

**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 |) | Case No. 13-893-EL-AIS |
| Authority to Issue and Sell an Amount |) | |
| Not to Exceed \$490 Million of First |) | |
| Mortgage Bonds, Debentures, Notes, or |) | |
| Other Evidences of Indebtedness or |) | |
| Unsecured Notes. |) | |

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

The Office of the Ohio Consumers' Counsel ("OCC") seeks rehearing of the Finding and Order ("July 10 Order" or "Order") in which the Public Utilities Commission of Ohio ("Commission" or "PUCO") acknowledged that "the costs associated with this proceeding may impact residential customers."¹ Customers should be protected now from ever paying certain of those costs, as will be explained in OCC's claims of error.

OCC is filing on behalf of the 455,000 residential utility customers of the Dayton Power and Light Company ("DP&L," "Applicant" or "Utility"). OCC files this application for rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35 because the July 10 Order was unjust, unreasonable and unlawful for the following reasons:

- A. The PUCO Erred by Failing to Properly Address OCC's Recommendations and by Failing to Provide Reasons and Findings of Fact to Support its Order, as Required by R.C. 4903.09.
- B. The PUCO erred in authorizing DP&L to use *refinancing* of existing debt (instead of new financing). It is not "necessary" or reasonable under R.C. 4905.40(A) for DP&L to incur early re-

¹ Finding and Order at paragraph 11 (July 10, 2013).

payment fees (projected at \$10 million) to pay-off debt that will mature anyway in a mere three months. And it is not “necessary” or reasonable under R.C. 4905.40(A) for DP&L to incur said re-payment fees when the interest costs to be saved by the early pay-off are minimal compared to the projected \$10 million in fees.

- C. The PUCO erred in finding that “the effect on Applicant’s revenue requirements ... can be determined only in rate proceedings....”² The PUCO should not postpone consideration of this consumer protection issue to a rate case. In the rate case DP&L can be expected to claim that the \$10 million of re-payment fees are part of its “actual embedded cost of debt,”³ which DP&L likely will assert is required (without PUCO discretion) for inclusion in ratemaking under R.C. 4909.15(E)(2)(a). For protection of customers the PUCO should avoid DP&L’s future legal argument (with a possible appeal by whichever party is unsuccessful) and instead determine now that the early re-payment fee (projected to be \$10 million) is not to become part of DP&L’s cost of debt (and not ever to be paid by customers).
- D. The PUCO erred in not expressly finding that DP&L’s Application should be considered under the state standards of R.C. 4905.40(A)(1) and 4905.40(F).
- E. The PUCO erred by granting DP&L’s Application without requiring DP&L to demonstrate why it is “necessary” or reasonable under R.C. 4905.40(A) for a monopoly (DP&L) to issue New Bonds for terms not to exceed *30 years* when the PUCO is expected soon in Case No. 12-426-EL-SSO to order that same monopoly to transfer those same power plants to a separate (unregulated) corporation in just a few years.⁴ Under R.C. 4928.02(H), the customers of the regulated monopoly that is DP&L are to be protected from paying “anticompetitive subsidies” for a competitive business. The Order allows the issuance of long-term debt for terms that far exceed (by decades) what is expected to be DP&L’s brief remaining hold time for the power plants. When corporate separation of the power plants occurs, that transaction will invoke a complicated unraveling of this financing with unnecessary risks that customers will pay costs (subsidize) that should be borne by DP&L’s transferee.

² Finding and Order at paragraph 12.

³ R.C. 4909.15(E)(2)(a).

⁴ See R.C. 4928.17.

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 OCC's claims of error, the PUCO should modify its July 10 Order.

