

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The AES)
Corporation, Dolphin Sub, Inc., DPL Inc. and) Case No. 11-3002-EL-MER
The Dayton Power and Light Company for)
Consent and Approval for a Change of)
Control of The Dayton Power and Light)
Company.)

In the Matter of the Application of The Dayton)
Power and Light Company for Approval) Case No. 08-1094-EL-SSO
of Its Electric Security Plan.)

In the Matter of the Application of The Dayton)
Power and Light Company for Approval) Case No.08-1095-EL-ATA
of Revised Tariffs.)

In the Matter of the Application of The Dayton)
Power and Light Company for Approval of) Case No. 08-1096-EL-AAM
Certain Accounting Authority Pursuant to)
Ohio Rev. Code Section 4905.13.)

In the Matter of the Application of The Dayton)
Power and Light Company for Approval of Its) Case No. 08-1097-EL-UNC
Amended Corporate Separation Plan.)

In the Matter of the Application of)
The Dayton Power and Light Company for) Case No. 12-426-EL-SSO
Approval of its Market Rate Offer.)

In the Matter of the Application of)
The Dayton Power and Light Company of) Case No. 12-427-EL-ATA
Approval of Revised Tariffs.)

In the Matter of the Application of)
The Dayton Power and Light Company for) Case No. 12-428-EL-AAM
Approval of Certain Accounting Authority.)

In the Matter of the Application of)
The Dayton Power and Light Company for) Case No. 12-429-EL-WVR
The Waiver of Certain Commission Rules.)

In the Matter of the Application of)
The Dayton Power and Light Company) Case No. 12-672-EL-RDR
To Establish Tariff Riders.)

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
INDUSTRIAL ENERGY USERS-OHIO,
OHIO PARTNERS FOR AFFORDABLE ENERGY,
OMA ENERGY GROUP,
SOLARVISION,
THE KROGER COMPANY,
OHIO ENERGY GROUP,
HONDA OF AMERICA MANUFACTURING, INC.,
WAL-MART STORES EAST, LP AND SAM'S EAST, INC.**

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January 18, 2013

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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)))))	Case No. 08-1096-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Amended Corporate Separation Plan)))	Case No. 08-1097-EL-UNC
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 and 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)
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OMA ENERGY GROUP,
SOLARVISION,
THE KROGER COMPANY,
OHIO ENERGY GROUP,
HONDA OF AMERICA MANUFACTURING, INC.,
WAL-MART STORES EAST, LP AND SAM'S EAST, INC.**

The Office of the Ohio Consumers' Counsel ("OCC"), Industrial Energy Users-Ohio, Ohio Partners for Affordable Energy, SolarVision, and OMA Energy Group, The Kroger Company, Ohio Energy Group, Honda of America Manufacturing, Inc., Wal-Mart Stores East, LP and Sam's East, Inc. (collectively, "Joint Movants," hereby apply for rehearing of the December 19, 2012 Entry ("December 19 Entry") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). Through this Application for Rehearing, the Joint Movants seeks to protect customers from paying potentially tens of millions of dollars because the PUCO permitted DP&L to continue its Rate Stabilization Charge ("RSC") (into 2013) in contravention of the terms of the Settlement Agreement in DP&L's ESP I proceeding.

Under R.C. 4903.10 and Ohio Admin. Code 4901-1-35, Joint Movants assert that the PUCO's Entry was unjust, unreasonable, and unlawful in the following particulars:

- A. The PUCO Erred In Allowing The Rate Stabilization Charge To Continue Into 2013, In Contravention To A Settlement Agreement That Terminated The Charge on December 31, 2012.

- B. The Commission Erred In Its Reliance On R.C. 4928.143(C)(2)(b) To Support Its Decision To Allow The Rate Stabilization Charge To Continue Into 2013.
- C. There Is No Evidence To Support A Rate Stabilization Charge, And No Evidence Justifying The Rate Stabilization Charge As A Provider Of Last Resort Charge.

An explanation of the basis for each ground for rehearing is set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and the claims of error stated herein, the PUCO should grant rehearing and modify its Order.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Commission erred when it determined that the RSC is a provision that continues indefinitely as a part of DP&L's ESP I. The parties to the ESP I settlement agreed explicitly that DPL could continue to bill and collect the RSC until December 31, 2012. The Commission found that the limited extension of the prior charge was in the public interest when it approved the ESP I Settlement. Because authorization of the RSC after December 31, 2012 violates the ESP I Settlement and is not in the public interest, the Commission's December 19, 2012 Entry was unlawful and unreasonable.

