BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Market Rate Offer.	)))	Case No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power & Light Company of Approval of Revised Tariffs.	)))	Case No. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	)))	Case No. 12-428-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for The Waiver of Certain Commission Rules.	)))	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.	)))	Case No. 12-672-EL-RDR

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

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January 13, 2017

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APPLICATION FOR REHEARING

The Office of the Ohio Consumers' Counsel ("OCC") files this application for rehearing to protect customers who have paid plenty to Dayton Power and Light Company ("DP&L") over the past three years for standard service offer rates. Customers in the Dayton area --where there is financial distress and a poverty level of 35%-- paid approximately $285 million in above market subsidies (through a so-called stability charge) to prop up DP&L's aging uneconomic power plants.

The Ohio Supreme Court ("Court"), however, found the PUCO should not have approved DP&L's $9.86 per month stability charge. The Court ruled that the stability

charge is an unlawful transition charge that customers should no longer pay.[1] On remand, it was up to the PUCO to carry out that Court decision.

But instead of requiring DP&L to reduce rates by excluding the $9.86 per month stability charge, the PUCO allowed DP&L to circumvent the Court. The PUCO ruled that DP&L could withdraw its current electric security plan ("ESP") rates, and in their place, charge rates to customers that include a $6.05 monthly stability charge from the Utility's previous ESP.[2] So instead of getting nearly a $10 per month reduction, as the Court ordered, customers got only a fraction of the reduction ($4.00 per month). DP&L continues to charge customers the difference.

The OCC filed an application for rehearing from the PUCO's August 26, 2016 Finding and Order. On October 12, 2016, the PUCO granted rehearing allowing itself more time to consider the applications for rehearing. OCC filed an application for rehearing from the PUCO's October 12, 2016 Entry. On December 14, 2016, the PUCO issued its Seventh Entry on Rehearing. In its Seventh Entry on Rehearing the PUCO denied all parties' applications for rehearing, including OCC's.

The PUCO's Seventh Entry on Rehearing was unreasonable or unlawful in the following respect:

Assignment of Error 1: The PUCO erred when it found the issue of whether a utility has an indefinite right to withdraw from an electric security plan is not present in

[1] *In the Matter of the Application of the Dayton Power & Light Company for Approval of its Market Rate Offer*, Slip Op. 2016-Ohio-3490. See also *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608 at ¶ 25, 38.

[2] *In the Matter of the Application of the Dayton Power & Light Company for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO, Sixth Entry on Rehearing (Aug. 26, 2016).

this case. This finding is manifestly against the weight of the evidence and clearly unsupported so as to show a mistake.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its Seventh Entry on Rehearing as requested by OCC.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

From the outset of DP&L's electric security plan (established under case No. 12-426-EL-SSO) the Utility was charging customers so-called stability charges that the Court found to be an unlawful transition charge. Unfortunately for consumers paying those transition charges, the charges would not likely be returned (and were not) to consumers under Court precedent.[3]

[3] *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957).

But the Court, within a week of the oral argument, issued a decision to stop future collections of the stability charge from DP&L's customers. That decision was reached on June 20, 2016.

To circumvent the Court's decision, and to protect its unlawful collection of revenues, DP&L filed to withdraw its electric security plan, and return consumers – in part -- to pricing from its earlier electric security plan. In DP&L's hybrid approach to implementing earlier rates, it resurrected a stability charge of $6.05 per month. The PUCO approved DP&L's plan.

Since September 1, 2016, DP&L customers have been forced to pay rates that include a $6.05 stability charge (from DP&L's prior ESP). On September 26, 2016, OCC applied for rehearing on the PUCO Order, maintaining that the PUCO violated Ohio law. The PUCO initially granted rehearing (so that it could further consider the issues raised by the parties' applications for rehearing) by a Sixth Entry on Rehearing. But on December 14, 2016, the PUCO issued its Seventh Entry on Rehearing denying all applications for rehearing.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." OCC filed a motion to intervene in this proceeding on April 16, 2012, which was granted. OCC also filed testimony regarding the application and participated in the evidentiary hearing on the application.

R.C. 4903.10 requires that an application for rehearing must be, "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." In addition, Ohio Adm. Code 4901-1-35(A) states: "An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing."

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear." The statute also provides: "[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 may abrogate or modify the same; otherwise such order shall be affirmed."

The statutory standard for abrogating some portions of the Order and modifying other portions is met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Seventh Entry on Rehearing of December 14, 2016. The PUCO's ruling was unreasonable or unlawful in the following respects.

III. ERRORS

Assignment of Error 1: The PUCO erred when it found the issue of whether a utility has an indefinite right to withdraw from an electric security plan is not present in this case. This finding is manifestly against the weight of the evidence and clearly unsupported so as to show mistake.

