**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of The Dayton Power and Light Company for Authority to Amend its Corporate Separation Plan. | )  )  )  ) | Case No. 13-2442-EL-UNC |

**APPLICATION FOR REHEARING**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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October 17, 2014

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**APPLICATION FOR REHEARING**

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**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Office of the Ohio Consumers’ Counsel (“OCC”) applies for rehearing of the September 17, 2014 Finding and Order (“Order”) issued by the Public Utilities Commission of Ohio (“Commission” or “PUCO”). This case involves the Dayton Power & Light Company’s (“DP&L” or “Utility”) Fourth Amended Corporate Separation Plan (“4th Amended Plan”). The plan includes revisions to account for a new affiliate services corporation (“AES US Services, LLC”) that serves 13 affiliates. This case matters to customers because consumers may be harmed if they are forced to pay for charges more properly allocated to affiliates under a utility’s corporate separation plan,

Through this filing, OCC seeks rehearing of the PUCO’s Order pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35. The September 17, 2014 Order constituted error because:

1. The PUCO’s Order was unreasonable and unlawful in not approving OCC’s Motion to Intervene.
2. The PUCO’s Order was unreasonable and unlawful in approving DP&L’s 4th Amended Plan without first enabling intervenors to review, through the discovery process, the cost allocation manuals which separate expenses between DP&L and its affiliates, violating R.C. 4903.082 and Ohio Admin. Code 4901-1-16.
3. As a result of unlawfully denying intervenors discovery, the PUCO unreasonably and unlawfully prevented intervenors from demonstrating that a hearing was reasonably required under R.C. 4928.17(B).
4. The PUCO unreasonably and unlawfully approved DP&L’s 4th Amended Plan based on its Staff’s review of the cost allocation manuals and its Staff’s recommendation that was not of record in this proceeding in violation of R.C. 4903.09.

The bases for this Application for Rehearing are set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC’s claims of error, the PUCO should modify or abrogate its September 17, 2014 Order.

Respectfully submitted,

BRUCE J. WESTON

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**MEMORANDUM IN SUPPORT**

# I. INTRODUCTION

The PUCO approved DP&L’s Fourth Amended Corporate Separation Plan (“4th Amended Plan”) on September 17, 2014. However, in its Order, the PUCO did not act on pending motions which affected the rights of parties in the proceeding. Specifically, the PUCO did not rule on Motions to Intervene that were filed by OCC and others, and the PUCO did not rule on OCC’s Motion to Compel. That motion to compel sought access to Dayton Power & Light Company’s (“DP&L” or “Utility”) Cost Allocation Manual (“CAM”) and DP&L’s new affiliate’s, AES US Services, LLC, Cost Alignment and Allocation Manual (“CAAM”). Review of those manuals was essential to enable intervenors to assess any potential harm to customers and the competitive market from DP&L’s 4th Amended Plan. Both manuals were the subject of a pending motion to compel (which was never ruled upon).

Approval of DP&L’s 4th Amended Plan and these cost allocation manuals without subjecting them to scrutiny from interested parties (through the discovery process) was unreasonable and unlawful under R.C. 4903.082. R.C. 4903.082 provides that “[a]ll parties and intervenors shall be granted ample rights of discovery.” The rules under the Ohio Administrative Code echo the law. Under Ohio Admin. Code 4901-1-16(B), any party to a PUCO proceeding “may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding.” Subsection (A) of that rule encourages the use of prehearing discovery “to facilitate thorough and adequate preparation for participation in commission proceedings.”

Customers may be harmed if the cost allocations result in customers subsidizing costs that should be borne by DP&L’s affiliates. Since intervenors were unable to proceed with discovery (through the motion to compel) the PUCO’s approval of DP&L’s 4th Amended Plan (and the cost allocations) was unreasonable and unlawful.

Further, by denying OCC its discovery rights, the PUCO unlawfully prevented OCC from demonstrating that a hearing was reasonably required under R.C. 4928.17(B). And in approving DP&L’s 4th Amended Plan based on a Staff review of the cost allocation manuals that was not of record in this proceeding, the PUCO made findings of fact based on information that was not of record, in violation of R.C. 4903.09.

