

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. 12-426-EL-SSO :
In the Matter of the Application of The Dayton Power and Light Company for 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 :

**MEMORANDUM OF THE DAYTON POWER AND LIGHT COMPANY
IN OPPOSITION TO THE APPLICATION FOR REHEARING BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION AND SUMMARY

The latest Application for Rehearing by The Office of the Ohio Consumers' Counsel ("OCC") should be denied as an improper second bite at the apple. In its only assignment of error, OCC argues (p. 4) that it was "manifestly against the weight of the evidence" for the Commission to allow DP&L to withdraw, and thus terminate, its ESP application in this proceeding based on the modification of that application in the August 26, 2016 Finding and Order. OCC already had the opportunity to raise that specific ground for rehearing in its September 26, 2016 Application for Rehearing, but failed to do so. Thus, the issue has been waived. Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 75.

Moreover, even if the Commission were to ignore that fatal defect, the Application for Rehearing is without merit. OCC relies exclusively (pp. 4-5) on the fact that DP&L moved to withdraw its ESP application before the Commission modified it. However, OCC ignores the Commission's finding that DP&L moved to withdraw its ESP application "in apparent anticipation that the Commission would modify its order or issue a new order" following reversal of the Commission's decision in this case by the Supreme Court of Ohio. Aug. 26, 2016 Finding and Order, ¶ 14. OCC also fails to mention the Commission's previous modifications of the ESP application, each of which gave DP&L an independent basis to withdraw it. Ohio Rev. Code § 4928.143(C)(2)(a). Thus, the Commission should deny the Application for Rehearing and re-affirm its August 26, 2016 Finding and Order.

II. OCC ALREADY FAILED TO SEEK REHEARING AS TO WHETHER DP&L COULD WITHDRAW ITS ESP APPLICATION BASED ON ITS MODIFICATION IN THE AUGUST 26, 2016 FINDING AND ORDER

Though OCC argues (p. 4) that "[t]he pertinent facts related to this case are not in dispute," OCC fails to paint a full picture of those facts. Following the evidentiary hearing in this proceeding, the Commission modified and approved DP&L's ESP application. Sept. 4, 2013 Opinion and Order, p. 53 ("It is, therefore, ORDERED, That DP&L's application for an electric security plan be approved, as modified by the Commission."). The Commission subsequently issued the September 6, 2013 Entry Nunc Pro Tunc, and modified its decision in the March 19, 2014 Second Entry on Rehearing and the June 4, 2014 Fourth Entry on Rehearing.

After the Commission affirmed the Fourth Entry on Rehearing, Industrial Energy Users-Ohio, OCC, and DP&L filed appeals with the Supreme Court of Ohio. On June 20, 2016, the Court summarily reversed, stating only that "t]he decision of the Public Utilities Commission is reversed on the authority of In re Application of Columbus S. Power Co., __ Ohio St.3d __, 2016-Ohio-1608, __ N.E.3d __." In re Application of Dayton Power and Light Co., 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179, ¶ 1. The Supreme Court remanded the case, thus requiring the Commission "to issue a new order which replaces the reversed order." Cleveland Elec. Illum. Co. v. Pub. Util. Comm., 46 Ohio St.2d 105, 117, 346 N.E.2d 778 (1976).

On remand, DP&L simultaneously moved to withdraw its ESP application and to implement rates consistent with the rates approved in its first ESP case, Case No. 08-1094-EL-SSO. July 27, 2016 Motion of The Dayton Power and Light Company to Withdraw Its Applications in This Matter ("Motion to Withdraw"); July 27, 2016 Motion of The Dayton

Power and Light Company to Implement Previously Authorized Rates.¹ In seeking to withdraw and, thus, terminate its ESP application, DP&L explained that the Supreme Court had "reversed in total the Commission's decision approving DP&L's Application." Motion to Withdraw, p. 1.

