IN THE SUPREME COURT OF OHIO

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. 17-0205
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)	Appeal from the Public Utilities Commission of Ohio
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	)	PUCO Case Nos. 12-0426-EL-SSO, 12-0427-EL-ATA, 12-0428-EL-AAM, 12-0429-EL-WVR, 12-0672-EL-RDR
In the Matter of the Application of The Dayton Power and Light Company for the Waiver of Certain Commission Rules.	)	
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.	)	

MOTION FOR LEAVE TO AMEND NOTICE OF APPEAL INSTANTER

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MOTION FOR LEAVE TO AMEND NOTICE OF APPEAL INSTANTER

Appellant, the Office of the Ohio Consumers' Counsel ("OCC"), moves the Court for leave to amend its Notice of Appeal, timely filed in this proceeding on February 13, 2017. Amendment is sought so that OCC can more fully identify where in its applications for rehearing it preserved the issues raised on appeal, consistent with the recently added provision of the Supreme Court Rules, S.Ct.Prac.R. 10.02(A)(2)(b). Appellant submits that its motion to amend will not delay this proceeding and will not prejudice any party.

For these reasons, and those discussed more fully in the attached Memorandum, OCC respectfully requests that the Court grant it leave to file the attached Amended Notice of Appeal Instanter.

Respectfully submitted,

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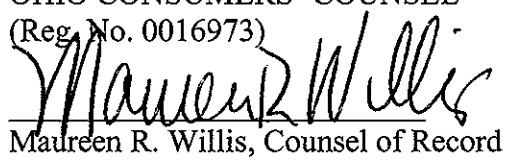

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IN THE SUPREME COURT OF OHIO

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On September 26, 2016, OCC filed an application for rehearing ("Application for Rehearing")[1] from the Public Utilities Commission of Ohio's ("PUCO") August 26, 2016 Finding and Order in the above referenced PUCO cases in accordance with R.C. 4903.10. On December 14, 2016, the PUCO issued its Seventh Entry on Rehearing denying all assignments of error raised in OCC's Application for Rehearing. On January 13, 2017, OCC filed another application for rehearing from that Seventh Entry on Rehearing.[2] OCC's January 13, 2017

[1] *In re Dayton Power and Light Co.*, PUCO No. 12-0426-EL-SSO, et al., App. for Rehearing (September 26, 2016).
[2] *Id.*, App. for Rehearing (January 13, 2017).

application for rehearing was denied by operation of law on February 13, 2017 under R.C. 4903.10.

In accordance with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(B)(2), 3.11(D)(2), and 10.02, on February 13, 2017, OCC timely filed its Notice of Appeal of the PUCO's August 26, 2016 Finding and Order, the PUCO's Seventh Entry on Rehearing and its denial of OCC's January 13, 2017 application for rehearing. ("Notice of Appeal"). On that same day, OCC attempted to amend its appeal, with specific citations to its Applications for Rehearing, in response to S.Ct.Prac.R. 10.02(A)(2)(b), a new addition to the Court's rules. It did so by filing an amended notice of appeal ("Amended Notice of Appeal") at the PUCO. Parties to the underlying PUCO proceedings who electronically subscribed to the cases, including the Appellees, were served with OCC's Amended Notice of Appeal via e-mail notice by the PUCO's electronic docketing or e-filing system.[3] OCC, however, was unable to file its Amended Notice of Appeal with the Court on February 13, 2017, prior the closing of the Clerk of Court's office.

OCC respectfully requests that the Court grant it leave to file the same attached Amended Notice of Appeal Instanter to supplement citations to its Applications for Rehearing, identifying where it preserved the issues raised on appeal.

II. ARGUMENT

In order to promote justice, the Court may exercise liberality in enforcing a strict attention to its rules, especially as to mere technical infractions. *Drake v. Bucher*, 5 Ohio St.2d 37, 40, 213 N.E.2d 182 (1966). Doing so is consistent with the "fundamental tenet of judicial review in Ohio that courts should decide cases on their merits." *DeHart v. Aetna Life Ins. Co.*, 69

[3] Ohio Adm.Code 4901-1-02(D)(5) and 4901-1-05(B).

Ohio St.2d 189, 192, 431 N.E.2d 644 (1982). Applying an inflexible standard is not appropriate in all circumstances. *See, e.g., Conrail v. PUC*, 213 N.E.2d 252, 254, 533 N.E.2d 317 (1988) (finding that an inflexible standard should not be applied to appellant's notice of appeal from a PUCO order).

Instead, this Court has recognized that certain mitigating factors can be considered when examining the sufficiency of a notice of appeal. Those factors are whether the appellant has substantially complied with the statutory appeal provisions and whether the purpose of the unsatisfied provision is sufficiently important to require compliance for jurisdictional purposes. *Conrail v. PUC,* 40 Ohio St.3d 252, 254, 533 N.E.2d 317 (1988) (finding the appellant's failure to designate the PUCO as appellee (as required by 4903.13) was not fatal, after considering mitigating factors); *Wells v. Chrysler Corp.*, 15 Ohio St.3d 21, 23, 472 N.E.2d 331 (1984), citing to *Mullins v. Whiteway Mfg.* Co., 15 Ohio St.3d 18, 471 N.E.2d 1383 (1984); *Akron Standard Div. of Eagle-Picher Industries, Inc. v. Lindley,* 11 Ohio St.3d 10, 11-12, 462 N.E.2d 419 (1984) (lack of verified signature on appeal from the Board of Tax Appeals is not jurisdictional); *State ex rel. Ernest Auto Body Shop v. Fuerst*, 30 Ohio St.3d 138, 139, 507 N.E.2d 1128 (1987) (error in notice of appeal did not preclude jurisdiction from vesting). Those mitigating factors should be considered here, consistent with, inter alia, *Conrail v. PUC.*

OCC has complied with all provisions of law (e.g. R.C. 4903.13) and PUCO rules, and has complied with all other provisions of the Supreme Court Rules. It also substantially complied with S.Ct.Prac.R. 10.02(A)(2)(b), when it referred to its Applications for Rehearing, but without specific references. OCC's notice of appeal gave sufficient notice and information to all concerned parties. And parties were on notice of the specific references to OCC's Applications for Rehearing through OCC's Amended Notice of Appeal filed at the PUCO on

February 13, 2017, the very same day OCC filed its Notice of Appeal. In furtherance of justice and for good cause, the Court should grant OCC's motion to amend its Notice of Appeal.

A. OCC's Notice of Appeal complied with the law, R.C. 4903.13, and the provisions of the Ohio Administrative Code.

Under R.C. 4903.13, to reverse, vacate or modify an order of the PUCO, a party must file a notice of appeal with the PUCO. The notice of appeal is filed against the PUCO, and must set forth the order appealed from and the errors complained of. The notice of appeal is to be served on the Chairman of the PUCO. OCC's Notice of Appeal complied with the provisions of the statute.

In addition to the statutory requirements of R.C. 4903.13, a notice of appeal must comply with the Ohio Administrative Code Rule 4901-1-36. This rule requires an appellant to file its notice with the PUCO's docketing division and serve the PUCO Chairman. OCC's Notice of Appeal was filed with the PUCO's docketing division and served on the Chairman of the PUCO.

B. OCC's Notice of Appeal substantially conforms to this Court's Rules of Practice.

Effective January 1, 2017, S.Ct.Prac.R. 10.02(A)(2)(b) requires that a "notice of appeal shall identify where in the application for rehearing that was filed pursuant to R.C. 4903.10 the issues to be raised on appeal were preserved." In its Notice of Appeal, OCC states that it is appealing the PUCO's Finding and Order entered in its Journal on August 26, 2016,[4] and that it filed its Application for Rehearing from the PUCO's August 26, 2016 Finding and Order on September 26, 2016. OCC also appealed the Seventh Entry on Rehearing and noted that it filed its Application for Rehearing on January 13, 2017.

