

**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
	)	)	

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**NOTICE OF TERMINATION AND WITHDRAWAL FROM THE  
FEBRUARY 24, 2009 SETTLEMENT  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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September 10, 2021

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The Ohio Consumers' Counsel hereby gives notice of its termination and withdrawal from the February 24, 2009 Settlement in these cases after the PUCO, in a long-delayed rehearing of its Second Finding and Order (dated December 18, 2019), failed to adopt the 2009 Settlement "in its entirety and without material modification." It is time for justice for DP&L (AES Ohio) consumers instead of the ongoing travesty of justice at the PUCO.

OCC is also providing the following background and context for this consumer protection action that is its right under the 2009 Settlement. Twice in the past three years, in response to Ohio Supreme Court rulings that could have protected consumers from paying illegal charges

under unlawful PUCO rulings,<sup>1</sup> DP&L (AES) has reverted to its ESP I. DP&L likes its ESP I because under ESP I it can charge more money to Dayton-area consumers – \$76 million per year for “stability,” with no corresponding expenses. Today, that stability charge, agreed to under a 2009 Settlement, could not withstand legal challenges, based on 2011 Ohio Supreme Court<sup>2</sup> and PUCO rulings.<sup>3</sup> DP&L consumers (many of whom struggle financially) continue to bleed money by paying the stability charges at a staggering rate that is expected to reach a cumulative total of \$1.2 billion by 2024, courtesy of PUCO rulings. Meanwhile, these same DP&L consumers have been deprived of the primary benefit of the 2009 Settlement – no distribution rate increases.

OCC files this Notice of Termination and Withdrawal from the 2009 Settlement after the PUCO, after a long delay in ruling on applications for rehearing from its Second Finding and Order (dated December 18, 2019), failed to adopt the 2009 Settlement “in its entirety and without material modification.”<sup>4</sup> On August 11, 2021, when the PUCO addressed OCC’s and DP&L’s latest rehearing requests, the PUCO issued a final, appealable order ending the rehearing process in this proceeding.

In the latest of the PUCO’s ongoing rulings on rehearing, the PUCO confirmed that DP&L could continue charging customers for stability charges but did not have to honor its obligation to freeze its base distribution rates while ESP I is in effect.<sup>5</sup> The PUCO’s August 11,

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<sup>1</sup> *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); *In re application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906.

<sup>2</sup> *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011).

<sup>3</sup> *In re the Ohio Power Company*, Case No. 08-917-EL-SSO, Order on Remand (Oct. 3, 2011).

<sup>4</sup> *In re Application of the Dayton Power & Light Company for approval of Its Electric Security Plan*, Case No. 08-1094-EL-SSO, Stipulation and Recommendation ¶ 37 (Feb. 24, 2009) (Attachment A).

<sup>5</sup> *Id.*, Entry on Rehearing ¶ 19 (June 16, 2021); Entry on Rehearing (Aug. 11, 2021).

2021 ruling upon rehearing failed to preclude DP&L from implementing further distribution rate increases while ESP I is in effect. In failing to preserve the rate distribution freeze benefit for consumers under the 2009 Settlement while allowing other charges for DP&L (*i.e.*, the stability charge), the PUCO materially modified the 2009 Settlement to the detriment of 500,000 DP&L consumers. Dayton-area consumers lost the benefit of the bargain.

## **I. WITHDRAWAL AND TERMINATION OF 2009 SETTLEMENT**

### **A. The PUCO ended the benefit of the bargain achieved for consumers in the 2009 Settlement by failing to freeze distribution rates while allowing DP&L to charge consumers for ESP I rates.**

On February 24, 2009, OCC, the PUCO Staff, DP&L and others submitted a Settlement for approval to the PUCO in this proceeding. Among other things, the Settlement required consumers to pay DP&L a “rate stabilization surcharge” of approximately \$76 million per year, in exchange for DP&L’s commitment not to increase distribution rates while the stability charge was being collected. The parties’ agreement (sponsorship) was “predicated on the reasonableness of the Stipulation taken as a whole,”<sup>6</sup> and was “conditioned on the PUCO’s adoption of the Stipulation in its entirety, without modification.”<sup>7</sup> The Settlement package struck a balance between the parties allowing for the resolution of difficult and contentious issues without litigation and appeals. As stated in the Settlement, “[t]his Agreement involves a variety of difficult, complicated issues that would otherwise be resolved only through expensive, complex, protracted litigation.”<sup>8</sup>

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<sup>6</sup> Case No. 08-1094-EL-SSO, Stipulation & Recommendation ¶ 35 (Feb. 24, 2021).