The Commission granted DP&L's motions. Aug. 26, 2016 Finding and Order. Upon modifying its decision in response to the Supreme Court's reversal, the Commission found that it had "no choice but to grant DP&L's motion and accept the withdrawal of *ESP II*." *Id.* at ¶¶ 11, 14, citing Ohio Rev. Code § 4928.143(C)(2)(a); In re Application of Ohio Power Co., 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060. The Commission explained that "DP&L filed its motion to withdraw *ESP II* after the Court issued its opinion in apparent anticipation that the Commission would modify its order or issue a new order," as required by Cleveland Elec. Illum., 46 Ohio St.2d at 117, 346 N.E.2d 778. Aug. 26, 2016 Finding and Order, ¶ 14 (emphasis added).

OCC sought rehearing from the Finding and Order. Sept. 26, 2016 Application for Rehearing by The Office of the Ohio Consumers' Counsel. Despite raising three assignments of error, including one relating to the timing of the withdrawal (*id.* at 3), OCC did not challenge DP&L's right to withdraw its ESP application based on the modification of the Commission's decision following reversal by the Supreme Court. Instead, OCC sat on that specific ground for rehearing until after the Commission denied its application for rehearing and affirmed the Finding and Order in its entirety. Dec. 14, 2016 Seventh Entry on Rehearing, ¶¶ 38-39.

¹ DP&L moved to implement the rates authorized in Case No. 08-1094-EL-SSO on that docket as well. July 27, 2016 Motion of The Dayton Power and Light Company to Implement Previously Authorized Rates, 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, et al., Case Nos. 08-1094-EL-SSO, et al. ("DP&L ESP I"). The Commission granted that motion. Aug. 26, 2016 Finding and Order, DP&L ESP I.

III. OCC WAIVED ITS ONLY ASSIGNMENT OF ERROR BY FAILING TO RAISE IT IN ITS INITIAL APPLICATION FOR REHEARING

OCC could have raised the only assignment of error raised in its January 13, 2017 Application for Rehearing in its previous September 26, 2016 Application for Rehearing. Thus, that assignment of error has been waived and should not be considered by the Commission.

The rehearing process is governed by Ohio Rev. Code § 4903.10, which provides, in pertinent part:

"After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission."

(Emphasis added.). Consistent with that statute, the Commission and the Supreme Court have held that any assignment of error that could have been raised in an earlier application for rehearing should be denied as untimely.

The Commission reached that conclusion in Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases, Case Nos. 03-93-EL-ATA, et al. In that case, the Commission ruled on proposed redactions of trade secret information. Nov. 5, 2008 Third Entry on Rehearing, ¶ 4. Duke Energy Ohio, Inc. and related entities (collectively, "Duke") sought rehearing from that decision, identifying numerous documents on which it believed the proposed redactions were in error. Nov. 5, 2008 Third Entry on Rehearing, ¶¶ 4, 6. Duke later filed a second application for rehearing, challenging redactions proposed in the Commission's original decision, but that were not addressed in Duke's initial application for rehearing. Id. at ¶¶ 8-10. OCC opposed Duke's new ground for rehearing as untimely under § 4903.10, and the Commission agreed, finding that:

"The Duke entities' assignment of error, therefore, actually stems from our original conclusion regarding the matters to be redacted, not on any new decision made in the second entry on rehearing. It is also critical to note that the redactions . . . have not been altered in any regard since the initial issuance of redactions in June 2008. If the Commission had altered [the material at issue] in the second entry on rehearing, then the alteration would have been an appropriate subject matter for a new assignment of error. As the second entry on rehearing made no changes to either the directive by which the redactions on [the material in question] were made or the proposed redactions . . . , no assignment of error concerning [that material] is timely. Therefore, the Duke entities' application for rehearing is untimely and should be denied."

Id. at ¶¶ 13-15. (Emphasis added.).

Similarly, the Supreme Court of Ohio barred OCC from asserting an argument that had not been raised in its initial application for rehearing. Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 75. The Supreme Court held that "OCC waived this issue by not setting forth this specific ground in its first application for rehearing," citing Ohio Rev. Code § 4903.10. Id. (emphasis added). Accord: Office of Consumers' Counsel v. Pub. Util. Comm., 70 Ohio St.3d 244, 248, 638 N.E.2d 550 (1994) (per curiam) (failure to raise argument on rehearing is "fatal" to further review).