[4] OCC attached to its Notice of Appeal a copy of the PUCO's August 26, 2016 Finding and Order and the PUCO's Seventh Entry on Rehearing in accordance with S.Ct.Prac.R. 10.02(A)(2)(a).

In its Notice of Appeal, OCC correctly directed the Court to its Applications for Rehearing filed at the PUCO, where it preserved the issues raised in its appeal. OCC did not, however, specifically identify the page number of its Applications for Rehearing or the numeric reference to each assignment of error. However, that same day, OCC filed with the PUCO an Amended Notice of Appeal to expand upon its citation to its Applications for Rehearing and more clearly identify where it preserved issues raised on appeal.

In its Amended Notice of Appeal OCC cross-referenced the claimed errors with the assignment of error number in its Applications for Rehearing. Additionally, OCC attached both of its Applications for Rehearing as Attachments C and D, respectively. OCC also unsuccessfully attempted to file its Amended Notice of Appeal with the Court on that same day.

OCC's amendment to supplement its citations does not alter the substance of its Notice of Appeal. In all other regards, Appellant's Notice of Appeal fully complied with the applicable Court rules, as well as the statutory requirements of R.C. 4903.13.

C. The Court's precedent supports granting OCC's motion to amend its Notice of Appeal

This Court has previously authorized appellants to amend notices of appeal to cure defects in the notices by granting similar motions for leave to amend. *See, e.g., In re Complaint of K&D Group v. Cleveland Thermal Steam Distrib., L.L.C.*, 133 Ohio St.3d 1495, 2012-Ohio-5492, 978 N.E.2d 913 (granting leave to amend the notice of appeal where appellant incorrectly identified the utility as the appellee instead of the PUCO). *See generally, e.g., State v. Steele*, 2015-Ohio-186, 141 Ohio St. 3d 1434; *K& D Group v. Cleveland Thermal Steam Distrib.*, 2012-Ohio-5492, 133 Ohio St.3d 1495; *State v. Oliver*, 69 Ohio St.3d 1423-1424, 631 N.E.2d 163 (1994); *State v. Lawson*, 67 Ohio St.3d 1404-1406, 615 N.E.2d 629 (1993); *Knafel v. Pepsi-Cola Bottlers of Akron*, 65 Ohio St.3d 1441, 600 N.E.2d 684 (1992).

In *State ex rel. Physicians Commt. for Responsible Medicine*, this Court also refused to strike an appellant's merit brief despite serious deficiencies, including (1) failure to list the names of all attorneys involved in the case on the cover of the brief, (2) lacking a table of contents or a table of authorities, (3) not containing an appendix with a copy of the relevant statutes, (4) not including page references to the factual record in the statement of facts, and (5) not including one or more argument headings that could be used by the court as a syllabus in an opinion, all of which were required under this Court's rules at the time. *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 8.

Only where there is a pervasive failure to comply with court rules should a case be dismissed or an appellant be denied the opportunity to amend its notice of appeal to cure the defect. *See e.g., Drake v. Bucher*, 5 Ohio St.2d 37, 213 N.E.2d 182 (1966) (dismissing appeal because appellant's brief did not contain a proper cover page, a table of authorities, the relevant statute in an appendix, page references to the factual record, proper argument headings, or a statement of the questions presented). The Court has recognized that substantial disregard of the whole body of these rules cannot be tolerated. *Drake v. Bucher*, 5 Ohio St.2d at 40. Unlike the appellant in *Drake v. Bucher*, OCC has not substantially disregarded the Court's rules.

Here, OCC merely requests leave to file its Amended Notice of Appeal to more fully comply with a new rule, S.Ct.Prac.R.10.02(A)(2)(b). The requirements of this rule are "not sufficiently important to require dismissal for failure to include it" or prohibit amendments or supplementation to cure the defect, and do not call into question this Court's jurisdiction. *Compare, Consol. Rail Corp. v. Pub. Utilities Com'n of Ohio*, 40 Ohio St.3d 252, 254, 533 N.E.2d 317 (1988) (finding that failure to designate the PUCO as "the appellee" in appellant's

notice of appeal, in strict compliance with R.C. 4903.13, did not strip this Court of jurisdiction and that mitigating factors should be considered when examining the sufficiency of a notice of appeal). S.Ct.Prac.R. 10.02(A)(2)(b) does not impose a jurisdictional requirement. Identifying the portions of the applications for rehearing that the assignments of error come from is a convenience to the Court and other parties who may act upon issues not preserved on appeal. What is jurisdictional is that parties can raise issues on appeal only after seeking rehearing on those issues at the PUCO. OCC has met that jurisdictional requirement because its assignments of error were preserved in its Applications for Rehearing. Therefore, the Court should grant OCC's motion to amend its Notice of Appeal.

D. No parties are prejudiced by OCC's Amended Notice of Appeal.

In an abundance of caution, OCC attempted to cure potential defects on the same day by filing an Amended Notice of Appeal with the PUCO to supplement its citations. That Amended Notice was served on parties to the underlying PUCO proceedings, including Appellees, who electronically subscribe to the PUCO case via e-mail notice by the PUCO's electronic docketing or e-filing system.[5] OCC is now seeking leave to file the same Amended Notice of Appeal with the Court four days later.

No party to the proceeding, including the Appellees, will be prejudiced by permitting OCC's Amended Notice of Appeal. The Appellees and other parties to the PUCO proceedings were already provided notice on February 13, 2017, of OCC's Amended Notice of Appeal, that contains more complete citations, consistent with S.Ct.Prac.R. 10.02(A)(2)(b). Notice was provided to the Appellees (and parties) when the Amended Notice of Appeal was docketed with

[5] Ohio Adm.Code 4901-1-02(D)(5) and 4901-1-05(B).

the PUCO on February 13, 2017. Further, OCC in its timely filed Notice of Appeal served upon the Appellees (and all parties to the underlying PUCO proceedings), identified the dates of its Applications for Rehearing in which it preserved the issues raised in its appeal.

The PUCO and parties to the PUCO proceedings had notice of OCC's Amended Notice of Appeal by February 13, 2017. That was the earliest date to file an appeal of the PUCO orders as prescribed by R.C. 4903.11. There is no unfair surprise or prejudice by accepting OCC's Amended Notice of Appeal. Parties (for the second time) and the Court (for the first time) will have the supplemented information identifying where in OCC's Applications for Rehearing the issues raised were preserved. At this early stage in the proceeding, there will be ample opportunity to examine OCC's Notice and Applications for Rehearing to determine if OCC has properly preserved the issues it raises on appeal. Accordingly, the Court should grant OCC's motion for leave to amend its Notice of Appeal.

III. CONCLUSION

OCC seeks to amend its Notice of Appeal to more fully identify where in its Applications for Rehearing it preserved the issues raised in its appeal. Although it believes this Court, the PUCO, and all parties to the PUCO proceedings can easily identify where it preserved those issues through the existing citations, OCC, in an abundance of caution, seeks to supplement its notice.

In ruling on OCC's motion to amend, the Court should consider mitigating factors, consistent with, inter alia, *Conrail v. PUC.* OCC's notice of appeal gave sufficient notice and information to all concerned parties. And parties were on notice, through the Amended Notice of Appeal filed at the PUCO, of the specific references to OCC's Applications for Rehearing

preserving the issues OCC raised on appeal. The Amended Notice of Appeal was filed at the PUCO the same day as OCC's Notice of Appeal was filed with the Court --February 13, 2017.

OCC substantially complied with the Supreme Court rules. Moreover, compliance with S.Ct.Prac.R. 10.02(A)(2)(b) is not sufficiently important to render OCC's timely notice of appeal insufficient. There will be no prejudice to the Appellees; nor will the amendment cause undue delay at this early stage in the appeal process. Appellees have already received notice of the Amended Appeal, with complete citations to OCC's Applications for Rehearing, filed on February 13, 2017 at the PUCO.

For these reasons, the Court should grant this motion and accept the Amended Notice of Appeal attached hereto as Attachment 1.