<sup>7</sup> *Id.* ¶ 37.

<sup>8</sup> *Id.* ¶ 35.

The PUCO approved that 2009 Settlement,<sup>9</sup> and DP&L's electric security plan remained in place from 2008 through 2013, until DP&L's second electric security plan was approved. Carried over into DP&L's second electric security plan was a second service stability charge no different than the stability charge agreed to under 2009 Settlement.<sup>10</sup>

However, in 2016, while DP&L was operating under its second electric security plan, the Ohio Supreme Court struck down the stability charges that customers were paying. Unfortunately for consumers, they had already paid close to \$300 million in stability charges—charges that were never refunded.<sup>11</sup>

Undaunted, DP&L found a work-around from the Court's decision, allowing (with PUCO permission) it to continue to collect stability charges from its consumers. DP&L withdrew from its second electric security plan in response to the Court's decision.<sup>12</sup> The PUCO approved DP&L's withdrawal despite vigorous objections from OCC and others.<sup>13</sup> And the PUCO allowed DP&L to reinstitute the rate stabilization charge that DP&L had collected from consumers under its first electric security plan. The PUCO allowed the charge 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, consumers were stuck with the bill, paying in 2016 and 2017 another \$82 million in charges for the reinstated rate stabilization charge.

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<sup>9</sup> *In re Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Opinion and Order (June 24, 2009).

<sup>10</sup> *In re 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).

<sup>11</sup> *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).

<sup>12</sup> *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).

<sup>13</sup> *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.

DP&L’s third electric security plan was approved on October 20, 2017.<sup>14</sup> The PUCO adopted DP&L’s third electric security plan that had been agreed to through stipulation, with OCC opposing the stipulation. That plan did not have a “rate stabilization charge.” But it contained another illegal charge condoned by the PUCO (in effect a stand-in stability subsidy)—the distribution modernization charge (supporting DP&L’s credit). To add insult to consumer injury, the PUCO did not require DP&L to spend a penny on distribution modernization.

Less than a year later, in September 2018, while DP&L was operating under its ESP 3, DP&L received approval to implement a \$30 million per year distribution rate increase to its consumers.<sup>15</sup> The distribution rate increase, which OCC and others agreed to, was not precluded under DP&L’s ESP 3, which was in effect at the time.

DP&L’s customers received a brief break in 2019. That is when the PUCO<sup>16</sup> ended the distribution modernization charge being collected from them, in response to a Supreme Court ruling that struck down FirstEnergy’s nearly identical distribution modernization charge approved illegally by the PUCO.<sup>17</sup> But DP&L consumers were not refunded the \$218 million they had already paid to DP&L for the unlawful modernization charges, as utilities and not consumers win on the refund issue.

For the second time in three years, DP&L seized upon a modification of its electric security plan as an opportunity to go back to its first electric security plan, with its utility-favored \$76 million a year stability charge to consumers. And this time, DP&L was able to have its cake

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<sup>14</sup> *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).

<sup>15</sup> *In the Matter of the Application of the Dayton Power and Light Company for an Increase in its Electric Distribution Rates*, Case No. 15-1830-EL-AIR, Opinion and Order (Sept. 16, 2018).

<sup>16</sup> *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).

<sup>17</sup> *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906.

and eat it too—with the stability charge intact along with its increased distribution rates the PUCO authorized in 2018. DP&L withdrew.<sup>18</sup> The PUCO approved.<sup>19</sup> Dayton-area consumers paid.

DP&L reverted to its ESP I effective December 2019. DP&L collected \$30 million from its consumers in increased distribution rates in 2020. DP&L will collect another \$30 million more in distribution rate increases from customers in 2021. And DP&L is seeking even more distribution rate increases from its consumers (\$120 million per year on top of the previous \$30 million increase) in its pending distribution rate increase application while under its ESP I.

During this same time, while ESP I rates are/were in effect, DP&L consumers have paid approximately \$76 million per year in stability charges. So while DP&L consumers kept their end of the deal (by paying hundreds of millions of dollars in so-called stability charges), DP&L has been allowed by the state utility regulator (PUCO) to walk away from its rate freeze commitment.

