under R.C. 4928.143(C)(2)(b) or otherwise sought to reinstate the rate freeze."[46] But DP&L's statements are misleading. No party needed to argue over the rate freeze because DP&L did not propose to end the rate freeze when it filed its plans to withdraw from its electric security plan. Instead, DP&L's proposed tariff filing to implement its withdrawal advised that its distribution tariffs "will not be changed from how they exist currently."[47] When the PUCO allowed DP&L's withdrawal, the PUCO ultimately approved DP&L's unchanged distribution tariffs.[48]

Under R.C. 4928.143(2)(b), "If a utility terminates an application pursuant to division (C)(2)(a) of this section ..., the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a

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[44] *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case No. 08-1094-EL-SSO, Entry ¶ 5 (Dec. 19, 2012).

[45] *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case No. 12-426-EL-SSO, Motion of the Dayton Power and Light Company to Withdraw its Application in this Matter (July 27, 2016).

[46] DP&L Memo Contra at 9-10.

[47] *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case No. 08-1094-EL-SSO, DP&L Notice of Filing Proposed Tariffs at 2 (Aug. 1, 2016).

[48] *Id.,* Finding and Order (Aug. 26, 2016).

subsequent offer is authorized...." The PUCO has interpreted this law to mean that when a utility withdraws from one ESP and reverts to a previous one, it reverts to the previous one in its entirety: "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."[49] Thus, regardless of anything that OCC or anyone else did or said in the ESP I or ESP II case, the PUCO ruled that DP&L reverted to ESP I in its entirety—and as explained above, the rate freeze was part of ESP I.

iii. The lack of a motion to dismiss DP&L's 2015 Rate Case did not modify ESP I to eliminate the rate freeze.

DP&L's next argument is that the PUCO should decline to enforce the rate freeze "because OCC failed to seek to impose a rate freeze" in DP&L's 2015 Rate Case.[50] DP&L similarly argues that the PUCO modified ESP I, eliminating the rate freeze, when it approved the settlement in the 2015 Rate Case.[51] These arguments fail for several reasons.

First, the question the PUCO must answer now is whether ESP I, under which DP&L currently operates, includes a rate freeze. Nothing that happened in the 2015 Rate Case could possibly have modified ESP I because the PUCO lacks authority to modify an electric security plan in a distribution rate case.[52] In fact, DP&L and the other Signatory Parties to the 2015 Rate Case understood this concept and expressly acknowledged it in the settlement: "This Stipulation is submitted for purposes of this proceeding only, and is not deemed binding in any other

[49] Case No. 12-426-EL-SSO, Entry on Rehearing (Feb. 13, 2013). OCC does not concede that the law required DP&L to revert to the entire ESP, only that the utility to revert to its most recent *standard service*. It remains an open issue in Case No. 08-1094-EL-SSO, where OCC argued that the Rate Stabilization Charge was part of ESP I but not part of DP&L's standard service offer. OCC reserves all rights on that issue in that case and any related cases, including appeals.

[50] DP&L Memo Contra at 10-11.

[51] DP&L Memo Contra at 19-20.

proceeding, expect as expressly provided herein, nor is it to be offered or relied upon in any other proceeding, except as necessary to enforce the terms of this Stipulation."[53] That settlement was found to be reasonable and was adopted by the PUCO, without modification.[54]

Further, the PUCO could not have modified the rate freeze in ESP I when it approved the 2015 Rate Case Settlement because ESP I was not in effect at that time, ESP III was. The PUCO cannot modify something that does not exist. Regardless of any action that OCC did or did not take in that case, the rate freeze must be enforced if it is a provision of ESP I—which it is.

Even if OCC's action in the rate case were relevant, everything OCC did in that case was consistent with the rate freeze. When DP&L filed its application in the 2015 Rate Case, ESP II was in effect, not ESP I, and ESP II does not include a rate freeze.[55] Thus, there was no rate freeze for OCC to enforce at that time. When DP&L reverted to ESP I in August 2016, the rate case was pending, so DP&L claims that OCC should have moved to enforce the rate freeze at that time.[56] But any motion to enforce the rate freeze at that point would have had no practical effect on the proceeding. As of August 2016, DP&L's *ESP III* case was already pending and was headed toward resolution, with a hearing scheduled for October 2016.[57] Had OCC moved to dismiss the case at that time, at best, the PUCO could have held the rate case in abeyance for a very brief period, and then when ESP III took effect, the rate case would continue because ESP III did not include a rate freeze. As it happens, the Staff Report was not issued in the 2015 Rate

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[52] *See In re Ohio Edison Co.*, 2020-Ohio-5450, ¶ 20 ("The commission is a creature of statute and may act only under the authority conferred on it by the General Assembly."); R.C. 4928.143 (no mention of PUCO authority to modify an electric security plan in a distribution rate case).

