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

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)

September 9, 2022

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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, 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 permitted by law.'"[2] The refund language, ordered by the PUCO at OCC's request,

[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.

[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).

was intended to allow consumer refunds if the Supreme Court (in OCC's appeal) finds the stability charge unlawful or unreasonable.

However, as the PUCO recently acknowledged (after OCC brought it to their attention) DP&L "did not file final tariffs as directed by the Commission."[3] Instead, DP&L continued to charge consumers under prior tariffs that lacked the refund language the PUCO had ordered.

So for approximately 11 months, DP&L failed to charge stability rates in accordance with its PUCO's approved rate schedule, i.e. rates with the PUCO-ordered refund provision – "refundable to the extent permitted by law." During that 11-month period DP&L collected about $60 million from Dayton-area consumers.

Of course, DP&L was well aware that it did not file final tariffs with the refund language the PUCO had ordered. And DP&L was well aware that it was charging consumers under tariffs that did not comply with the PUCO's August 11, 2021 Entry. We know this because it told the Supreme Court of Ohio that its stability charge tariffs with refund language were "not currently operative."[4] DP&L also falsely claimed that the PUCO had not approved its stability tariff with refund language, despite the PUCO's approval being publicly docketed for all to see.[5]

[3] *Id.*, Eighth Entry on Rehearing at ¶24; 25 "AES Ohio did mistakenly fail to timely file final tariffs in response to the approval of the proposed tariffs in the Sixth Entry on Rehearing dated August 11, 2021." (August 10, 2022).

[4] *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).

[5] *Id.*

Despite DP&L's unclean hands,[6] the PUCO declared that it "will not ascribe bad faith to AES Ohio or its counsel without evidence."[7] Instead the PUCO blamed OCC for not raising the issue earlier and used that as an excuse to deny consumers refunds.[8]

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 Order and Ohio laws (R.C. 4905.22, 4905.32 and 4905.54). As stated, the PUCO should have ordered DP&L to return its illegally collected stability charge to consumers. But it did not.

Accordingly, under R.C. 4903.10, OCC applies for rehearing of the PUCO's August 10, 2022 Entry. The Entry unlawfully and unreasonably denied consumers a refund of charges that were collected from them under unauthorized tariffs. The PUCO's Entry is *unreasonable and unlawful* in the following respects:

> **Claim of Error 1:** The PUCO erred when it failed to order refunds to consumers for $60 million paid by consumers under DP&L's unauthorized tariffs, after finding no prejudice to OCC or DP&L consumers. Contrary to the PUCO's unsupported conclusion, consumers suffered prejudice when they were denied a $60 million refund for unauthorized charges.
>
> Additionally, the PUCO unreasonably and unlawfully ruled that OCC must show prejudice before consumer refunds may be ordered. This ruling violated R.C. 4903.09 because the PUCO failed to provide a reasoned explanation of the basis of its decision that (1) consumers were not prejudiced and (2) that prejudice must be shown before consumer refunds may be ordered.
>
> Additionally, the PUCO is a creature of statute and has no authority beyond that given to it by the General Assembly. The PUCO cannot lawfully write into the law a requirement of prejudice before ordering refunds where a utility has violated a PUCO Order and Ohio laws (4905.22 and 4905.32).

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[6] *See generally State ex rel. Miller v. Hamilton Cty. Bd. of Elections,* 165 Ohio St.3d 13, 16-17 (2021).

[7] Eighth Entry on Rehearing at ¶25.

[8] *Id.* at ¶30.

Claim of Error 2: The PUCO erred when it unreasonably failed to order consumer refunds for $60 million they paid under DP&L's tariffs that were not authorized by the PUCO, by finding no evidence of bad faith or a deliberate failure by AES Ohio or its counsel. The PUCO's finding of no bad faith by DP&L was unlawful, unreasonable and contrary to the record in this case in violation of R.C. 4903.09.

Additionally, the PUCO is a creature of statute and has no authority to write into the law a requirement of bad intent before ordering consumer refunds where a utility has violated a PUCO Order and Ohio laws (R.C. 4905.22 and 4905.32).

Claim of Error 3: The PUCO erred when it found that DP&L lawfully collected stability charges between August 11, 2021 and the present under its tariff filed with PUCO under R.C. 4905.32. The PUCO's ruling is unlawful and unreasonable, being without record support, and against the manifest weight of the evidence, violating R.C. 4903.09. DP&L violated R.C. 4905.22 and 4905.32 when it continued to charge consumers under posted rates that were not in accordance with the PUCO approved rate schedule from its August 11, 2021 Entry.

The PUCO mistakenly construes *Lucas Cty Commissioners v. Pub Util. Comm.* 80 Ohio St.3d 344 and claims refunds would be retroactive ratemaking. Because the rates DP&L was charging were not in accordance with the PUCO order, they were not authorized to begin with. In fact, DP&L was obligated to collect charges under a different PUCO-approved tariff –an obligation that it failed to carry out. The principle against retroactive ratemaking does not apply.

Claim of Error 4: The PUCO erred when it found that OCC did not raise the underlying issue in a timely manner and thus arguably deprived the PUCO of the opportunity to correct it earlier in the proceeding. The PUCO's ruling is unlawful and unreasonable lacking record support, violating R.C. 4903.09.

OCC informed the PUCO in a timely manner that would have allowed the PUCO to correct the error by ordering a full refund to consumers. The PUCO wrongly relied on *Parma v. Public Util. Comm*., 86 Ohio St.3d 144, as rationale for denying consumers refunds. *Parma* is distinguishable.