The pertinent facts related to this case are not in dispute. The PUCO "modified and approved" DP&L's second electric security plan ("ESP II") on September 4, 2013.[4] Included in that electric security plan was a so-called service stability rider. The term of the electric security plan began January 1, 2014 and was to terminate on May 31, 2017 -- a 41-month electric security plan.[5] Tariffs implementing DP&L's modified electric security plan were approved and went into effect on January 1, 2014. Customers of DP&L were billed at the new rates beginning January 1, 2014. During the many months that the rates were in effect, DP&L enjoyed the benefits of its electric security plan, charging Dayton-area consumers more than a quarter-billion dollars just for the stability charge (among other charges).

Thirty-one months after the PUCO modified its electric security plan, DP&L moved to withdraw it,[6] citing to the PUCO's September 4, 2013 modifications as justification for its withdrawal. [7] What prompted DP&L to do so was action by the Court -- a June 20, 2016 decision that reversed the PUCO's decision approving DP&L's stability

[4] See, e.g., *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, Seventh Entry on Rehearing at ¶4 (Dec. 14, 2016); Opinion and Order at 53 (Sept. 4, 2013).

[5] *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, Opinion and Order at 15 (Sept. 4, 2013); modified by Entry Nunc Pro Tunc (Sept. 6, 2013).

[6] *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Motion of the Dayton Power and Light Company to Withdraw its Applications in this Matter (July 27, 2016).

[7] Id. at 1.

charge.[8] Yet despite the fact that (1) DP&L filed to withdraw its application 31-months after the PUCO modified its electric security plan, and (2) the withdrawal was keyed to an Ohio Supreme Court decision, the PUCO granted DP&L's motion.

The PUCO maneuvered around the facts and the law to allow DP&L's untimely withdrawal. The PUCO, found, on August 26, 2016, that the ESP II should be modified (a second time) to remove the stability charge, based on the Ohio Supreme Court's ruling. The PUCO reasoned that this second modification of DP&L's electric security plan vested DP&L with the right to withdraw its application. It granted DP&L's motion.[9]

The PUCO declared that it did not need to address the issue OCC and others raised on rehearing[10] that the General Assembly intended to allow a utility to withdraw an electric security plan only within a relatively short period after the PUCO modified it. The PUCO's conclusion was based on the notion that the second PUCO modification of DP&L's electric security plan was the trigger for DP&L to withdraw. The PUCO found that, when considering the second modification, DP&L's ESP II was "withdrawn immediately upon the Commission's August 26, 2016 modification of ESP II." So the PUCO ignored the fact that DP&L's filing was admittedly in response to two events, neither of which related to the PUCO's August 26, 2016 modification. According to

[8] The Court's reversal was succinct: "The decision of [Commission] is reversed on the authority of In re Application of Columbus S. Power Co., _ Ohio St.3d _, 2016-Ohio-1608, _N.E.3d_."

[9] *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, Finding and Order at 5 (Aug. 26, 2016).

[10] *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, Seventh Entry on Rehearing at ¶25.

DP&L, the events triggering its right to withdraw were the PUCO's ESP II Order (dated Sept. 9, 2013) and the Ohio Supreme Court's reversal.[11]

And under those facts, DP&L's withdrawal from its ESP plan occurred 31-months after the modifications -- not "immediately" as the PUCO erroneously found. So DP&L was allowed to withdraw and terminate its ESP application 31-months into a 41-month plan. This allowed DP&L to reap the benefits of increased revenues under the plan. And when the Ohio Supreme Court determined customers were being charged unlawful rates, the PUCO allowed DP&L to terminate the rate plan. And DP&L was allowed to reinstate a hybrid version of prior ESP rates, including a $6.05 monthly stability charge, rather than excluding the stability charge from its rates, as ordered by the Ohio Supreme Court.

The PUCO's interpretation was wrong. The PUCO's mistaken interpretation of the facts in the record, to support its holdings, was unreasonable and unlawful. The PUCO's findings that DP&L withdrew immediately after the PUCO modified its plan is in error, and against the manifest weight of the evidence. It is a mistake. Under Supreme Court of Ohio precedent, the PUCO's holdings should be overturned.[12]

IV. CONCLUSION

To protect customers, the PUCO should grant rehearing and abrogate or modify its Finding and Order. This would help protect the interests of the residential customers that OCC represents.

[11] Obviously, at the time DP&L filed its motion, it could not have been relying upon the PUCO's second modification as the trigger because that second modification had not been made yet.

[12] See *Cleveland Elec. Illuminating Co., v. Pub. Util. Comm.*, 42 Ohio St.2d 403; *General Motors Corporation v. Pub. Util. Comm.*, 47 Ohio St.2d 58 (1976).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was electronically served via electric transmission on the persons stated below this 13th day of January 2017.

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Case No(s). 12-0426-EL-SSO, 12-0427-EL-ATA, 12-0428-EL-AAM, 12-0429-EL-WVR, 12-0672-EL-RDR

Summary: App for Rehearing Application for Rehearing by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Willis, Maureen Mrs.