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. 16-395-EL-SSO**
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	**)** **)** **)**	**Case No. 16-396-EL-ATA**
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4904.13	**)** **)** **)** **)** **)**	**Case No. 16-397-EL-AAM**

REPLY IN SUPPORT OF MOTION TO REOPEN PROCEEDING
BY
OHIO ENVIRONMENTAL COUNCIL, SIERRA CLUB,
ENVIRONMENTAL LAW & POLICY CENTER, AND
ENVIRONMENTAL DEFENSE FUND

I. INTRODUCTION

The Conservation Groups' Motion to Reopen this proceeding presents the Commission with an opportunity to protect customers from risks associated with FirstEnergy Solutions' ("FES's") bankruptcy, while also considering newly discovered facts that bear on the Commission's stated rationale for approving the Reconciliation Rider. At a minimum, the Commission should reopen the record to consider these new risks and to revise its approval of the Reconciliation Rider to include conditions that prohibit DP&L from charging its customers for costs that should be borne by FES or the Ohio Valley Electric Corporation ("OVEC"). But the Conservation Groups also ask that the Commission consider newly discovered facts that tend to show that its approval of the Reconciliation Rider is no longer reasonable now that OVEC itself and an OVEC co-

owner have represented in federal venues that the OVEC contract is an above-market contract, which as such cannot provide any beneficial hedge for DP&L's customers. In addition, DP&L's claim that it is mere "speculation" that the bankruptcy court might allow FES to reject the Inter-Company Power Agreement ("ICPA") is suspect because that court has ordered that briefing on the OVEC rejection motion be concluded by May 31, 2018, and appears set to decide the issue soon thereafter.

Further, the Commission should not credit DP&L's claim that it lacks authority to consider new evidence pursuant to a valid motion to reopen the record while it is considering timely applications for rehearing. Last, as explained below, DP&L is wrong that hearsay rules are relevant to the Commission's consideration of our motion to re-open this proceeding.

II. ARGUMENT

A. The Commission Has Authority to Reopen the Record in This Proceeding Under Ohio Administrative Code 4901-1-34(A).

DP&L's primary argument against reopening the record in this proceeding is that the Commission lacks authority to do so under Ohio Admin. Code 4901-1-34(A) because the initial Opinion and Order purportedly operates as a "final order" under that rule.[1] According to the Company, the Conservation Groups' Motion to Reopen is effectively an untimely application for rehearing precluded by R.C. 4903.10. However, that argument ignores the fact that the Commission *is* currently considering timely filed applications for rehearing—including several challenging the Commission's approval of the

[1] DP&L Memo Contra at 3-5.

Reconciliation Rider.[2] Thus, the initial Opinion and Order is not in fact final with respect to the Reconciliation Rider, since the Commission has the authority to revisit the merits of that rider—including the taking of "additional evidence"—as part of the statutory rehearing process under R.C. 4903.10.

The Commission has itself recently relied on its broad authority to revisit any issues raised on rehearing when it reopened the record in Case No. 14-1297-EL-SSO, FirstEnergy's Electric Security Plan case. In that proceeding, the Commission's initial Opinion and Order approving cost recovery by FirstEnergy for power purchase agreements with affiliate-owned coal and nuclear units was effectively superseded by a subsequent Federal Energy Regulatory Commission ("FERC") order requiring those agreements to undergo scrutiny as affiliate contracts with captive distribution customers. The Commission subsequently reopened the record on rehearing to consider entirely new proposals from FirstEnergy and Commission Staff that did not directly rely on such affiliate contracts. In doing so, the Commission expressly rejected the idea that R.C. 4903.10 constrains its authority to take new evidence and consider new issues on rehearing. In fact, the Commission explicitly stated that "R.C. 4903.10 specifically contemplates that the Commission may reopen the record to take additional evidence,"[3] and noted that the Supreme Court of Ohio has recognized that "under R.C. 4903.10(B), if

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[2] Entry on Rehearing (Dec. 6, 2017); *see also, e.g.*, Application for Rehearing by the Office of the Ohio Consumers' Counsel (Nov. 20, 2017) at 5-6; Application for Rehearing by the Ohio Manufacturers' Association Energy Group (Nov. 20, 2017) at 12-15.