While DP&L is operating under ESP I, which it unilaterally chose to do, it is required to adhere to the Settlement in its entirety, not just provisions of its choosing. The provisions of the Settlement include the distribution rate freeze. The PUCO should have should have restored the balance of the Settlement by requiring DP&L to freeze distribution rates at 2018 levels, not allowing for further distribution rate increases during the term of ESP 1. Instead, the PUCO turned its back on Dayton-area consumers.

The lack of justice for consumers is apparent at the PUCO. DP&L continues to reap *its* rewards under the ESP I Settlement in the form of a stability charge—at consumer expense—

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<sup>18</sup> *In re 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).

<sup>19</sup> *Id.*, Finding and Order (Dec. 18, 2019).



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, it pled, “The Commission should not permit the Joint Movants to elect to take of the benefits of a settlement package but 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.”<sup>20</sup>

**B. OCC has met the conditions under the 2009 Settlement that allow it to terminate and withdraw from the Settlement**

There are discrete conditions to be met before OCC may withdraw and terminate the 2009 Settlement. These conditions have been met. The conditions are 1) that the PUCO “rejects or modifies all or any part” of the 2009 stipulation; 2) the PUCO does “not adopt the Stipulation without material modification upon rehearing,” with the materiality being determined in the sole discretion of any Signatory Party (here, OCC);<sup>21</sup> 3) the Signatory Party must negotiate in good faith with other Signatory Parties to achieve an outcome that substantially satisfies the intent of the Stipulation; and 4) the notice of withdrawal and termination is filed with the PUCO within 30 days of the Commission’s Entry on Rehearing.

The PUCO in its Second Finding and Order failed to adopt the 2009 Settlement “in its entirety and without material modification.” The PUCO rejected or modified the 2009 Stipulation by ruling that DP&L did not have to honor its distribution rate freeze while ESP I rates are in effect.

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<sup>20</sup> *In re Application of Dayton Power & Light Co. for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Motion of Applicant to Continue Briefly Current Rates Until Implementation of Terms of a Commission Order at 14-15 (Nov. 7, 2012).

<sup>21</sup> Under the terms of the 2009 Settlement “[a]ny Signatory Party has the right, in its sole discretion, to determine what constitutes a ‘material’ change for the purposes of that Party withdrawing from the Stipulation.” Stipulation and Recommendation at footnote 5 (Feb. 24, 2009) (Attachment A).

Following that PUCO material modification of the 2009 Settlement, on January 17, 2020, OCC applied for rehearing, consistent with its rights under the 2009 Settlement to seek rehearing if the PUCO rejects or modifies all or any part of the Settlement.

On June 16, 2021, sixteen long months after OCC's rehearing request and in apparent response to OCC filing a writ at the Supreme Court,<sup>22</sup> the PUCO belatedly issued an Entry on Rehearing. In its Fifth Entry on Rehearing, it granted in part, and denied in part, OCC's rehearing requests. The PUCO's June 16, 2021 Entry, with its new rulings, including its ruling granting rehearing (in part), modified the PUCO's Second Finding and Order. Those modifications spurred additional applications for rehearing by DP&L and OCC.

On August 11, 2021, the PUCO issued a final rehearing order where it disposed of both DP&L's and OCC's application for rehearing, ending the rehearing process. The PUCO failed to adopt the 2009 Settlement "without material modification upon rehearing." The PUCO denied OCC's application for rehearing that sought to preserve consumers' rights under the 2009 Settlement to a distribution rate freeze while ESP I is in effect.

With the PUCO's August 11, 2021 Entry on Rehearing, the rehearing process, addressing OCC's and DP&L's latest applications for rehearing, is no longer ongoing, but complete. The ability of the PUCO to modify or abrogate its Orders excusing DP&L from its commitment to freeze distribution rates to consumers is at an end with the issuance of the PUCO's final rehearing Order of Aug. 11, 2021. After being denied access to judicial review and consumer justice by the PUCO's rehearing delay, OCC has filed its Notice of Appeal with the Ohio

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<sup>22</sup> *State ex rel Office of the Ohio Consumers' Counsel v. Jenifer French, et al.*, S.Ct. 2021-0456, Complaint in procedendo (Apr. 14, 2021). The Court denied the writ after the PUCO filed a motion to dismiss, following the PUCO's ruling on OCC's application for rehearing in the Fifth Entry on Rehearing. 2021-Ohio-2795.

