

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the Dayton	)	
Power and Light Company for Approval of its	)	Case No. 16-0395-EL-SSO
Electric Security Plan.	)	

In the Matter of the Application of the Dayton	)	
Power and Light Company for Approval of	)	Case No. 16-0396-EL-ATA
Revised Tariffs.	)	

In the Matter of the Application of the Dayton	)	
Power and Light Company for Approval of	)	Case No. 16-0397-EL-AAM
Certain Accounting Authority Pursuant to Ohio	)	
Rev. Code § 4905.13.	)	

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

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October 19, 2018

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The Office of the Ohio Consumers' Counsel ("OCC") files this Third Application for Rehearing to protect consumers from paying their utility hundreds of millions of dollars for charges such as a Distribution Modernization Rider ("DMR") that doesn't require any money to be spent on distribution and instead requires customers to subsidize coal-fired power plants.<sup>1</sup> In its Third Entry on Rehearing of September 19, 2018 ("Third Entry"), the Public Utilities Commission of Ohio ("PUCO") made unlawful and unreasonable decisions that will enable Dayton Power & Light Company ("DP&L") to continue unlawful and unreasonable customer charges, including the so-called Distribution Modernization Rider.

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<sup>1</sup> See R.C. 4903.10 and O.A.C. 4901-1-35.

The Third Entry harms customers and is unreasonable and unlawful in the following respects:

**Assignment of Error 1: The PUCO's Third Entry on Rehearing is unreasonable and unlawful because, when comparing the utility's electric security plan to a market rate offer (R.C. 4928.143(C)(1)), it improperly relied on R.C. 4905.31. That statute does not create independent authority for an electric utility to unilaterally (upon PUCO approval) charge consumers for advanced metering in an electric security plan.**

**Assignment of Error 2: The PUCO's Third Entry on Rehearing is unreasonable and unlawful because its misinterpretation of R.C. 4905.31 led to a misapplication of the ESP v. MRO test.**

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 its Third Entry as requested by OCC.

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

In the Third Entry, the PUCO (unreasonably and unlawfully) denied OCC's assignments of error. But in doing so, it made new findings that constitute additional errors. To protect consumers, the errors in the Third Entry need corrected. The PUCO in its ESP v. MRO analysis under R.C. 4928.143(C)(1) improperly interpreted R.C. 4905.31. The statute does not create independent authority for an electric utility to unilaterally (upon PUCO approval) charge consumers for advanced metering. And as a result of the PUCO's error in misinterpreting R.C. 4905.31, and its reliance on that misinterpretation, the PUCO's finding that DP&L's electric security plan passed the ESP v. MRO test because "under a hypothetical MRO, DP&L could recover the costs of deploying advanced metering infrastructure pursuant to R.C. 4905.31" is wrong.

The PUCO has an opportunity to stand between the public interest and DP&L charging consumers hundreds of millions of dollars to subsidize, via government regulation, old, inefficient, coal-fired power plants that cannot compete in a market

deregulated by the Ohio General Assembly over 16 years ago. It should ensure that its Third Entry is reasonable and lawful. Unfortunately for consumers, it is not. To protect consumers and the public interest, it should reconsider its Third Entry as described herein. Upon reconsideration of any one of the issues raised by OCC herein, the PUCO should find that the settlement should be rejected.

## **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 entered an appearance and filed testimony regarding DP&L’s Application and the Settlement. It participated in the evidentiary hearing on the settlement.

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.” Additionally, 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 Third Entry and modifying other portions are met here. The PUCO should grant and hold rehearing on the matters specified in this Third Application for Rehearing, and subsequently abrogate or modify its Opinion and Order.

