

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)
Dayton Power and Light Company for) Case No. 08-1094-EL-SSO
Approval of its Electric Security Plan.)

In the Matter of the Application of The)
Dayton Power and Light Company for) Case No. 08-1095-EL-ATA
Approval of Revised Tariffs.)

In the Matter of the Application of The)
Dayton Power and Light Company for)
Approval of Certain Accounting) Case No. 08-1096-EL-AAM
Authority Pursuant to Ohio Rev. Code)
Section 4905.13.)

In the Matter of the Application of The)
Dayton Power and Light Company for) Case No. 08-1097-EL-UNC
Approval of its Amended Corporate)
Separation Plan.)

**APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Bruce Weston (0016973)
Ohio Consumers' Counsel

Maureen R. Willis (0020847)
Senior Counsel
Counsel of Record
William J. Michael (0070921)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone: Willis (614) 466-9567
Telephone: Michael (614) 466-1291
maureen.willis@occ.ohio.gov
william.michael@occ.ohio.gov
(willing to accept service by e-mail)

July 15, 2022

**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**

DP&L (now AES) has been charging Dayton-area consumers \$76 million a year for so-called “stability,” under DP&L’s reinstated 2009 electric security plan. (OCC is asking the Supreme Court to find it to be an unlawful charge.) Last year, in response to OCC’s rehearing request, the PUCO provided consumers some glimmer of hope on the stability charge. The PUCO, with public fanfare,¹ ordered DP&L “to file new proposed tariffs providing that the RSC [rate stability charge] shall be refundable ‘to the extent

¹ Refundability had become a very public consumer issue. The topical nature of utility refunds was reflected during the Ohio Senate’s confirmation hearing for PUCO Chair French.

permitted by law.”² The refund language, ordered by the PUCO at OCC’s request, was intended to allow consumer refunds if the Supreme Court (in OCC’s appeal) finds the stability charge unlawful or unreasonable. (Interestingly, the PUCO is essentially opposing its own tariff language in OCC’s appeal, claiming that it does not allow for refunds to consumers.)³

And recall the related issue of the PUCO’s 16 months of delay in ruling on OCC’s application for rehearing, that further undermined consumer relief by delaying OCC’s appeal. That PUCO delay denied OCC its lawful access to judicial review by the Supreme Court, which further limited consumer relief (to end the charge) to the benefit of the PUCO and DP&L.

Indeed, in its ruling last year the PUCO *linked* its assertion that it was not seeking to evade the Supreme Court’s judicial review with its inclusion of the refundability language in DP&L’s tariff.⁴ But things have changed. The PUCO’s has now allowed a tariff noncompliance by DP&L to cut off about \$60 million of the PUCO’s originally intended refundability for consumers.

Last year, on July 16, 2021, DP&L filed proposed stability charge tariffs containing the refund language that the PUCO had ordered.⁵ About two months later, on

² *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, Fifth Entry on Rehearing at ¶64 (June 16, 2021).

³ S.Ct. Case No. 2021-1068, PUCO Second Merit Brief at 23 (January 18, 2022) (stating that DP&L’s stability charge does not meet the conditions allowing for a refund, including the condition that the tariff contains language providing for refunds).

⁴ *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, Fifth Entry on Rehearing at ¶64 (June 16, 2021).

⁵ *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, Proposed Second Revised Sheet No. G12, PUCO. No. 17, Pursuant to Fifth Entry on Rehearing (July 16, 2021) (In its enclosure letter,

August 11, 2021, the PUCO approved DP&L’s proposed stability charge tariff. The PUCO wrote it is: “ORDERED, That the proposed tariffs filed by AES Ohio on July 16, 2021, be approved.”⁶ Additionally the PUCO wrote that it is: “ORDERED, That AES Ohio be authorized to file, in final form, two complete copies of the tariffs, consistent with this Sixth Entry on Rehearing. AES shall file one copy in the TRF docket and one copy in this docket.”⁷ And the PUCO wrote in its ruling that: “refunds of the RSC [rate stability charge] should be made to the extent that such refunds are permitted by law, at least for any period the RSC is collected after this Sixth Entry of Rehearing.”⁸

Ordinarily, those PUCO rulings are where things would have ended with the effectiveness of the publicized tariffs. But DP&L disobeyed the PUCO. DP&L failed to file its final stability charge tariffs with consumer refund language as the PUCO ordered in its Sixth Entry on Rehearing. Regulatorily speaking, things are turned upside down when the regulated monopoly doesn’t follow its regulator’s orders.

Things then got even weirder. DP&L misinformed the PUCO that its stability charge tariffs had not been approved by the PUCO, and DP&L claimed the tariffs were “not currently operative.”⁹ DP&L made this false claim (that the PUCO hadn’t approved the tariffs) despite the PUCO’s approval being publicly docketed for all to see. How

DP&L noted that it “submits the attached tariff sheet to comply with the Commission’s 5th Entry on Rehearing in Case No. 08-1094-EL-SSO regarding the Company’s tariff sheet G12 – Rate Stabilization Charge”).

⁶ *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, Sixth Entry on Rehearing at ¶51 (August 11, 2021).

⁷ *Id.* at ¶52.

⁸ *Id.* at ¶47.

⁹ *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer*, S.Ct. Case No. 2021-1068, Fourth Merit Brief at 1 (March 8, 2022) (DP&L claiming that its July 16, 2021 tariff was “not approved and is not currently operative”).

could DP&L, with its regulatory staff, counsel, executives, and its officials whose name appears on each filed tariff, make this claim that the PUCO had not approved the tariffs?

So, from August 11, 2021 to June 21, 2022, DP&L unlawfully collected the stability charge from its consumers *without* the PUCO-approved tariff that required refundability of the charge. But DP&L was only authorized by the PUCO to collect its stability charge from consumers under the condition that the PUCO's refund language would make it refundable.

Coincidentally, note that for every day the tariff refund language was not in effect, that is a day DP&L would claim in the Supreme Court that it cannot be ordered to provide a refund to its 495,000 consumers in the event the Court reverses the PUCO on the stability charge. So DP&L benefits by delays in the effective date of refundability (to consumers detriment).

The strange reality is that DP&L has collected the stability charge from consumers since August 11, 2021 without a lawful PUCO tariff. The lawful tariff, that DP&L did not implement, was one that conditioned the stability charge on refundability.