[3] Third Entry on Rehearing (July 6, 2016) at 11.

the commission determines upon rehearing that its 'original order or any part thereof is *in any respect* unjust or [sic] unwarranted, *or should be changed*,' [the Commission] can abrogate or modify the order."[4] Ultimately, the Commission approved an alternative proposal by Commission Staff that had not been raised in any rehearing application, based on evidence presented solely in a proceeding to take new evidence on rehearing. Adopting DP&L's cramped reading of Ohio Admin. Code 4901-1-34(A) would inevitably constrain the Commission's flexibility to thus address new events and circumstances relevant to issues properly raised on rehearing, as permitted by R.C. 4903.10.

Moreover, the Commission's broad authority to take new evidence on rehearing is in fact consistent with R.C. 2505.02, the provision defining "final orders" that are appealable to Ohio courts cited by DP&L as the basis for the Commission's decision in *In the Matter of the Application of Verizon North Inc.*, Case No. 08-989-TP-BLS. The Ohio Supreme Court has expressly stated that "a commission order is *not final and appealable* where the matter is still pending before the commission on rehearing," since "[t]o hold otherwise would be inconsistent with this court's repeatedly pronounced disfavor of piecemeal appeals." *Toledo Edison Co. v. PUCO*, 5 Ohio St. 3d 95, 95, 449 N.E.2d 428, 428 (1983) (emphasis added). Similarly in *City of Ashtabula v. PUCO*, 139

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[4] *In re Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 856 N.E.2d 213, 2006-Ohio-5789 at ¶15 ("CG&E Case"); *cited* in Third Entry on Rehearing (July 6, 2016) at ¶ 29. *See also* Fifth Entry on Rehearing (Oct. 12, 2016) at ¶ 38 (reiterating its recognition that in the CG&E Case the Supreme Court of Ohio recognized the Commission's discretion to decide whether a subsequent hearing is necessary to take additional evidence).

Ohio St. 213, 215, 39 N.E.2d 144, 145 (1942), the Court explained that an order still pending reconsideration should not be considered final because the Commission's rehearing order might address the parties' complaints and render appeal unnecessary. If an order is not final for purposes of appeal under R.C. 2505.02, the Commission likewise should not consider it final for purposes of precluding reopening of the record under Ohio Admin. Code 4901-1-34(A). Otherwise, if DP&L concedes and the Commission rules that the initial Opinion and Order is in fact a "final order" under R.C. 2505.02, then the next logical step is for parties to pursue appeal before the Supreme Court regardless of the status of any pending rehearing applications. If a party is not yet permitted to appeal an order of the Commission under R.C. 2505.02 because it is not final for purposes of appeal, then surely that party should not be precluded from continuing to pursue arguments about newly discovered risks and facts that bear on the core elements of the Commission's order.

Furthermore, DP&L cites only a single case in its Memorandum in Opposition as a basis for applying R.C. 2505.02 in the context of a motion to reopen under Ohio Admin. Code 4901-1-34(A), *In the Matter of the Application of Verizon North Inc.*, Case No. 08-989-TP-BLS. DP&L Memo Contra at 3. However, that decision notes that both parties "rely upon" R.C. 2505.02 as determinative of the meaning of "final order."[5] Accordingly, the Commission never expressly ruled on the question of whether it is appropriate to apply the definition of "final order" in R.C. 2505.02 in determining

[5] *In the Matter of the Application of Verizon North Inc.*, Case No. 08-989-TP-BLS, 2009 Ohio PUC LEXIS 388, at *26 (Entry on Rehearing, June 3, 2009).

whether there is a basis to reopen a proceeding for new evidence under Ohio Admin. Code 4901-1-34(A). We submit that, to the extent the Commission has flexibility to interpret the term "final order" in accordance with its authority to take new evidence on rehearing under R.C. 4903.10, the Commission should recognize its own power that allows it to consider new risks and facts that bear on customer costs and benefits. For the Commission to blind itself to such new evidence while the matter is still before it, as DP&L suggests, serves no public policy purpose.