Claim of Error 5: The PUCO erred when it unreasonably and unlawfully construed R.C. 4903.10 to allow rehearing on matters not specified in applications for rehearing under PUCO review. The PUCO erred by construing, and not applying, an unambiguous statute.

Additionally, assuming arguendo the statute was ambiguous (it wasn't), the PUCO erred in unreasonably construing the statute to such an extent as to make it unworkable and contrary to its just and reasonable intent, violating Ohio Rules of Construction Section 1.47(B).

The PUCO should grant rehearing and abrogate or modify its August 10, 2022 Entry. 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)

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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 its Seventh Entry on Rehearing, in response to unrelated applications for rehearing,[9] the PUCO curiously approved DP&L's July 16, 2021 tariff a *second* time and made those tariffs "effective upon filing."[10] 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 Rehearing[11] on August 11, 2021. DP&L later *misinformed* the Ohio Supreme Court that the tariffs were never approved.[12] DP&L further claimed that tariffs with refund language "were not currently operative."[13]

Now we come to another strange ruling, issued by the PUCO on August 10, 2022, the ruling prompting this request for rehearing. The PUCO explained that its ruling approving DP&L's tariffs a second time was an attempt to cure the alleged deficiency that DP&L created when it "mistakenly represented" to the Supreme Court that the tariffs

[9] *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).

[10] *Id.* ¶29.

[11] *Id.*, Sixth Entry on Rehearing at ¶51.

[12] *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).

[13] *Id.*

had not been approved.[14] The PUCO also acknowledged that AES did not file tariffs as directed by the Commission in August 2021[15] –a violation of R.C. 4905.54.

Yet despite all of DP&L's unlawful conduct and its misrepresentations to Ohio's highest court, the PUCO ruled that it "will not ascribe bad faith to AES Ohio or its counsel."[16] *Instead, the PUCO redirected the blame to OCC ("OCC did not raise the underlying issue in a timely manner") and denied consumers refunds due to OCC's alleged untimely objections.*[17]

In the name of justice for DP&L consumers, OCC seeks refunds to consumers through this application for rehearing. The PUCO should order refunds to DP&L consumers for those illegally collected stability charges that consumers paid from August 2021 to June 2022.

[14] *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, Eighth Entry on Rehearing ¶24 (August 10, 2022).

[15] *Id.*

[16] *Id.* at ¶25.

[17] *Id.* at ¶30. Of note, the same day that DP&L made its claims before the Ohio Supreme Court, OCC Counsel contacted the PUCO's Counsel as to the DP&L's representations, The PUCO's Counsel was made aware of the issue and OCC's concerns. *See* Attachment. There was no follow-up by PUCO Counsel with OCC on this matter.

II. ARGUMENT

Claim of Error 1: The PUCO erred when failed to order refunds to consumers for $60 million paid under DP&L's unauthorized tariffs, after finding no prejudice to OCC or DP&L consumers. Contrary to the PUCO's unsupported conclusion, consumers suffered prejudice when they were denied a $60 million refund for unauthorized charges.

Additionally, the PUCO unreasonably and unlawfully ruled that OCC must show prejudice before consumer refunds may be ordered. This ruling violated R.C. 4903.09 because the PUCO failed to provide a reasoned explanation of the basis of its decision that (1) consumers were not prejudiced and (2) that prejudice must be shown before consumer refunds may be ordered.

Additionally, the PUCO is a creature of statute and has no authority beyond that given to it by the General Assembly. The PUCO cannot lawfully write into the law a requirement of prejudice before ordering refunds where a utility has violated a PUCO Order and Ohio laws (R.C. 4905.22 and 4905.32).

In its first assignment of error, OCC demonstrated that the PUCO erred when it failed to find that DP&L's collection of stability charges (about $60 million) from consumers for the period of August 11, 2021 to June 22, 2022, was unauthorized and in violation of law and a PUCO order.[18] In its Eighth Entry on Rehearing, the PUCO concluded that OCC had not demonstrated error because it had not shown prejudice to DP&L consumers.[19]

The PUCO's conclusion violated R.C. 4903.09 because the PUCO failed to provide a reasoned explanation of the basis of its decision[20] that: (1) consumers were not prejudiced and (2) that prejudice must be shown before consumer refunds may be ordered. The PUCO's order does not contain enough evidence and discussion to enable

[18] OCC's Application for Rehearing (July 15, 2022) at 8-11.

[19] Eighth Entry on Rehearing (August 10, 2022) at para. 28.

[20] *See In re Suvon, LLC.,* 166 Ohio St.3d 519, 2021-Ohio-3630, 188 N.E.3d 140.

the PUCO's reasoning to be readily discerned.[21] Its summary findings and conclusions fail to provide the court with sufficient details to enable them to determine, on appeal, how the PUCO reached its decision. That undermines the purpose of R.C. 4903.09.[22]

OCC demonstrated that DP&L illegally collected from consumers about $60 million for the stability charge.[23] Without any record support, explanation, or reasoning the PUCO simply said that consumers had not been prejudiced by paying approximately $60 million for the stability charge.[24] It defies credulity to conclude that consumers are not prejudiced by the illegal collections of approximately $60 million by DP&L. And it certainly defies Ohio law.[25]

Additionally, the very imposition by the PUCO of a "prejudice" requirement here, created out of whole cloth, is unreasonable and unlawful. The PUCO's conclusion that prejudice is required before refunds may be ordered is not tethered to any explanation. The PUCO's decision failed to cite reasoning, law, or precedent explaining its finding. This is contrary to R.C. 4903.09.