# II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty days after issuance of an order from the PUCO, “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.”[[1]](#footnote-1) Furthermore, the 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.”[[2]](#footnote-2)

In considering an application for rehearing, Ohio law provides that the PUCO “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.”[[3]](#footnote-3) Furthermore, if the PUCO grants a rehearing and determines 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 \* \* \*.”[[4]](#footnote-4)

OCC meets both the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10 and the requirements of the PUCO’s rule on applications for rehearing.[[5]](#footnote-5) Accordingly, OCC respectfully requests that the PUCO grant rehearing on the matters specified below.

# Iii. LAW AND ARGUMENT

## The PUCO’s Order was unreasonable and unlawful in not approving OCC’s Motion to Intervene.

Although residential customers may be substantially harmed by DP&L’s corporate separation plan, the PUCO did not grant OCC’s Motion to Intervene in this matter. That Motion was filed on January 30, 2014.

R.C. 4903.221 provides, in part, that any person “who may be adversely affected” by a PUCO proceeding is entitled to seek intervention in that proceeding. The interests of Ohio’s residential customers may be “adversely affected” by DP&L’s application, in that the review of corporate separation plans involves evaluation of cross-subsidization between competitive and noncompetitive services. It also considers whether a utility’s competitive generation affiliates may have an unfair competitive advantage and, therefore, may be able to abuse market power. The rates and terms of service that both DP&L’s transmission and distribution customers pay and the rates and terms of service of those shopping in the competitive market may be affected by DP&L’s corporate separation plan.

R.C. 4903.221(B) requires the PUCO to consider the following criteria in ruling on motions to intervene:

(1) The nature and extent of the prospective intervenor’s interest;

(2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;

(3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and

(4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

Additionally, R.C. 4928.17(B) provides that any person having a “real and substantial interest” in a corporate separation plan may file specific objections to the plan and propose specific responses to issues raised in objections of other parties.[[6]](#footnote-6)

OCC’s Motion to Intervene detailed the reasons it should be granted intervention in this proceeding. First, OCC established that residential customers of DP&L will be affected by DP&L’s 4th Amended Plan. OCC explained that, among other things, it seeks to ensure that DP&L does not provide an unfair competitive advantage to any supplier of competitive generation services (or nonelectric product or service) and that it does not abuse its market power. OCC also explained that it seeks to ensure that, under DP&L’s continued functional separation, it appropriately allocates costs between Transmission & Distribution services and generation services, so that residential customers pay only the legal and reasonable charges associated with providing the specified service to them.

Second, OCC explained in its Motion to Intervene that its advocacy for residential customers will, among other things, include advancing the position that DP&L’s residential customers should not be harmed by any unfair competitive advantage or abuse of market power, or any undue preference that might be given to an affiliate or business division, by DP&L. OCC’s position is therefore directly related to the review by the PUCO, the authority with regulatory control of public utilities’ rates and service obligations in Ohio.

Third, OCC explained that its intervention will not unduly prolong or delay the proceedings since, with its longstanding expertise and experience in PUCO proceedings, OCC will duly allow for the efficient processing of the case with consideration of the public interest.

Fourth, OCC explained that its intervention will significantly contribute to the full development and equitable resolution of the factual issues.

OCC’s Motion to Intervene also pointed out that, although the intervention criteria in the Ohio Administrative Code are subordinate to those in the Revised Code, OCC also satisfies the Ohio Administrative Code criteria. As per Ohio Adm. Code 4901-1-11(A)(2), to intervene, a party should have a “real and substantial interest.” As the advocate for residential utility customers, OCC has a very real and substantial interest in this case where, inter alia, DP&L’s 4th Amended plan is being evaluated with respect to its impact on all of DP&L’s 455,000 residential customers. In addition, OCC meets the criteria of Ohio Adm. Code 4901-1-11(B)(1)-(4). These criteria mirror the statutory criteria in R.C. 4903.221(B) that OCC already has addressed and that OCC satisfies.