A. When It Approved The ESP I Order, The Commission Determined That An Extension Of The RSC Was Lawful Only Through December 31, 2012.

On June 24, 2009, the Public Utilities Commission of Ohio ("Commission") issued an Opinion and Order³ ("ESP I Order") in Dayton Power & Light Company's ("DP&L") *ESP I Case* adopting the ESP I Settlement and approving an electric security plan ("ESP") for DP&L through December 31, 2012. The ESP I Settlement contained the following key provisions:

To assist in maintaining rate certainty, the parties agree to extend DP&L's current rate plan through December 31, 2012, except as expressly modified herein.⁴

³ *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 08-1094-EL-SSO, Opinion and Order (June 24, 2009) (hereinafter, "*ESP I Case*"). DP&L's ESP was resolved through a Stipulation and Recommendation submitted on February 24, 2009 (hereinafter, "ESP I Settlement").

⁴ ESP I Settlement at 4 (Section 1).

* * *

The current RSS [RSC] charge will continue as a non-bypassable charge through December 31, 2012.⁵

* * *

DP&L will file a new ESP and/or MRO case by March 31, 2012 to set SSO rates to apply for a period beginning January 1, 2013. At least 120 days prior to March 31, 2012, DP&L will consult with interested Signatory Parties to discuss the filing.⁶

The ESP I Settlement, by addressing the duration of the non-bypassable Rate Stabilization Charge (“RSC”), plainly contained an agreement for this charge to end on December 31, 2012. The Commission in adopting the ESP I Settlement as presented by the parties, including the applicant DP&L, approved that agreement as being in the public interest. Neither the ESP I Settlement nor the law authorize RSC charges beyond such date.

B. The Commission Extended The RSC For A Term Not Contemplated By The Parties’ Agreement And Beyond The Limits Of The Period That The Commission Found Was In The Public Interest.

On March 30, 2012, DP&L filed an application with the PUCO to establish a standard service offer in the form of a Market Rate Offer (“MRO”). On September 7, 2012, DP&L filed a Notice of Withdrawal of its MRO. At the same time, it filed a Motion to Set Procedural Schedule for an Electric Security Plan filing, to be made on or before October 8, 2012.

On September 26, 2012, Joint Movants⁷ submitted a Joint Motion Seeking Enforcement of Approved Settlement Agreements and Orders Issued by the Public

⁵ *Id.* (Section 3).

⁶ *Id.* at 7 (Section 9).

⁷ Joint Movants included Industrial Energy Users-Ohio, OMA Energy Group, Wal-Mart Stores East LP and Sam’s East, Inc., Ohio Partners for Affordable Energy, Kroger Co., SolarVision, LLC, Ohio Energy Group, Honda of America Manufacturing, Inc., and the Office of the Ohio Consumers’ Counsel

Utilities Commission of Ohio (“Joint Motion”). The Joint Motion requested that the Commission require DP&L to comply with the Commission-approved settlement agreement and end the Rate Stabilization Charge effective December 31, 2012. In addition to Joint Movants’ position that the continuation of this charge would violate the Settlement Agreement in the *ESP I* proceeding, Joint Movants also stated that the termination of the RSC charge “will provide shopping and non-shopping customers with a better ability to project future electric bills, compare SSO prices with prices available from competitive retail electric service (“CRES”) providers and make such future electric bills more stable and certain.”⁸

Rather than comply with the terms of its Settlement Agreement and the Commission’s Order approving that Agreement, DP&L responded to Joint Movants on October 11, 2012, contesting the claims in the Joint Motion. DP&L also claimed that ending the RSC would threaten DP&L’s financial integrity.⁹ DP&L then filed a Motion to Continue Briefly Current Rates Until Implementation of Terms of a Commission Order on November 7, 2012 (“Motion”). In that Motion, DP&L requested that the Commission approve its successor SSO prior to December 31, 2012 and also further replied to the Joint Motion.