The Ohio Supreme Court has recently explained that R.C. 4903.09 requires the PUCO to make "independent findings" and that PUCO's orders "must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed

[21] *See MCI Telecoms. Corp. v. PUC of Ohio*, (1987), 32 Ohio St.3d 306, 311-312, 513 N.E.2d. 337.

[22] *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, (1983), 4 Ohio St.3d 107, 110, 447 N.E.2d 746.

[23] OCC's Application for Rehearing at 8-11.

[24] Eighth Entry on Rehearing (August 10, 2022) at para. 28.

[25] *See, e.g.,* R.C. 4905.22; 4905.32.

by the [commission] in reaching its conclusions."[26] The PUCO failed to do so here, in violation of R.C. 4903.09.

Further, the PUCO is a creature of statute and has no authority beyond that given to it by the General Assembly.[27] Accordingly, the PUCO cannot lawfully write into the law a requirement of prejudice before ordering refunds where a utility has violated a PUCO Order and Ohio laws. But that's just what it did in its Eighth Entry on Rehearing.[28]

The PUCO erred. Rehearing should be granted. The PUCO should order DP&L to return to consumers all illegally collected stability charges since August 2021.

> **Claim of Error 2: The PUCO erred when it unreasonably failed to order consumer refunds for $60 million they paid under DP&L's tariffs that were not authorized by the PUCO, by finding no evidence of bad faith or a deliberate failure by AES Ohio or its counsel. The PUCO's finding of no bad faith by DP&L was unlawful, unreasonable and contrary to the record in this case in violation of R.C. 4903.09.**
>
> **Additionally, the PUCO is a creature of statute and has no authority to write into the law a requirement of bad intent before ordering consumer refunds where a utility has violated a PUCO Order and Ohio laws (R.C. 4905.22 and 4905.32).**

In its Eighth Entry on Rehearing, the PUCO ruled that refunds to consumers would not be ordered, based in part, on its finding that there was no evidence of bad faith or the deliberate failure to perform a duty on the part of DP&L.[29] The PUCO's conclusion, however, was contrary to the plain facts contained in the record. And the

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[26] *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*, 166 Ohio St.3d 519, 2021-Ohio-3630 at ¶22 and 25.

[27] *Discount Cellular, Inc. v. Pub. Util. Comm.,* 112 Ohio St.3d 360, 2007-Ohio-53 at ¶51.

[28] *See, e.g.,* R.C. 4905.22; 4905.32.

[29] Eighth Entry on Rehearing (August 10, 2022) at para. 28.

PUCO failed to provide a reasoned explanation of its finding that there had to be bad faith or deliberate failure by AES Ohio or its counsel before ordering refunds.

The record in the case reflects that 1) DP&L filed tariffs on July 16, 2021, that contained the consumer refund language but no effective date;[30] 2) the PUCO denied DP&L's July 16, 2021 rehearing request that argued against including refund language in the stability charge tariffs;[31] 3) the PUCO approved DP&L's July 16, 2021 tariffs in its Sixth Entry on Rehearing;[32] 4) the PUCO ordered DP&L to file a copy of its tariffs in final form with the PUCO, with one copy in the TRF docket and one copy in this docket;[33] 5) DP&L did not file the final tariffs as directed by the Commission;[34] 6) seven months after the PUCO's Order approving the stability charge tariffs with refund language DP&L told the Supreme Court that its "tariff has not been approved and is not currently operative."[35]

And during the seven-month period DP&L apparently failed to alert the PUCO that its tariffs have not been approved, despite the PUCO's very public pronouncement that it was requiring refund language in DP&L's stability charge tariffs.[36] Instead, it saved that tidbit of information to use against consumer refunds in its Supreme Court brief. And upon learning that the PUCO had approved its tariffs (presumably by the time

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[30] Proposed Second Revised Sheet No. G12, No. 17.

[31] Sixth Entry on Rehearing at ¶29.

[32] Sixth Entry on Rehearing at ¶47, 48, 51.

[33] *Id.* at ¶52.

[34] Eighth Entry on Rehearing at ¶24; AES Memorandum in Opposition to the Application for Rehearing by Office of the Ohio Consumer's Counsel at 2 (AES admits that "[i]t is correct that AES Ohio did not take the additional administrative step of filing a final version of the redline tariff until after the Seventh Entry on Rehearing was issued [on June 15, 2022].").

[35] S.Ct. Case No. 2021-1068, Fourth Merit Brief at 1 (March 8, 2022).

[36] *See* Fifth Entry on Rehearing at ¶64.

DP&L filed its next Supreme Court Brief[37]) DP&L apparently failed to alert the PUCO to its misrepresentation. This led the PUCO to establish an effective date for the refund language that cut out almost a year of consumer refunds.

DP&L's behavior, where it claimed that the PUCO had not approved its tariffs, and yet failed to alert the PUCO of this supposed error, is the very definition of bad faith and deliberate inaction. The record does not support the PUCO's determination that DP&L did not act in bad faith. The PUCO's finding thus violates R.C. 4903.09.