[53] *In re Application of the Dayton Power & Light Co. to Increase its Rates for Elec. Distribution,* Case No. 15-1830-EL-SSO (the "2015 Rate Case"), Stipulation and Recommendation at VI, ¶3, page 16 (June 18, 2018).

[54] *Id*., Opinion and Order (Sept. 26, 2018).

[55] *See* Case No. 12-426-EL-SSO, Opinion & Order (Sept. 4, 2013) (approving ESP I in September 2013); Finding & Order (Aug. 26, 2016) (authorizing DP&L to withdraw from ESP and revert to ESP I).

[56] DP&L Memo Contra at 11.

Case until March 2018, at which point ESP III was effective.[58] At that point, there was no rate freeze, so it is understandable that OCC proceeded to work with parties cooperatively to achieve a reasonable settlement of the 2015 Rate Case.

In summary, the PUCO did not increase DP&L's base rates at any point when ESP I was in effect, so DP&L's rate freeze commitment was not violated. The issue was therefore preserved for the future, should there be a situation—as there is now—when the PUCO might be faced with approving a rate increase while ESP I is pending, in violation of the ESP I Settlement.

iv. The rate freeze continued when DP&L withdrew ESP III and reverted to ESP I.

Just as it argued that the rate freeze did not survive DP&L's withdrawal from ESP II and reversion to ESP I, DP&L argues that the rate freeze did not survive its withdrawal from ESP III and reversion to ESP I because "OCC's failure to raise the issue in its comments constitutes a waiver."[59] DP&L's argument in this regard fails for all the same reasons.

Under R.C. 4928.143(2)(b), "If a utility terminates an application pursuant to division (C)(2)(a) of this section ..., the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized...." When DP&L withdrew from ESP II and reverted to ESP I, the PUCO interpreted this law to mean that when a utility withdraws from one ESP and reverts to a previous one, it reverts to the previous one in its entirety: "The Commission cannot arbitrarily

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[57] ESP III Case, Entry (Aug. 16, 2106).

[58] *In re Application of the Dayton Power & Light Co. to Increase its Rates for Elec. Distribution,* Case No. 15-1830-EL-SSO (the "2015 Rate Case"), Staff Report (Mar. 12, 2018).

[59] DP&L Memo Contra at 12-13.

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."[60]

The PUCO followed this same reasoning when it approved DP&L's withdrawal from ESP III and reversion to ESP I. There, it again concluded that the PUCO "is bound by the plain language of R.C. 4928.143(C)(2)(b)."[61] Likewise, the PUCO ruled that it "must restore the provisions, terms and conditions of ESP I which were in effect prior to the effective date of ESP III."[62] And as explained above, the terms and conditions of ESP I included a rate freeze. So, when DP&L withdrew from ESP III and reverted to ESP I, that reversion included a rate freeze, regardless of whether OCC or any other party specifically mentioned the rate freeze in its comments.

E. The plain language of the ESP I Settlement allows the PUCO to freeze DP&L's base rates at those rates established in the 2015 Rate Case.

DP&L argues that it is impossible to enforce the ESP I Settlement rate freeze because of the rate increase that occurred in 2018.[63] In making this claim, DP&L misconstrues the plain language of the ESP I Settlement and attempts to add words that are not there.

The ESP I Settlement states, "DP&L's distribution rates will be frozen through December 31, 2012" (subject to limited exceptions for storm costs, changes in tax or regulatory laws, and emergencies, none of which apply here).[64] DP&L claims that this is an "unambiguous term," such that the rate freeze can only apply to freezing rates that were in effect following its 1991

[60] Case No. 12-426-EL-SSO, Entry on Rehearing (Feb. 13, 2013). OCC does not concede that the law required DP&L to revert to the entire ESP, only that the utility to revert to its most recent *standard service*. It remains an open issue in Case No. 08-1094-EL-SSO, where OCC argued that the Rate Stabilization Charge was part of ESP I but not part of DP&L's standard service offer. OCC reserves all rights on that issue in that case and any related cases, including appeals.

