

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the	)	
Dayton Power and Light Company for	)	Case No. 16-0395-EL-SSO
Approval of its Electric Security Plan.	)	
In the Matter of the Application of the	)	Case No. 16-0396-EL-ATA
Dayton Power and Light Company for	)	
Approval of Revised Tariffs.	)	
In the Matter of the Application of the	)	Case No. 16-0397-EL-AAM
Dayton Power and Light Company for	)	
Approval of Certain Accounting	)	
Authority Pursuant to Ohio Rev. Code §	)	
4905.13.	)	

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

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Bruce Weston (0016973)  
Ohio Consumers' Counsel

William J. Michael (0070921)  
Counsel of Record  
Ambrosia E. Logsdon (0096598)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
65 East State Street, 7th Floor  
Columbus, Ohio 43215  
Telephone: [Michael] (614) 466-1291  
Telephone: [Logsdon] (614) 466-1292  
[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)  
[ambrosia.logsdon@occ.ohio.gov](mailto:ambrosia.logsdon@occ.ohio.gov)  
(willing to accept service by e-mail)

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Since November 1, 2017, DP&L has taken approximately \$218.75 million in subsidies from customers in the Dayton area – where there is financial distress and a poverty level of 35% -- through its so-called Distribution Modernization Rider (“Rider DMR”). But now the PUCO has ordered that Rider DMR is an unlawful charge that customers should not be paying.<sup>1</sup> This vast sum of money was taken from consumers by DP&L with no refunds to customers.

After the PUCO’s order, residential customers should have seen their monthly bills reduced because, all else being equal, they did not have to pay the \$9.40 monthly distribution modernization charge. But instead of reducing customers’ bills by the entire \$9.40 per month, DP&L took a different path. DP&L filed a notice to withdraw and

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<sup>1</sup> See Supplemental Opinion and Order (November 21, 2019).

terminate its three-year old electric security plan application and implement a plan that initially ended over seven years ago. Through DP&L's maneuvering customers will not be getting the entire reduction in rates.

The PUCO unreasonably and unlawfully held that DP&L has an absolute right to withdraw its application. The PUCO's ruling thwarted the full rate reduction customers should have received. But the PUCO's ruling was wrong and violated R.C. 4903.13 and R.C. 4928.143(C)(2)(a).

And in its ruling, the PUCO did not even address multiple arguments made by OCC (and others) that DP&L could not withdraw its application.<sup>2</sup> That violates R.C. 4903.09 and controlling precedent from the Supreme Court of Ohio ("Court").<sup>3</sup>

The PUCO's Finding and Order allowing DP&L to withdraw its electric security plan harms customers and is unreasonable and unlawful in the following respects:

**ASSIGNMENT OF ERROR 1: The PUCO's Finding and Order is unreasonable and unlawful under R.C. 4903.13 and R.C. 4928.143(C)(2)(a), thereby harming consumers, because DP&L does not have an absolute statutory right to withdraw its electric security plan application.**

**ASSIGNMENT OF ERROR 2: The PUCO's Finding and Order is unreasonable and unlawful under R.C. 4903.09 and Ohio Supreme Court precedent, thereby harming consumers, because it approved DP&L's Notice of Withdrawal of Application without addressing all arguments against the Notice of Withdrawal.**

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<sup>2</sup> See Memorandum Contra DP&L's Motions to Withdraw its Application and Implement Previously Authorized Rates (to Increase Charges to Consumers) by The Office of the Ohio Consumers' Counsel, The Ohio Manufacturers' Association Energy Group, The Kroger Company, and IGS Energy (December 4, 2019) ("Memorandum Contra"). The parties that filed the Memorandum Contra are referred to herein as the "Consumer Parties."

<sup>3</sup> See, e.g., *Motor Service Co. v. PUCO*, 39 Ohio St.2d 5 (1974); *Ohio Consumers' Counsel v. PUCO*, 111 Ohio St.3d 300 (2006).

The reasons for this Application for Rehearing are set forth in the accompanying memorandum in support. The PUCO should grant rehearing and abrogate its Finding and Order as requested by OCC.