Supreme Court,<sup>23</sup> which, consistent with R.C. 4903.10, is taken from a final, appealable PUCO order. The PUCO has failed to adopt the Settlement “without material modification upon rehearing,” triggering OCC’s right to terminate and withdraw from the Settlement.

Before terminating and withdrawing from the 2009 Settlement, OCC was under an obligation to negotiate in good faith with the other Signatory Parties to achieve an outcome that substantially satisfied the intent of the Settlement.<sup>24</sup> OCC had three different settlement meetings where all the Signatory Parties were invited to attend and negotiate. OCC made two separate offers of settlement that it presented to the Signatory Parties. DP&L was the only Signatory Party that had any response to OCC. DP&L made two counteroffers. OCC negotiated in good faith with the Signatory Parties to achieve an outcome that substantially satisfies the intent of the Settlement. Despite OCC’s good faith efforts, no resolution was reached that satisfied the intent of the 2009 Settlement.

With this filing of the OCC’s Notice of Termination and Withdrawal on September 10, 2021, OCC has filed its notice within thirty days of the PUCO’s August 11, 2021 final Entry on Rehearing.

**C. The 2009 Settlement provides that “[u]pon the filing of such notice, the Stipulation shall immediately become null and void ... [and the PUCO] will convene an evidentiary hearing” to allow evidence to be presented with the PUCO deciding the case “as if the Stipulation had never been executed.”**

Under the terms of the 2009 Settlement, OCC’s notice of termination and withdrawal is effective immediately, and the Settlement is thus null and void.<sup>25</sup> Because the 2009 Settlement resolved DP&L’s application for a standard service offer, and the Settlement is now rendered

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<sup>23</sup> *In re Dayton Power and Light Co.*, S.Ct. No. 2021-1068.

<sup>24</sup> Stipulation ¶ 37.

<sup>25</sup> *Id.*

null and void, the terms of DP&L’s ESP I are also rendered null and void, including the rate stabilization charge, the storm damage recovery rider, and the infrastructure investment rider. Accordingly, the terms of DP&L’s first electric security plan—including the rate stability charge—should terminate *now*.<sup>26</sup>

To maintain the integrity of competitive wholesale and retail markets in this state, the PUCO should honor existing contracts with competitive bidding process suppliers and maintain current PJM obligations for all suppliers. That would be consistent with the PUCO’s approach to DP&L’s last ESP withdrawal, as outlined in its Second Finding and Order in these cases.<sup>27</sup>

OCC requests that the PUCO establish a reasonable schedule for the convening of an evidentiary hearing to afford the Signatory Parties the opportunity “to present evidence through witnesses, to present rebuttal testimony, and to brief all issues that the Commission shall decide based upon the record and briefs as if this Stipulation had never been executed.”<sup>28</sup>

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<sup>26</sup> *Id.* See also *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Service and Related Matters*, Case No. 05-1444-GA-UNC, Supplemental Opinion and Order (June 27, 2007) (treating case as if no settlement had been filed after OCC filed a notice of termination and withdrawal).

<sup>27</sup> *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, Second Finding and Order ¶ 28 (Dec. 18, 2019).

<sup>28</sup> *Id.*, Stipulation and Recommendation ¶ 37. (Attachment A).

## II. CONCLUSION

Consistent with the plain language of the settlement in these cases,<sup>29</sup> and for the protection of 500,000 DP&L consumers, OCC hereby provides its Notice of Termination and Withdrawal from the 2009 PUCO-approved Settlement in these cases. The PUCO should establish a procedural schedule allowing Signatory Parties the due process they are guaranteed under the PUCO-approved 2009 Settlement. OCC is submitting its proposed procedural schedule for consumer justice at the PUCO via a separate motion.

Respectfully submitted,

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*/s/ Maureen R. Willis*

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<sup>29</sup> The PUCO should apply the settlement's plain language. See generally *Alexander Local Sch. Dist. Bd. of Educ. v. Albany*, 2017-Ohio-8704, para. 36 (Athens 2017).

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Termination and Withdrawal was electronically served via electric transmission on the persons stated below this 10th day of September 2021.

/s/ Maureen R. Willis

Maureen R. Willis  
Counsel of Record

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

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Summary: Notice Notice of Termination and Withdrawal from the February 24, 2009 Settlement by Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J. Greene on behalf of Willis, Maureen R.