BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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 for 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 Waiver of Certain Commission Rules.	)))	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.	)))	Case No. 12-672-EL-RDR

MEMORANDUM CONTRA THE APPLICATION FOR REHEARING OF THE DAYTON POWER AND LIGHT COMPANY AS TO THE SECOND ENTRY ON REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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April 28, 2014

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MEMORANDUM CONTRA THE APPLICATIONS FOR REHEARING OF THE DAYTON POWER AND LIGHT COMPANY AND THE KROGER COMPANY BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") files this Memorandum Contra[1] the Application for Rehearing of The Dayton Power and Light Company ("DP&L" or "Utility" or "Company") as to the Second Entry on Rehearing, to maintain the accelerated Competitive Bidding Plan ("CBP") blending schedule that will benefit consumers with a more rapid move to full market-based rates. In its Application for

[1] OCC's filing is in accordance with Ohio Adm. Code 4901-1-35(B).

Rehearing, DP&L asks the Public Utilities Commission of Ohio ("PUCO" or "Commission") to "restore" the May 31, 2017 deadline for DP&L to transfer its generation assets and the blending schedule established in the September 6, 2013 Entry *Nunc Pro Tunc*. But as further explained later in this Memorandum Contra, DP&L's Application for Rehearing does not fulfill the necessary statutory and administrative requirements for a rehearing application[2] and therefore, as a matter of law, the PUCO cannot grant DP&L's rehearing request with regard to the PUCO's March 19, 2014 Second Entry on Rehearing.

Furthermore, nowhere in DP&L's Application for Rehearing (or its Memorandum in Support) does DP&L even allege that the PUCO's Second Entry on Rehearing is unlawful or unreasonable. And DP&L's Memorandum in Support provides no basis for DP&L's contention that the PUCO should "restore" the May 31, 2017 deadline for DP&L to transfer its generation assets and the blending schedule established in the September 6, 2013 Entry *Nunc Pro Tunc*. Accordingly, OCC urges the PUCO to deny DP&L's Application for Rehearing, and instead modify its March 19, 2014 Second Entry on Rehearing consistent with OCC's Second Application for Rehearing filed on April 18, 2014.

II. APPLICABLE LAW

Applications for rehearing are governed by R.C. 4903.10 and may be sought by any party who has entered an appearance in the proceeding on any matter determined in the proceeding. 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

[2] *See* R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

in its judgment sufficient reason therefore is made to appear."[3] Further, 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 ***."[4]

But before this Commission can grant rehearing on any matter, the requirements of R.C. 4903.10 must be met. R.C. 4903.10 mandates that the application for rehearing must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[5] The Ohio Supreme Court has held that "when an appellant's grounds for rehearing fail to specifically allege in what respect the PUCO's order was unreasonable or unlawful, the requirements of R.C. 4903.10 have not been met."[6] The Court has further mandated that there be "strict compliance with such specificity requirement."[7] In addition, the statute states, "No party shall in any court urge or rely on a ground for reversal, vacation, or modification not so set forth in the application."[8] With respect to this requirement, the Supreme Court has affirmed that setting forth specific grounds for rehearing is a jurisdictional prerequisite for review, and that an issue is waived "by not setting it forth in its application for rehearing."[9]

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[3] R.C. 4903.10.

[4] *Id.*

[5] *Id.*

[6] *Discount Cellular, Inc., et al. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 375, 2007-Ohio-53, 59 (citations omitted).

[7] *Office of Consumers' Counsel v. Public Util. Comm.* (1994), 70 Ohio St. 3d 244, 247-248 (citations omitted); s*ee also Discount Cellular, Inc., et al. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 375, 2007-Ohio-53, 59 (citations omitted) (stating that "[W]e have strictly construed the specificity test set forth in R.C. 4903.10.").

[8] R.C. 4903.10.

[9] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St. 3d 340, 349, 2007-Ohio-4276.