Respectfully submitted,

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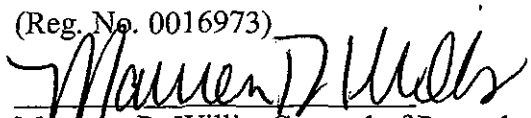
(Reg. No. 0016973)



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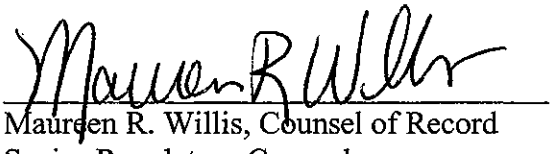
CERTIFICATE OF SERVICE

I certify that this Motion for Leave to Amend Notice of Appeal Instanter has been served upon the below-named parties via electronic transmittal this 17th day of February 2017.



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IN THE SUPREME COURT OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan.	)	Case No. 17- 0205
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)	
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.	)	On Appeal from the Public Utilities Commission of Ohio
In the Matter of the Application of The Dayton Power and Light Company for Approval of its Amended Corporate Separation Plan.	)	PUCO Case Nos. 12-426-EL-SSO, 12-427-EL-ATA, 12-428-EL-AAM, 12-429-EL-WVR, 12-672-EL-RDR

AMENDED NOTICE OF APPEAL
BY
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NOTICE OF APPEAL

Appellant, the Office of the Ohio Consumers' Counsel ("OCC"), consistent with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(B)(2), 3.11(D)(2), and 10.02, gives notice to this Court and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of this appeal taken to protect customers from being made to pay millions of dollars ($73 million per year) to Dayton Power & Light Company ("DP&L") for unlawful transition charges.

The appeal is taken from PUCO decisions pertaining to the electric security plan of DP&L, Case No. 12-426-EL-SSO et al. The decisions being appealed are the PUCO's Finding and Order entered in its Journal on August 26, 2016 (Attachment A), the PUCO's Seventh Entry on Rehearing of December 14, 2016 (Attachment B), and the PUCO's denial (by operation of law) of OCC's January 13, 2017 Application for Rehearing.[1] This appeal addresses the PUCO's approval of DP&L's motion to withdraw its electric security plan in response to an Ohio Supreme Court order.

Appellant is the statutory representative, as established under R.C. Chapter 4911, of DP&L's 456,282 residential customers. OCC was a party of record in the case being appealed.

On September 26, 2016, OCC filed an Application for Rehearing from the PUCO's August 26, 2016 Finding and Order, in accordance with R.C. 4903.10. On December 14, 2016, the PUCO issued its Seventh Entry on Rehearing. On January 13, 2017, OCC filed an application for rehearing from that Seventh Entry on Rehearing. On February 13, 2017, OCC's January 13, 2017 application for rehearing was denied by operation of law. With that denial of OCC's January 13, 2017 application, a final appealable order has been rendered.

---

[1] Per S.Ct.Prac.R. 10.02(A)(2), the decisions being appealed are attached.

Appellant files this Notice of Appeal complaining of errors in the PUCO's August 26, 2016 Finding and Order, the Seventh Entry on Rehearing, and the denial of OCC's January 13, 2017 application. OCC alleges that these orders, and the denial of OCC's application are unlawful and unreasonable in the following respects, all of which were raised in OCC's Applications for Rehearing:

1. The PUCO violated R.C. 4928.143(C)(2) when it allowed a utility to withdraw its electric security plan in response to a mandate from the Supreme Court of Ohio. The letter and intent of R.C. 4928.143(C)(2) allows a utility to withdraw its electric security plan in response to a PUCO Order, not in response to a Supreme Court decision. Otherwise, the Court's decisions and the rights of parties to appeal can be undermined and the Court's mandates to the PUCO could be unfulfilled, violating R.C. 4903.13. (Assignment of Error 1, 2, OCC Application for Rehearing (Sept. 26, 2016)).
2. The PUCO unreasonably and unlawfully allowed a utility to withdraw its electric security plan after 32 months of charging customers. The PUCO's ruling is unreasonable and inconsistent with R.C. 4928.143(C)(2)(b). (Assignment of Error 1, OCC Application for Rehearing (Sept. 26, 2016)).
3. The PUCO violated R.C. 4903.09 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 evidence and clearly unsupported so as to show a mistake. (Assignment of Error 1, OCC Application for Rehearing (Jan. 13, 2016)).

Appellant preserved these issues in its Applications for Rehearing on Sept. 26, 2016 and Jan. 13, 2017 (Attachment C, D).

The PUCO's unlawful and unreasonable rulings are allowing DP&L to charge customers more than what is allowed by law, including as the Supreme Court found the law in *In re: Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62.N.E.3d 179. OCC respectfully submits that the PUCO's August 26, 2016 Opinion and Order, its subsequent Entry on Rehearing, and its denial of OCC's application, by operation of law was unreasonable and unlawful, and should be reversed or modified with specific instructions to the PUCO to correct its errors.

BRUCE WESTON
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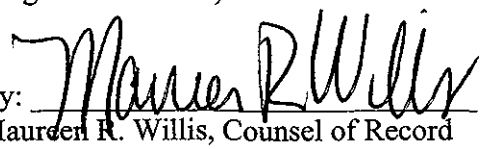
By: 
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Amended Notice of Appeal by the Office of the Ohio Consumers' Counsel, was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the Office of the Chairman in Columbus and upon all parties of record via electronic transmission this 17th day of February 2017.

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Attachment 1

CERTIFICATE OF FILING

I hereby certify that a Amended Notice of Appeal of the Office of the Ohio Consumers' Counsel was filed with the docketing division of the Public Utilities Commission of Ohio as required by Ohio Adm. Code 4901-1-02(A) and 4901-1-36.

Maureen R. Willis, Counsel of Record
Senior Regulatory Counsel

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THE PUBLIC UTILITIES COMMISSION OF OHIO

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. 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 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

FINDING AND ORDER

Entered in the Journal on August 26, 2016

I. SUMMARY

{¶ 1} Based upon the opinion of the Supreme Court of Ohio reversing the Commission's Opinion and Order in this case, the Commission modifies The Dayton Power and Light Company's electric security plan. Further, the Commission grants the motion filed by The Dayton Power and Light Company to withdraw its application for an electric security plan and finds that this case should be dismissed.

II. PROCEDURAL HISTORY

{¶ 2} The Dayton Power and Light Company (DP&L) is a public utility as defined under R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility (EDU) shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} By Opinion and Order (Order) issued on June 24, 2009, in Case No. 08-1094-EL-SSO, the Commission approved a stipulation and recommendation to establish DP&L's first ESP (*ESP I*). *In re The Dayton Power and Light Co.*, Case No. 08-1094-EL-SSO, et al., (*ESP I case*), Opinion and Order (June 24, 2009).

{¶ 5} Thereafter, by Order issued on September 4, 2013, in this case, the Commission modified and approved DP&L's application for a second ESP (*ESP II*). Included in *ESP II* was a service stability rider (SSR) for DP&L's financial integrity. *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al. (*ESP II case*), Opinion and Order (Sept. 4, 2013).

{¶ 6} On June 20, 2016, the Supreme Court of Ohio issued an opinion reversing the decision of the Commission approving *ESP II* and disposing of all pending appeals. *In re Application of Dayton Power & Light Co.*, ---Ohio St.3d---, 2016-Ohio-3490, ---N.E.3d---. Subsequently, on July 19, 2016, a mandate from the Supreme Court of Ohio was filed in this case requiring the Commission to modify its order or issue a new order.

{¶ 7} Thereafter, on July 27, 2016, DP&L filed a motion and memorandum in support to withdraw its application for an ESP in this matter. On August 11, 2016, memoranda contra the motion to withdraw its application for an ESP were filed by the Ohio Manufacturers' Association Energy Group (OMAEG), the Kroger Company (Kroger), the Ohio Consumers' Counsel (OCC), Industrial Energy Users - Ohio (IEU-Ohio), Ohio Partners for Affordable Energy and Edgemont Neighborhood Coalition (OPAE Edgemont), Ohio Energy Group (OEG), and the Retail Energy Supply Association (RESA).