Therefore, DP&L owes its consumers the return of the illegally collected stability charge for the period it delayed complying with the PUCO's tariff order. *As OCC will explain, the PUCO should order DP&L to return \$60 million in one lump-sum bill credit on consumers' bills.*

And now, in a perverse twist, the PUCO issued a ruling on June 15, 2022 that approved DP&L's July 16, 2021 tariffs *a second time* and ordered DP&L to (again) file

final tariffs.¹⁰ This second time around, the PUCO approved what DP&L placed in front of it – new tariffs that delayed the refundability date by ten months.¹¹ The ten months of delay that the PUCO approved could save DP&L (and cost its consumers) about \$60 million of the annual \$76 million in stability charges, if the Supreme Court reverses.

The PUCO’s second ruling on DP&L’s tariffs, with consumer refund language not effective until ten months later, is wrong and cannot cover for DP&L’s ten months in violation of the original tariff order. What is happening here?

Under the law, the PUCO must recognize in this rehearing that DP&L was collecting its stability charge since August 11, 2021 in violation of the PUCO’s tariff order. As stated, the PUCO should order DP&L to return its illegally collected stability charge to consumers.

At a very minimum, the PUCO should order DP&L to make its stability charges refundable as of August 11, 2021, as the PUCO originally ordered. *OCC’s minimum position is stated without waiving our claims that DP&L owes consumers the return of \$60 million in unauthorized charges and that DP&L (and potentially its personnel) should be assessed forfeitures.*

For some historical DP&L/PUCO context, the inexplicability of this situation rivals that of the PUCO’s *nunc pro tunc* ruling for DP&L some years ago. That’s where,

¹⁰ *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, Seventh Entry on Rehearing at ¶23 (June 15, 2022).

¹¹ *Id.*, ¶28, 29.

just days after a PUCO order, the PUCO issued a *nunc pro tunc* ruling that substantially increased DP&L's charges to consumers.¹²

Accordingly, under R.C. 4903.10, OCC applies for rehearing of the PUCO's June 15, 2022 Entry. The Entry unlawfully and unreasonably established a second, later effective date for consumer refunds under DP&L's stability charge tariff. The PUCO's Entry is *unreasonable and unlawful* in the following respects:

Claim of Error 1: The PUCO erred when it failed to find that DP&L's collection of stability charges (about \$60 million) from consumers since August 11, 2021 was unauthorized and in violation of law and a PUCO order. The violations of law include R.C. 4905.22 because DP&L was charging consumers under stability charge tariffs that did not contain the consumer refund language the PUCO ordered. And violations of law include R.C. 4905.32 when DP&L charged consumers for stability charges without the consumer refund language the PUCO ordered. The PUCO's error includes that it failed to enforce its August 11, 2021 Entry when it did not order DP&L to return ten months of illegally collected stability charges to consumers. The PUCO should have ordered DP&L to change the effective date of the stability charge tariffs (with consumer refund language) to August 11, 2021, consistent with its Sixth Entry on Rehearing.

Claim of Error 2: The PUCO erred by misusing the statutory rehearing process to change its ruling on a matter not specified in the applications for rehearing that were under review, violating R.C. 4903.10.

Claim of Error 3: The PUCO erred when it reapproved DP&L's July 16, 2021 stability charge tariffs as if it had not already approved those tariffs through its August 11, 2021 Sixth Entry on Rehearing. The PUCO's ruling shows misapprehension or mistake and should be modified to reflect the PUCO's earlier approved tariff effective date of August 11, 2021.

Claim of Error 4: The PUCO erred by issuing a ruling that departed from its past ruling in its Sixth Entry on Rehearing, without an explanation, violating R.C. 4903.09 and Ohio Supreme Court precedent. And the PUCO failed to show that its new course of action was lawful and reasonable, in violation of Ohio Supreme Court precedent.

Claim of Error 5: The PUCO erred by failing to order DP&L to pay forfeitures of \$9.45 million for DP&L's violations of the PUCO's Sixth Entry on Rehearing, R.C. 4905.22, R.C. 4905.32, R.C. 4905.54, and other laws and by failing to

¹² *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, Entry Nunc Pro Tunc (September 6, 2013).

determine if DP&L personnel involved in these tariff noncompliances are liable for forfeitures under R.C. 4905.56. Per R.C. 4905.54, each day of DP&L's violation is a separate offense, at up to \$10,000 per day.

The PUCO should grant rehearing and abrogate or modify its June 15, 2022 Entry. The PUCO should direct DP&L to file tariffs for its stability charge that comply with the PUCO's Sixth Entry on Rehearing, containing an effective date of August 11, 2021. The PUCO should order DP&L to return to consumers the stability charges it collected without an authorized tariff since August 2021.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Maureen R. Willis
Maureen R. Willis (0020847)
Senior Counsel
Counsel of Record
William J. Michael (0070921)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone: Willis (614) 466-9567
Telephone: Michael (614) 466-1291
maureen.willis@occ.ohio.gov
william.michael@occ.ohio.gov
(willing to accept service by e-mail)

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. PROCEDURAL HISTORY.....	3
A. The PUCO ordered DP&L to include consumer refund language in its stability charge tariffs last year in its Fifth Entry on Rehearing.	3
B. The PUCO issued its Sixth Entry on Rehearing, approving DP&L’s July 16, 2021 stability charge tariffs, and ordered DP&L to file copies of its stability charge tariffs consistent with its August 11, 2021 Order.....	4
C. Despite being a utility subject to the PUCO’s authority, DP&L failed to file a final stability charge tariff in compliance with the PUCO’s Sixth Entry on Rehearing that required consumer refund language. Then DP&L claimed (falsely) to the PUCO that its stability charge tariff with consumer refund language was not approved by the PUCO and is “not currently operative.”	5
D. The PUCO for some reason issued its Seventh Entry on Rehearing approving DP&L’s stability charge tariffs a second time. The PUCO ordered the tariffs to be effective upon DP&L’s filing. This time DP&L filed compliance tariffs, but with an effective date of June 22, 2022.	7
III. ARGUMENT	8
Claim of Error 1: The PUCO erred when it failed to find that DP&L’s collection of stability charges (about \$60 million) from consumers since August 11, 2021 was unauthorized and in violation of law and a PUCO order. The violations of law include R.C. 4905.22 because DP&L was charging consumers under stability charge tariffs that did not contain the consumer refund language the PUCO ordered. And violations of law include R.C. 4905.32 when DP&L charged consumers for stability charges without the consumer refund language the PUCO ordered. The PUCO’s error includes that it failed to enforce its August 11, 2021 Entry when it did not order DP&L to return ten months of illegally collected stability charges to consumers. The PUCO should have ordered DP&L to change the effective date of the stability charge tariffs (with consumer refund language) to August 11, 2021, consistent with its Sixth Entry on Rehearing.	8
Claim of Error 2: The PUCO erred by misusing the statutory rehearing process to change its ruling on a matter not specified in the applications for rehearing that were under review, violating R.C. 4903.10.	11