Respectfully submitted,

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TABLE OF CONTENTS

| | PAGE |
|--|------|
| I. INTRODUCTION AND BACKGROUND | 1 |
| II. STANDARD OF REVIEW | 2 |
| III. ARGUMENT | 3 |
| A. The PUCO Erred By Failing To Properly Address OCC’s Recommendations And By Failing To Provide Reasons And Findings Of Fact To Support Its Order, As Required By R.C. 4903.09..... | 3 |
| B. The PUCO Erred In Authorizing DP&L To Use <i>Refinancing</i> Of Existing Debt (Instead Of New Financing). It Is Not “Necessary” Or Reasonable Under R.C. 4905.40(A) For DP&L To Incur Early Re-Payment Fees (Projected At \$10 Million) To Pay-Off Debt That Will Mature Anyway In A Mere Three Months. And It Is Not “Necessary” Or Reasonable Under R.C. 4905.40(A) For DP&L To Incur Said Re-Payment Fees When The Interest Costs To Be Saved By The Early Pay-Off Are Minimal Compared To The Projected \$10 Million In Fees..... | 5 |
| C. The PUCO Erred In Finding That “The Effect On Applicant’s Revenue Requirements ... Can Be Determined Only In Rate Proceedings....” The PUCO Should Not Postpone Consideration Of This Consumer Protection Issue To A Rate Case. In The Rate Case DP&L Can Be Expected To Claim That The \$10 Million Of Re-Payment Fees Are Part Of Its “Actual Embedded Cost Of Debt,” Which DP&L Likely Will Assert Is Required (Without PUCO Discretion) For Inclusion In Ratemaking Under R.C. 4909.15(E)(2)(A). For Protection Of Customers The PUCO Should Avoid DP&L’s Future Legal Argument (With A Possible Appeal By Whichever Party Is Unsuccessful) And Instead Determine Now That The Early Re-Payment Fee (Projected To Be \$10 Million) Is Not To Become Part Of DP&L’s Cost Of Debt (And Not Ever To Be Paid By Customers)..... | 5 |
| D. The PUCO Erred In Not Expressly Finding That DP&L’s Application Should Be Considered Under The State Standards Of R.C. 4905.40(A)(1) And 4905.40(F)..... | 8 |

| | | |
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| E. | The PUCO Erred By Granting DP&L’s Application Without Requiring DP&L To Demonstrate Why It Is “Necessary” Or Reasonable Under R.C. 4905.40(A) For A Monopoly (DP&L) To Issue New Bonds For Terms Not To Exceed <i>30 Years</i> When The PUCO Is Expected Soon In Case No. 12-426-EL-SSO To Order That Same Monopoly To Transfer Those Same Power Plants To A Separate (Unregulated) Corporation In Just A Few Years. Under R.C. 4928.02(H), The Customers Of The Regulated Monopoly That Is DP&L Are To Be Protected From Paying “Anticompetitive Subsidies” For A Competitive Business. The Order Allows The Issuance Of Long-Term Debt For Terms That Far Exceed (By Decades) What Is Expected To Be DP&L’s Brief Remaining Hold Time For The Power Plants. When Corporate Separation Of The Power Plants Occurs, That Transaction Will Invoke A Complicated Unraveling Of This Financing With Unnecessary Risks That Customers Will Pay Costs (Subsidize) That Should Be Borne By DP&L’s Transferee. | 8 |
| IV. | CONCLUSION..... | 10 |

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MEMORANDUM IN SUPPORT

I. INTRODUCTION AND BACKGROUND

On April 16, 2013, the Dayton Power and Light Company (“DP&L or “the Utility”) filed an Application requesting authority “to issue and sell . . . up to \$490 million principal amount of First Mortgage Bonds, debentures, notes and/or other evidences of indebtedness,” in order to “refinance outstanding First Mortgage Bonds.”⁵ Utilities such as DP&L typically seek to charge customers for the costs of their debt.⁶

Customers’ exposure to inappropriate costs is a real risk here. For example, DP&L’s financing application will lead it to incur substantial early re-payment fees to pay-off existing debt. DP&L projects those fees at \$10 million.⁷ And incurring those fees comes incongruously at a time when DP&L is claiming in its electric security plan case that it needs to charge customers to stabilize its finances.⁸ And DP&L appears finally on

⁵ Application at 1 (Apr. 16, 2013).

⁶ E.g. R.C. 4909.15(E)(2)(a).

⁷ In this regard, it is not adequately explained why DP&L would incur such high pay-off fees (and subject customers to paying the fees as a cost of debt) when the bonds are maturing anyway in a few months.

⁸ *In the matter of The Application of The Dayton Power and Light Company to Establish a Standard Officer in the Form of an Electric Security Plan*, Case No. 12-0426-EL-SSO.

the verge of separating itself from its power plants, fourteen years after the passage of Senate Bill 3 in 1999.

The Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Intervene on June 6, 2013, which was granted in the Finding and Order. OCC then filed Comments on July 9, 2013, raising concerns with the amount of "Redemption Costs," at a cost of approximately \$10 million⁹ that DP&L seeks as part of this Application, for early repayment of its existing debt a mere three months before maturity. Nevertheless, on July 10, 2013, the PUCO approved DP&L's Application in its entirety.