In their memoranda contra, some parties combined arguments regarding DP&L's proposed tariffs to implement *ESP I* with arguments regarding DP&L's motion to withdraw *ESP II*. In this case, the Commission is only considering DP&L's motion to withdraw *ESP II*. Any arguments regarding DP&L's proposal to implement *ESP I* will be considered by the Commission in the *ESP I case*. On August 18, 2016, DP&L filed its reply to the memoranda contra regarding its motion to withdraw *ESP II*.

III. ARGUMENTS BY THE PARTIES

{¶ 8} Pursuant to R.C. 4928.143(C)(2)(a), "[i]f the Commission modifies and approves an application [for an electric security plan], 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." DP&L filed a motion to withdraw its application for an ESP, thereby terminating *ESP II*, pursuant to R.C. 4928.143(C)(2)(a), arguing the Commission modified and approved *ESP II* when it authorized the ESP on September 4, 2013. Contemporaneous with its motion to withdraw *ESP II*, DP&L also filed a motion pursuant to R.C. 4928.143(C)(2)(b) to implement *ESP I*.

{¶ 9} DP&L asserts that even if it did not file a motion to withdraw *ESP II*, the Supreme Court of Ohio reversed *ESP II* in total, which effectively terminates its application for an ESP in this case. According to DP&L, the Supreme Court of Ohio reversed all aspects of *ESP II*. *In re Application of Dayton Power & Light Co.*, ---Ohio St.3d---, 2016-Ohio-3490, ---N.E.3d---. Therefore, the Commission should grant its motion to withdraw *ESP II*, thereby terminating it, and issue an order implementing *ESP I*. DP&L avers that continuing *ESP II* without the SSR would be inconsistent with the Supreme Court of Ohio's opinion and would make it very difficult for DP&L to continue to provide safe and reliable electric service. DP&L notes that recent actions by credit agencies demonstrate the possible adverse effects if DP&L does not receive adequate rate relief. DP&L argues that R.C. 4928.143(C)(2)(a) imposes no time limit on its right to withdraw an application for an ESP and, therefore, the Commission should grant its motion.

{¶ 10} OMAEG, Kroger, OCC, IEU-Ohio, OPAE Edgemont, OEG, and RESA argue that the Supreme Court of Ohio reversed just the SSR and not the entire *ESP II*. They assert the Supreme Court of Ohio's opinion reversed *ESP II* on the authority of *In re Application of Columbus S. Power Co.*, ---Ohio St.3d---, 2016-Ohio-1608, ---N.E.3d---, which means the scope of the Court's decision is limited by the Court's findings in *In re Application of Columbus S. Power Co.*, ---Ohio St.3d---, 2016-Ohio-1608, ---N.E.3d. The Supreme Court of Ohio found that financial integrity charges provide utilities with the equivalent of transition revenue in violation of R.C. 4928.38. Accordingly, the parties assert that the Commission should require *ESP II* to continue without the SSR.

{¶ 11} Additionally, OMAEG, Kroger, OCC, IEU-Ohio, OPAE Edgemont, OEG, and RESA argue that R.C. 4928.143(C)(2)(a) does not provide DP&L with authority to withdraw *ESP II* because the Commission did not modify *ESP II*, the Supreme Court of Ohio did. Therefore, under the plain language of the statute, DP&L cannot withdraw *ESP II*. Further, the parties argue it would be an unreasonable reading of the statute to find that it provides DP&L with an everlasting right to withdraw an ESP that was modified and approved by the Commission. The parties assert that a reasonable reading of R.C. 4928.143(C)(2)(a) is that the electric utility may withdraw a modified ESP within a reasonable period of time, or only while the ESP is pending prior to the approval of final tariffs. They argue it would be unreasonable in this case to allow DP&L to terminate *ESP II* after being effective for nearly three years.

IV. COMMISSION CONCLUSION

{¶ 12} The Commission finds that *ESP II* should be modified to remove the SSR, based upon the opinion of the Supreme Court of Ohio reversing the Commission's Order in this case. On June 20, 2016, the Supreme Court of Ohio reversed the Order of the Commission approving *ESP II*. Thereafter, on July 19, 2016, a mandate from the Supreme Court of Ohio was filed in this case requiring the Commission to modify its order or issue a new order. *In re Application of Dayton Power & Light Co.*, ---Ohio St.3d---, 2016-Ohio-3490, ---N.E.3d---. It is well established that, when the Supreme Court of Ohio reverses and

remands an order of the Commission, the reversal is not self-executing and the Commission must modify its order or issue a new order. *Cleveland Elec. Illuminating Co. v. Public Utilities Commission* (Ohio 1976) 46 Ohio St.2d 105, 346 N.E.2d 778, 75 O.O.2d 172. Accordingly, pursuant to the Court's reversal of our decision modifying and approving DP&L's proposed *ESP II*, the Commission hereby modifies its order authorizing *ESP II* in order to eliminate the SSR.

{¶ 13} Further, the Supreme Court of Ohio has established that when the Commission modifies an order approving an ESP, it effectively modifies the EDU's application for an ESP. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶29. R.C. 4928.143(C)(2)(a) provides that "[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." On July 26, 2016, DP&L filed a motion to withdraw its application for an ESP, terminating *ESP II*, pursuant to R.C. 4928.143(C)(2)(a).

{¶ 14} The Commission finds that, pursuant to R.C. 4928.143(C)(2)(a), we have no choice but to grant DP&L's motion and accept the withdrawal of *ESP II*. The Supreme Court of Ohio has held 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 at ¶24-30. 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 noted above, the Court has held that "[p]ublic utilities are required to charge the rates and fees stated in the schedules filed with the commission pursuant to the commission's orders; that the schedule remains in effect until replaced by a further order of the commission; that this court's reversal and remand of an order of the commission does not change or replace the schedule as a matter of law, but is a mandate to the commission to issue a new order which replaces the reversed order; and that a rate schedule filed with

the commission remains in effect until the commission executes this court's mandate by an appropriate order." *Cleveland Elec. Illuminating Co.*, 46 Ohio St.2d at 116-117.

{¶ 15} In conclusion, the Commission grants DP&L's motion to withdraw its application for an ESP, thereby terminating *ESP II*. Accordingly, the Commission finds that this case should be dismissed.

V. ORDER

{¶ 16} It is, therefore,

{¶ 17} ORDERED, That DP&L's motion to withdraw its application for an ESP, thereby terminating it, be granted. It is, further,

{¶ 18} ORDERED, That this case be dismissed. It is, further,

{¶ 19} ORDERED, That a copy of this Finding and Order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

Lynn Slaby

M. Beth Trombold

Thomas W. Johnson

M. Howard Petricoff

GAP/BAM/sc

Entered in the Journal AUG 26 2016

Barcy F. McNeal

Barcy F. McNeal
Secretary

THE PUBLIC UTILITIES COMMISSION OF OHIO

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. 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 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

CONCURRING OPINION OF COMMISSIONER THOMAS W. JOHNSON

{¶ 1} The Commission's decision reaches the appropriate outcome in today's ruling, and does so in a manner that is well reasoned. I concur with its outcome. R.C. 4928.143(C)(2)(a)'s assertion that "[i]f the commission *modifies and approves* an application" for an ESP, the EDU "may withdraw the application, thereby terminating it" (emphasis added) has been the subject of many different interpretations by multiple intervenors. I merely wish to express one Commissioner's impression of this provision.

{¶ 2} While the Commission is not deciding today exactly when a modification triggers the right of an EDU to withdraw an ESP, I would like to express my belief that DP&L has had the right to withdraw their second ESP starting when it was originally

modified and approved. *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al. I am not opining as to when this right to withdraw terminates. I merely express an opinion that this is a right created under the statute.