The PUCO has a rule related to the statute, Ohio Adm. Code 4901-1-35. Ohio Adm. Code 4901-1-35 addresses the form and timing of applications for rehearing and states, in part, that:

> An application for rehearing must set forth the *specific ground or grounds* upon which the applicant considers the commission order to be unreasonable or unlawful. An application for rehearing must be accompanied by a *memorandum in support, which sets forth an explanation of the basis for each ground for rehearing identified in the application for rehearing* and which shall be filed no later than the application for rehearing.[10]

Thus, the PUCO's administrative requirements contemplate and require two documents (i.e., the application required by statute and the memorandum in support), each with a specific purpose.

III. ARGUMENT

A. DP&L's Application For Rehearing Does Not Assert The Specific Grounds For Rehearing And Therefore Does Not Comply With The Applicable Statutory And Administrative Requirements As Mandated In Ohio Revised Code 4903.10 And Ohio Administrative Code 4901-1-35.

As presented above, R.C. 4903.10 requires that all applications for rehearing present specific grounds for the PUCO's review.[11] Ohio Adm. Code 4901-1-35(A) requires that applications for rehearing present specific grounds for rehearing and that the purpose of the corresponding memorandum is to "set forth an explanation of the basis for each ground for rehearing *identified in the application for rehearing*."[12] DP&L's Application for Rehearing does not meet these requirements. The Application for Rehearing does not state *any* grounds on which DP&L considers the PUCO's March 19,

[10] Ohio Adm. Code 4901-1-35(A). (Emphasis added).

[11] *See* R.C. 4903.10.

[12] Ohio Adm. Code 4901-1-35(A). (Emphasis added).

2014 Second Entry on Rehearing to be unreasonable or unlawful. DP&L's Application for Rehearing merely requests that the PUCO grant rehearing on its decision in its Second Entry on Rehearing to accelerate: 1) the deadline for DP&L to transfer its generation assets to January 1, 2016, and 2) blending in the competitive bidding process[13] and restore the deadline and blending schedule that it established in its September 6, 2013 Entry *Nunc Pro Tunc*.[14] DP&L's Application for Rehearing is void of the words "unlawful" and "unreasonable."[15]

R.C. 4903.10 does not provide for the filing of a memorandum in support of an application for rehearing.[16] The requirement for filing a memorandum in support is an administrative requirement of the PUCO for the purpose of setting "forth an explanation of the basis for each ground for rehearing *identified in the application for rehearing*."[17] DP&L's reliance on its Memo in Support does not cure the Application's statutory defect of failing to state, in accordance with R.C. 4903.10, the grounds on which DP&L considers the PUCO's March 19, 2014 Second Entry on Rehearing to be unreasonable or unlawful.

The PUCO has followed the well-established precedent of the Ohio Supreme Court discussed above. For example, in October 2009, the Commission denied an Application for Rehearing filed by Aqua Ohio because the Application did not present

[13] DP&L's Application for Rehearing.

[14] DP&L's Application for Rehearing.

[15] *See* DP&L's Application for Rehearing.

[16] *See* R.C. 4903.10.

[17] Ohio Adm. Code 4901-1-35(A). (Emphasis added).

the specific grounds on which rehearing was warranted.[18] In that case, the PUCO found that the Application for Rehearing did not fulfill either the statutory requirements of R.C. 4903.10 or the administrative requirements of Ohio Adm. Code 4901-1-35.[19] Specifically, the PUCO held that:

> [T]he application merely states that Aqua requests rehearing and refers to the attached memorandum in support for the specific grounds upon which Aqua considers the August 19, 2009, opinion and order to be unreasonable or unlawful. An application for rehearing that does not substantially comply with the statutory requirements of specificity was found inadequate by the Ohio Supreme Court in *Conneaut*, 10 Ohio St.2d at 270.
> For the foregoing reasons, Aqua's September 18, 2009, application for rehearing is denied.[20]