B. Conservation Groups Have Demonstrated That "Good Cause" Exists to Reopen this Proceeding.

In suggesting that "good cause" does not exist to reopen this proceeding, DP&L largely ignores one of the two reasons that the Conservation Group seek to reopen this proceeding—to present risks associated with FES's bankruptcy to the Commission—and argues instead that the specific newly discovered facts that we seek to present to the Commission are "simply hearsay that would not be admissible in DP&L's ESP."[6] However, DP&L misconstrued our core argument and is incorrect about the application of evidentiary rules to the Conservation Groups' motion.

The core reason that the Conservation Groups seek to reopen this proceeding is to present the risks related to FES's bankruptcy that exist *today* for DP&L's customers under the Reconciliation Rider. As explained in our Motion to Reopen the Proceeding

[6] DP&L also references the regulatory language that provides that reopening a proceeding is appropriate only when evidence "could not, with reasonable diligence, have been presented earlier in the proceeding." DP&L Memo Contra at 5 (citing Ohio Admin. Code 4901-1-34(A)). To its credit, DP&L does not press this argument, *see id*. at 5-6, as there can be no serious contention that the Conservation Groups could have presented risks and facts related to FES's bankruptcy *before* FES filed for bankruptcy.

(*see* pages 7-8), OVEC itself has stated that FES's exit from the ICPA presents risks for the remaining OVEC owners and that costs could increase "in the amount of hundreds of millions of dollars over the remaining life of the contract."[7] This risk of higher costs exists today, and has become more likely since the Conservation Groups filed our Motion to Reopen because the bankruptcy court has ordered that briefing on the issue be concluded by May 31, 2018 and appears poised to decide the issue soon thereafter.

If, after the conclusion of the reopened evidentiary hearing in this proceeding, the Commission continues to believe that the Reconciliation Rider is in customers' interests, then, at a minimum, it should include conditions in a revised order that preclude DP&L's customers from having to pay FES's share of OVEC losses either directly, through increased debt payments, or otherwise. DP&L's customers need these protections from the risks that exist *today*, regardless of how long litigation over FES's exit from OVEC may last.

In such a reopened proceeding, the Conservation Groups also intend to present newly discovered facts that confirm that the OVEC contract is an above-market contract that does not provide any beneficial hedge for customers. Contrary to DP&L's objection, all of the newly discovered facts referenced in our Motion to Reopen (page 8-13) would be admissible in a reopened DP&L Reconciliation Rider proceeding. With respect to the fact that FES has filed for bankruptcy (which DP&L does not dispute), the Commission could take administrative notice of filings before the federal bankruptcy court, or the Conservation Groups or another party could present a witness with personal knowledge.

[7] Motion at 7-8, 10-11 (quoting OVEC statements to FERC).

The Commission could also consider taking administrative notice of newly discovered forecasts from OVEC and FES regarding expected losses on the ICPA, as those forecasts were filed with judicial and administrative bodies. But the Conservation Groups do not intend to seek administrative notice for these newly discovered forecasts. Instead, the Conservation Groups, or some subset of us, would likely ask the Commission to issue subpoenas to FES, OVEC, and/or Judah Rose, assuming none of those entities agreed to offer voluntary testimony or voluntary stipulations of facts. Witnesses for both OVEC and FES have appeared before the Commission in recent proceedings, in some instances voluntarily, and in others by compulsion. Judah Rose has testified in Columbus many times and can be compelled to do so again. An OVEC witness was compelled to testify in Duke's ESP II proceeding, and can be compelled to do so again. While we hope that a voluntary method could be used for presenting these facts, the Conservation Groups expect that non-voluntary means may be necessary. As such, DP&L's complaints about the admissibility of these facts are premature and ignore the toolkit of fact-gathering options available to the Commission and to litigants before it.

III. CONCLUSION

For the foregoing reasons and those proffered in our Motion to Reopen, the Conservation Groups respectfully ask that the Commission grant the Motion to Reopen.

Dated: May 18, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Reply in Support of Motion to Reopen Proceeding by Ohio Environmental Council, Sierra Club, Environmental Law & Policy Center, and Environmental Defense Fund has been served upon the following parties via electronic mail on May 18, 2018.

/s/ Tony Mendoza
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