OCC now seeks rehearing of that July 10, 2013 Finding and Order because the PUCO's decision was unreasonable and unlawful. In the Order, the PUCO approved DP&L's unreasonable request for early redemption allowing the Utility to incur a substantial amount of early pay-off costs (projected as \$10 million) and unreasonably allowed the Utility, without explanation, to acquire long-term bonds despite the high possibility of corporate separation in the imminent future.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. The statute 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 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

⁹ Supplement, Exhibit A. The "Early Redemption" costs include \$2.2 million in Consent Costs and \$7.8 million in Make-whole/Tender Costs.

application, if in its judgment sufficient reason therefor is made to appear.” The statute also provides: “If, 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 Commission should grant rehearing and modify or abrogate its Finding and Order of July 10, 2013.

III. ARGUMENT

A. The PUCO Erred By Failing To Properly Address OCC’s Recommendations And By Failing To Provide Reasons And Findings Of Fact To Support Its Order, As Required By R.C. 4903.09.

R.C. 4903.09 provides that: “In all contested cases heard by the public utilities commission . . . the commission shall file . . . findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.” The Supreme Court of Ohio has addressed the requirements of R.C. 4903.09: “In order to meet the requirements of R.C. 4903.09, therefore, the PUCO’s order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion.”¹⁰

Under this statute, the Supreme Court of Ohio must be able “to understand the commission’s rationale underlying its decision on appeal.”¹¹ The PUCO’s Order does not meet the standards in the forgoing law, rule and precedent.

¹⁰ *MCI Telecommunications Corp. v. Public Utilities Com.*, 32 Ohio St. 3d 306, 344, 513 N.E.2d 337 (Sept 9, 1987).

¹¹ *Elyria Foundry Co. v. PUC*, 118 Ohio St. 3d 269, 2008-Ohio-2230; 888 N.E.2d 1055, ¶ 36; *see also*, *Payphone Ass’n v. PUC*, 109 Ohio St. 3d 453, 2006-Ohio-2988; 849 N.E.2d 4 ¶32. (citing *Allnet Communications Serv., Inc. v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 202, 209, 1994 Ohio 460, 638 N.E.2d 516).

The Order contains a footnote acknowledging that “OCC filed additional comments regarding the application,” without discussing OCC’s concerns.¹² And the Order stated that “the Applicant has addressed OCC’s concerns adequately,”¹³ with only a mentioning of OCC’s general concern of “prevent[ing] any potential unjust or unreasonable costs being incurred or passed on to DP&L’s residential customers.”¹⁴ That point was raised in OCC’s Motion to Intervene and not in OCC’s Comments that were unaddressed in the Order.

The Order does not properly contain the reasons why DP&L is authorized to issue long-term debt as a *refinancing*, when DP&L itself is projecting it will incur high fees of \$10 million in re-payment costs to pay-off the bonds. Those existing bonds are maturing anyway in a few months.

And the Order does not contain the reasons for how the customers of DP&L, the monopoly, will be protected from subsidizing¹⁵ the competitive generation of the future owner of the power plants after DP&L makes its upcoming transfer of the plants. It is DP&L’s power plants that secure the debt at issue. The PUCO is authorizing DP&L to issue debt for terms up to 30 years.¹⁶ But proper reasons are not provided in the Order to explain why DP&L should be authorized to issue debt for terms that are ten times longer than the few years DP&L is expected to remain holding the power plants.

¹² Finding and Order, footnote 1, page 2.

¹³ Finding and Order at paragraph 12.

¹⁴ Finding and Order at paragraph 8.

¹⁵ See R.C. 4928.02(H).

¹⁶ Finding and Order at paragraph 4.

The Order merely contains a conclusory statement that “the cost of the Securities and redemption of the Prior Bonds appear reasonable” and that “the probable cost to the Applicant . . . do not appear to be unjust or unreasonable.”¹⁷

OCC’s Application for Rehearing should be granted.