Respectfully submitted,

Bruce Weston (0016973)  
Ohio Consumers' Counsel

/s/ William J. Michael  
William J. Michael (0070921)  
Counsel of Record  
Ambrosia E. Logsdon (0096598)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
65 East State Street, 7th Floor  
Columbus, Ohio 43215  
Telephone: [Michael] (614) 466-1291  
Telephone: [Logsdon] (614) 466-1292  
[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)  
[ambrosia.logsdon@occ.ohio.gov](mailto:ambrosia.logsdon@occ.ohio.gov)  
(willing to accept service by e-mail)

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

500,000 customers of DP&L should be receiving a long overdue rate decrease that reflects a full \$9.40 monthly reduction for the ending of the distribution modernization charge as a result of a Court decision overturning PUCO-authorized subsidies. But instead of seeing that reduction, customers' bills will only be partially reduced because the PUCO allowed DP&L to go back to ESP I rates.

The PUCO found that DP&L had an absolute statutory right to withdraw its electric security plan application and return to its first electric security plan. But as demonstrated herein, neither DP&L, nor any electric utility, has an absolute right to withdraw an electric security plan application. The PUCO violated R.C. 4903.13 and R.C. 4928.143(C)(2)(a) in finding that it did. Further, when the PUCO failed to address

the multiple arguments made by parties against the withdrawal, PUCO violated R.C. 4903.09 and controlling precedent from the Court.<sup>4</sup>

To protect consumers, the PUCO should grant rehearing and abrogate its Finding and Order as requested by OCC.

## **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, which was granted. OCC also filed testimony regarding the application, the Settlement, and 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.” 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

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<sup>4</sup> See, e.g., *Motor Service Co. v. PUCO*, 39 Ohio St.2d 5 (1974); *Ohio Consumers’ Counsel v. PUCO*, 111 Ohio St.3d 300 (2006).

changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.”

The statutory standard for abrogating some portions of the Finding and Order is met here. The PUCO should grant and hold rehearing on the matters specified in this Application, and subsequently abrogate or modify its Finding and Order. The PUCO’s ruling was unreasonable or unlawful as described below.

### **III. ERRORS**

**ASSIGNMENT OF ERROR 1: The PUCO’s Finding and Order is unreasonable and unlawful under R.C. 4903.13 and 4928.143(C)(2)(a), thereby harming consumers, because DP&L does not have an absolute statutory right to withdraw its electric security plan application.**

The PUCO held that “under R.C. 4928.143(C)(2)(a), DP&L has an absolute statutory right to withdraw its Application for ESP III, thereby terminating it, . . .”<sup>5</sup> The PUCO was wrong. DP&L does not have an absolute right to terminate its electric security plan application. It cannot withdraw its electric security plan where, as here, doing so circumvents the jurisdiction of the Ohio Supreme Court. And it cannot withdraw its electric security plan where, as here, doing so renders R.C. 4928.143(C)(2)(b) infeasible of execution.

In consumers’ interest, the PUCO should revisit its determination that there is an absolute statutory right for an electric utility to withdraw an electric security plan application. It should hold that there is no absolute right to withdraw an electric security plan application because, as explained below, that is not what the governing statutes

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<sup>5</sup> See Finding and Order (December 18, 2019) at 7.



allow (let alone require). And it should hold that DP&L cannot withdraw its third electric security plan application in response to an Ohio Supreme Court decision.

- 1. There is no absolute statutory right to withdraw an electric security plan application in response to a Supreme Court of Ohio decision. By allowing DP&L to do so, the PUCO violated R.C. 4903.13 and harmed consumers.**

Since November 1, 2017, DP&L has taken approximately \$218.75 million in subsidies from customers in the Dayton area – where there is financial distress and a poverty level of 35% -- through Rider DMR. After the Supreme Court of Ohio invalidated the same rider that the PUCO approved for FirstEnergy, the PUCO ordered DP&L to stop charging customers for Rider DMR because it is an unlawful charge that customers should not be paying.<sup>6</sup>

But in response to the PUCO's order, prompted and necessitated by the Court's decision in *Ohio Edison*, DP&L filed a plan that undermines the Supreme Court's ruling in *Ohio Edison*. DP&L sought to withdraw and terminate its over two-year old electric security plan (under R.C. 4928.143(C)(2)(b)). DP&L proposed that the PUCO allow it to put new rates into effect that replace the unlawful Rider DMR with other unlawful charges, including an above-market transition charge, the Rate Stabilization Charge. Unfortunately for consumers, the PUCO let DP&L withdraw and terminate its electric security plan.