Claim of Error 3: The PUCO erred when it reapproved DP&L’s July 16, 2021 stability charge tariffs as if it had not already approved those tariffs through its August 11, 2021 Sixth Entry on Rehearing. The PUCO’s ruling shows misapprehension or mistake and should be modified to reflect the PUCO’s earlier approved tariff effective date of August 11, 2021.....13

Claim of Error 4: The PUCO erred by issuing a ruling that departed from its past ruling in its Sixth Entry on Rehearing, without an explanation, violating R.C. 4903.09 and Ohio Supreme Court precedent. And the PUCO failed to show that its new course of action was lawful and reasonable, in violation of Ohio Supreme Court precedent.....15

Claim of Error 5: The PUCO erred by failing to order DP&L to pay forfeitures of \$9.45 million for DP&L’s violations of the PUCO’s Sixth Entry on Rehearing, R.C. 4905.22, R.C. 4905.32, R.C. 4905.54, and other laws and by failing to determine if DP&L personnel involved in these tariff noncompliances are liable for forfeitures under R.C. 4905.56. Per R.C. 4905.54, each day of DP&L’s violation is a separate offense, at up to \$10,000 per day.....18

IV. CONCLUSION.....20

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)
Dayton Power and Light Company for) Case No. 08-1094-EL-SSO
Approval of its Electric Security Plan.)

In the Matter of the Application of The)
Dayton Power and Light Company for) Case No. 08-1095-EL-ATA
Approval of Revised Tariffs.)

In the Matter of the Application of The)
Dayton Power and Light Company for)
Approval of Certain Accounting) Case No. 08-1096-EL-AAM
Authority Pursuant to Ohio Rev. Code)
Section 4905.13.)

In the Matter of the Application of The)
Dayton Power and Light Company for) Case No. 08-1097-EL-UNC
Approval of its Amended Corporate)
Separation Plan.)

MEMORANDUM IN SUPPORT

I. INTRODUCTION

This is a case with a long history played out over nearly a decade-and-a-half – a history that has greatly disfavored Dayton-area consumers. DP&L is currently operating under its 2009 electric security plan, having reverted to it for the second time in three years. DP&L likes the 2009 plan because it is collecting \$76 million per year from consumers for “stability” – a made-up charge that is not based on any real cost of utility service. All told, DP&L consumers will have paid over \$1.2 billion in so-called stability charges to DP&L by the end of DP&L’s reinstated ESP I. That is courtesy of Ohio’s pro-utility 2008 energy law and the choices the PUCO has made in implementing it.

In the latest twist in this unfair saga, the PUCO pulled back on part of its publicly avowed intention to give consumers the opportunity for refunds of stability charges. In

response to unrelated applications for rehearing,¹³ the PUCO curiously approved DP&L’s July 16, 2021 tariff a *second* time and made those tariffs “effective upon filing.”¹⁴ DP&L refiled its July 16, 2021 tariffs with a new effective date of *June 22, 2022* for stability charges to be subject to refund to consumers, in the event the Ohio Supreme Court finds such charges are unjust or unreasonable.

But DP&L’s stability charge tariffs, with consumer refund language, were already approved by the PUCO in the PUCO’s Sixth Entry on Rehearing¹⁵ on August 11, 2021. The PUCO’s tariff approval is publicly filed for all to see. That DP&L later *misinformed* the PUCO (that the tariffs were never approved) should be seen for what it is – wrong on a number of levels.¹⁶ DP&L should be culpable for misinforming the PUCO.

So, the PUCO’s second, later approval of DP&L’s stability charge tariff was inappropriate. And when the PUCO ruled that DP&L’s tariffs would be effective upon filing, it directly contradicted its Sixth Entry on Rehearing, to the detriment of DP&L consumers. In the name of justice for DP&L consumers, OCC seeks rehearing.

¹³ *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, Seventh Entry on Rehearing ¶1 (June 15, 2022).

¹⁴ *Id.* ¶29.

¹⁵ *Id.*, Sixth Entry on Rehearing at ¶51.

¹⁶ *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service offer*, S.Ct. Case No. 2021-1068, Fourth Merit Brief at 1 (March 8, 2022) (DP&L claiming that its July 16, 2021 tariff was “not approved and is not currently operative”).

II. PROCEDURAL HISTORY

A. The PUCO ordered DP&L to include consumer refund language in its stability charge tariffs last year in its Fifth Entry on Rehearing.

On June 16, 2021, in its Fifth Entry on Rehearing, the PUCO directed DP&L to file new proposed stability charge tariffs with consumer refund language. The PUCO did so in response to OCC's application for rehearing. The PUCO made a very public point of this, writing:

We do not seek to evade the Supreme Court review of our decisions. Therefore, in light of the extraordinary circumstances in this case, the Commission will grant rehearing on OCC's sixth assignment of error. In fashioning tariff language, we are mindful of our ruling in this case. Therefore, we will direct the company to file new proposed tariffs providing that the RSC [rate stability charge] shall be refundable 'to the extent permitted by law.' This language should allow OCC to effectively appeal our decision in this case without undermining our rulings. We note that our decision is limited to the extraordinary circumstances of this case, including the fact that previous appeals of a decision to reinstate the RSC were dismissed as moot.¹⁷

The above ruling linked the PUCO's assertion that it was not seeking to evade judicial review (by delaying a ruling on OCC's application for rehearing by 16 months) with its ordered refundability language. Despite that very public PUCO pronouncement, the PUCO has now walked back about \$60 million of stability-charge refundability that was supposed to be part of the "extraordinary" circumstances that the PUCO cited in its ruling.

¹⁷ *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, Fifth Entry on Rehearing at ¶64 (June 16, 2021).

On July 16, 2021, DP&L filed proposed tariffs in compliance with the PUCO's Fifth Entry on Rehearing.¹⁸ Its proposed tariffs contained the consumer refund language but contained no effective date.¹⁹

B. The PUCO issued its Sixth Entry on Rehearing, approving DP&L's July 16, 2021 stability charge tariffs, and ordered DP&L to file copies of its stability charge tariffs consistent with its August 11, 2021 Order.