But more importantly, the PUCO violated R.C. 4903.09 because the PUCO failed to provide a reasoned explanation of the basis of its decision[38] that there had to be bad faith or deliberate failure by AES Ohio or its counsel before consumer refunds can be ordered. The PUCO's order does not contain enough evidence and discussion to enable the PUCO's reasoning to be readily discerned.[39] Its summary findings and conclusions fail to provide the court with sufficient details to enable them to determine, on appeal, how the PUCO reached its decision. That undermines the purpose of R.C. 4903.09.[40]

Additionally, the PUCO is a creature of statute and has no authority beyond that given to it by the General Assembly.[41] It cannot write provisions into the law. The PUCO's requirement of "bad faith or deliberate failure to perform a duty" before ordering refunds, writes into the law a requirement that is not otherwise found. There is no such wording found in R.C. 4905.22 or R.C. 4905.32, the statutes that DP&L violated.

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[37] *See* DP&L's brief in S.Ct. 2021-1473, filed on April 26, 2022, where DP&L failed to present its argument that the PUCO failed to approve its stability charge tariff.

[38] *See In re Suvon, LLC.,* 166 Ohio St.3d 519, 2021-Ohio-3630, 188 N.E.3d 140.

[39] *See MCI Telecoms. Corp. v. PUC of Ohio*, (1987), 32 Ohio St.3d 306, 311-312, 513 N.E.2d. 337.

[40] *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, (1983), 4 Ohio St.3d 107, 110, 447 N.E.2d 746.

[41] *Discount Cellular, Inc. v. Pub. Util. Comm.,* 112 Ohio St.3d 360, 2007-Ohio-53 at para.51.

Accordingly, the PUCO erred. Rehearing should be granted. The PUCO should order DP&L to return to consumers all illegally collected stability charges since August 2021.

Claim of Error 3: The PUCO erred when it found that DP&L lawfully collected stability charges between August 11, 2021 and the present under its tariff filed with PUCO under R.C. 4905.32. The PUCO's ruling is unlawful and unreasonable, being without record support, and against the manifest weight of the evidence, violating R.C. 4903.09. DP&L violated R.C. 4905.22 and 4905.32 when it continued to charge consumers under posted rates that were not in accordance with the PUCO approved rate schedule from its August 11, 2021 Entry.

The PUCO mistakenly construes *Lucas Cty Commissioners v. Pub Util. Comm.,* 80 Ohio St.3d 344 and claims refunds would be retroactive ratemaking. Because the rates DP&L was charging were not in accordance with the PUCO order, they were not authorized to begin with. In fact, DP&L was obligated to collect charges under a different PUCO-approved tariff –an obligation that it failed to carry out. The principle against retroactive ratemaking does not apply.

In its Eighth Entry on Rehearing, the PUCO concluded that DP&L had lawfully collected the stability charge from consumers between August 11, 2021 and the present.[42] The PUCO's conclusion in this respect was without record support and contrary to the manifest weight of the evidence, violating R.C. 4903.09.[43] The PUCO cannot decide cases based on subjective belief, wishful thinking, or folk wisdom. Its decision must be based on a record containing "sufficient probative evidence to show that the commission's determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful

[42] Eighth Entry on Rehearing at¶ 29 (August 10, 2022).

[43] *See, e.g., Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 22 Ohio St.2d 40, approved and followed, *General Motors Corp. v. Pub. Util. Comm.*, (1976), 47 Ohio St.2d 58, 351 N.E.2d 183.

disregard of duty."[44] The PUCO abuses its discretion when it renders an opinion on an issue without record support. [45]

Then building upon its erroneous conclusion, the PUCO ruled that it "has no authority to order a refund of charges collected *under a Commission approved tariff*."[46] It advised that OCC's remedy "is not a refund but to raise this issue in a timely manner with the Commission."[47] In denying OCC's request for a refund, the PUCO relied on *Lucas Cty. Comm'rs v. Pub. Util. Comm.*, (1997), 80 Ohio St.3d 344, 348, 686 N.E2d. 501. But in doing so, the PUCO misapplied the Supreme Court's holding.

A. The charges to DP&L consumers were not collected under a PUCO approved tariff in effect at the time.

For a solid year, DP&L charged its consumers under a stability charge tariff that contained no refund language. That stability charge tariff for charging DP&L consumers was initially approved by the PUCO on December 18, 2019.[48] DP&L filed its rate stabilization charge tariff (original Sheet No. G12) the next day and it was rendered effective December 19, 2019.[49]

But on August 11, 2021, the PUCO approved a different tariff – this time with consumer refund language that OCC had advocated for. DP&L was ordered to file a revised tariff that contained the refund language, consistent with what DP&L had filed on

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[44] *Columbus v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 103, 104, 388 N.E.2d 1237; *see, also, Consolidated Rail v. Pub. Util. Comm.*, (1989), 47 Ohio St.3d 81, at 84-85, 547 N.E.2d 1176.

[45] *Industrial Energy Users Ohio v. Pub. Util. Comm*., 117 Ohio St.3d 486, 2008-Ohio-990, ¶30, citing to *Tongren v. Pub. Util. Comm.,* 85 Ohio St.3d 87, 90, 199-Ohio-206.

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

[47] *Id.*

[48] Second Finding and Order (December 18, 2019).

[49] DP&L Final Tariff Sheets (December 19, 2019).

July 16, 2021.[50] But for some reason DP&L did not file its final tariffs, as it was ordered to do. (How convenient for DP&L to not file such tariffs, allowing an end-run around consumer refunds.) And somehow DP&L's failure to file its tariffs, went unnoticed by the regulator (the PUCO) and others, including OCC. (DP&L obviously knew it had not filed its compliance tariffs, as it advised the Supreme Court of this fact when it argued against consumer refunds.)