The PUCO's decision is unreasonable and unlawful because it circumvents the jurisdiction of the Ohio Supreme Court to reverse, vacate, or modify a final order made by the PUCO. That jurisdiction is vested through R.C. 4903.13.<sup>7</sup> The PUCO is strictly

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<sup>6</sup> See Supplemental Opinion and Order (November 21, 2019) at ¶¶ 88-110.

<sup>7</sup> See *Cleveland Electric Illuminating Co. v. Pub. Util. Com.*, 46 Ohio St.2d 105 (1976).

obligated to follow statutory demands set forth in the Revised Code and Supreme Court mandates.<sup>8</sup> The PUCO cannot subordinate a decision of the Ohio Supreme Court to its own will. Yet below, it did so, when it worked around the Court's decision in *Ohio Edison* by depriving customers of the full rate reduction they are otherwise owed.

The Court's decision in *Ohio Edison*, invalidating FirstEnergy's equivalent Rider DMR, meant that DP&L's Rider DMR was also unlawful. On the authority of *Ohio Edison*, the PUCO held that DP&L's Rider DMR was unlawful and that it should be removed from DP&L's tariffs.<sup>9</sup> That means that customers would no longer have to pay the \$9.40 monthly Rider DMR charge over the remaining period that DP&L's third electric security plan rates are in effect.

And while the \$9.40 Rider DMR charge was removed from customers' bills, the PUCO allowed DP&L to withdraw its third electric security plan and charge customers replacement rates that included other charges (including the Rate Stabilization Charge) that deprived customers of the full rate reduction they were owed. Instead of getting a full \$9.40 per month reduction, customers will only see a fraction of the reduction, with DP&L collecting other charges that eat up the expected rate reduction.

Under the PUCO's approach, customers were denied the protection the Court ordered for customers in *Ohio Edison*. Rather than removing Rider DMR from DP&L's tariffs and allowing consumers to see full bill reductions (as required by *Ohio Edison*), the PUCO simply replaced all the rates and denied customers the full rate reduction they were entitled to. The PUCO brushed aside the Court's decision, violating R.C. 4903.13.

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<sup>8</sup> See *The Frankelite Company v. Lindley*, 28 Ohio St.3d 29 (1986) (citation omitted).

<sup>9</sup> See Supplemental Opinion and Order (November 21, 2019) at ¶¶ 88-110.

In consumers' interest, the PUCO should revisit its determination to approve DP&L's Notice of Withdrawal. Upon doing so, it should reject the Notice of Withdrawal.

**2. Allowing DP&L to withdraw its third electric security plan nearly three years into the plan conflicts with R.C. 4928.143(C)(2)(b), is unreasonable, and harms consumers.**

DP&L believes it has a right to implement what it interprets as prior rates (rates that would deny customers the full \$9.40 monthly reduction) because the PUCO modified and approved the settlement in this case based on *Ohio Edison*. In this latest twist on using Senate Bill 221 (Ohio's 2008 energy law) to cost Ohio consumers their hard-earned money, DP&L claimed that it could withdraw and terminate its electric security plan application filed in 2016, now over two years—almost three years-- into that plan. DP&L advanced this argument despite having accepted and enjoyed the financial benefits of the 2016 plan for almost three years. During that time DP&L charged Dayton-area consumers more than \$218.75 million just for the unlawful Rider DMR (among other charges).

Unfortunately for consumers, the PUCO bought into DP&L's anti-consumer assertions. It was wrong to do so because R.C. 4928.143(C)(2)(b) does not permit DP&L to withdraw its application at any time. R.C. 4928.143(C)(2)(b) requires that the provisions, terms, and conditions of a utility's most recent standard service offer must be continued after withdrawing an electric security plan in response to a public utilities commission modification. That cannot be done here.

All statutes that relate to the same general subject matter must be read *in pari materia*.<sup>10</sup> The statutes comprising Title 49 are no different.<sup>11</sup> In reading statutes *in pari materia*, the statutes must be reasonably construed together so as to give the proper force and effect to each and every one.<sup>12</sup> The object is to ascertain and carry into effect the General Assembly's intention. It must be inferred that a set of statutes relating to one subject are governed by one spirit and policy and are intended to be consistent and harmonious.<sup>13</sup>

R.C. 4928.143(C)(2)(a) and (b) are *in pari materia*, addressing the same subject matter: the consequences of the PUCO modifying an electric security plan. Section (a) of the statute defines the conditions under which a utility may withdraw its electric security plan, limiting those to a "commission" modification. Subsection (b) addresses what happens if the utility terminates its electric security plan. Applying the principles of *in pari materia* to the subsections of the statute, the PUCO's Finding and Order was unreasonable and unlawful. This is because under the PUCO's interpretation, R.C. 4928.143(C)(2)(b) is rendered infeasible of execution.