- B. The PUCO Erred In Authorizing DP&L To Use *Refinancing* Of Existing Debt (Instead Of New Financing). It Is Not “Necessary” Or Reasonable Under R.C. 4905.40(A) For DP&L To Incur Early Re-Payment Fees (Projected At \$10 Million) To Pay-Off Debt That Will Mature Anyway In A Mere Three Months. And It Is Not “Necessary” Or Reasonable Under R.C. 4905.40(A) For DP&L To Incur Said Re-Payment Fees When The Interest Costs To Be Saved By The Early Pay-Off Are Minimal Compared To The Projected \$10 Million In Fees.**

AND

- C. The PUCO Erred In Finding That “The Effect On Applicant’s Revenue Requirements ... Can Be Determined Only In Rate Proceedings....”¹⁸ The PUCO Should Not Postpone Consideration Of This Consumer Protection Issue To A Rate Case. In The Rate Case DP&L Can Be Expected To Claim That The \$10 Million Of Re-Payment Fees Are Part Of Its “Actual Embedded Cost Of Debt,”¹⁹ Which DP&L Likely Will Assert Is Required (Without PUCO Discretion) For Inclusion In Ratemaking Under R.C. 4909.15(E)(2)(A). For Protection Of Customers The PUCO Should Avoid DP&L’s Future Legal Argument (With A Possible Appeal By Whichever Party Is Unsuccessful) And Instead Determine Now That The Early Re-Payment Fee (Projected To Be \$10 Million) Is Not To Become Part Of DP&L’s Cost Of Debt (And Not Ever To Be Paid By Customers).**

Regarding Claim of Error B, R.C. 4905.40(A) allows the PUCO to authorize utilities to issue debt, when it is “necessary” for financing. Here, the issuance of new

¹⁷ Finding and Order at paragraph 12.

¹⁸ Finding and Order at paragraph 12.

¹⁹ R.C. 4909.15(E)(2)(a).

debt is *not* necessary because there should not be a refinancing on the terms in the Application.

First, the refinancing costs too much. DP&L itself projects the cost at \$10 million in early-repayment fees. And the \$10 million DP&L will incur to pay-off the existing debt can be expected to show up in a future DP&L rate case filing as part of the cost of debt. When that happens, it can be expected that DP&L will claim it is legally entitled to charge customers for its actual cost of debt which at that time will likely encompass some amount of early re-payment fees.

Second, the refinancing will produce only minimal savings in interest. The savings do not come close to offsetting the \$10 million for early re-payment.

The use of a *refinancing* is not an adequately explained choice for the PUCO or the Utility. In this regard, there is no showing from the Utility or in the PUCO's Order as to why DP&L's financing needs could not be met without using the instrument involving early re-payment and the associated \$10 million in fees. DP&L could propose an approach to issuing debt that does not involve refinancing.

As a result of the large redemption costs, DP&L will need to issue more bonds. These redemption costs become part of the issuing costs, which in turn increase the monthly financing costs (interest payment plus amortized issuing costs). The higher monthly financing costs then increase the embedded costs of debt of DP&L. This increase debt costs will be reflected, for example, in the rate of return of the next rate case. Ultimately, DP&L's customers are paying for these high redemption costs.

While utilities have utilized early redemption of bonds in order to take advantage of declining interest rates, early redemption generally makes sense only when there is a

significant difference in interest rates between the existing bonds and new bonds. In order to achieve significant savings from reduced interest payments, the existing bonds (at a higher interest rate) must still have a considerable length of time before maturity. But these two conditions are not applicable in this case. Any savings in interest costs associated with the First Mortgage Bonds (“Existing Bonds”) is minimal because the Existing Bonds will mature in October 2013, allowing a mere three-month period or less for early redemption.

DP&L estimates that the total cost of early redemption of the Existing Bonds is approximately ten million dollars.²⁰ However, assuming the new financing has an interest rate of 4.5%, as a result of early redemption, the potential savings in interest payments would not be more than \$0.73 million for the three-month period.²¹ A potential savings of just \$0.73 million does not justify the \$10 million worth of additional “Redemption Costs” that DP&L would incur and likely would seek to collect from its customers.

Regarding Claim of Error C, the PUCO should not defer to a rate case to consider this issue of customer protection. In the rate case DP&L can be expected to claim that the re-payment fees are part of its “actual embedded cost of debt under R.C. 4909.15(E)(2)(a).” And DP&L will assert that the amounts are required for inclusion in ratemaking under that statute. The PUCO should avoid DP&L’s later legal argument (with a possible appeal by one side or the other) and instead determine now that the early

²⁰ See *In the Matter of the Application of the Dayton Power and Light Company for Authority to Issue and Sell an Amount Not to Exceed \$490 Million of First Mortgage Bonds, Debentures, Notes, or Other Evidences of Indebtedness or Unsecured Notes*, Case No. 13-0893-EL-AIS, Supplement to the Application, Exhibit A (June 28, 2013).