In other words, DP&L continued to charge its consumers under its old stability charge tariffs (original sheet G12) when it should have been charging consumers under a stability charge tariff that included the PUCO- approved refund language. So since August 11, 2020, DP&L has been charging its consumers under a tariff that is not in effect and not approved by the PUCO –a clear violation of R.C. 4905.22 and 4905.32.

B. Because the tariffs under which DP&L was collecting stability charges from consumers were not PUCO approved tariffs at the time such charges were collected, a refund to consumers would not be retroactive ratemaking.

The PUCO declared that it "has no authority to order a refund of charges collected *under a Commission-approved tariff.*"[51] True. *But here, DP&L was charging consumers under a tariff that was not a Commission-approved tariff in effect at the time.* In fact, DP&L affirmatively chose to continue to charge consumers under a superseded tariff even when the PUCO directed it to "file new proposed tariffs providing the RSC [stability charge] shall be refundable 'to the extent permitted by law.'"[52]

[50] Sixth Entry on Rehearing at ¶52.

[51] Eighth Entry on Rehearing at ¶29 (emphasis added).

[52] Sixth Entry on Rehearing at ¶48, 51 and 52.

Because DP&L was charging consumers under a tariff that was not PUCO approved and in effect at the time, there can and should be refunds to consumers. Importantly, the Ohio Supreme Court has determined that under the statutes in Ohio a utility has no choice but to collect *rates set by order* of the Public Utilities Commission, in absence of a stay of execution.[53] But in this case, unlike in *Keco,* the rates DP&L was charging consumers were not *rates set by order* of the PUCO. In fact, DP&L was charging rates in violation of a PUCO order (the PUCO's Sixth Entry on Rehearing.)

The PUCO, however, ignores DP&L's violation of Ohio law. The PUCO cites to *Lucas Cty. Comm'rs v. Pub. Util. Comm.,*[54] for support that it cannot order consumer refunds because retroactive ratemaking is prohibited. The PUCO got it only half right.

It is true that *Lucas Cty.* held that the PUCO is not authorized to order a refund for charges a public utility previously collected *where those charges were calculated in accordance with a PUCO-approved rate program.*[55] But again*, DP&L was charging consumers under a tariff that was not a Commission-approved tariff in effect at the time. Lucas Cty.* like *Keco,* does not present a barrier to consumer refunds.

Every public utility in Ohio, including DP&L, is (1) required to file with the PUCO, for its review and approval, tariff schedules that detail rates, charges, and classifications for every service offered, and (2) the public utility must charge the rates that are approved by and on file with the PUCO.[56] But the rates that DP&L charged its consumers starting on August 11, 2021, were without the required refund language and

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[53] *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 258, 141 N.E.2d 465 (1957).

[54] *Lucas Cty. Comm'rs v. Pub. Util. Comm.,* 80 Ohio St.3d 344, 686 N.E.2d 501.

[55] *Id. at* 349.

[56] *Hull v. Columbia Gas,* 110 Ohio St.3d 96, 2006-Ohio-3666, ¶25.

thus were not rates approved by the PUCO. The rates DP&L was charging were on file at the PUCO, but those filed rates were contained in schedules that were superseded by PUCO Order.

DP&L just ignored that Order and sought to use their non-compliance as a way to avoid giving refunds to consumers. However, the jig is up for DP&L. Consumers, by law, are due a refund of charges that were unlawfully collected from them. The PUCO should have ordered those consumer refunds, as a just and reasonable resolution of DP&L's violation of law. Rehearing should be granted.

Claim of Error 4: The PUCO erred when it found that OCC did not raise the underlying issue in a timely manner and thus arguably deprived the PUCO of the opportunity to correct it earlier in the proceeding. The PUCO's ruling is unlawful and unreasonable lacking record support, violating R.C. 4903.09.

OCC informed the PUCO in a timely manner that would have allowed the PUCO to correct the error by ordering a full refund to consumers. The PUCO wrongly relied on *Parma v. Public Util. Comm*., 86 Ohio St.3d 144, as rationale for denying consumers refunds. *Parma* is distinguishable.

In its application for rehearing, OCC advised the PUCO that DP&L failed to file its final stability charge tariffs with the consumer refund language the PUCO ordered. And OCC advised the PUCO that it had already approved DP&L's stability charge tariff, so its re-approval in its Eighth Entry on Rehearing was a mistake. Because DP&L charged consumers for about a year under unlawful tariffs (tariffs without the refund language) OCC asked the PUCO to order a refund to consumers for the moneys paid under the unauthorized tariff (approximately $60 million).

The PUCO denied OCC's refund request on a number of grounds and then took "note" that "OCC did not raise the underlying issue in a timely manner and, thus, arguably deprived the Commission of the opportunity to correct it earlier in the

proceeding.[57] The PUCO relied upon *Parma v. v. Pub. Util. Comm.,* 86 Ohio St.3d 144 148, 712 N.E.2d 724 (1999) as authority for its notation.[58]

The PUCO declared that OCC had "several opportunities" to raise the issue of DP&L's failure to file final tariffs, and yet did not do so until the PUCO's Seventh Entry on Rehearing. According to the PUCO those opportunities included when DP&L "mistakenly claimed" that the PUCO had not approved its proposed tariffs.[59] The PUCO maintains that OCC's failure to raise the issue at an earlier juncture "precludes any claim for forfeiture" because the PUCO was deprived of an opportunity to cure the error when it reasonably could have done so.[60]

A. OCC's discovery of DP&L's error was timely brought to the PUCO.

Contrary to the PUCO's assertion otherwise, OCC's claim was timely raised with the PUCO. When parties make claims in Supreme Court briefs, there is a reasonable expectation that the claims are truthful and supported by the record. OCC initially believed DP&L's representations that the PUCO had not approved its stability charge tariffs with refund language. And it appears that the PUCO did as well. In fact, the PUCO issued its Order erroneously approving DP&L's tariffs a second time because it "sought to cure this alleged deficiency."[61]

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[57] Eighth Entry on Rehearing at ¶30.