Thomas W. Johnson, Commissioner

TWJ/sc

Entered in the Journal
AUG 26 2016

Barcy F. McNeal
Secretary

THE PUBLIC UTILITIES COMMISSION OF OHIO

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. 12-426-EL-SSO
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IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY TO ESTABLISH TARIFF RIDERS.	CASE NO. 12-672-EL-RDR

SEVENTH ENTRY ON REHEARING

Entered in the Journal on December 14, 2016

I. SUMMARY

{¶ 1} The Commission finds that the assignments of error raised in the applications for rehearing lack merit. Accordingly, the Commission denies the applications for rehearing.

II. PROCEDURAL HISTORY

{¶ 2} The Dayton Power and Light Company (DP&L) is a public utility as defined under R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility (EDU) shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric service to customers, including a firm supply of electric generation service. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} By Order issued on September 4, 2013, in this case, the Commission modified and approved DP&L's application for its second ESP (*ESP II*). Included as a term of *ESP II* was a service stability rider (SSR) for DP&L's financial integrity.

{¶ 5} On June 20, 2016, the Supreme Court of Ohio issued an opinion reversing the Commission's decision approving *ESP II* and disposing of all pending appeals. *In re Application of Dayton Power & Light Co.*, ___Ohio St.3d___, 2016-Ohio-3490, ___N.E.3d___. Subsequently, on July 19, 2016, the mandate issued by the Supreme Court of Ohio was filed in this case.

{¶ 6} On July 27, 2016, DP&L filed a motion and memorandum in support to withdraw its application for *ESP II*. Thereafter, on August 11, 2016, memoranda contra to DP&L's motion to withdraw *ESP II* were filed by the Ohio Manufacturers' Association Energy Group (OMAEG), the Kroger Company (Kroger), the Ohio Consumers' Counsel (OCC), Industrial Energy Users - Ohio (IEU-Ohio), Ohio Partners for Affordable Energy and Edgemont Neighborhood Coalition (OPAE/Edgemont), Ohio Energy Group (OEG), and the Retail Energy Supply Association (RESA).

{¶ 7} By Order issued on August 26, 2016, the Commission granted DP&L's application to withdraw *ESP II*, thereby terminating it, pursuant to R.C. 4928.143(C)(2)(a). The Commission then dismissed this case.

{¶ 8} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 9} On September 23 and 26, 2016, applications for rehearing were filed by OPAE/Edgemont, IEU-Ohio, OEG, OMAEG, Kroger, and OCC. Thereafter, on October 3 and 6, 2016, DP&L filed memoranda contra to the applications for rehearing.

{¶ 10} By Entry issued on October 12, 2016, the Commission granted rehearing for the limited purpose of further consideration of the matters raised in the applications for rehearing. The Commission found that sufficient reason was set forth by the parties to warrant further consideration of the matters raised in the applications for rehearing.

{¶ 11} However, on November 14, 2016, OCC filed an application for rehearing regarding the Commission's granting of rehearing for the limited purpose of further consideration of the matters specified in the applications for rehearing. On November 25, 2016, DP&L filed its memorandum contra to OCC's application for rehearing.

III. DISCUSSION

A. *Assignment of Error 1*

{¶ 12} OMAEG, Kroger, and OEG argue the Commission's order was unjust and unreasonable because the Commission found that the Supreme Court of Ohio reversed in total the Commission's order authorizing *ESP II*. OMAEG, Kroger, and OEG each argue the Commission erred when it found the Court reversed *ESP II* in total. They assert the Supreme Court of Ohio only reversed the SSR, but not the remaining provisions, terms, and conditions of *ESP II*.

{¶ 13} DP&L responds by arguing that the Supreme Court of Ohio fully reversed *ESP II*. DP&L argues the Court could have reversed in part or modified the Commission's

order authorizing *ESP II* but did not. Further, the Court could have identified that it found just the SSR to be unlawful or unreasonable, but it did not. DP&L argues the parties' assertion that the Court's decision was limited just to the SSR or transition costs is plainly false. The Court's opinion does not instruct the Commission to excise the SSR from DP&L's tariff sheets and does not order rates to be lowered. Regardless, DP&L notes that the Commission specifically modified *ESP II* to eliminate the SSR, and that pursuant to R.C. 4928.143(C)(2)(a), the Commission's modification of *ESP II* to eliminate the SSR provided DP&L with the right to withdraw and terminate *ESP II*. However, DP&L asserts that it has maintained the unilateral right to withdraw *ESP II* at any time since the Commission's modification and approval of *ESP II* on September 4, 2013.

CONCLUSION

{¶ 14} The Commission finds that the parties' assignment of error lacks merit. The Commission recognized that the Supreme Court of Ohio's opinion was not self-executing and required the Commission to modify its order or issue a new order. Order at 5, citing *Cleveland Elec. Illuminating Co. v. Public Utilities Commission* (Ohio 1976) 46 Ohio St.2d 105, 346 N.E.2d 778, 75 O.O.2d 172 at 116-117 ("* * * this court's reversal and remand of an order of the commission does not change or replace the schedule as a matter of law, but is a mandate to the commission to issue a new order which replaces the reversed order; and a rate schedule filed with the commission remains in effect until the commission executes this court's mandate by an appropriate order."). Therefore, pursuant to the Supreme Court's mandate, the Commission modified "its order authorizing *ESP II* in order to eliminate the SSR." Finding and Order (Aug. 26, 2016) at 5. Having modified *ESP II*, as ordered by the Court, the Commission acknowledged and granted DP&L's previously-filed application to withdraw *ESP II*, pursuant to R.C. 4928.143(C)(2)(a).

{¶ 15} As the Supreme Court of Ohio has held, "[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 at ¶24-30. Further, the Court has made it clear that, when the Commission modifies an order approving an ESP, the Commission effectively modifies the EDU's application for an ESP. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶29. Any modification, whether in part or in total, of an application for an ESP triggers the utility's right to withdraw the application, thereby terminating it, pursuant to R.C. 4928.143(C)(2)(a). Therefore, whether the Court reversed just the SSR or the ESP in total is moot, as in either instance, the Commission was required to modify its Order approving *ESP II*, which then provided DP&L the right to withdraw *ESP II*, pursuant R.C. 4928.143(C)(2)(a), even if such right did not already exist.

B. Assignment of Error 2

{¶ 16} OEG, OPAE/Edgemont, OMAEG, Kroger, OCC, and IEU-Ohio argue the Commission's Order is unjust or unreasonable because the Commission allowed DP&L to withdraw its application for *ESP II* in violation of R.C. 4928.143(C)(2)(a). The parties aver that while the Commission was mandated to terminate the billing and collection of the SSR, the Commission erred when it apparently found that R.C. 4928.143(C)(2)(a) required the Commission to grant DP&L's withdrawal of *ESP II* upon elimination of the SSR. IEU-Ohio argues that because the Court's decision required the Commission to issue an order terminating the billing and collection of the SSR, the Commission order terminating the SSR is ministerial only. "A ministerial act may be defined to be one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to the exercise of his own judgment upon the propriety of the act being done." *State ex. rel. Trauger v. Nash*, 66 Ohio St. 612, 618 (1902). Further, "a ministerial duty is an absolute, certain and imperative duty imposed by law upon a public officer involving merely execution of a specific duty arising from fixed and designated facts." *State v. Moretti*, 1974 Ohio App. Lexis 3838 at *8 (10th Dist. Ct. App., Apr. 9, 1974).

{¶ 17} OCC argues the General Assembly intended for R.C. 4928.143(C)(2)(a) to allow a utility to withdraw and terminate an ESP within a relatively short period of time after implementing the ESP. OCC asserts that withdrawal of an ESP after 32 months is inconsistent with the law and the General Assembly's intent. OCC then argues the Commission violated R.C. 4928.143(C)(2)(b) by replacing the SSR with a charge that similarly allows the unlawful recovery of the equivalent of transition revenues.