[61] Case No. 08-1094-EL-SSO, Second Finding & Order ¶ 26 (Dec. 18, 2019).

[62] *Id.* ¶ 27.

[63] DP&L Memo Contra at 16.

base distribution rate case.[65] But nothing in the plain language of the ESP I Settlement says that rates will be frozen at the specific rates approved in the 1991 rate case—only that they will be frozen. The "unambiguous term" of the settlement is merely that rates will be frozen at whatever they happen to be when ESP I is in effect. And when DP&L most recently reverted to ESP I, its base rates were those that took effect in 2018, so those are the rates that should be frozen.

DP&L mistakenly suggests that OCC is seeking to undo the effects of the 2015 Rate Case.[66] OCC is not asking the PUCO to undo the most recent rate case and require DP&L to revert to its 1991 rates. OCC is asking only that the rate freeze be enforced as to the current base rates, meaning the current rate case should be dismissed, and the rates approved in the 2015 Rate Case should continue until sometime in the future when the rate freeze ends (after ESP I ends) and DP&L is lawfully entitled to seek new rates through a future base rate case.

F. The Motion to Dismiss is not a collateral attack on the ESP I Case.

DP&L argues that OCC's Motion to Dismiss is a "collateral attack on the ESP I case."[67] According to DP&L, OCC cannot pursue the Motion to Dismiss here because the PUCO rejected OCC's arguments regarding the rate freeze in the ESP I case.[68] This argument fails because the PUCO, in denying OCC's applications for rehearing in the ESP I case, explicitly stated that it "will determine in the *2020 Distribution Rate Case* whether a motion to dismiss is appropriate pursuant to R.C. 4909.18."[69] Thus, the PUCO itself did not consider the Motion to Dismiss to be a collateral attack on the ESP I case but instead denied OCC's application for rehearing while

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[64] ESP I Settlement ¶ 18.

[65] DP&L Memo Contra at 16.

[66] DP&L Memo Contra at 16 ("it isn't practical to revert back [sic] to 1991 base rates").

[67] DP&L Memo Contra at 4.

[68] *Id.*

[69] ESP I Case, Sixth Entry on Rehearing ¶ 39 (Aug. 11, 2021) (emphasis in original).

deferring any ruling on the Motion to Dismiss to this case. OCC has the right to pursue the Motion to Dismiss, notwithstanding any PUCO rulings in the ESP I Case.

Further, the ESP I Case remains pending. OCC intends to appeal the ESP I Case, including the ruling regarding the rate freeze. Today, August 27, 2021, OCC filed its appeal which was docketed as S.Ct. Case No. 2021-1068. OCC's Motion to Dismiss is therefore necessary to preserve all rights. In that regard, the Motion to Dismiss is consistent with OCC's continued litigation and appeal of the ESP I Case.

G. OCC's conduct in other proceedings does not bar OCC from enforcing the rate freeze here.

In a final attempt to thwart OCC's enforcement of the rate freeze, DP&L cites miscellaneous instances where OCC allegedly took positions that are inconsistent with the rate freeze. Even a cursory glance at these examples demonstrates that DP&L's claims have no merit.

First, DP&L notes that in testimony filed in its DP&L's quadrennial review case, OCC filed the testimony of witness Matthew Kahal, wherein Mr. Kahal asserted that DP&L's financial projections should include the results of a distribution rate case.[70] From this, DP&L leaps to the conclusion that Mr. Kahal's expert opinion regarding financial projections is akin to OCC admitting that the rate freeze does not apply. But DP&L ignores two things about this case. First, Mr. Kahal's testimony was that DP&L would need to file a base distribution case *if it were operating under an MRO*, which would necessarily mean that ESP I ended.[71] Thus, Mr. Kahal's testimony is consistent with the rate freeze. Further, OCC's position in the quadrennial review

[70] DP&L Memo Contra at 17.

[71] *In re Application of the Dayton Power & Light Co. for a Finding that its Current Elec. Sec. Plan Passes the Significantly Excessive Earnings Test & More Favorable in the Aggregate Test in R.C. 4928.143(E)*, Case No. 20-680-EL-UNC, Supplemental Direct Testimony of Matthew I. Kahal on Behalf of the Office of the Ohio Consumers' Counsel at 30-31 (Dec. 17, 2020).

case was that the PUCO should terminate ESP I and require DP&L to move to an MRO.[72] If ESP I were terminated, as OCC recommended, then there would be no rate freeze. So, OCC's assumption that there might be a rate case in the future is entirely consistent with OCC's recommendations in that case.