[58] *Id.*

[59] Of note, the same day that DP&L made its claims before the Ohio Supreme Court, OCC Counsel contacted the PUCO's Counsel as to DP&L's representations, The PUCO's Counsel was made aware of the issue and OCC's concerns. *See* Attachment. There was no follow-up by PUCO Counsel with OCC on this matter.

[60] *Id.*

[61] Eighth Entry on Rehearing at ¶24.

It was not until OCC reviewed DP&L's brief in the second OCC appeal (S.Ct. 2021-1473) that OCC discovered that DP&L had lied (by "inartful"[62] representation) to the Court. There was no discussion in DP&L's supreme court brief (filed April 26, 2022) about the PUCO's failure to approve its tariff. (So apparently DP&L had discovered its error but did not alert the PUCO or OCC of it). This prompted OCC to dig deeper into the PUCO orders. Upon a review of the PUCO orders issued in this case, OCC discovered the error.

Shortly after, the PUCO issued its Seventh Entry on Rehearing, where it apparently was still of mind that DP&L's stability charge tariffs with refund language had not been approved. Following the PUCO's Order, OCC filed its application for rehearing. So, contrary, to the PUCO's rendition of facts, OCC did timely raise the issue after it discovered DP&L's error.

B. *Parma* is not an excuse for the PUCO to deny consumers refunds.

In any event, even if blame can be laid on OCC (and curiously not on DP&L) the PUCO still had time to correct the error. The PUCO could have ordered a refund in its Eighth Entry on Rehearing. As explained above, the policy against retroactive ratemaking does not prevent the PUCO from issuing refunds *where the charges to consumers were not collected "under a Commission approved tariff" in effect at the time.* The PUCO was not deprived of an opportunity to correct the error.

Additionally, the PUCO's reliance on *Parma*[63] is misplaced. *Parma is easily distinguished from the case at hand.* In *Parma,* the appellant filed a complaint (under

[62] DP&L Memorandum Contra OCC Application for Rehearing at 5 (July 25, 2022).

[63] *City of Parma v. PUC*, 86 Ohio St.3d 144, 199 Ohio 141, 712 N.E.2d 724.

R.C. 4905.26) against the utility which the PUCO dismissed. In its appeal the Appellant raised an issue of the adequacy of the pre-hearing notice. [64] The utility notice did not comply with the complaint statute because it was published four days before the evidentiary hearing instead of 15 to 30 days prior to the hearing.[65] And publication of the notice occurred on two consecutive days, instead of two consecutive weeks.[66] The appellant claimed that it was deprived of due process because the notice of the hearing did not strictly comply with the requirements of R.C. 4905.26.[67]

The Court rejected Parma's argument on a number of grounds. The Court found that the published notice was sufficient.[68] And the Court found that Parma fully and fairly participated in the hearing on the complaint.[69] The Court also noted that it will not reverse the PUCO for an error where there has been substantial compliance with the statutory notice requirements and the party has not shown prejudice by the lack of strict compliance.[70] The Court also ruled that Parma deprived the PUCO of an opportunity to redress any injury or prejudice that may have occurred.[71]

Contrary to *Parma,* in this case there is no issue of the sufficiency of public notice; rather DP&L's noncompliance was a latent (not blatant) error, not discovered by the PUCO for over a year, and only then, when OCC pointed the error out. Nor has OCC

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[64] *Id.* at 146-147.

[65] *Id.* at 147-148.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 148-149.

[69] *Id.*

[70] *Id.*

[71] *Id.*

raised an issue of due process like the error in *Parma.* Rather OCC has raised an issue about DP&L's lack of compliance with PUCO orders and statutes requiring the utility to charge consumers rates as approved and on file with the PUCO. And unlike *Parma,* the PUCO did not find that DP&L substantially complied with its Order, despite DP&L's arguments urging such a finding.[72]

Most importantly, unlike *Parma,* the utility's non-compliance caused prejudice to consumers and the PUCO was given an opportunity to cure the injury. The prejudice to consumers is that they paid stability charges under tariffs that were not in effect, due to the utility's non-compliance with the PUCO orders. No utility consumer is supposed to be charged under tariffs that have not been approved by the PUCO. So the $60 million in charges that consumers paid is the prejudice they suffered. The PUCO was given an opportunity to cure. That opportunity to do right by consumers is through a refund for rates paid under unauthorized tariffs. Refunds can be ordered without amounting to retroactive ratemaking. This stems from the fact that the rates were not collected under a PUCO approved order.

Rehearing should be granted.

[72] Eighth Entry on Rehearing at ¶23.

Claim of Error 5: The PUCO erred when it unreasonably and unlawfully construed R.C. 4903.10 to allow rehearing on matters not specified in applications for rehearing under PUCO review. The PUCO erred by construing, and not applying, an unambiguous statute.