DP&L sought rehearing of the PUCO's decision requiring it to place refund language in its stability charge tariffs.²⁰ The PUCO denied DP&L's rehearing application, noting the "extraordinary circumstances [that] surround this proceeding."²¹ The PUCO *approved* DP&L's July 16, 2021 tariffs, finding that "the proposed tariffs are consistent with the Fifth Entry on Rehearing and do not appear to be unjust or unreasonable."²² The PUCO also found that "it is unnecessary to hold a hearing regarding the proposed tariffs. Accordingly, we find that the proposed tariff should be approved."²³

The PUCO very publicly explained that "[i]f OCC files an appeal in this proceeding and is successful, refunds of the RSC [rate stability charge] should be made to

¹⁸ *Id.*, Proposed Second Revised Sheet No. G12, PUCO. No. 17, Pursuant to Fifth Entry on Rehearing (July 16, 2021); (In its enclosure letter, DP&L noted that it "submits the attached tariff sheet to comply with the Commission's 5th Entry on Rehearing in Case No. 08-1094-EL-SSO regarding the Company's tariff sheet G12 – Rate Stabilization Charge.").

¹⁹ *Id.*

²⁰ DP&L Application for Rehearing (July 16, 2021).

²¹ *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, Sixth Entry on Rehearing at ¶29 (August 11, 2021).

²² *Id.* at ¶47, 48, 51.

²³ Sixth Entry on Rehearing at ¶48; *see also* Fifth Entry on Rehearing at ¶45, rejecting OCC's claim that the PUCO erred by adopting earlier proposed tariffs without a prior review, finding that "it is not unusual for the Commission, when time is of the essence, to order that revisions to proposed tariffs be filed as final tariffs, subject to final Commission review."

the extent that such refunds are permitted by law, at least for any period the RSC is collected after this Sixth Entry of Rehearing.”²⁴

And in the final ordering paragraphs of the PUCO’s Sixth Entry on Rehearing, the PUCO reiterated its findings including: “ORDERED, That the proposed tariffs filed by AES Ohio on July 16, 2021, be approved.”²⁵ And “ORDERED, That AES Ohio be authorized to file, in final form, two complete copies of the tariffs, consistent with this Sixth Entry on Rehearing. AES shall file one copy in the TRF docket and one copy in this docket.”²⁶

Under R.C. 4903.15, the PUCO’s order approving DP&L’s tariffs was effective immediately upon journalization of its Entry. In short, the PUCO’s rulings left nothing to DP&L’s imagination. Or so it seemed.

C. Despite being a utility subject to the PUCO’s authority, DP&L failed to file a final stability charge tariff in compliance with the PUCO’s Sixth Entry on Rehearing that required consumer refund language. Then DP&L claimed (falsely) to the PUCO that its stability charge tariff with consumer refund language was not approved by the PUCO and is “not currently operative.”²⁷

It was plain as day that the PUCO ordered DP&L to file final tariffs in compliance with the refund language per the PUCO’s Sixth Entry on Rehearing.²⁸ But DP&L did not comply. And then DP&L wrongly claimed there was no PUCO approval.

²⁴ *Id.* at ¶47.

²⁵ *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, Sixth Entry on Rehearing at ¶51 (August 11, 2021).

²⁶ *Id.* at ¶52.

²⁷ *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer*, S.Ct. Case No. 2021-1068, Fourth Merit Brief (March 8, 2022).

²⁸ *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, Sixth Entry on Rehearing at ¶51 (August 11, 2021).

The effective date of the refund tariff is no minor issue. DP&L, without “an operative” tariff, had no authority to collect the stability charge from its consumers. Those collections should be returned to consumers now.

The 10-month delay in tariffs that DP&L is contriving could cost consumers in the neighborhood of \$60 million in denied refunds, if the Supreme Court reverses. The PUCO should not be complicit in this unlawful scheme.

And if that weren’t bad enough for consumers, it gets worse. DP&L then used its tariff non-compliance at the PUCO to argue against OCC’s claims in the Supreme Court for consumer refunds dating back to 2021. In its Fourth Merit Brief filed in S.Ct. Case 2021-1068, DP&L relied on its false claim that the PUCO had not approved the stability charge tariff with the refund language:

One clarifying point: OCC (p.36) tells the Court that the Commission ‘approved’ language making the RSC subject to refund to the extent permitted by law. That is not correct. The Commission ordered AES Ohio to file ‘proposed’ tariffs that would make the RSC subject to refund to the extent permitted by law. OCC Appx. 57, ¶64. AES filed a ‘proposed’ tariff with the Commission on July 16, 2021, but that tariff has not been approved and is not currently operative.²⁹

²⁹ *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer*, S.Ct. Case No. 2021-1068, Fourth Merit Brief (March 8, 2022).

D. The PUCO for some reason issued its Seventh Entry on Rehearing approving DP&L’s stability charge tariffs a second time. The PUCO ordered the tariffs to be effective upon DP&L’s filing. This time DP&L filed compliance tariffs, but with an effective date of June 22, 2022.

Clearly the PUCO already approved DP&L’s proposed July 16, 2021 stability charge tariffs in its Sixth Entry on Rehearing.³⁰ The PUCO ruled that “[i]f OCC files an appeal in this proceeding and is successful, refunds of the RSC [rate stability charge] should be made to the extent that such refunds are permitted by law, *at least for any period the RSC is collected after this Sixth Entry of Rehearing.*”³¹

But on June 15, 2022, in response to unrelated applications for rehearing, the PUCO approved DP&L’s stability charge tariffs a second time.³² And the second time around the PUCO ruled the tariffs would be effective on the date DP&L filed them.³³ On June 22, 2022, DP&L filed its tariffs.³⁴ The tariffs contain the effective date of June 22, 2022, which erases ten months of refundability ordered in the PUCO’s earlier tariff approval. Unless the effective date of the tariffs is corrected, reverting back to the prior PUCO effective date of August 11, 2021, DP&L consumers will be denied almost a year of refund protection. That’s about \$60 million in lost consumer protection.

³⁰ *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, Sixth Entry on Rehearing at ¶48 (August 11, 2021).

³¹ *Id.*, at ¶47 (emphasis added).

³² *Id.*, Seventh Entry on Rehearing at ¶1, 23, 28, 29.

³³ *Id.*, at ¶29.

³⁴ *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, Revised Tariff Pages (June 22, 2022).

III. ARGUMENT

Claim of Error 1: The PUCO erred when it failed to find that DP&L’s collection of stability charges (about \$60 million) from consumers since August 11, 2021 was unauthorized and in violation of law and a PUCO order. The violations of law include R.C. 4905.22 because DP&L was charging consumers under stability charge tariffs that did not contain the consumer refund language the PUCO ordered. And violations of law include R.C. 4905.32 when DP&L charged consumers for stability charges without the consumer refund language the PUCO ordered. The PUCO’s error includes that it failed to enforce its August 11, 2021 Entry when it did not order DP&L to return ten months of illegally collected stability charges to consumers. The PUCO should have ordered DP&L to change the effective date of the stability charge tariffs (with consumer refund language) to August 11, 2021, consistent with its Sixth Entry on Rehearing.