In addition, if the Commission were to allow parties to seek rehearing on issues that could have been addressed in earlier applications for rehearing, it would invite multiple rounds of rehearing even without any modifications by the Commission. That practice would undermine finality and prevent Supreme Court review, which requires complete resolution of the rehearing process. Senior Citizens Coalition v. Pub. Util. Comm., 40 Ohio St.3d 329, 332-33, 533 N.E.2d 353 (1988) (per curiam) (construing Ohio Rev. Code §§4903.10 through 4903.13).

Here, OCC's latest Application for Rehearing seeks review only of the Commission's decision allowing DP&L to withdraw its ESP application upon modification of

that application after the Supreme Court's reversal. Aug. 26, 2016 Finding and Order, ¶¶ 12-14. OCC could have challenged that decision in its September 26, 2016 Application for Rehearing, but failed to do so. Thus, as in Ohio Consumers' Counsel and Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases, its argument is untimely and, therefore, waived. Accord: Ohio Rev. Code § 4903.10.

Perhaps aware that it should have raised this assignment of error in its previous application for rehearing, OCC refers (pp. 5-6) to language in the December 14, 2016 Seventh Entry on Rehearing. In that Entry (¶ 25), the Commission noted that "*ESP II* was effectively withdrawn immediately upon the Commission's August 26, 2016 modification of *ESP II*." That language, however, did not modify the August 26, 2016 Finding and Order. On the contrary, the Commission found in the Finding and Order that it had "no choice but to grant DP&L's motion and accept the withdrawal of *ESP II*" given its simultaneous modification of the ESP application, and the fact that DP&L moved to withdraw that application "in apparent anticipation that the Commission would modify its order or issue a new order." Aug. 26, 2016 Finding and Order, ¶ 14. Thus, nothing prevented OCC from raising its untimely assignment of error in its initial application for rehearing.

IV. DP&L WAS AUTHORIZED TO WITHDRAW ITS ESP APPLICATION UPON MODIFICATION BY THE COMMISSION

Pursuant to Ohio Rev. Code § 4928.143(C)(2)(a), "[i]f the commission modifies and approves an application [for an ESP], the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code." The Supreme Court has explained that "[i]f the commission makes a modification to a proposed ESP that the utility is

unwilling to accept, R.C. 4928.143(C)(2)(a) allows the utility to withdraw the ESP application." In re Application of Ohio Power Co., 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 26. The Court interprets this statute broadly to achieve that purpose. Id. at ¶¶ 29-30 (holding that the Commission had "nullifie[d] the clear purpose of R.C. 4928.143(C)(2)(a)" by modifying Ohio Power Company's ESP application after the ESP had expired, thus preventing the utility from withdrawing its ESP).

Following reversal of the Commission's decision in this proceeding, the Commission had a duty to issue an "appropriate order." Cleveland Elec. Illum. Co. v. Pub. Util. Comm., 46 Ohio St.2d 105, 117, 346 N.E.2d 778 (1976). In other words, the Commission had a duty to modify its decision. Moreover, the Commission already modified DP&L's application in its September 4, 2013 Opinion and Order, its September 6, 2013 Entry Nunc Pro Tunc, its March 19, 2014 Second Entry on Rehearing, and its June 4, 2014 Fourth Entry on Rehearing. Each modification gave DP&L an independent ground to withdraw its ESP application at any time. Ohio Rev. Code § 4928.143(C)(2)(a) (imposing no time limits on the unilateral authority of a utility to withdraw its ESP application). Accord: Portage Cty. Bd. of Commrs. v. City of Akron, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 52 ("An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language, and a court cannot simply ignore or add words.").

Since DP&L had the right to withdraw its ESP application unilaterally upon any modification under Ohio Rev. Code § 4928.143(C)(2)(a), it was both lawful and reasonable for the Commission to allow DP&L to withdraw its application when it modified that application in its August 26, 2016 Finding and Order and after the several other modifications.

V. **CONCLUSION**

For these reasons, the Commission should deny the January 13, 2017 Application for Rehearing by OCC and re-affirm the August 26, 2016 Finding and Order.

Respectfully submitted,

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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: Memorandum Memorandum of The Dayton Power and Light Company in Opposition to the Application for Rehearing by The Office of the Ohio Consumers' Counsel electronically filed by Mr. Charles J. Faruki on behalf of The Dayton Power and Light Company