Furthermore, in a 2010 Entry on Rehearing denying rehearing, the PUCO found that an application for rehearing by Ohio American fulfilled "neither the statutory requirements of section 4903.10, Revised Code, nor the administrative requirements of Rule 4901-1-35, O.A.C."[21] In that case, the application merely stated "that the company requests rehearing" and referred "to the attached memorandum in support for the specific grounds upon which Ohio American considers the May 5, 2010, opinion and order to be unreasonable or unlawful."[22]

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[18] *See In the Matter of a Settlement Agreement Between the Staff of the Public Utilities Commission of Ohio, the Office of the Ohio Consumers' Counsel, and Aqua Ohio, Inc. Relating to Compliance with Customer Service Terms and Conditions Outlined in the Stipulation and Recommendation in Case No, 07-564-WW-AIR and the Standards for Waterworks Companies and Sewage Disposal System Companies*, PUCO Case No. 08-1125-WW-UNC, Entry on Rehearing at 5 (October 14, 2009).

[19] *See id.*

[20] *Id.*

[21] *In the Matter of the Application of Ohio American Water Company to Increase its Rates for Water and Sewer Services Provided to its Entire Service Area*, PUCO Case No. 09-391-WS-AIR, Entry on Rehearing at 2 (June 23, 2010).

[22] *Id.*

In this case, DP&L's Application for Rehearing fulfills neither the statutory nor the administrative requirements for an application for rehearing. Therefore, consistent with the PUCO's denial of Aqua Ohio's Application for Rehearing,[23] and OAW's Application for Rehearing,[24] DP&L's Application should be denied because it fails to comply with the specificity requirement of R.C. 4903.10[25] and the PUCO's specificity requirement mandated in Ohio Adm. Code 4901-1-35.

B. The PUCO Should Deny DP&L's Application for Rehearing Because It Is Both Lawful and Reasonable for DP&L to be Required to Divest its Generating Assets By January 1, 2016 To Protect Customers From Paying Additional Unwarranted Charges to Support DP&L's Competitive Generating Assets.

The PUCO should deny DP&L's Application for Rehearing of the PUCO's decision that, as of January 1, 2016, DP&L must fully divest its generating assets. That PUCO decision is lawful, reasonable and good for consumers. In its Second Entry on Rehearing, the PUCO accelerated the date that DP&L must divest its generating assets from May 31, 2017 to January 1, 2016, finding that "[b]ased upon new information contained in DP&L's supplemental application in Case No. 13-2420-EL-UNC" where DP&L indicated that it was evaluating divestiture as early as 2014, the "deadline for DP&L to divest its generation assets" should in no case "be later than January 1, 2016."[26]

The PUCO's determination to advance the date for DP&L to divest was based upon its factual finding that DP&L's own statements (in its Supplemental Application in

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[23] *See id.*

[24] Entry on Rehearing at 2 (June 23, 2010), PUCO Case No. 09-391-WS-AIR.

[25] *See Office of Consumers' Counsel v. Public Util. Comm.* (1994), 70 Ohio St. 3d 244, 247-248 (citations omitted); s*ee also Discount Cellular, Inc., et al. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 375, 2007-Ohio-53, 59 (citations omitted) (stating that "we have strictly construed the specificity test set forth in R.C. 4903.10.").

[26] Second Entry on Rehearing at 17-18.

PUCO Case No. 13-2420-EL-UNC) supported the conclusion that DP&L could divest much earlier – as early as 2014.[27] DP&L's representations in that proceeding, as the PUCO recognized, are at odds with the testimony of DP&L's Chief Financial Officer, Craig L. Jackson, in this ESP proceeding. Mr. Jackson had testified that DP&L could not divest before September 1, 2016 because of provisions in its first and refunding mortgage bonds that prohibit calling such bonds at an earlier date.[28] And the PUCO had found in its September 4, 2013 Order that defeasement and release of those bonds at an earlier date "present significant financial risk to DP&L."[29]

But DP&L's statement that it was considering divesting as early as 2014 in PUCO Case No. 13-2420-EL-UNC made apparent that the obstacles to earlier divestment had been overstated. And, as a result, the PUCO concluded that DP&L should divest sooner. It should not be surprising to anyone – especially DP&L -- that when DP&L stated that it was considering divesting as early as 2014 – that the PUCO would correct its order finding that DP&L could divest as late as May 31, 2017. The PUCO's decision to require divestment by January 1, 2016 is both lawful and was reasonable given the most recent information presented by DP&L.