{¶ 18} OMAEG, Kroger, and OPAE/Edgemont argue the Commission erred by impermissibly treating a Court-ordered reversal of a provision of *ESP II* as having the same effect as a Commission-ordered modification to the ESP. They argue that under R.C. 4928.143(C)(2)(a), the utility may terminate and withdraw its ESP only "[i]f *the Commission* modifies and approves an application" for an ESP (emphasis added). They assert the statute does not grant the utility the right to terminate and withdraw an ESP in response to a modification made by the Supreme Court of Ohio. Additionally, OMAEG and Kroger argue the Commission erred in finding that a utility retains an everlasting right to terminate an ESP. They assert the utility's right to withdraw and terminate an ESP ends upon the filing of tariffs.

{¶ 19} OMAEG, Kroger, and OPAE/Edgemont then aver the outcome of the Commission's determination in this case is to dilute the potency of the direct right of appeal granted by R.C. 4903.13, and has effectively allowed DP&L to override the Court's ruling by moving to withdraw and terminate *ESP II*.

{¶ 20} OEG argues that R.C. 4928.143(C)(2)(a) provides the utility with a right to withdraw an ESP only when a proposed ESP is modified by the Commission. OEG asserts the ESP in this case was not *an application* for an ESP, but a final and fully implemented ESP. Much like OCC, OEG argues the right to withdraw an ESP does not extend indefinitely, but OEG's argument rests on the premise that once the ESP is implemented, it is no longer an "application under division (C)(1) [for an ESP]" as contemplated in R.C. 4928.143(C)(2)(a).

{¶ 21} DP&L argues the Commission's decision to allow DP&L to withdraw *ESP II* is both mandated by law and necessary to allow DP&L to maintain its financial integrity so that it can continue to provide safe and reliable electric service. DP&L asserts the Commission correctly held that R.C. 4928.143(C)(2)(a) establishes DP&L's right to withdraw and terminate *ESP II*. R.C. 4928.143(C)(2)(a) is clear, if the Commission modifies and approves an application for an ESP, the utility may withdraw the application, thereby terminating the ESP. Additionally, DP&L avers the Court has long held that if the Commission makes a modification to an ESP, R.C. 4928.143(C)(2)(a) allows the utility to withdraw the ESP. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶26.

{¶ 22} Further, DP&L argues that R.C. 4928.143(C)(2)(a) contains no limit on the utility's right to withdraw its application for an ESP. DP&L asserts that, although it sought to withdraw its application after the Court's ruling to reverse the Commission's decision to approve ESP II, there is no material difference whether the Commission modifies an ESP in the first instance, or after rehearing, or following reversal by the Supreme Court of Ohio. In each instance, DP&L argues, the utility may withdraw the ESP.

CONCLUSION

{¶ 23} The Commission finds that rehearing on this assignment of error should be denied. As we noted above, the Supreme Court of Ohio's opinion was not self-executing and required the Commission to modify its order or issue a new order. *Cleveland Elec. Illuminating Co. v. Public Utilities Commission* (Ohio 1976) 46 Ohio St.2d 105, 346 N.E.2d 778, 75 O.O.2d 172 at 116-117 ("* * * this court's reversal and remand of an order of the commission does not change or replace the schedule as a matter of law, but is a mandate to the commission to issue a new order which replaces the reversed order; and a rate schedule filed with the commission remains in effect until the commission executes this court's mandate by an appropriate order."). We are not persuaded, however, that the

Commission consideration of any matter on remand is simply a ministerial act, and IEU-Ohio has cited no precedent in support of this claim. In fact, in many cases, the Commission takes additional comments or holds additional hearings on remand. The Commission modified its Order approving *ESP II* to eliminate the SSR, as ordered by the Court. Because the Commission made a modification to the ESP, the plain language of R.C. 4928.143(C)(2)(a) allows DP&L to withdraw and terminate *ESP II*. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶24-30. Accordingly, pursuant to R.C. 4928.143(C)(2)(a), the Commission granted DP&L's application to withdraw and terminate *ESP II*.

{¶ 24} Further, regarding OEG's argument that the Commission modified DP&L's fully implemented ESP, not its *application* for an ESP, the Court has held that when the Commission modifies an order approving an ESP, it effectively modifies the utility's application for an ESP. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶29. By modifying its Order approving *ESP II*, the Commission modified DP&L's application for the ESP, thereby triggering the provisions of R.C. 4928.143(C)(2)(a).

{¶ 25} Additionally, regarding OCC's argument that the General Assembly intended for R.C. 4928.143(C)(2)(a) to allow a utility to withdraw and terminate an ESP only within a relatively short period of time, we note that the Supreme Court of Ohio has stated that it would "not weigh in on whether [the utility] could collect ESP rates for some period of time and then withdraw the plan." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011). The Court was referring to whether the utility has an indefinite right to withdraw an ESP after the Commission issues its initial Order modifying and approving an ESP. In the present case, the Commission modified *ESP II* by Order issued on August 26, 2016, and then granted the withdrawal in the same Order. Therefore, like the Supreme Court of Ohio, the Commission does not need to weigh in on whether DP&L could collect the ESP for some period of time and then withdraw it, because that issue is

not present here. In this case, *ESP II* was effectively withdrawn immediately upon the Commission's August 26, 2016 modification of *ESP II*.

C. Assignment of Error 3

{¶ 26} OCC and IEU-Ohio argue the Commission's Order granting DP&L's withdrawal and termination of *ESP II* violated R.C. 4903.09 for failing to set forth the reasons prompting the decision arrived at. IEU-Ohio asserts it sought a Commission order initiating a proceeding to determine the amount that DP&L billed and collected under the SSR and to establish future rate reductions to return the collected amount to customers. OCC and IEU-Ohio assert the Commission's Order was unlawful and unreasonable for both failing to address their argument and for failing to initiate such a proceeding.

{¶ 27} DP&L argues the Commission's Order authorizing DP&L to withdraw and terminate its *ESP II* application was consistent with and required by R.C. 4928.143(C)(2)(a). DP&L asserts the Commission followed the plain language and meaning of R.C. 4928.143(C)(2)(a). The Commission fully explained its reasoning, therefore, DP&L argues, rehearing should be denied.

CONCLUSION

{¶ 28} The Commission finds that the arguments raised by OCC and IEU-Ohio lack merit. Pursuant to R.C. 4928.143(C)(2)(a), if the Commission modifies an ESP, the utility may withdraw the ESP, thereby terminating it. OCC and IEU-Ohio cite to no other conditions or qualifications contained in the Revised Code that the utility must satisfy for it to withdraw an ESP. In this case, the Court issued an opinion requiring the Commission to modify its order or issue a new order. *Cleveland Elec. Illuminating Co. v. Public Utilities Commission* (Ohio 1976) 46 Ohio St.2d 105, 346 N.E.2d 778, 75 O.O.2d 172 at 116-117. The Commission modified its Order, which provided DP&L the right under R.C. 4928.143(C)(2)(a) to withdraw *ESP II*. DP&L exercised its right and filed a notice of

withdrawal of *ESP II*, which became effective immediately upon the Commission's August 26, 2016 Order modifying the ESP. Therefore, the SSR, which was not reconcilable, was terminated along with the rest of *ESP II*.

{¶ 29} Further, IEU-Ohio's previous request for a proceeding to determine the amount that DP&L billed and collected under the SSR, and to establish future rate reductions to return the collected amount to customers, is moot. The Commission cannot make a prospective adjustment to the SSR to return previously collected revenues to customers because the SSR has been terminated and no longer exists. Accordingly, rehearing on this assignment of error should be denied.