Under R.C. 4905.22, utilities are only authorized to implement charges for services to consumers that are “just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission.” Additionally, under R.C. 4905.22, “no unjust or unreasonable charge shall be made or demanded for, in conjunction with any service, or in excess of that allowed by law or by order of the commission.” Under R.C. 4905.32, no public utility may charge or demand charges for services rendered except as specified in its schedule filed with the PUCO which is in effect at the time.

The PUCO’s Sixth Entry on Rehearing was straight forward. The obligation was on DP&L to file final stability charge tariffs with the PUCO-approved consumer refund language the PUCO ordered in its Fifth Entry on Rehearing.³⁵ Despite the PUCO’s plain language ordering DP&L to file compliance tariffs consistent with its order, DP&L did not comply. In fact, DP&L has admitted (in its Supreme Court brief filing) that it has been charging consumers under tariffs that do not contain refund language.³⁶

³⁵ *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, Sixth Entry on Rehearing at ¶48, 51 and 52.

³⁶ *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer*, S.Ct. Case No. 2021-1068, Fourth Merit Brief (March 8, 2022).

To top it off, DP&L falsely claimed to the PUCO that the PUCO had not approved the tariffs. And then the PUCO, the same PUCO that actually did approve the tariffs, acted as though it had not approved the tariffs. It is inexplicable.

The PUCO, in its Seventh Entry on Rehearing, should have found that DP&L violated R.C. 4905.22 and 4905.32, starting August 11, 2021, when DP&L continued to charge consumers for so-called stability without filing authorized tariffs containing the refund language the PUCO ordered. But the PUCO failed to make such a finding.

Instead, the PUCO curiously issued a ruling on June 15, 2022, approving DP&L's July 16, 2021 tariffs *a second time*.³⁷ This second time around, the PUCO approved what DP&L placed in front of it – and directed DP&L once again to file final tariffs.³⁸ The PUCO also ordered the final tariffs to be effective upon filing.³⁹ DP&L quickly complied with this favorable result for its tariffs – the result that it wanted despite it not being the result that the PUCO ordered in the Sixth Entry on Rehearing. DP&L filed the tariffs on June 22, 2022.⁴⁰

Accordingly, DP&L unlawfully collected the stability charge from its consumers *without* the PUCO-approved tariff on file. DP&L was only authorized to collect its stability charge from consumers under the condition that the PUCO's refund language would make it refundable if the Supreme Court reverses.

³⁷ *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, Seventh Entry on Rehearing at ¶23 (June 15, 2022).

³⁸ *Id.*, ¶28.

³⁹ *Id.*, ¶28, 29.

⁴⁰ *Id.*, Revised Tariff Pages (June 22, 2022).

DP&L owes its consumers the return of the illegally collected stability charge, about \$60 million. *The PUCO should order the return of the money in one, lump-sum bill credit on consumers' bills.*

In effect, the PUCO's wrongful second approval of DP&L's tariffs (with consumer refund language delayed by ten months until June 22, 2022), would deny consumers almost a year of refund protection compared to the intended August 2021 date. The PUCO is (or is supposed to be) in charge of tariffs, not DP&L. R.C. 4905.22 and 4905.32 make that clear. It is the PUCO that approves tariffs and the utility that must charge only the PUCO-approved tariffs. Nothing more and nothing less.

The PUCO, however, did not find that DP&L violated its Sixth Entry on Rehearing. Nor did the PUCO find that the tariff charges to consumers over the last year were unauthorized. In this strange turn of events the PUCO let DP&L off the hook (for non-compliance) and rewarded DP&L's non-compliance by approving a later effective date for potential consumer refunds to begin. It does not make sense.

The PUCO's ruling violated the law and unreasonably denied consumers the protection ordered by the PUCO in its Entries. That consumer protection was supposed to be refund language placed in DP&L's filed tariffs starting in August of 2021. That was the language that the PUCO assured would protect consumers when it promised that "[i]f OCC files an appeal in this proceeding and is successful, refunds of the RSC [rate stability charge] should be made to the extent that such refunds are permitted by law, at least for any period the RSC is collected after this Sixth Entry of Rehearing."⁴¹

⁴¹ *Id.* at ¶47.

The PUCO erred. Rehearing should be granted to OCC. The PUCO should order DP&L to return to consumers its illegally collected stability charge since August 2021. At a minimum,⁴² the PUCO should require DP&L to change the effective date of the stability charge tariffs (with consumer refund language) to August 11, 2021, consistent with the PUCO's Sixth Entry on Rehearing that DP&L ignored.

Claim of Error 2: The PUCO erred by misusing the statutory rehearing process to change its ruling on a matter not specified in the applications for rehearing that were under review, violating R.C. 4903.10.

R.C. 4903.10 is the Ohio statute that sets the standards for PUCO review of applications for rehearing. Under R.C. 4903.10, the PUCO may only hold rehearing on matters specified in the application for rehearing. The PUCO violated this statute.

In the PUCO's Seventh Entry on Rehearing, the PUCO was responding to applications for rehearing filed from the PUCO's Second Finding and Order (issued Dec. 18, 2019) by numerous intervenors including the Industrial Energy Users-Ohio, the City of Dayton and Honda of America Mfg., and the Ohio Manufacturers' Association and the Kroger Company.⁴³ The PUCO deferred review of these applications for rehearing at the Intervenor's request.⁴⁴ The Intervenor represented that their applications for rehearing would be withdrawn⁴⁵ within 7 days after the PUCO issued a final appealable order

⁴² OCC's minimum position is stated without waiving our claims that DP&L owes consumers the return of \$60 million in unauthorized stability charges and that DP&L (and potentially its personnel) should be assessed forfeitures.

⁴³ Seventh Entry on Rehearing at ¶1 (June 15, 2022).

⁴⁴ *Id.* at ¶13.