In its Application for Rehearing, DP&L asserts that the PUCO's decision in its Second Entry on Rehearing was "based upon a miscommunication."[30] DP&L argues that it was not Mr. Jackson's testimony that the generation assets could not be divested at an earlier date but that they could not be transferred "to an affiliate before 2017 ***without***

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[27] *Id.*

[28] Transcript Vol. I-public, page 126; DP&L Exhibit 16 at 2-4.

[29] September 4, 2013 Order at 15, *citing* DP&L Exhibit 16 at 2-4.

[30] Memorandum in Support at 2.

additional financial resources."[31] DP&L argues that a sale of the assets – as compared to a transfer to an affiliate – "would allow for funds which could then be used to cover the material costs that DP&L would face in order to allow it to redeem its bonds early."[32] DP&L further argues that "changes" and "deteriorations" in "market conditions" forced DP&L to explore a sale rather than a transfer to its affiliate and thus raised the possibility of an earlier divestment.[33] DP&L states that it "regrets the miscommunication" and requests that the May 31, 2017 for divestment date be restored.[34] DP&L also states repeatedly that the evidence which it presented, and particularly Mr. Jackson's testimony, was accurate at the time of the testimony and remains accurate today, since it related to a transfer to an affiliate rather than a sale.[35]

The PUCO appropriately recognized in its Second Entry on Rehearing that DP&L's representations of the obstacles to corporate separation were significantly overstated in modifying the required date of divestment to January 1, 2016. Even though that date is still nearly seventeen years after Senate Bill 3 was enacted in 1999 mandating structural separation of a utility's generating assets and operations from its transmission and distribution business, it is still far better for customers than the later date of May 31, 2017.

A review of Mr. Jackson's rebuttal testimony indicates that he made little, if any, distinction in his testimony between the obstacles to legal separation associated with a transfer and the obstacles to legal separation associated with a sale. As he testified in his

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[31] *Id.* at 2-3. (Emphasis added).

[32] *Id.* at 2.

[33] *Id.* at 2, 5-7.

[34] *Id.* at 3.

[35] *Id.* 3-5.

Rebuttal Testimony, these obstacles were primarily related to no-call provisions in DP&L's First and Refunding Mortgage bonds, as follows:[36]

> Q. Several parties have suggested through their testimony, that DP&L could separate its generation assets sooner than the Company's proposed date of December 31, 2017. Do you agree?
>
> A. No. The Company is limited in how quickly it can legally separate its generation assets by two separate and distinct factors:
>
> - First, the Company maintains a First and Refunding Mortgage, which creates a lien on all of the assets (transmission, distribution and generation) of DP&L for the purposes of securing approximately $884M of current indebtedness ('Secured Bonds'). So long as this First and Refunding Mortgage remains in existence in its current form, the Company is ***unable to effectuate a legal separation of the generation assets from the regulated assets***. In fact, legal separation cannot occur until this First and Refunding Mortgage is either: a) defeased or; b) amended to permit the release of the generation assets from the First and Refunding Mortgage.
>
> * * *
>
> - Second, notwithstanding the restrictions above, the Company has material financing market limitations. If DP&L could defease or amend its First and Refunding Mortgage such that the lien on the generation assets was released the Company would then have to: a) maintain or refinance all $884M of indebtedness at the regulated business; b) call a portion of this indebtedness and repay it with cash; or c) call a portion of this indebtedness and refinance it with proceeds raised by the new nonregulated business. Option a) is problematic, since leaving the entire debt within the regulated business would result in a capital structure with excessive debt under current PUCO guidelines would increase business and financial risks and would increase financing costs attendant with excessive debt levels. Options b) is not practical given the Company would not have sufficient time to accumulate the necessary cash in order to pay down a material amount of this debt Options c) is not practical given the new non-regulated

[36] DP&L Exhibit 16A, pp. 2-4 (Jackson). (Emphasis added.)