D. *Assignment of Error 4*

{¶ 30} OEG and IEU-Ohio argue the Commission's Order is unjust and unreasonable because it failed to require DP&L to refund all SSR charges paid by customers to DP&L from the time the SSR was initially approved by the Commission. IEU-Ohio asserts that the Court's opinion in *Keco* does not bind the Commission from initiating a proceeding to refund amounts collected under the SSR to customers. Further, if the Commission finds that its prior decisions extending *Keco* preclude such relief, the Commission or the Supreme Court of Ohio should overrule the cases extending *Keco* to Commission decisions. *Keco Industries v. Cincinnati and Suburban Telephone Co.*, 166 Ohio St. 254 (1957); *Lucas County Commissioners v. Public Utilities Commission of Ohio*, 80 Ohio St.3d 344 (1997).

{¶ 31} Further, IEU-Ohio notes the Supreme Court of Ohio reversed *ESP II* on the authority of *In re Application of Columbus S. Power. Co.*, ___ Ohio St.3d ___, 2016-Ohio-1608, ___ N.E.3d ___" (*Columbus Southern*). Therefore, the Commission must look to *Columbus Southern* to guide the Commission's actions following the Court's reversal of the SSR. In *Columbus Southern*, the Court directed the Commission on remand to make prospective adjustments to AEP-Ohio's balance of deferred capacity charges to account

for the revenue AEP-Ohio unlawfully collected under the rider. *Columbus Southern* at ¶39-40. Therefore, IEU-Ohio argues the Commission must initiate a proceeding to account for the effects of the SSR and adjust rates accordingly. Such a proceeding, IEU-Ohio argues, would not violated *Keco*.

{¶ 32} Further, IEU-Ohio argues this case is distinguishable from *Keco* in two respects. First, *Keco* was limited to whether a general division court had the authority to order restitution of rates the Court found to be unlawful. Second, in *Keco* the plaintiff was seeking restitution. IEU-Ohio asserts the Commission could authorize prospective relief to reduce future rates to eliminate the effect of the SSR, which would not violate *Keco* or frustrate the precedent prohibiting retroactive ratemaking. Additionally, even if the Commission determines that *Keco* prohibits a proceeding to make prospective adjustments to reduce DP&L's rates to account for the revenue collected under the SSR, the Commission or the Supreme Court of Ohio should overrule those decisions and initiate such a proceeding.

CONCLUSION

{¶ 33} The Commission finds the arguments raised by IEU-Ohio lack merit and the application for rehearing should be denied. In the first instance, the arguments are moot, as DP&L withdrew and terminated the SSR along with the rest of *ESP II*. In the second instance, IEU-Ohio's request would violate long-held precedent established in *Keco* and *Lucas County* prohibiting retroactive ratemaking. *Keco Industries v. Cincinnati and Suburban Telephone Co.*, 166 Ohio St. 254 (1957); *Lucas County Commissioners v. Public Utilities Commission of Ohio*, 80 Ohio St.3d 344 (1997).

{¶ 34} The issue is moot because DP&L withdrew and terminated the SSR along with the rest of *ESP II*. As noted above, R.C. 4928.143(C)(2)(a) provides that if the Commission modifies and approves an application for an ESP, the utility may withdraw its application, thereby terminating the ESP. In this case, the Commission modified its

order approving *ESP II* on remand from the Court. DP&L exercised its right and withdrew *ESP II*, which was effective immediately upon the Commission's Order modifying *ESP II*. The termination of *ESP II* includes the terms, conditions, and charges included in *ESP II*. The SSR was a term of *ESP II* and was terminated along with it. The facts in this case are different from AEP Ohio's rate stability rider (RSR) addressed by the Court in *Columbus Southern*. In *Columbus Southern*, the Court remanded the matter to the Commission to properly adjust the RSR, which was intended to be reconcilable and to extend past the term of AEP Ohio's second ESP, on a going forward basis to account for the Court's opinion. *Columbus Southern* at *7, ¶33, ("AEP will recover its costs in the following manner: * * * collecting any remaining balance of the deferred costs (plus carrying charges) after the ESP period ends."). However, in the present case, the Commission cannot adjust the SSR on a going forward basis because DP&L withdrew and terminated it along with the rest of *ESP II*. There are no prospective rates to adjust because the SSR was terminated. Further, the relief requested by IEU-Ohio would violate the Court's and this Commission's long-held precedent in *Keco* and *Lucas County* prohibiting retroactive ratemaking.

E. Assignment of Error 5

{¶ 35} OCC argues in its November 14, 2016, application for rehearing that the Commission erred by not granting and holding rehearing on the matters specified in OCC's previous application for rehearing. OCC asserts that the errors in the Commission's Order, for which OCC filed its previous application for rehearing, were clear and the Commission should have granted rehearing. Further, OCC argues the Commission failed to fulfill its duty to hear matters pending before it without unreasonable delay and with due regard to the rights and interests of all litigants before it. OCC asserts the Commission's Entry on Rehearing permits the Commission to evade a timely review and reconsideration of its order by the Ohio Supreme Court and

precludes parties from exercising their rights to appeal, which is a right established, inter alia, under R.C. 4903.10, 4903.11, and 4903.13

{¶ 36} *DP&L asserts that the Commission has a longstanding practice of granting* applications for rehearing for further consideration, which allows the Commission to review the myriad of complex issues facing Ohio's diverse public utilities. DP&L argues that this practice is not only consistent with R.C. 4903.10, but has been expressly permitted by the Supreme Court of Ohio. *State ex rel. Consumers' Counsel v. Pub. Util. Comm.*, 102 Ohio St.3d 301, 2004-Ohio-2894, 809 N.E.2d 1146, ¶19. DP&L avers that is was lawful and reasonable for the Commission to take additional time to consider the issues raised in the many applications for rehearing filed in this case.

CONCLUSION

{¶ 37} The Commission finds that this assignment of error is moot and that rehearing should be denied. As set forth above, the Commission has fully considered the assignments of error raised by OCC in its September 26, 2016 application for rehearing. As we discussed above, OCC's assignments of error lack merit and we have denied rehearing on those assignments of error. Further, we note that DP&L has ceased collecting charges under the SSR pursuant to our August 26, 2016 Finding and Order terminating *ESP II*. Accordingly, OCC has not demonstrated any prejudice or undue delay as the result of our October 12, 2016 Entry on Rehearing in this proceeding.

IV. ORDER

{¶ 38} It is, therefore,

{¶ 39} ORDERED, That the applications for rehearing be denied. It is, further,

{¶ 40} ORDERED, That a copy of this Entry on Rehearing be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

Lynn Slaby

M. Beth Trombold

Thomas W. Johnson

M. Howard Petricoff

BAM/sc

Entered in the Journal

DEC 14 2016

Barcy F. McNeal

Barcy F. McNeal
Secretary

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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September 26, 2016

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APPLICATION FOR REHEARING

The Office of the Ohio Consumers' Counsel ("OCC") files this application to protect customers who have paid plenty to 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 subsidies (through a so-called stability charge) to prop up DP&L's power plants. The Ohio Supreme Court, however, found the PUCO should not have approved DP&L's $9.86 per month stability charge. It

ruled that the PUCO should carry out its judgment that the stability charge is an unlawful transition charge that customers should no longer pay.[1]

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's Order. The PUCO ruled that DP&L could withdraw its plan and charge new rates to customers that include a $6.05 monthly stability charge. So instead of getting a full $10 per month reduction, as the Court ordered, customers will only see a fraction of the reduction ($4.00 per month), with DP&L pocketing the difference.

The PUCO was wrong in allowing DP&L to withdraw its current rates and set new rates that contained another unlawful stability charge. The PUCO's Order of August 26, 2016, permitting DP&L to withdraw and terminate its electric security plan application was unreasonable and unlawful in the following respects:

Assignment of Error 1: The PUCO erred, under R.C. 4928.143(C)(2)(a) , in allowing DP&L to withdraw and terminate its electric security plan after it charged customers under the plan for 32 months.

A. The PUCO's ruling is inconsistent with R.C. 4928.143(C)(2)(b), which requires the PUCO to continue the utility's most recent standard service offer.