²¹ The potential saving in interest rate is calculated in the following way: \$470 million * (0.05125 – 0.045)/12 * 3 = \$734,375.

re-payment fee (projected to be \$10 million) is not to become part of DP&L's cost of debt (and not ever to be paid by customers)

OCC's Application for Rehearing should be granted.

D. The PUCO Erred In Not Expressly Finding That DP&L's Application Should Be Considered Under The State Standards Of R.C. 4905.40(A)(1) And 4905.40(F).

AND

E. The PUCO Erred By Granting DP&L's Application Without Requiring DP&L To Demonstrate Why It Is "Necessary" Or Reasonable Under R.C. 4905.40(A) For A Monopoly (DP&L) To Issue New Bonds For Terms Not To Exceed 30 Years When The PUCO Is Expected Soon In Case No. 12-426-EL-SSO To Order That Same Monopoly To Transfer Those Same Power Plants To A Separate (Unregulated) Corporation In Just A Few Years.²² Under R.C. 4928.02(H), The Customers Of The Regulated Monopoly That Is DP&L Are To Be Protected From Paying "Anticompetitive Subsidies" For A Competitive Business. The Order Allows The Issuance Of Long-Term Debt For Terms That Far Exceed (By Decades) What Is Expected To Be DP&L's Brief Remaining Hold Time For The Power Plants. When Corporate Separation Of The Power Plants Occurs, That Transaction Will Invoke A Complicated Unraveling Of This Financing With Unnecessary Risks That Customers Will Pay Costs (Subsidize) That Should Be Borne By DP&L's Transferee.

With regard to these two claims of errors, the PUCO should have addressed the appropriate statutory framework for the Application. The Applicant did not identify the specific statutory basis in its Application.²³

Under the unique circumstances of this Application as described above, the appropriate statutory sections for such a DP&L Application includes R.C. 4905.40(A)(1) and 4905.40(F). Under those sections, a DP&L Application will receive stricter scrutiny

²² See R.C. 4928.17.

²³ DP&L merely states that it filed its Application "under the provisions of Sections 4905.40 and 4905.41 of the Code."

(meaning more customer protection) from the PUCO, as this particular Application well should.

R.C. 4905.40(F) requires DP&L to show the following, as protections for its customers:

- (F) In any proceeding under division (A)(1) of this section initiated by a public utility, the commission shall determine and set forth in its order:
 - (1) Whether the purpose to which the issue or any proceeds of it shall be applied was or is reasonably required by the utility to meet its present and prospective obligations to provide utility service;
 - (2) Whether the amount of the issue and the probable cost of such stocks, bonds, notes, or other evidences of indebtedness is just and reasonable;
 - (3) What effect, if any, the issuance of such stocks, bonds, notes, or other evidences of indebtedness and the cost thereof will have upon the present and prospective revenue requirements of the utility.

The standard of reasonableness that would apply under any statutory standard would warrant granting this Application for Rehearing. But under R.C. 4905.40(F), it is all the more apparent that DP&L did not justify its Application and that the Order therefore should be reheard. R.C. 4905.40(F)(1) speaks directly to the issue of the separation of the power plants. The Order did not “set forth” (not could it) how DP&L needed the financing for up to 30 years, as secured by the power plants, for its “prospective obligations” for utility service considering that the power plants will soon be separated from DP&L. Allowing the financing for up 30 years when DP&L will likely have to separate the power plants in a few years, creates an unnecessary exposure for customers to paying subsidies for the future holder of the power plants. Such subsidies are contrary to the state policy in R.C. 4928.02(H). And the Order does not adequately establish any

protections for customers. In fact, DP&L acknowledges the important need to structure the New Bonds to “accommodate a potential future separation of generation assets.”²⁴

Furthermore, in a recent case, the PUCO approved Duke's application to issue securities with conditions.²⁵ Two conditions addressed corporate separation.²⁶ Accordingly, the PUCO should address corporate separation in this case and order conditions necessary to protect consumers.

IV. CONCLUSION

For the reasons set forth above and in the interests of Ohio customers, the PUCO should grant OCC's Application for Rehearing.

Respectfully submitted,

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/s/ Melissa R. Yost

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²⁴ See Amendment to Application at 1-2 (May 29, 2013), and Supplement to the Application, Exhibit A (June 28, 2013).

²⁵ Finding and Order (May 1, 2013), PUCO Case No. 13-1752-GE-AIS.

²⁶ *Id* at paragraph 13.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Application for Rehearing* as served on the persons stated below electronic transmission this 9th day of August 2013.

/s/ Melissa R. Yost
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Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Yost, Melissa R. Ms.