Additionally, assuming arguendo the statute was ambiguous (it wasn't), the PUCO erred in unreasonably construing the statute to such an extent as to make it unworkable and contrary to its just and reasonable intent, violating Ohio Rules of Construction Section 1.47(B).

In OCC's application for rehearing, OCC claimed that the PUCO misused the statutory process to change its ruling on a matter not specified in the applications for rehearing that were under review, violating R.C. 4903.10.[73] OCC based its argument on the language in R.C. 4903.10 that limits the PUCO's authority on rehearing to addressing "the matter specified in such application."

The PUCO found that OCC's claim should be denied as moot, given its ruling on other OCC assignments of error.[74] But, the PUCO went on to claim, through dicta that "even if this assignment of error were not moot, the assignment of error would be denied."[75] The PUCO found that the plain language of the statute does not limit the PUCO's authority to modify the original order to "matters raised on rehearing."

The PUCO came to its conclusion by dissecting the statute and construing, in isolation, a different section of R.C. 4903.10 which reads "[i]f after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission my abrogate or modify the same***." According to the PUCO, OCC ignored this language. And, according to the PUCO, this language allows it to change any part of it original order, regardless of

[73] OCC Application for Rehearing, Memorandum in Support at 11-12 (July 15, 2022).

[74] Eighth Entry on Rehearing at ¶32.

[75] *Id.*

whether or not the issue was raised on rehearing. The PUCO cited *Columbus &Southern Ohio Elec. Co. v. Pub. Util. Comm*., 10 Ohio St.3d 12, 15, 460 N.E.2d 1108, as authority for its position.

But the PUCO has misconstrued the statute and Ohio Supreme Court precedent. Its interpretation of R.C. 4903.10, allowing it to change its original order or any part thereof, outside of matters raised in rehearing, would lead to unjust and unreasonable results, contrary to Ohio Rule of Construction, Section 1.47. The PUCO's interpretation undermines the finality of its rulings and further delays parties' right to appellate review of PUCO Orders.

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 grant and hold such *rehearing on the matter specified in such application* if in its judgement sufficient reason therefor is made to appear." In other words, the PUCO has authority to hold rehearing on matters specified in a parties' application for rehearing if it believes there is sufficient reason for rehearing. If rehearing is held, "after such rehearing," the Commission may abrogate or modify "the original order or any part thereof" that "is in any respect unjust or unwarranted or should be changed."

Note that the PUCO's ability to abrogate its original order or any part thereof is conditioned on holding rehearing "on matters specified in such application [for rehearing]."[76] In *Columbus & Southern Ohio Electric Co. v. Publ. Utili. Comm*., 10 Ohio St.3d 12, 460 N.E.2d 1108, 1109, (1984) (the case cited by the PUCO), the Court

[76] The Ohio Supreme Court has also ruled that the PUCO may not modify an order on rehearing where it has denied and not granted rehearing. *See Disc. Cellular, Inc. v. PUC*, 112 Ohio St.3d 360, 859 N.E. 2d 957, 2007 Ohio 53.

confirmed this limit on the PUCO's rehearing authority: a rehearing is limited, "first, to matters determined in the earlier proceedings, and second, among those, to matters for which, in judgment of the commission, *sufficient reason has been shown* [through an application for rehearing]. The General Assembly did not intend for a rehearing to be a de novo hearing." (Emphasis added).

The PUCO, however, ignored that part of the *Columbus & Southern Ohio Electric Co.* holding when it cited the case as authority for its view that "[t]he plain language of the statute does not limit 'to matters raised on rehearing' the Commission's authority to modify the original order."[77] The PUCO's ruling, at best, can be characterized as oversight in this regard.

Additionally, the PUCO fails to acknowledge other authority from the Court that similarly limits its rehearing to matters raised in applications for rehearing. In an earlier proceeding before the Ohio Supreme Court, *Doc Goodrich & Son, Inc. v. Pub b. Util. Comm.,* 53 Ohio St.2d 70, syllabus ¶1, (1978) the Court tied the PUCO's rehearing duties to a review of the issues bring reheard: "it [the PUCO] may analyze the evidentiary record to determine whether, on a proper view of the law, there was any evidence to support its ultimate findings *on the issues being reheard.*" (Emphasis added). *See, also In re: Complaint of Ohio Cable Telecommunications Assoc. et al,* Case No. 96-1309-EL-CSS, Entry on Rehearing at 5 (Dec. 4, 1997) where the PUCO itself acknowledged that its authority to address an issue on rehearing must be "within the scope of issues raised in the initial applications for rehearing." (citing *Doc Goodrich & Son, Inc. v. Pub Util. Comm.*)

[77] Eighth Entry on Rehearing at ¶32.

The PUCO cannot lawfully broaden the scope of rehearing to matters that were not raised in applications for rehearing before it. The plain language of the statute prohibits it. And Supreme Court precedent precludes it.

The scope of rehearing is set by the applications for rehearing filed by parties. On rehearing the PUCO analyzes the record to determine if there was evidence to support its ultimate finding *on issues being reheard.* And "*if, after such rehearing*, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed." These words when read in the context of the entire statute do not give the PUCO unlimited authority to change its original order or any part thereof. Rather, the changes the PUCO may make are limited to matters raised on rehearing.