Ohio Adm. Code 4901-1-11(B)(5) states that the Commission shall consider the “extent to which the person’s interest is represented by existing parties.” While OCC does not concede the lawfulness of this criterion, OCC satisfies this criterion in that it uniquely has been designated as the state representative of the interests of Ohio’s residential utility customers. That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio confirmed OCC’s right to intervene in PUCO proceedings, in deciding two appeals in which OCC claimed the PUCO erred by denying its interventions. The Court found that the PUCO abused its discretion in denying OCC’s interventions and that OCC should have been granted intervention in both proceedings.[[7]](#footnote-7)

OCC meets the criteria set forth in R.C. 4903.221, Ohio Adm. Code 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. The PUCO should grant OCC’s Motion to Intervene upon rehearing.

## The PUCO’s Order was unreasonable and unlawful in approving DP&L’s 4th Amended Plan without first enabling intervenors to review, through the discovery process, the cost allocation manuals which separate expenses between DP&L and its affiliates, violating R.C. 4903.082 and Ohio Admin. Code 4901-1-16.

The PUCO approved DP&L’s 4th Amended Plan without enabling parties to review DP&L’s Cost Allocation Manual or its affiliate’s (AES US Services, LLC) Cost Alignment and Allocation Manual. OCC had requested these documents and served other discovery in this proceeding in order to evaluate DP&L’s 4th Amended Plan. DP&L objected to OCC’s discovery requests. Subsequently, OCC, on May 21, 2014, filed a Motion to Compel to obtain this information. However, no action was taken by the PUCO on OCC’s Motion to Compel prior to issuing its Order in this matter. The Supreme Court of Ohio has previously ruled that the PUCO abuses its discretion when it issues a decision and has, at the same time, denied parties the right to conduct discovery that is relevant to the issues before the PUCO.[[8]](#footnote-8)

R.C. 4903.082 assures parties “ample rights of discovery” and Ohio Admin. Code 4901-1-16(A) encourages “the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings.” OCC’s requests for DP&L’s CAM and the AES US Services’ CAAM, and other discovery, were submitted pursuant to this law and the PUCO’s rules. When DP&L would not produce the information, OCC filed a motion to compel. But the PUCO’s Order unreasonably and unlawfully failed to rule on OCC’s motion to compel. This prevented OCC from obtaining this information in order to properly assess the 4th Amended Plan.

It was unreasonable and unlawful for the PUCO to rule on DP&L’s 4th Amended Plan before intervenors had access to, and opportunity to review, DP&L’s CAM and AES US Services CAAM, or to conduct other appropriate discovery.[[9]](#footnote-9) An improper allocation of costs to DP&L's services could result in higher transmission and distribution rates to DP&L customers. An improper allocation of costs could also impact rates paid by retail electric customers in the competitive market as DP&L’s competitive retail electric service (“CRES”) affiliate, DP&L Energy Resources (“DPLER”) could be given an advantageous allocation. R.C. 4928.02(H) specifically establishes a state policy to “[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa.” That policy further prohibits “the recovery of any generation-related costs through distribution or transmission rates.”[[10]](#footnote-10) Implementation of an appropriate corporate separation plan is essential to carrying out these state policies. These laws reinforce the need for parties to conduct full discovery on issues such as cross-subsidization.

Discovery of the cost allocation manuals and other requested information was a step in this direction. But the PUCO in its ruling foreclosed such discovery, despite the requirements of R.C. 4903.082 and the laws underlying the state policies. For these reasons, it was unreasonable for the PUCO to fail to address the motion to compel prior to issuing its ruling in this matter. The PUCO should grant rehearing and provide the parties with ample rights of discovery as required by R.C. 4903.082 before ruling on DP&L’s 4th Amended Plan.

## As a result of unlawfully denying intervenors discovery, the PUCO unreasonably and unlawfully prevented intervenors from demonstrating that a hearing was reasonably required under R.C. 4928.17(B).