Although R.C. 4928.143(C)(2)(a) contains no express limitation on the timing of withdrawal, the next subsection of the statute, (C)(2)(b), limits in practice a utility's opportunity to withdraw. Under subsection (C)(2)(b), if a utility withdraws its electric security plan application, it must return to prior rates: "the commission shall issue such

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<sup>10</sup> See *Maxfield v. Brooks* 110 Ohio St. 566 (1924); *State ex rel. Bigelow v. Butterfield*, 132 Ohio St. 5 (1936).

<sup>11</sup> See *Consumers' Counsel v. Pub. Util. Comm.*, 6 Ohio St.3d 405, 410 (1983); *Consumers' Counsel v. Pub. Util. Comm.*, 6 Ohio St.3d 412, 415 (1983).

<sup>12</sup> *Maxfield v. Brooks*.

<sup>13</sup> *Hays v. Lewis*, 28 Ohio St. 326 (1876), citing *Hirn v. The State*, 1 Ohio St. 15 (1852).

order, as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer . . . ."

In this case, the return to prior rates is impossible. For DP&L that would mean (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.<sup>14</sup> But DP&L has procured power for standard service through 2022 by way of auctions held much earlier. Those auctions cannot be undone.<sup>15</sup> And DP&L in its tariff filing to implement the proposed rates has not proposed undoing the auctions to get back to the most recent standard service offer.<sup>16</sup> Thus, even DP&L understands that its argument under the statute is flawed.

The language in R.C. 4928.143(C)(2)(b) is not optional. The word "shall" is to be construed as mandatory, unless clear and unequivocal legislative intent connotes that it receives a construction other than its ordinary usage.<sup>17</sup> With no evidence that the legislative intent was for a different construction, the PUCO must construe "shall" as mandatory. The General Assembly used the word "shall" leaving the PUCO no choice but to return to "the utility's most recent standard service offer."

Returning to the "utility's most recent standard service offer" cannot legally or practically be done after such a long period of time – nearly three years and going back to

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<sup>14</sup> See *In re the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Pub. Util. Comm. No. 08-1094-EL-SSO, Opinion and Order at 4 (June 24, 2009).

<sup>15</sup> See Notice of Filing Proposed Tariffs at 2 (DP&L states that it "will honor existing contracts with winning competitive bid suppliers through the end of their term (May 2021) and maintain current PJM obligations for all suppliers.").

<sup>16</sup> See *id.*

<sup>17</sup> *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102,108 (1971); see also *Ohio Department of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St.3d 532, 535 (1992).

rates that were implemented in 2009, almost ten years ago. If the PUCO were right, then the General Assembly enacted a law (R.C. 4928.143(C)(2)(b)) that is not feasible of being executed. This is contrary to the Ohio rules of statutory construction. Under R.C. 1.47(D), in enacting a statute, inter alia, a result feasible of execution is intended. The PUCO disregarded that rule, resulting in an unreasonable interpretation of R.C. 4928.143(C)(2)(a) -- an interpretation that allows a utility to withdraw its application after almost three years of charging customers unlawful rates.

The only way the most recent standard service rates can continue is if the utility withdraws within a relatively short period of time after implementing its electric security 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. The PUCO should have rejected DP&L's Notice of Withdrawal, which required a strained interpretation of the law rendering R.C.4928.143(C)(2)(b) infeasible to execute.<sup>18</sup> It should now do so on rehearing.

**ASSIGNMENT OF ERROR 2: The PUCO's Finding and Order is unreasonable and unlawful under R.C. 4903.09 and Ohio Supreme Court precedent, thereby harming consumers, because it approved DP&L's Notice of Withdrawal of Application without addressing all arguments against the Notice of Withdrawal.**

R.C. 4903.09 requires the PUCO, in all contested cases, to "file, with the records of such cases, findings of fact and a written opinion setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." To meet the requirements of this statute, the PUCO's order must show, in sufficient detail, the facts in the record on

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<sup>18</sup> See R.C. 1.47(D), stating that in enacting a statute, inter alia, a result feasible of execution is intended.

which the order is based and the reasoning followed in reaching the conclusion.<sup>19</sup> As the Supreme Court of Ohio has explained:

The General Assembly never intended this court to perform the same functions and duties as the Public Utilities Commission but it did intend that this court should determine whether the facts found by the commission lawfully and reasonably justified the conclusions reached by the commission in its order and whether the evidence presented to the commission as found in the record supported the essential findings of fact so made by the commission.<sup>20</sup>

It has also explained that the PUCO must address all arguments raised by parties to fulfill its obligations under R.C. 4903.09.<sup>21</sup> The PUCO failed to meet its obligation to address all arguments in its Finding and Order approving DP&L's Notice of Withdrawal. This is particularly bad for consumers because, although the PUCO found that DP&L had a statutory right to withdraw its application, it did not address the many statutory arguments made by parties demonstrating that DP&L did *not* have the right to withdraw its application.

In their briefing, the Consumer Parties explained that DP&L's anti-consumer proposal to revert back to its first electric security plan violates the plain language and intent of R.C. 4928.143(C)(2)(b). The statute requires the PUCO to "continue" the most recent electric security plan, which is impossible when the most recent plan has already

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<sup>19</sup> See, e.g., *MCI Telecommunications Corp. v. PUCO*, 32 Ohio St.3d 306 (1987).

<sup>20</sup> *Commercial Motor Freight, Inc. v. PUCO*, 156 Ohio St. 360, 364 (1951); see also *Motor Service Co. v. PUCO*, 39 Ohio St.2d 5 (1974); *Ohio Consumers' Counsel v. PUCO*, 111 Ohio St.3d 300 (2006).

<sup>21</sup> See *In re Comm'n Review of the Capacity Charges of Ohio Power Co.*, 147 Ohio St. 3d 59 (2016).

expired.<sup>22</sup> The PUCO did not address this argument.<sup>23</sup> The Consumer Parties explained that DP&L's proposal to circumvent consumer protection by reverting to its first electric security plan violates the plain language of R.C. 4928.143(C)(2)(b), which requires only that the PUCO continue the utility's "most recent standard service offer." The statute does not require the PUCO to continue DP&L's entire previous electric security plan (in this case, DP&L's first electric security plan).<sup>24</sup> The PUCO did not address this argument.<sup>25</sup> The Consumer Parties explained that DP&L sought to defy the PUCO's decision in its Supplemental Opinion and Order, and the Supreme Court of Ohio's decision in *Ohio Edison*, by depriving consumers of the full rate reduction they should have received.<sup>26</sup> The PUCO did not address this argument.<sup>27</sup> The Consumer Parties explained that DP&L should not be permitted the extraordinary result of depriving consumers of the full rate reduction they are owed by withdrawing and terminating its

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<sup>22</sup> See Memorandum Contra DP&L's Motions to Withdraw its Application and Implement Previously Authorized Rates (to Increase Charges to Consumers) by The Office of the Ohio Consumers' Counsel, The Ohio Manufacturers' Association Energy Group, The Kroger Company, and IGS Energy (December 4, 2019) at 5-7.

<sup>23</sup> Finding and Order (December 18, 2019).

<sup>24</sup> See Memorandum Contra DP&L's Motions to Withdraw its Application and Implement Previously Authorized Rates (to Increase Charges to Consumers) by The Office of the Ohio Consumers' Counsel, The Ohio Manufacturers' Association Energy Group, The Kroger Company, and IGS Energy (December 4, 2019) at 7-9.

<sup>25</sup> Finding and Order (December 18, 2019).

<sup>26</sup> See Memorandum Contra DP&L's Motions to Withdraw its Application and Implement Previously Authorized Rates (to Increase Charges to Consumers) by The Office of the Ohio Consumers' Counsel, The Ohio Manufacturers' Association Energy Group, The Kroger Company, and IGS Energy (December 4, 2019) at 3-13.

<sup>27</sup> Finding and Order (December 18, 2019).



electric security plan application at this late time.<sup>28</sup> The PUCO did not address this argument.<sup>29</sup>

In consumers' interest, the PUCO should revisit its determination to approve DP&L's Notice of Withdrawal. It did not address many of the Consumer Parties' arguments against the Notice of Withdrawal, many of which were statutorily based. Under Ohio law, it must.

#### IV. CONCLUSION

To protect customers from unnecessary and unlawful charges, the PUCO should grant rehearing and abrogate its Finding and Order. This would safeguard that DP&L's charges to consumers would be fair, just, and reasonable.