Second, DP&L notes that under the 2015 Rate Case Settlement, DP&L's distribution investment rider would be reset to zero if DP&L did not file a base rate case before October 31, 2022.[73] This is true. But DP&L then argues that "OCC did not assert in that case (or seek rehearing) that the distribution rate case could or would be barred by an ESP I rate freeze, which is yet another waiver of the issue by OCC."[74] There is no such waiver here. The 2015 Rate Case Settlement does not *require* DP&L to file a base rate case at all; it simply says that in the absence of a base rate case, a certain rider would be set to zero. OCC was under no obligation to warn DP&L that the rate freeze might prevent DP&L from obtaining a rate increase, thus making it likely that the distribution investment rider would be set to zero.

Further, at the time of the 2015 Rate Case settlement, ESP I had already been terminated and replaced by ESP III. DP&L cannot possibly suggest that OCC waived the right to enforce a provision of an ESP that was not even in effect at the time. Additionally, the 2015 Rate Case Settlement explicitly says that it was "submitted for purposes of this proceeding only, and is not deemed binding in any other proceeding, ... nor is it to be offered or relied upon in any other proceedings, except as necessary to enforce the terms of the Stipulation."[75] DP&L is therefore

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[72] *Id.*, Initial Brief for Consumer Protection by Office of the Ohio Consumers' Counsel at 18-20 (Feb. 12, 2021).

[73] DP&L Memo Contra at 18 (DP&L mistakenly says that the date is January 1, 2025; the 2015 Rate Case Settlement says October 31, 2022). *See In re Application of the Dayton Power & Light Co. to Increase its Rates for Elec. Distribution*, Case No. 15-1830-EL-AIR, Stipulation and Recommendation at 7 (June 18, 2018) (the "2015 Rate Case Settlement").

[74] DP&L Memo Contra at 18.

[75] 2015 Rate Case Settlement at 15-16.

barred from using the settlement against OCC by arguing that OCC signing the settlement constitutes a waiver of all related issues in the future. The entire point of signing a settlement is that parties are choosing not to litigate each and every issue, in the interest of compromise. If such compromise is later used as a sword, causing parties to waive arguments on any issues resolved in the settlement, parties will be reluctant to settle any case for concern that their hands will be tied in the future when similar issues arise.

Finally, DP&L points to comments that OCC recently submitted to the PUCO for its Cost of Capital Forum.[76] DP&L claims that these comments somehow caused OCC to waive the rate freeze issue. As a threshold matter, the PUCO's Cost of Capital Forum was just that—a forum—not a formal PUCO proceeding with a formal docket. OCC certainly cannot be deemed to have waived substantive rights in PUCO proceedings by sharing its opinion through open dialogue with the PUCO in a forum. If the PUCO were to rule that parties' positions in forums and workshops can be used against them to bar arguments in PUCO proceedings, it would substantially chill any future participation by stakeholders in these informal PUCO settings.

Further, in those comments, one of OCC's primary points was that many Ohio utilities have a stale cost of capital (rate of return, cost of debt, and capital structure) because they do not file base rate cases very often. OCC's concern with lack of rate cases is that (i) they are being avoided because of excessive single-issue ratemaking, which favors utilities, and (ii) the PUCO has consistently used the cost of capital from the last rate case for purposes of riders, even when the last rate case took place long ago. These positions have nothing at all to do with DP&L's rate freeze, and they certainly do not amount to OCC's endorsement of a base rate increase for DP&L.

[76] DP&L Memo Contra at 18.

III. CONCLUSION

DP&L has gotten more than its fair share of money from consumers in the last 12 years, including hundreds of millions of dollars more than it bargained for under the Rate Stabilization Charge. It is time, for once, that consumers receive the protection that *they* deserve. The PUCO can—and should—protect consumers by enforcing the rate freeze and dismissing DP&L's latest attempt to charge consumers even more money for electric distribution service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Reply* was served on the persons stated below *via* electronic transmission, this 27th day of August 2021.

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Summary: Reply Reply in Support of Motion to Dismiss DP&L's Application for a Rate Increase by Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of Healey, Christopher