The PUCO’s Order, by unlawfully denying intervenors discovery, also unreasonably and unlawfully prevented the parties from showing that a hearing was reasonably required under R.C. 4928.17(B). In its Comments, OCC had requested a hearing, if after review of the cost allocation manuals, intervenors “identify provisions of the CAM or CAAM that appear to be deficient or will likely allow cross-subsidization to occur, then an evidentiary hearing should be ordered, with opportunities for all parties to present testimony.”[[11]](#footnote-11)

R.C. 4928.17(B) provides that the “commission shall afford a hearing upon those aspects of the [corporate separation] plan that the commission determines reasonably require a hearing.” That section of the law also requires the PUCO to adopt rules that “include an opportunity for any person having a real and substantial interest in the corporate separation plan to file specific objection to the plan and propose specific responses to issues raised in the objections, which objections and responses the commission shall address in its final order.” R.C. 4928.17(B) is intended to ensure that intervenors are able to participate substantively in a review of a utility’s corporate separation plan by offering objections to the plan.

The PUCO’s denial of discovery rights, as in this case, prevents parties from making a demonstration under R.C. 4928.17(B) that a hearing is “reasonably required.” Thus, by denying the parties their discovery rights, the PUCO acted unreasonably and unlawfully in preventing intervenors from demonstrating that a hearing is reasonably required under R.C. 4928.17(B).

## The PUCO unreasonably and unlawfully approved DP&L’s 4th Amended Plan based on its Staff’s review of the cost allocation manuals and its Staff’s recommendation that was not of record in this proceeding in violation of R.C. 4903.09.

In the Attorney Examiner’s Entry of February 25, 2014, DP&L was ordered to provide DP&L’s CAM and AES US Services CAAM to PUCO Staff for review. These documents were not ordered to be provided to other parties for review. On August 19, 2014, the PUCO Staff filed a letter with the PUCO stating that “Staff has reviewed the AES US CAAM and believes that the provisions of this document are consistent with the Commission's Corporate Separate Rules.” In its Order in this proceeding, the PUCO relied upon this letter in stating that “Staff reviewed the AES US CAAM, and that it is consistent with the Commission's corporate separation rules.”[[12]](#footnote-12)

But the PUCO Staff’s review of the cost allocation manuals and Staff’s finding that the documents were consistent with the PUCO’s corporate separation rules was not made part of the record in this proceeding. Consequently, under R.C. 4903.09, the PUCO Staff’s review and recommendation cannot be the basis for the PUCO’s decision in this matter.

The Supreme Court of Ohio has long held that the PUCO may not simply rely on Staff’s recommendation as evidence in a proceeding if “there is nothing in the record below to evince the bases for the commission's acceptance of such recommendations and adoption of such findings.”[[13]](#footnote-13) Here, the PUCO relied on the Staff’s review of the CAM and CAAM, stating that “pursuant to Staff s representation, the DP&L CAM and AES US Services CAAM comply with the Commission's rules, and that DP&L's application appears to be in compliance with R.C. 4928.17, Ohio Adm.Code 4901:l-37-06(A), and Ohio Adm.Code 4901:1-37-09.”[[14]](#footnote-14) But the Supreme Court has made clear that a Staff representation is not evidence and has no weight in a proceeding. The Supreme Court stated in this regard:

However, it is impossible to determine what record evidence was considered by the staff in determining reasonableness. Since the commission adopted the staff's determination of reasonableness as its own, it is impossible to determine what record evidence was considered by the commission other than the conclusion of its staff and the assertion of factually unsupported conclusions by the companies in their joint application for merger approval.[[15]](#footnote-15)

The Supreme Court’s decision in *Tongren* emphasized the impropriety, and inadequacy, of a secret investigation by the PUCO. Citing to its own decision in *Ideal Transp. Co. v. Pub. Util. Comm.*,[[16]](#footnote-16) and the 1937 United States Supreme Court decision in *Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio,*[[17]](#footnote-17) the Supreme Court pointed to the view of Justice Cardozo that “judicial review of administrative agency action ‘would be no longer a reality if \* \* \* [the court were] to take the word of the Commission as to the outcome of a **secret** investigation and let it go at that.’”[[18]](#footnote-18) Such a result, according to the Supreme Court of Ohio would “stymie[] the complaining party's effort in demonstrating prejudice and prevent[] this court from conducting an effective review.”