But here the PUCO did broaden the scope of the rehearing,[78] sua sponte, contrary to the plain language of R.C. 4903.10 and Ohio Supreme Court precedent. It improperly used the rehearing process to "cure an alleged deficiency" that in reality was no deficiency at all. That matter was not before the PUCO for its consideration. The PUCO had no authority under law to address the matter on rehearing.

The PUCO's interpretation of the statute was wrong on a number of counts. First, the statute is unambiguous, and therefore must be applied as written, and not interpreted.[79] The PUCO as a creature of statute, has no authority other than that

[78] The PUCO was responding to applications for rehearing filed from the PUCO's Second Finding and Order (issued December 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. These applications for rehearing did not involve the effective date of the tariff or the refund language.

[79] *See, e.g., Sears v. Weimer*, (1944), 143 Ohio St. 312, 316-317, 55 N.E.2d 413 (1944) 55 N.E.

delegated to it by the General Assembly.[80] The General Assembly did not delegate authority to the PUCO to willy-nilly change its orders on rehearing.

And even assuming arguendo that the statute is ambiguous (it's not), the PUCO's interpretation is unreasonable and inconsistent with Ohio's rules of construction. Under Revised Code 1.47, it is presumed that in enacting a statute, a just and reasonable result is intended. The PUCO's interpretation would likely lead to unjust and unreasonable results. The PUCO orders would have no finality if the PUCO could change its original orders on rehearing at will, unrelated to matters specified in applications for rehearing. And finality of law is needed in proceedings, including administrative proceedings.[81] That would likely lead to more applications for rehearing being filed, when changes are made, delaying parties' right to seek an appeal of the PUCO rulings (under R.C. 4903.11 and 4903.12).

III. CONCLUSION

OCC seeks justice for the 465,000 residential consumers of DP&L. In this case justice means $60 million refunded to consumers of stability charges unlawfully collected from them under unauthorized tariffs, in violation of Ohio law. It's just as simple as that.

DP&L has violated the law. DP&L has disobeyed a PUCO Order. DP&L has made misrepresentations to the Ohio Supreme Court. And yet, unfortunately for consumers, the PUCO seeks to let them off scot-free.

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[80] *Time Warner AxS v. Publ. Util. Comm.,* (1996), 75 Ohio St.3d 229, 661 N.E.2d 1097.

[81] *See, e.g., Superior Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d 133, 135, 403 N.E.2d 996.

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 9th day of September 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
slesser@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

From: Willis, Maureen
Sent: Tuesday, March 8, 2022 1:53 PM
To: Thomas Lindgren <Thomas.Lindgren@OhioAGO.gov>
Cc: Turkenton, Tamara <Tamara.Turkenton@puco.ohio.gov>
Subject: RE: DP&L's claim that the PUCO never approved the RSC subject to refund tariffs and therefore they are inoperaabe?

Thanks.

Maureen R. Willis
Senior Counsel

Office of the Ohio Consumers' Counsel
65 East State Street
Suite 700
Columbus, Ohio 43215
(614) 466-9567
Maureen.willis@occ.ohio.gov

you have received this communication in error, please notify me immediately by email and telephone.

From: Thomas Lindgren <Thomas.Lindgren@OhioAGO.gov>
Sent: Tuesday, March 8, 2022 1:07 PM
To: Willis, Maureen <Maureen.Willis@occ.ohio.gov>
Cc: Turkenton, Tamara <Tamara.Turkenton@puco.ohio.gov>
Subject: RE: DP&L's claim that the PUCO never approved the RSC subject to refund tariffs and therefore they are inoperaabe?

We probably need to talk internally here first.

From: Maureen.Willis@occ.ohio.gov <Maureen.Willis@occ.ohio.gov>
Sent: Tuesday, March 8, 2022 12:55 PM
To: Thomas Lindgren <Thomas.Lindgren@OhioAGO.gov>
Cc: Tamara.Turkenton@puco.ohio.gov
Subject: RE: DP&L's claim that the PUCO never approved the RSC subject to refund tariffs and therefore they are inoperaabe?

Can we talk about this after the Toshi call?

Maureen R. Willis
Senior Counsel

Office of the Ohio Consumers' Counsel
65 East State Street
Suite 700
Columbus, Ohio 43215
(614) 466-9567
Maureen.willis@occ.ohio.gov

From: Thomas Lindgren <Thomas.Lindgren@OhioAGO.gov>
Sent: Tuesday, March 8, 2022 12:44 PM
To: Willis, Maureen <Maureen.Willis@occ.ohio.gov>
Cc: Turkenton, Tamara <Tamara.Turkenton@puco.ohio.gov>
Subject: RE: DP&L's claim that the PUCO never approved the RSC subject to refund tariffs and therefore they are inoperaabe?

No, I wasn't aware of it.

From: Maureen.Willis@occ.ohio.gov <Maureen.Willis@occ.ohio.gov>
Sent: Tuesday, March 8, 2022 11:51 AM

To: Thomas Lindgren <Thomas.Lindgren@OhioAGO.gov>
Cc: Tamara.Turkenton@puco.ohio.gov
Subject: DP&L's claim that the PUCO never approved the RSC subject to refund tariffs and therefore they are inoperaabe?

Please see DP&L's SCT Brief (fourth merit) in 2021-1068, filed today, where they make this claim.

Were you aware of this and are you in agreement?

Maureen R. Willis
Senior Counsel

Office of the Ohio Consumers' Counsel
65 East State Street
Suite 700
Columbus, Ohio 43215
(614) 466-9567
Maureen.willis@occ.ohio.gov

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.