The PUCO, in its Entry of December 19, 2012, denied the Joint Motion and granted DP&L’s Motion to continue its rates, including the RSC, for an indefinite period. The PUCO found that it would be consistent with Sections 4921.141 and Sections 4928.143(C)(2)(b) of the Revised Code to continue the “provisions, terms and conditions

⁸ *Id.*

⁹ Memorandum Of The Dayton Power And Light Company In Opposition To Joint Motion Seeking Enforcement Of Approved Settlement Agreements And Orders Issued By The Public Utilities Commission Of Ohio, Docket No. 12-0426-EL-SSO, pp. 11-12 & Exhibit 1 (Declaration of William J. Chambers).

of the ESP” until a subsequent offer is authorized. The only issue before the Commission is whether the ESP I Settlement and the applicable law authorize DP&L to collect the RSC beyond December 31, 2012. They do not. Because DP&L agreed in the ESP I Settlement that the Company would not collect the RSC after December 31, 2012, and the PUCO approved the settlement, it is unlawful and unreasonable for the PUCO to allow the electric utility to continue to collect the RSC from customers beyond December 31, 2012.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides that within thirty days after an order is issued by the Commission “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.”¹⁰ 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.”¹¹

In considering an application for rehearing, the Commission “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear.”¹² If the Commission 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 ***.”¹³

¹⁰ R.C. 4903.10.

¹¹ Id.

¹² Id.

¹³ Id.

As parties to the instant proceeding, Joint Movants meet the statutory condition necessary to file an application for rehearing under R.C. 4903.10. Joint Movants respectfully request that the PUCO grant rehearing and terminate the RSC, so that customers of DP&L are not paying for a charge that should have expired on December 31, 2012, under the terms of a PUCO approved Stipulation.

III. ARGUMENT

A. The PUCO Erred In Allowing The Rate Stabilization Charge To Continue Into 2013, In Contravention To A Settlement Agreement That Terminated The Charge on December 31, 2012.

Among other provisions, the ESP I Settlement approved by the Commission included the following provisions:

The current RSS [RSC] charge *will continue as a nonbypassable charge through December 31, 2012*. Through December 31, 2012, shopping customers who return to DP&L shall pay the Standard Service Offer ("SSO") rate under the applicable tariff.¹⁴

* * *

DP&L will file a new ESP and/or MRO case by March 31, 2012 to set SSO rates to apply for period beginning January 1, 2013. At least 120 days prior to March 31, 2012, DP&L will consult with interested Signatory Parties to discuss the filing.¹⁵

These provisions clearly indicate that the parties agreed that the RSC charge would terminate at the end of calendar year 2012 and that, after such date, a new SSO rate would apply. Indeed the concept was that DP&L would file an application for a new SSO in early 2012 to give the PUCO sufficient time (nine months) to adjudicate its application and render a decision for new SSO rates to be implemented January 1, 2013.

¹⁴ ESP 1 Settlement at 4 (Section 3) (Emphasis added).

¹⁵ ESP I Settlement at 7 (Section 9).

While the Commission is not bound to accept the terms of any stipulation, a stipulation presented to the commission is entitled to the force of law if it is approved by an order of the Commission.¹⁶ Indeed, the Commission, in many proceedings, has recognized the importance of enforcing the terms of settlements.¹⁷ While the PUCO may change or modify earlier orders, it must justify any changes. Further, if the Commission revisits an issue, as the Supreme Court of Ohio has stated, it should do so only when the need is clear and the prior decision was in error in order to ensure the “predictability which is essential in all areas of the law, including administrative law.”¹⁸ As discussed below, however, the Commission has not justified its modification to extend the collection of the RSC rate from December 31, 2012 to some indefinite point in the future.

The Commission’s December 19, 2012 Entry extending the RSC indefinitely has undermined the value of the Settlement to the parties other than DPL. The signatory parties to the settlement, including DP&L, intended that the RSC would terminate on December 31, 2012. The termination date of the RSC was part of a package, and the Commission has allowed DP&L to selectively retain a part of the package for itself. In the December 19, 2012 Entry, the Commission effectively tossed the signatory parties’ expectations aside, and rendered the paragraph in the settlement regarding the termination of the RSC meaningless. The Commission’s determination is unreasonable and unlawful; it violates the rule of construction (applied to both legislation and agreements)

¹⁶ See *Ohio Consumers’ Counsel v. Pub. Util. Comm’n of Ohio*, 114 Ohio St.3d 340, 2007-Ohio-4276 (2007); *AK Steel Corp. v. Pub. Util. Comm’n of Ohio*, 95 Ohio St.3d 81, 82-83, 765 N.E.2d 862 (2002); Ohio Adm. Code 4901-1-30(D). See also *Akron v. Pub. Util. Comm’n of Ohio*, 55 Ohio St.2d 155, 157, 9 O.O.3d 122, 378 N.E.2d 480 (1978).