⁴⁵ Contrary to their representations, the Intervenor did not withdraw their applications for rehearing within seven days of the final order in the Quadrennial Review Case. The final order in that case was December 1, 2021. PUCO Case No. 18-1875-EL-GRD, Third Entry on Rehearing (December 1, 2021). Motions to withdraw were not filed by Intervenor until early May 2022, after the prehearing conference where the Attorney Examiner raised the issue. The Intervenor's pending applications were apparently the reason the Ohio Supreme Court dismissed one of OCC's appeals of DP&L's stability charge. *See* Ohio S.Ct. Case 2021-1068, Reconsideration Entry (June 21, 2022).

adopting, without modification, the global stipulation submitted in the Quadrennial Review case.⁴⁶ (The intervenors had all signed onto the global stipulation, which was opposed by OCC.)

Notably there are no claims specified in the Intervenors' Applications for Rehearing related to refund language associated with the stability charge. And the applications for rehearing that were under review did not specify issues pertaining to the compliance tariffs that DP&L filed on July 16, 2021.

However, and in violation of law, the PUCO took the opportunity in its Seventh Entry on Rehearing to hold rehearing on matters resolved by its prior rulings (its Fifth and Sixth Entries on Rehearing). Those matters (refund language and the effective date of the stability tariff) were not presented to the PUCO through the Intervenors' applications for rehearing. The PUCO's Order in this regard was unlawful and unreasonable.

R.C. 4903.10 limits the PUCO's authority to only hold rehearing on matters specified in the application for rehearing: "Where such application for rehearing has been filed, the commission may grant and hold such rehearing *on the matter specified in such application* if in its judgement sufficient reason therefor is made to appear." (Emphasis added.)

The PUCO violated this statute when it held rehearing on the Intervenors' applications and made an unrelated ruling changing the effective date of the stability charge tariff. That change will potentially deprive DP&L consumers of \$60 million in refunds for stability charges collected between August 11, 2021 and June 21, 2022.

⁴⁶ *Id.*

Under the statute, the matter was not before the PUCO for its consideration. The PUCO had no authority under law to address the matter on rehearing.

Claim of Error 3: The PUCO erred when it reapproved DP&L’s July 16, 2021 stability charge tariffs as if it had not already approved those tariffs through its August 11, 2021 Sixth Entry on Rehearing. The PUCO’s ruling shows misapprehension or mistake and should be modified to reflect the PUCO’s earlier approved tariff effective date of August 11, 2021.

On July 16, 2021, DP&L filed new proposed stability charge tariffs containing the refund language that the PUCO had ordered.⁴⁷ About two months later, on August 11, 2021, the PUCO approved DP&L’s stability charge tariff. The PUCO wrote:

“ORDERED, That the proposed tariffs filed by AES Ohio on July 16, 2021, be approved.”⁴⁸ Additionally the PUCO wrote that it: “ORDERED, That AES Ohio be authorized to file, in final form, two complete copies of the tariffs, consistent with this Sixth Entry on Rehearing. AES shall file one copy in the TRF docket and one copy in this docket.”⁴⁹ And the PUCO wrote in its ruling that: “refunds of the RSC [rate stability charge] should be made to the extent that such refunds are permitted by law, at least for any period the RSC is collected after this Sixth Entry of Rehearing.”⁵⁰

Despite the PUCO’s very clear holdings on DP&L’s stability charge tariffs, holdings made by the PUCO with some public fanfare, the PUCO curiously issued a

⁴⁷ *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, Proposed Second Revised Sheet No. G12, PUCO. No. 17, Pursuant to Fifth Entry on Rehearing (July 16, 2021) (In its enclosure letter, DP&L noted that it “submits the attached tariff sheet to comply with the Commission’s 5th Entry on Rehearing in Case No. 08-1094-EL-SSO regarding the Company’s tariff sheet G12 – Rate Stabilization Charge.”).

⁴⁸ *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, Sixth Entry on Rehearing at ¶51 (August 11, 2021).

⁴⁹ *Id.* at ¶52.

⁵⁰ *Id.* at ¶47.

ruling on June 15, 2022, approving DP&L's July 16, 2021 tariffs *a second time*.⁵¹ This second time around, the PUCO retrenched on its avowed refund protection by approving what *DP&L* placed in front of it. The PUCO directed DP&L once again to file final tariffs and ordered the final tariffs to be effective upon filing.⁵² But the PUCO's wrongful second approval of DP&L's tariffs (with refundability language delayed ten months until June 22, 2022), would deny consumers about \$60 million of refunds in the event the Court reverses.

As stated, DP&L falsely claimed to the PUCO that the PUCO had not approved the original refundability tariffs. But the PUCO did approve the refundability tariffs, effective August 2011. That PUCO ruling is as plain as day.

The PUCO should have been enforcing its Sixth Entry on Rehearing, not in effect indulging DP&L's false claim that the PUCO had failed to approve the tariffs ten months earlier. The PUCO's ruling, that plainly contradicts its Sixth Entry on Rehearing, shows mistake or error. Consistent with *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403 and other Ohio Supreme Court precedent, rehearing should be granted.

⁵¹ *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, Seventh Entry on Rehearing at ¶23 (June 15, 2022).

⁵² *Id.*, ¶28, 29.

Claim of Error 4: The PUCO erred by issuing a ruling that departed from its past ruling in its Sixth Entry on Rehearing, without an explanation, violating R.C. 4903.09 and Ohio Supreme Court precedent. And the PUCO failed to show that its new course of action was lawful and reasonable, in violation of Ohio Supreme Court precedent.

In its Sixth Entry on Rehearing, the PUCO approved DP&L’s July 16, 2021 tariffs: “ORDERED, That the proposed tariffs filed by AES Ohio on July 16, 2021, be approved.”⁵³ And it “ORDERED, That AES Ohio be authorized to file, in final form, two complete copies of the tariffs, consistent with this Sixth Entry on Rehearing. AES shall file one copy in the TRF docket and one copy in this docket.”⁵⁴

Under R.C. 4903.15, the PUCO’s order approving DP&L’s tariffs was effective immediately upon journalization of its Entry (August 11, 2021.) The PUCO explained that with the approval of DP&L’s tariffs, “[i]f OCC files an appeal in this proceeding and is successful, refunds of the RSC [rate stability charge] should be made to the extent that such refunds are permitted by law, *at least for any period the RSC is collected after this Sixth Entry of Rehearing.*”⁵⁵

The PUCO’s ruling approving DP&L’s July 16, 2021 tariffs a second time, with an effective date of June 22, 2022, departed from its Sixth Entry on Rehearing. The Ohio Supreme Court has instructed the PUCO “to respect its own precedents in its decisions to assure the predictability, which is essential in all areas of law, including administrative

⁵³ *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, Sixth Entry on Rehearing at ¶51 (August 11, 2021).

⁵⁴ *Id.* at ¶52.