The cost allocation manual is an important part of a utility’s corporate separation plan. It is a document that details how costs should be allocated between DP&L and its affiliates. If costs are not allocated appropriately, customers of DP&L may end up subsidizing DP&L’s affiliates. Customers and the competitive market may be harmed if subsidization is permitted vis-à-vis the cost allocation manual. These cost allocations should not be secretive, but they were treated as secretive by only being provided to the PUCO Staff. It was unreasonable and unlawful for the PUCO to approve DP&L’s corporate separation plan solely based on Staff’s secretive review of DP&L’s CAM and the AES US Services CAAM.

The requested information should have been required to be provided in discovery prior to any determination by the PUCO. The information sought by OCC was reasonably calculated to lead to the discovery of admissible evidence in this proceeding. Ohio Admin. Code 4901-1-16(B). The PUCO’s action undermined the judicial process applicable to these administrative proceedings and stymied the ability of other parties to show prejudice. Rehearing should be granted.

# Iv. CONCLUSION

For all the reasons discussed above, the PUCO should grant rehearing on OCC’s claims of error and modify or abrogate its September 17, 2014 Finding and Order consistent with Ohio law and reason.

Respectfully submitted,

BRUCE J. WESTON

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of theforegoing *Application for Rehearing* was served on the persons stated below via electronic transmission, this 17th day of October, 2014.

*/s/ Edmund “Tad” Berger*\_\_\_\_\_\_\_

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1. R.C. 4903.10. [↑](#footnote-ref-1)
2. R.C. 4903.10(B). [↑](#footnote-ref-2)
3. *Id.* [↑](#footnote-ref-3)
4. *Id.* [↑](#footnote-ref-4)
5. *See* Ohio Adm. Code 4901-1-35. [↑](#footnote-ref-5)
6. R.C. 4928.17(B). [↑](#footnote-ref-6)
7. *See Ohio Consumers’ Counsel v. Pub. Util. Comm*., 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶13-20 (2006). [↑](#footnote-ref-7)
8. *Ohio Consumers' Counsel v. PUC* , 2006-Ohio-5789, 111 Ohio St. 3d 300, 856 N.E. 2d 213, ¶¶86, 95 (finding that the commission abused its discretion when it denied discovery regarding alleged side agreements that may have been inducements or concessions giving parties an unfair advantage in the bargaining process) [↑](#footnote-ref-8)
9. R.C. 4903.082; Ohio Admin. Code 4901-1-16. [↑](#footnote-ref-9)
10. R.C. 4928.02(H) [↑](#footnote-ref-10)
11. OCC Comments at 5. [↑](#footnote-ref-11)
12. Order at 2. [↑](#footnote-ref-12)
13. *Tongren v. PUC*, 85 Ohio St. 3d 87, 90, 706 N.E. 2d 1255, 1257 (1999). [↑](#footnote-ref-13)
14. Order at 2. [↑](#footnote-ref-14)
15. *Tongren v. PUC*, 85 Ohio St. 3d 87, 91, 706 N.E. 2d 1255, 1258 (1999). [↑](#footnote-ref-15)
16. 42 Ohio St. 2d 195, 71 Ohio Op. 2d 183, 326 N.E.2d 861 (1975). [↑](#footnote-ref-16)
17. 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1937) (“Ohio Bell”). [↑](#footnote-ref-17)
18. *Tongren v. PUC*, 85 Ohio St. 3d 87, 92, 706 N.E. 2d 1255, 1258 (1999), *citing Ohio Bell,* 301 U.S. at 303-304, 57 S. Ct. at 730, 81 L. Ed. at 1101 [↑](#footnote-ref-18)