¹⁷ See, e.g., *In the Matter of the 1995 Electric Long Term Forecast Report of the Cincinnati Gas & Electric Company*, Case Nos. 95-203-EL-FOR, et al. (Opinion and Order at 49-50) (Dec. 19, 1996).

¹⁸ *Ohio Consumers’ Counsel v. Public Util. Comm.* 10 Ohio St.3d 49; 461 N.E.2d 303 (1984).

that requires that meaning be assigned to all terms and provisions and the assigned meaning be based on the entire agreement.¹⁹ The PUCO's decision to allow DP&L to continue to bill and collect the RSC (a charge to customers of \$73 million annually or \$6.1 million monthly) to continue in contravention of the terms of a Commission approved Settlement, without basis or evidence, undermines all settling parties' ability to rely on the settlement process to resolve their differences.

B. The Commission Erred In Its Reliance On R.C. 4928.143(C)(2)(b) To Support Its Decision To Allow The Rate Stabilization Charge To Continue Indefinitely.

As provided by the ESP I Settlement, the term of the RSC as a provision of *ESP I* ended on December 31, 2012. The Commission, nonetheless, permitted DP&L to continue to collect the RSC beyond its explicit term. As the basis for its determination to continue the RSC indefinitely in its Entry of December 19, 2012, the Commission relied upon R.C. 4928.143(C)(2)(b).²⁰ That provision of the law (4928.143(C)(2)(b)) may only be utilized if the Commission disapproves or approves an application with modification. In this case, the Commission did not act upon DP&L's application. DP&L simply withdrew it on its own initiative. Even if R.C. 4928.143(C)(2)(b) were applicable, the terms of DP&L's currently approved ESP do not include an RSC. Thus, the Commission's reliance on that Section to extend the term of the RSC was in error.

¹⁹ "One may not regard only the right hand which giveth, if the left hand also taketh away. The intention of the parties must be derived instead from the instrument as a whole, and not from detached or isolated parts thereof." *Gomolka. v. State Automobile Ins. Co.*, 70 Ohio St.2d 166, 172 (1982); *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104 at ¶ 29 (*citing Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361 (1997)) ("Where possible, a court must construe the agreement to give effect to every provision in the agreement."); *Molnar v. Castle Bail Bonds, Inc.*, 4th Dist. No. 04CA-2808, 2005-Ohio-6643 at ¶ 42 (*quoting Bank v. Insurance Co.*, 83 Ohio St.309 (1911) ("In the construction of a contract courts should give effect, if possible, to every provision therein contained, and if one construction of a doubtful condition written in a contract would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must obtain.")).

²⁰ Entry (December 19, 2012) at 3.

Although the Commission notes that R.C. 4928.143(C)(2)(b) does not apply where a utility terminates an MRO application and files a new ESP, “as is the case here,” the Commission bases its determination to continue the RSC on that provision of the law. Specifically, the Commission stated that “it would be consistent with both Section 4928.141 and Section 4928.143(C)(2)(b) for the “the terms and conditions of the current ESP [to] continue until a subsequent offer is authorized.” *Entry at 4.*

The Commission’s conclusion, however, assumes that the current ESP includes the RSC. By its terms, the RSC ended on December 31, 2012. Thus the “current ESP” does not include authorization to continue to bill and collect the RSC.

The Commission’s reliance on Section 4928.143(C)(2)(b) of the Revised Code does not alter this result. Section 4928.143(C)(2)(b) is intended to apply only where the Commission “*modifies and approves* an application under division (C)(1) of this Section” and the utility then elects to “withdraw the application, thereby terminating it” or where the Commission disapproves an application. R.C. 4928.143(C)(2)(b). The instant circumstance, however, does not involve an *ESP* application which the Commission modified and approved and which was subsequently withdrawn by the utility, thereby terminating it.

The instant circumstance involves an MRO application that was never rejected or approved by the PUCO. Indeed, it was withdrawn before the Commission had any opportunity to modify or approve it since no evidentiary record had been created. Consequently, R.C. 4928.143(C)(2)(b) is simply inapplicable to the instant determination. Thus, the Commission cannot rely upon that Section to extend DP&L’s entire ESP by operation of law.

As a practical matter, DP&L may only collect the rates and charges contained in its approved tariffs;²¹ thus, the rates and charges contained in the Stipulation that did not have a specific termination date may continue by operation of law. The ESP I Settlement, however, provided that the RSC must terminate on December 31, 2012. The Commission should enforce the terms of the ESP I Settlement and direct DP&L to remove the RSC tariff (G25) from its approved tariffs. Failure to enforce the terms of the ESP I Settlement renders the Commission's Order unlawful and unreasonable.