⁵⁵ *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, Sixth Entry on Rehearing at ¶47 (August 11, 2021) (emphasis added).

law.”⁵⁶ The PUCO failed to do so here, when it changed the prior effective date of the stability charge tariff to a later effective date.

And, while the PUCO can revisit a particular decision, the PUCO is “bound by certain institutional constraints to justify that change before such order may be changed or modified.”⁵⁷ If the PUCO sees fit to depart from a prior order, it “must explain why” and “the new course also must be substantively reasonable and lawful.”⁵⁸ Here, there was no explanation of why the PUCO departed from its Sixth Entry on Rehearing. There was no finding that the PUCO’s decision in its Sixth Entry on Rehearing was in error. In fact, there was no discussion of the PUCO’s Sixth Entry on Rehearing at all.

Additionally, the new course the PUCO took when it set a new effective date for DP&L’s stability charge tariff was not substantively reasonable and lawful. The establishment of a new effective date for the tariffs rewards DP&L for its non-compliance with the PUCO’s Sixth Entry on Rehearing.

DP&L should be penalized for noncompliance, not rewarded for it. Consumers should be protected from utility noncompliance, not harmed by it.

The PUCO’s ruling, coupled with DP&L’s assertions that the prior tariff was “not currently operative” call to mind the “invited error doctrine.” Under the invited error doctrine, a party will not be permitted to take advantage of an error that it invited or

⁵⁶ *Cleveland Electric Illuminating Co. v. Pub Util. Comm.*, 42 Ohio St.2d 403, 431, 330 N.E.2d 1, at 20 (1975), superseded on other grounds (by statute), as recognized in *Babbit v. Pub. Util. Comm.*, 59 Ohio St.2d 81, 89, 391 N.E.2d 1376 (1979).

⁵⁷ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51, 461 N.E.2d 303 (1984).

⁵⁸ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶52.

induced the trial court to make.⁵⁹ (Still, it is a curiosity why the PUCO did not call out DP&L for violating the PUCO’s 2021 order approving the tariffs.)

Here DP&L did not file final stability charge tariffs as ordered by the PUCO. DP&L claimed its stability charge tariffs were not approved and “not currently operative.”⁶⁰ The PUCO acted in response to DP&L’s false claim about the lack of tariff approval. The PUCO then issued an unneeded ruling on June 15, 2022 that approved, for a second time, DP&L’s stability charge tariffs, potentially costing consumers about \$60 million in refunds if the Supreme Court reverses.

The PUCO should order the return to consumers of about \$60 million for DP&L’s stability charges that were collected without an authorized tariff, since August 2021. At a minimum, the PUCO should order DP&L to file tariffs for its stability charge that comply with the PUCO’s Sixth Entry on Rehearing, containing an effective date of August 11, 2021.⁶¹

There can be no reward in this for DP&L. Indeed, there should be penalties in the form of forfeitures for DP&L. Rehearing should be granted.

⁵⁹ *In re Application of Columbus Southern Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, ¶68, citing *State ex rel. Johnson v. Ohio Adult Parole Auth.*, 95 Ohio St.3d 463, 2002-Ohio-2481, 768 N.E.2d 1176, ¶6; *City of Fostoria v. Ohio Patrolmen's Benevolent Ass'n.*, 106 Ohio St.3d 194, 2005-Ohio-4558, 833 N.E.2d 720, ¶12.

⁶⁰ DP&L Fourth Merit Brief (March 8, 2022).

⁶¹ *OCC's minimum position is stated without waiving our claims that DP&L owes consumers the return of \$60 million in unauthorized charges and that DP&L (and potentially its personnel) should be assessed forfeitures.*

Claim of Error 5: The PUCO erred by failing to order DP&L to pay forfeitures of \$9.45 million for DP&L's violations of the PUCO's Sixth Entry on Rehearing, R.C. 4905.22, R.C. 4905.32, R.C. 4905.54, and other laws and by failing to determine if DP&L personnel involved in these tariff noncompliances are liable for forfeitures under R.C. 4905.56. Per R.C. 4905.54, each day of DP&L's violation is a separate offense, at up to \$10,000 per day.

The PUCO should find that DP&L violated its Sixth Entry on Rehearing. DP&L violated the PUCO's order when it failed to file two complete copies of the July 16, 2021 PUCO-approved tariffs, one copy in the TRF docket and one copy in the 08-1094 docket.⁶²

But in its ruling the PUCO did not address DP&L's non-compliance with its Sixth Entry on Rehearing. And the PUCO did not consider forfeitures for DP&L's (and its personnel's) non-compliance.

The PUCO also should have found that DP&L violated R.C. 4905.22 and 4905.32, starting August 11, 2021, when it continued to unlawfully charge consumers under tariffs that had been superseded and were no longer in effect, consistent with the PUCO's Sixth Entry on Rehearing. Such unlawful collections should be fully returned to consumers.

Under R.C. 4905.22 a utility may not demand charges that differ from those allowed by order of the PUCO. Under R.C. 4905.32, no public utility may charge or demand charges for services rendered except as specified in its schedule filed with the PUCO which is in effect at the time. In this regard, DP&L has admitted (in its Supreme Court brief filing) that it has been charging consumers under tariffs that do not contain

⁶² *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, Sixth Entry on Rehearing at ¶52 (August 11, 2021).

refund language, despite the PUCO Sixth Entry on Rehearing that approved DP&L's July 16, 2021 tariffs with refund language.

Under R.C. 4905.54, every public utility "shall comply with every order, direction, and requirement of the public utilities commission***." Under that statute, the PUCO may assess a forfeiture against a public utility that violates a PUCO order or violates provisions of the Revised Code. Under R.C. 4905.56, no "officer, agent, or employee" shall knowingly violate provisions of the Revised Code (including 4905.22 and 4905.32) or "willfully fail to comply with any lawful order or direction of the public utilities commission." The statute further provides that "[e]ach day's continuance of such failure is a separate offense." These statutes allow the PUCO to assess a forfeiture of up to \$10,000 per day for each violation.

The PUCO should have noted these violations and assessed forfeitures against DP&L. With three violations, and a \$10,000 per day forfeiture, the violations by DP&L warrant a forfeiture of up to \$9.4 million. The PUCO should have ordered such a forfeiture against DP&L. And the PUCO should have determined if DP&L personnel are culpable for paying forfeitures, per R.C. 4905.56.

The PUCO's recent ruling also unreasonably rewarded DP&L's failure to obey the PUCO's Sixth Entry on Rehearing. DP&L disobeyed the PUCO when it failed to file its tariffs in final form, as the PUCO ordered in its Sixth Entry on Rehearing. Despite its non-compliance with the PUCO's Sixth Entry on Rehearing, DP&L continued to collect the stability charge from its consumers, minus the PUCO approved refund language. The absence of the refund language harms consumers if the Supreme Court overturns the PUCO in OCC's appeal.