Respectfully submitted,

Bruce Weston (0016973)  
Ohio Consumers' Counsel

/s/ William J. Michael

William J. Michael (0070921)  
Counsel of Record  
Ambrosia E. Logsdon (0096598)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

65 East State Street, 7th Floor  
Columbus, Ohio 43215  
Telephone: [Michael] (614) 466-1291  
Telephone: [Logsdon] (614) 466-1292  
[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)  
[ambrosia.logsdon@occ.ohio.gov](mailto:ambrosia.logsdon@occ.ohio.gov)  
(willing to accept service by e-mail)

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<sup>28</sup> See Memorandum Contra DP&L's Motions to Withdraw its Application and Implement Previously Authorized Rates (to Increase Charges to Consumers) by The Office of the Ohio Consumers' Counsel, The Ohio Manufacturers' Association Energy Group, The Kroger Company, and IGS Energy (December 4, 2019) at 10-12.

<sup>29</sup> Finding and Order (December 18, 2019).

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Application for Rehearing has been served upon the below-named persons via electronic transmission this 17th day of January 2020.

/s/ William J. Michael  
William J. Michael  
Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

### **SERVICE LIST**

<a href="mailto:Thomas.mcnamee@ohioattorneygeneral.gov">Thomas.mcnamee@ohioattorneygeneral.gov</a>	<a href="mailto:michael.schuler@aes.com">michael.schuler@aes.com</a>
<a href="mailto:dboehm@bkllawfirm.com">dboehm@bkllawfirm.com</a>	<a href="mailto:djieland@ficlaw.com">djieland@ficlaw.com</a>
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<a href="mailto:mpritchard@mwncmh.com">mpritchard@mwncmh.com</a>	<a href="mailto:evelyn.robinson@pjm.com">evelyn.robinson@pjm.com</a>
<a href="mailto:mjsettineri@vorys.com">mjsettineri@vorys.com</a>	<a href="mailto:schmidt@sppgrp.com">schmidt@sppgrp.com</a>
<a href="mailto:glpetrucci@vorys.com">glpetrucci@vorys.com</a>	<a href="mailto:rsahli@columbus.rr.com">rsahli@columbus.rr.com</a>
<a href="mailto:ibatikov@vorys.com">ibatikov@vorys.com</a>	<a href="mailto:tony.mendoza@sierraclub.org">tony.mendoza@sierraclub.org</a>
<a href="mailto:wasiack@vorys.com">wasiack@vorys.com</a>	<a href="mailto:kristin.henry@sierraclub.org">kristin.henry@sierraclub.org</a>
<a href="mailto:mleppla@theoec.org">mleppla@theoec.org</a>	<a href="mailto:mdortch@kravitzllc.com">mdortch@kravitzllc.com</a>
<a href="mailto:cmooney@ohiopartners.org">cmooney@ohiopartners.org</a>	<a href="mailto:rparsons@kravitzllc.com">rparsons@kravitzllc.com</a>
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<a href="mailto:elizabeth.watts@duke-energy.com">elizabeth.watts@duke-energy.com</a>	<a href="mailto:lhawrot@spilmanlaw.com">lhawrot@spilmanlaw.com</a>
<a href="mailto:jeanne.kingery@duke-energy.com">jeanne.kingery@duke-energy.com</a>	<a href="mailto:dwilliamson@spilmanlaw.com">dwilliamson@spilmanlaw.com</a>
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<a href="mailto:laurac@chappelleconsulting.net">laurac@chappelleconsulting.net</a>	<a href="mailto:rseiler@dickinsonwright.com">rseiler@dickinsonwright.com</a>
<a href="mailto:jdoll@djflawfirm.com">jdoll@djflawfirm.com</a>	<a href="mailto:cpirik@dickinsonwright.com">cpirik@dickinsonwright.com</a>
Attorney Examiners:	<a href="mailto:wvorys@dickinsonwright.com">wvorys@dickinsonwright.com</a>
<a href="mailto:gregory.price@puco.ohio.gov">gregory.price@puco.ohio.gov</a>	<a href="mailto:todonnell@dickinsonwright.com">todonnell@dickinsonwright.com</a>
<a href="mailto:patricia.schabo@puco.ohio.gov">patricia.schabo@puco.ohio.gov</a>	

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**Case No(s). 16-0395-EL-SSO, 16-0396-EL-ATA, 16-0397-EL-AAM**

Summary: App for Rehearing Application for Rehearing by The Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of Michael, William J.