> generation business could not raise debt in the capital markets to refinance currently outstanding indebtedness (primarily due to today's generally weak power markets).

Thus, although Mr. Jackson's testimony on the obstacles to separation were focused at the time on DP&L's plan to transfer its generation assets to an affiliate, he never indicated that these obstacles could be resolved by a sale of the assets, rather than a transfer to an affiliate. Clearly, the sale of the generation assets was a means of structural separation that was then, and continues to be, available to DP&L. Mr. Jackson's failure to indicate that a sale of the assets was a means of resolving the debt refinancing issues reasonably led the PUCO to conclude that divestment could not occur earlier than September 1, 2016. That was the date that Mr. Jackson testified that the no-call provisions expired, because, as he also testified, amending the no-call provision would require bondholder consent and "entail significant execution and financial risk," *i.e.* it was unlikely.[37] The PUCO accepted DP&L's representation to this effect in its Opinion and Order of September 4, 2013.[38] Neither DP&L nor its Chief Financial Officer, Mr. Jackson, **ever** distinguished the obstacles to debt refinancing based upon whether divestment was through a sale or through a transfer to an affiliate. The PUCO should not entertain such an argument at this stage of the proceedings and in the absence of affirmative evidence to that effect.

DP&L also argues that, after the hearing, there were "material and adverse changes in market conditions," pointing to 2016/2017 PJM capacity prices, which cleared on May 24, 2013.[39] OCC notes that this occurred within two months after the close of

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[37] *Id.* at 2-3.

[38] September 4, 2013 Order at 27-28.

[39] Memorandum in Support at 5.

record and while the parties were still briefing this matter – Reply Briefs were not filed until June 5, 2013. Certainly, had this outcome been so significant that DP&L might consider earlier divestment, DP&L should have moved to reopen the record at that time. Its decision to wait nearly 11 months from that event to present its concerns regarding the effect of market changes on its debt refinancing again suggests the overstatement of those debt refinancing limitations. Indeed, as DP&L indicates in its Application for Rehearing, it first presented the PUCO with the possibility of selling its generation assets to a third party in its Supplemental Application in PUCO Case No. 13-2420-EL-UNC, on February 25, 2014. And now, for the first time, DP&L argues that a third party sale could be done sooner because the purchase price might be such that DP&L could "offset costs of releasing the generation assets from the Company's mortgage and otherwise restructuring/refinancing its debt."[40]

The PUCO should deny DP&L's request to postpone its divestment beyond January 1, 2016 to the detriment of customers. DP&L's divestment is long overdue. DP&L was well aware that a sale of its generation assets was a possible form of divestment and did not earlier apprise the PUCO of its position that this could have been done sooner than a transfer to an affiliate. The fact that DP&L has now changed its "strategic plan" does not change the factual nature of the information it presented to the PUCO or the significance of that information to assessing the time frame for divestment. The PUCO's decision that DP&L be required to divest its generation assets no later than January 1, 2016 is both lawful and reasonable.

[40] Memorandum in Support at 6.

C. The PUCO Should Deny DP&L's Application for Rehearing Because The PUCO's Decision To Accelerate the CBP Blending Schedule to Benefit Consumers Is Neither Unlawful or Unreasonable.

DP&L's customers have waited too long for the benefits of competition in a market with historically low energy prices. DP&L's customers are now closer to realizing those potential benefits because the PUCO appropriately accelerated the blending schedule in its Second Entry on Rehearing. As the PUCO noted, "The acceleration of the CBP blending schedule will benefit consumers through a more rapid move to full market-based rates ***."[41]

The PUCO should deny DP&L's request to reconsider its decision to accelerate the blending schedule for several reasons. First, as discussed earlier, DP&L failed to raise any ground in its Application for Rehearing for the PUCO's consideration.[42] Second, it should be noted that DP&L does not allege that the PUCO's decision is unlawful in any way. Third, even if the new blending schedule results in a reduction of DP&L's profits, the schedule is reasonable and will benefit consumers.