### III. RECOMMENDATIONS

**Assignment of Error 1: The PUCO’s Third Entry on Rehearing is unreasonable and unlawful because, when comparing the utility’s electric security plan to a market rate offer (R.C. 4928.143(C)(1)), it improperly relied on R.C. 4905.31. That statute does not create independent authority for an electric utility to unilaterally (upon PUCO approval) charge consumers for advanced metering in an electric security plan.**

OCC explained that the PUCO’s evaluation of DP&L’s proposed electric security plan under the ESP v. MRO test in R.C. 4928.143(C)(1) was unreasonable and unlawful.<sup>2</sup> Because DP&L failed to present evidence regarding the cost of several proposed riders, including the Smart Grid Rider, the PUCO could not possibly have considered “pricing and all other terms and conditions” of the plan as required by the statute.<sup>3</sup>

As it relates to the Smart Grid Rider and its import under the ESP v. MRO test, the PUCO asserted that “R.C. 4905.31 specifically authorizes an electric light company to file a mechanism to recover the costs incurred in conjunction with any acquisition and deployment of advanced metering.”<sup>4</sup> It thus concluded that “under a hypothetical MRO, DP&L could recover the costs of deploying advanced metering infrastructure pursuant to

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<sup>2</sup> See, e.g., OCC’s Initial Brief at 56-69.

<sup>3</sup> See, e.g., Third Entry at 35.

<sup>4</sup> *Id.* at 37.

R.C. 4905.31, . . . for purposes of the ESP versus MRO test; it [the costs of advanced metering] is a wash.”<sup>5</sup>

But R.C. 4905.31 does not create independent authority for an electric utility to unilaterally (upon PUCO approval) charge consumers for advanced metering. It permits certain “reasonable arrangements” *between* parties. In relevant part, it provides that a public utility may enter into a “*reasonable arrangement with another public utility or with one or more of its customers, consumers, or employees* providing for . . . [a]ny other financial device that may be practicable or advantageous to the *parties* interested . . . [which] may include . . . any acquisition and deployment of advanced metering, . . .”<sup>6</sup>

Contrary to the PUCO’s Third Entry, a utility could not, by itself, charge customers for advanced metering on the authority of R.C. 4905.31. There must be two parties to a unique arrangement under the statute. The PUCO’s misinterpretation of R.C. 4905.31 sets a dangerous precedent that harms consumers by allowing electric utilities to rely on the statute as an independent source of authority to unilaterally (upon PUCO approval) charge consumers for advanced metering.

The PUCO should grant rehearing on Assignment of Error No. 1.

**Assignment of Error 2: The PUCO’s Third Entry on Rehearing is unreasonable and unlawful because its misinterpretation of R.C. 4905.31 led to a misapplication of the ESP v. MRO test.**

As just explained, the PUCO’s decision that DP&L’s proposed electric security plan passed the ESP v. MRO test in R.C. 4928.143(C)(1) was based, in part, on a misinterpretation of R.C. 4905.31. Accordingly, the PUCO’s MRO v. ESP analysis was, inherently, unreasonable and unlawful.

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<sup>5</sup> *Id.* at 37.

<sup>6</sup> *See* R.C. 4905.31 (italics added).

The PUCO should grant rehearing on Assignment of Error No. 2.

#### **IV. CONCLUSION**

The PUCO should grant rehearing on OCC's above claims of error and modify or abrogate its Opinion and Order because it will harm customers. Granting rehearing as requested by OCC is necessary to ensure that DP&L customers are not subject to unreasonable and unjust charges. Without rehearing, Ohio consumers will pay electric security plan rates that are excessive and relate to a whole host of unreasonable and unlawful charges. The unreasonable and unlawful charges include, but are not limited to, a government ordered subsidy of deregulated, old, inefficient, coal-fired power plants by captive monopoly customers that under the law should be competing in a competitive market.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Third Application for Rehearing was served on the persons stated below via electronic transmission, this 19<sup>th</sup> day of October 2018.

/s/ William J. Michael

William J. Michael  
Assistant Consumers' Counsel

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Summary: App for Rehearing Third Application for Rehearing by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Michael, William Mr.