DP&L's tariffs violate the PUCO's prior Entry⁶³ that approved DP&L's July 16, 2021 tariffs effective *August 11, 2021*. The PUCO should have ordered DP&L to place an effective date of August 11, 2021 in its July 16, 2021 tariffs. After all, that was the effective date of the tariffs under the PUCO's Sixth Entry on Rehearing. But the PUCO failed to do so and instead established a new effective date for the tariffs – the date which DP&L filed its tariffs (June 22, 2022). It erred in this regard. The PUCO should have ordered refunds to consumers for the unauthorized charges they paid from August 11, 2021 to June 21, 2022.

The PUCO also failed by not imposing forfeitures on DP&L for its failure to comply with the PUCO's Sixth Entry on Rehearing, a violation of R.C. 4905.54. DP&L was also charging consumers under tariffs that were no longer in effect, in violation of R.C. 4905.22 and 4905.32. The PUCO should have ruled that DP&L should be subject to forfeitures for violations of these three laws under R.C. 4905.54. The violations began on August 11, 2021, with each day a separate violation. The PUCO should have assessed a forfeiture of up to \$10,000 a day for each of the violations, with total forfeitures of \$9.4 million. And the PUCO should have determined if DP&L personnel should pay forfeitures.

IV. CONCLUSION

Something inexplicable is afoot with the PUCO's handling of DP&L's tariffs involving refundability of its so-called stability charge. With public fanfare, the PUCO

⁶³ *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, Sixth Entry on Rehearing (August 11, 2022); *see also id.*, Fifth Entry on Rehearing at ¶64 (directing DP&L “to file new proposed tariffs providing that the RSC [rate stability charge] shall be refundable ‘to the extent permitted by law’”).

ordered DP&L to file its stability charge tariffs with refundability language effective in August 2021. The order was as plain as day.

But DP&L did not file final tariffs as the PUCO ordered. DP&L later claimed there was no such PUCO order approving its tariffs and that tariffs with the refund language are “not currently operative.” Then the PUCO failed to order DP&L into compliance.

Then, nearly a year later, DP&L presented the PUCO with the same tariffs that the PUCO already had approved. Curiously, the PUCO approved the tariffs for a second time and ordered a June 22, 2022 effective date of the tariffs – an effective date that is ten months later than what the PUCO originally ordered. Ten months of delay equates to about \$60 million in potential lost refunds for consumers if the Supreme Court throws out DP&L’s PUCO-approved stability charge in OCC’s appeal. That is on top of the 16-month delay in the PUCO’s ruling on OCC’s rehearing application, that also cost consumers in denial of timely relief.

In this regard, the PUCO asserted in its ruling that it was not seeking to prevent judicial review of DP&L’s rates, despite making OCC wait 16 months for a ruling on its application for rehearing before OCC could appeal. The PUCO then made a public point of linking the judicial review issue with enabling the refundability issue. So nearly a year later, what happened to that PUCO commitment?

The PUCO should do the right thing. The PUCO should order DP&L to return the \$60 million to consumers for stability charges paid to DP&L under unauthorized tariffs since August 2021.

At a minimum, the PUCO should protect consumers' right to a potential refund beginning August 11, 2021, as it ordered. OCC's minimum position is stated without waiving our claims that DP&L owes consumers the return of \$60 million in unauthorized charges and that DP&L (and potentially its personnel) should be assessed forfeitures. Refundability should not be delayed and only start ten months later on June 22, 2022, through DP&L's sleight of hand.⁶⁴

In that regard, the PUCO should require DP&L to amend its stability charge tariffs by inserting an effective date of August 11, 2021. That would be consistent with its Sixth Entry on Rehearing, where the PUCO announced that "refunds of the RSC [rate stability charge] should be made to the extent that such refunds are permitted by law, at least for any period the RSC is collected after this Sixth Entry of Rehearing."⁶⁵

Also, per authority of R.C. 4905.54 and 4905.56, the PUCO should order that DP&L (and potentially its personnel) pay forfeitures to the state treasury for violations of Ohio law. The forfeitures assessed to DP&L should be approximately \$9.4 million.

⁶⁴ *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, Sixth Entry on Rehearing at ¶47 (August 11, 2021).

⁶⁵ *Id.*

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Maureen R. Willis

Maureen R. Willis (0020847)

Senior Counsel

Counsel of Record

William J. Michael (0070921)

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, Suite 700

Columbus, Ohio 43215

Telephone: Willis (614) 466-9567

Telephone: Michael (614) 466-1291

maureen.willis@occ.ohio.gov

william.michael@occ.ohio.gov

(willing to accept service by e-mail)

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 15th day of July 2022.

/s/ Maureen R. Willis

Maureen R. Willis
Senior Counsel

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

SERVICE LIST

thomas.lindgren@ohioAGO.gov
kyle.kern@ohioAGO.gov
djireland@ficlaw.com
jsharkey@ficlaw.com
christopher.hollon@aes.com
joliker@igsenergy.com
Ned.Ford@fuse.net
mjsettineri@vorys.com
glpetrucci@vorys.com
Bojko@carpenterlipps.com
paul@carpenterlipps.com
slessor@beneschlaw.com
mkeaney@beneschlaw.com
talexander@beneschlaw.com
ssiewe@beneschlaw.com
mswhite@igsenergy.com
dborcher@bricker.com
dparram@bricker.com
rmains@bricker.com
fdarr2019@gmail.com

Attorney Examiners:

henry.phillips.gary@puco.ohio.gov
gregory.price@puco.ohio.gov

jeanne.kingery@duke-energy.com
haydenm@firstenergycorp.com
mjsatterwhite@aep.com
stnourse@aep.com
henryeckhart@aol.com
michael.nugent@igs.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
jkylercohn@bkllawfirm.com
Cynthia.brady@constellation.com
David.fein@constellation.com
njohnson@theoec.org
Williams.toddm@gmail.com
ejacobs@ablelaw.org
stephen.chriss@wal-mart.com
rdove@keglerbrown.com
fykes@whitt-sturtevant.com
whitt@whitt-sturtevant.com
mpritchard@mcneeslaw.com
evan.betterton@igs.com
michael.nugent@igs.com
ctavenor@theOEC.org
khehmeyer@beneschlaw.com

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

7/15/2022 4:25:37 PM

in

**Case No(s). 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-
UNC**

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.