In an effort to convince the PUCO that it should grant rehearing in regard to the blending schedule, DP&L "miscommunicates" the basis for the PUCO's decision in the Second Entry on Rehearing. Specifically, DP&L states that the PUCO should grant rehearing as to the blending schedule because "the basis for the Commission's decision on rehearing – that DP&L could transfer its generation assets sooner than DP&L had stated at the hearing -- is not accurate."[43] But what is not accurate is DP&L's account of the PUCO's Second Entry on Rehearing. That Entry, however, speaks to "divestiture" of

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[41] Second Entry on Rehearing at 19.

[42] R.C. 4903.10.

[43] Memorandum in Support at 9.

generation assets—not transfer—as alleged by DP&L. Specifically, in granting rehearing requested by OCC and FES, the PUCO stated that "[i]n determining the CBP blending schedule in the Order, the Commission relied upon the fact that DP&L would be unable to *divest* its generation assets before September 1, 2016."[44]

DP&L does allege that it cannot transfer its assets to an affiliate by January 1, 2016. But DP&L ***does not*** maintain that it cannot sell its generation assets to a third party by January 1, 2016. In fact, DP&L merely alleges that selling its generation assets to a third party "*may* not be feasible at this point ***."[45] But, to the contrary, it may be feasible at this point for DP&L to sell its generation assets. And per the PUCO's Second Entry on Rehearing, DP&L has adequate time—until January 1, 2016—to divest those assets. The PUCO's decision to accelerate the blending schedule is reasonable and rehearing on this issue should not be granted.

DP&L wants the PUCO (and parties in this case) to ignore the fact that DP&L has had some of the highest returns on equity of any utility in recent years. From 2001 through 2010, DP&L's return on equity was 17% or greater, 20% or more in 7 of those 10 years.[46] While DP&L's returns on equity appear to be declining – 14.1% in 2011 and 10.8% in 2012,[47] it is premature to conclude that the floor will fall out on DP&L's financial condition any time soon. Moreover, had DP&L separated its generation operations from its other operations earlier, it would not face the claimed financial threat that operation of its generation assets presents today. DP&L bears responsibility for its

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[44] Second Entry on Rehearing at 18. (Emphasis added).

[45] Memorandum in Support at 9. (Emphasis added).

[46] Direct Testimony of IEU witness Joseph G. Bowser, Exh. JGB-4.

[47] Direct Testimony of IEU witness Joseph G. Bowser at 13 & Exh. JGB-4.

"predicament," if indeed there is one. Under the law, DP&L—and not customers—was to be "wholly responsible" for the success of its competitive generation operations since its market development period ended -- in 2005.[48] The PUCO should not further delay flowing through the benefits of the competitive market to DP&L's customers in order to prop up DP&L's competitive generation business. Accordingly, DP&L should be required to divest its generation assets no later than January 1, 2016.

IV. CONCLUSION

For all the reasons discussed above, the OCC urges the PUCO to deny DP&L's Application for Rehearing. Instead, the PUCO should modify its March 19, 2014 Second Entry on Rehearing, consistent with OCC's Second Application for Rehearing filed on April 18, 2014.

Respectfully submitted,

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[48] R.C. 4928.38.

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Memorandum Contra* was served via electronic mail to the persons listed below this 28th day of April, 2014.

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Case No(s). 12-0426-EL-SSO, 12-0427-EL-ATA, 12-0428-EL-AAM, 12-0429-EL-WVR, 12-0672-EL-RDR

Summary: Memorandum Memorandum Contra the Application for Rehearing of the Dayton Power and Light Company as to the Second Entry on Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Yost, Melissa R. Ms.