C. There Is No Evidence To Support A Rate Stabilization Charge, And No Evidence Justifying The Rate Stabilization Charge As A Provider Of Last Resort Charge.

Rather than adhere to the terms of that ESP I Settlement, which directed the termination of the RSC effective December 31, 2012, the Commission stated that it was continuing the RSC. The PUCO found that the RSC is a “provider of last resort (POLR) charge” and “not a transition charge like the charge in Case No. 08-935-EL-SSO.”²² The characterization of the RSC as a POLR charge has no significance to the Commission's decision, and the Commission does not explain why it characterizes the RSC as a POLR charge.²³

Having characterized the RSC as a POLR charge, however, the Commission has further erred in authorizing collection of the RSC beyond December 31, 2012 without

²¹ R.C. 4905.32.

²² *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security plan, No. 08-935-EL-SSO.*

²³ The Supreme Court of Ohio, however, has defined Provider of Last Resort costs to “represent charges incurred by an incumbent electric-distribution utility for risks associated with its statutory obligation under R.C. 4928.14(C) as the default provider, or provider of last resort, for customers who opt for another provider who then fails to provide service. See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, at ¶ 24.” *Ohio Consumers' Counsel v. Pub. Util. Comm'n of Ohio*, 114 Ohio St.3d 340, 341, n.2, 872 N.E.2d 269, 272 n.2 (2007).

making findings of fact, based on an evidentiary record necessary to authorize a POLR charge.

With respect to the Commission’s suggestion that “POLR charges” are inherently meritorious, the Commission may approve a POLR charge only if there is a cost or other reasoned basis for the charge. As the Supreme Court of Ohio stated: “the commission must ‘carefully consider what costs it is attributing’ to ‘POLR obligations,’ *Ohio Consumers’ Counsel*, 114 Ohio St.3d 340, 2007 Ohio 4276, 872 N.E.2d 269, ¶ 26.”²⁴

When the record failed to support the authorization of a POLR charge in the AEP-Ohio ESP I case, the Supreme Court reversed the Commission, stating:

[N]o evidence supports the commission's characterization of this charge as based on cost. Ruling on an issue without record support is an abuse of discretion and reversible error. See, e.g., *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008 Ohio 990, 885 N.E.2d 195, ¶ 30.²⁵

The Commission has repeated the error it committed in the AEP-Ohio ESP I case through its December 19 Entry. DP&L did not present an evidentiary basis to support the continuation of the RSC charge and the Commission, in its decision, put forth no basis to justify its claim that the proposed RSC charge is justified as a POLR charge. The only apparent basis for its decision in this respect is the Commission’s assertion that the charge was justified on this basis in the preceding proceeding—which was settled and, therefore, was not subjected to an evidentiary test.

The characterization of the RSC as a POLR charge is not a basis to alter the agreement of the parties to terminate this charge on December 31, 2012. Whether the

²⁴ See *Ohio Consumers’ Counsel v. Pub. Util. Comm’n of Ohio*, 128 Ohio St. 3d 512, 519; 2011 Ohio 1788; 947 N.E.2d 655, 664 (2011).

²⁵ *Id.*

Commission characterizes the RSC as a POLR charge or a transition charge, the parties, including DP&L, agreed that the RSC would end. Without some cost or other justification, the ESP I Settlement is the only basis the Commission can point to authorize the RSC. That sole justification no longer exists. Thus, the Commission's decision to extend the RSC has no foundation in fact or law.

IV. CONCLUSION

Parties agreed in the settlement package that the RSC would continue until December 31, 2012—the RSC was never intended to extend into perpetuity. If the Commission does not grant this application for rehearing, it can and should construct an end date beyond which DPL can no longer continue the RSC without demonstrating a legal basis for the charge

For the reasons articulated herein, the Commission's December 19, 2012 Entry is unjust and unreasonable. The Entry violates the terms of the ESP I Settlement Agreement by extending the authorization of the RSC. The RSC is not a term of the current ESP that may continue beyond December 31, 2012 and the Commission may not unilaterally impose the RSC as a POLR charge. Because the December 19, 2012 Entry is unlawful and unreasonable, the Commission should grant Joint Movants' application for rehearing and modify the December 19, 2012 Entry and grant the Joint Movants' Motion to enforce the terms of the ESP I Settlement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Application for Rehearing of the Office of the Ohio Consumers' Counsel* was served on the persons stated below via electronic transmission, this 18th day of January, 2013.

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