Assignment of Error 2:The PUCO erred by allowing DP&L to circumvent the Ohio Supreme Court's decision protecting customers from unlawful and unreasonable transition charges.

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[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.

Assignment of Error 3: The PUCO failed to comply with R.C. 4903.09 when it merely noted (but did not address parties' arguments) and summarily concluded that DP&L could withdraw its application at any time, all without setting forth the reasons prompting its decisions.

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 Opinion and Order as requested by OCC.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

From the outset of DP&L's current electric security plan (established under case no. 12-426-EL-SSO) the Utility was charging customers so-called stability-like charges that the Ohio Supreme Court found to be unlawful transition charges. Unfortunately for consumers paying those transition charges (which DP&L inaptly named stability charges), the charges could not likely be returned (and were not) to consumers under Court precedent. But the Court in an unprecedented manner issued its decision within a week of the oral argument in an effort to stop future collections of the stability charge from customers. That decision was reached on June 20, 2016.

To circumvent the Court's decision, DP&L requested permission from the PUCO to withdraw and terminate its ESP, and return consumers – in part -- to pricing from its earlier ESP. But that earlier pricing cannot be implemented fully and completely. Rather DP&L proposed to leave in place certain pricing from its current ESP and certain prices from its prior ESP. The PUCO allowed DP&L's hybrid approach to be implemented. That approach however is not contemplated in the ESP statute, and cannot be entertained by the PUCO.

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 Commission should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Opinion and Order of August 25, 2016. The PUCO's rulings were unreasonable and unlawful in the following respects.

III. ERRORS

Assignment of Error 1: The PUCO erred in allowing DP&L to withdraw and terminate its electric security plan after charging customers under the plan for 32 months.

The PUCO ruled that it had no choice but to grant DP&L's motion and accept the withdrawal of ESP II.[2] The PUCO was wrong.

A utility's right to withdraw an ESP application is not unlimited. The PUCO itself has recognized this when in the past it has determined that the filing of tariffs consistent with its Opinion and Order (modifying the ESP) is to be deemed as acceptance of the Order (thereby precluding later withdrawal).[3] Therefore, the PUCO should have decided that it was unlawful, under R.C. 4928.143(C)(2)(a), for DP&L to withdraw and terminate its electric security plan.

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[2] Finding and Order at ¶14.

[3] See *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 106 (Mar. 31, 2016); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order at 86 (Mar. 31, 2016).

The only way the most recent standard service rates can continue is if the right to withdraw is exercised within a relatively short period of time after implementing its ESP plan. That would allow the provisions of R.C. 4928.143(C)(2)(b) to be implemented as written and intended by the General Assembly. Withdrawal of an ESP application after 32 months of charging customers is inconsistent with the law requiring the PUCO to issue an order continuing the utility's prior ESP rates. The PUCO should grant rehearing and reverse.

A. The PUCO's ruling is inconsistent with R.C. 4928.143(C)(2)(b), which requires the PUCO to continue the utility's most recent standard service offer.

That the Utility's opportunity to withdraw an electric security plan is limited in duration is seen by another aspect of the PUCO's unlawful decision to allow withdrawal, as follows. In order for DP&L to withdraw and terminate its current ESP, R.C. 4928.143(C)(2)(b) requires the Utility to return to prior rates. The PUCO's ruling violated that law. It is impossible for DP&L to return fully and completely to its prior rates given the passage of time since the approved ESP rates went into effect and began to be charged to customers. Customers began paying new ESP rates on January 1, 2014. Customers have paid these rates for the past 32 months.

Under R.C. 4928.143(C)(2)(b), if the utility withdraws an application or if the PUCO disapproves the application, then the provisions, terms, and conditions of the utility's most recent standard service offer must be continued. Because DP&L's withdrawal was so late into the term of the electric security plan (32 months into a 45 month term), it is impossible to go back to the most recent standard service offer.

For DP&L to return to prior rates would have meant (among other things) going back to a standard service offer that is priced based on DP&L supplying the power,

instead of the auction-based standard service. But DP&L has procured power for standard service through May 31, 2017 by way of auctions held much earlier. Those auctions cannot be undone. In fact, in attempting to implement the terms and conditions of DP&L's most recent standard service offer, the PUCO did not undo the existing contracts with competitive suppliers for standard service.[4]

But, the PUCO is a creature of statute. *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St. 3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St. 2d 181, 22 Ohio Op. 3d 410, 429 N.E.2d 444*Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St. 2d 153, 21 Ohio Op. 3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St. 2d 302, 18 Ohio Op. 3d 478, 414 N.E.2d 1051. It may only exercise the authority conferred on it by the General Assembly. The PUCO must follow the law.

Continuing DP&L's most recent standard service offer rates (after a utility withdraws 32 months later) is not feasible of execution. But that is what R.C. 4928.143(C)(2)(b) requires. The PUCO lacks discretion in this regard. If the PUCO is right that a utility can withdraw at any time, after accepting the benefits of the ESP, then one would have to assume that the General Assembly enacted laws that are not feasible of being executed. This is contrary to the Ohio rules of statutory construction.[5]

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[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, Finding and Order at ¶21 (Aug. 26, 2016).

[5] See R.C. 1.47(D) stating that in enacting a statute, inter alia, a result feasible of execution is intended.

Assignment of Error 2:The PUCO erred by allowing DP&L to circumvent the Ohio Supreme Court's decision protecting customers from unlawful and unreasonable transition charges.

The PUCO's Order is unreasonable and unlawful, because it circumvents the Ohio Supreme Court's recent o for that acceptance, DP&L should be precluded from withdrawing its electric security plan as a response to the Court's mandate.

For one matter, it is not reasonable and lawful for the PUCO to have replaced a charge that the Court just declared to be wrongful to collect from customers, with an identical charge from a few years ago. For another matter, in approving DP&L's request, the PUCO precluded customers from receiving the reduced rates ordered by the Ohio Supreme Court. DP&L has reaped the benefits of increased revenues under the plan for the past 32 months, in the matter that was before the Court. Now at a time when the Ohio Supreme Court determined DP&L should not be charging customers for a transition charge, the PUCO allowed DP&L to terminate the plan and bill customers for another transition charge. The PUCO erred. It should grant rehearing on these issues.

Assignment of Error 3: The PUCO failed to comply with R.C. 4903.09 when it merely noted (but did not address parties' arguments) and summarily concluded that DP&L could withdraw its application at any time, all without setting forth the reasons prompting its decisions.

OCC and others presented arguments against accepting DP&L's motion to withdraw and terminate.[6] OCC and others specifically challenged the utility's assertion that it could withdraw, at any time, an ESP that was modified and approved by the PUCO. The PUCO described these arguments as "the parties argue it would be an

[6] See, e.g., OCC Memorandum Contra (Aug. 11, 2006).

unreasonable reading of the statute to find that it provides DP&L with an everlasting right to withdraw an ESP that was modified and approved by the Commission."[7]

Nonetheless after noting the arguments against DP&L's motion, the PUCO concluded it "had no choice but to grant DP&L's motion and accept the withdrawal of ESP II."[8] It offered no explanation of its conclusion beyond this bare pronouncement. By not explaining its decision as to why it had no choice and not addressing parties' arguments, the PUCO violated R.C. 4903.09. Without sufficient detail, the Court will be unable to determine how the PUCO reached its decision. Thus, the purpose of R.C. 4903.09 will be thwarted and the review that OCC is entitled to, under R.C. 4903.09 and 4903.10 cannot occur. The PUCO should grant rehearing on this matter and modify its Order on this issue.

IV. CONCLUSION

To protect customers and allow them to receive the rate reductions the Ohio Supreme Court ordered, the PUCO should grant rehearing and abrogate or modify its Finding and Order.

[7] Finding and Order at ¶11.

[8] Id. at ¶14.

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 26th day of September 2016.

/s/ Maureen Willis
Maureen Willis
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January 13, 2017

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

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]

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[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

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[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.

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[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).

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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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