

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan.)	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
)	
)	

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

As part of our advocacy for residential consumers of the Dayton Power and Light Company (“DP&L” or “Utility”) to receive adequate service at reasonable rates, the Office of the Ohio Consumers’ Counsel (“OCC”) files this Third Application for Rehearing. OCC seeks rehearing of the Fourth Entry on Rehearing (“Fourth Rehearing Entry”) issued by the Public Utilities Commission of Ohio (“Commission” or “PUCO”) in the above-captioned proceedings on June 4, 2014. OCC is authorized to file this Third Application for Rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

OCC seeks rehearing on the PUCO's decision to grant, in part, DP&L's April 18, 2014 Application for Rehearing that was statutorily deficient. Accordingly, OCC requests rehearing on the Fourth Rehearing Entry based on the following assignment of Error:

The PUCO Unreasonably And Unlawfully Erred In Granting DP&L's Request For Rehearing of the PUCO's March 19, 2014 Second Rehearing Entry. DP&L's April 18, 2014 Application For Rehearing Did 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.

The basis of this Third Application for Rehearing is set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claim of error, the PUCO should modify its Fourth Entry on Rehearing.

Respectfully submitted,

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Approval of its Electric Security Plan.)	

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Approval of Certain Accounting)	
Authority.)	

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Dayton Power and Light Company for)	
Waiver of Certain Commission Rules.)	

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Dayton Power and Light Company to)	
Establish Tariff Riders.)	

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") files this Third Application for Rehearing as to the Fourth Entry on Rehearing because of the error made by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in granting rehearing to the Dayton Power and Light Company ("DP&L" or "Utility"). The PUCO acted unlawfully and unreasonably by granting DP&L's request for rehearing as the Utility's Application for Rehearing did not fulfill the necessary statutory and administrative

requirements for a rehearing application.¹ In its Application, DP&L failed to assert the specific grounds for rehearing required by the Ohio Revised Code and the Ohio Administrative Code.² As such, the PUCO could not have lawfully granted the Utility the rehearing requested. Therefore, the PUCO should grant rehearing here to undo the unlawful outcome of the June 4, 2014 Fourth Entry on Rehearing.

II. STANDARD OF REVIEW

Ohio law 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.”³ 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.”⁴

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.”⁵ 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 * * *.”⁶

¹ See R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

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

³ R.C. 4903.10.

⁴ R.C. 4903.10(B).

⁵ *Id.*

⁶ *Id.*

OCC meets both the statutory conditions applicable to an applicant for rehearing under R.C. 4903.10 and the requirements of the PUCO's rule on applications for rehearing.⁷ Accordingly, OCC respectfully requests that the PUCO grant rehearing on the matter specified below.

III. APPLICABLE LAW

The granting of an application for rehearing is governed by R.C. 4903.10. But before the PUCO 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."⁸ 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."⁹ The Court has further mandated that there be "strict compliance with such specificity requirement."¹⁰ 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."¹¹ With respect to this requirement, the Supreme Court has affirmed that setting forth

⁷ See Ohio Admin. Code 4901-1-35.

⁸ *Id.*

⁹ *Discount Cellular, Inc., et al. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 375, 2007-Ohio-53, 59 (citations omitted).

¹⁰ *Office of Consumers' Counsel v. Public Util. Comm.* (1994), 70 Ohio St. 3d 244, 247-248 (citations omitted); see 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.").

¹¹ R.C. 4903.10.

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.”¹²

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.¹³

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.

IV. LAW AND ARGUMENT

ASSIGNMENT OF ERROR:

The PUCO Unreasonably And Unlawfully Erred In Granting DP&L’s Request For Rehearing of the PUCO’s March 19, 2014 Second Rehearing Entry. DP&L’s April 18, 2014 Application For Rehearing Did 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.¹⁴ Ohio Adm. Code 4901-1-35(A) requires that applications for rehearing present specific grounds for rehearing and that the

¹² *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 114 Ohio St. 3d 340, 349, 2007-Ohio-4276.

¹³ Ohio Adm. Code 4901-1-35(A). (Emphasis added).

¹⁴ See R.C. 4903.10.

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*.”¹⁵ DP&L’s Application for Rehearing did not meet these requirements. The Application for Rehearing did not state *any* grounds on which DP&L considered the PUCO’s March 19, 2014 Second Entry on Rehearing to be unreasonable or unlawful. DP&L’s Application for Rehearing merely requested 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 process¹⁶ and restore the deadline and blending schedule that it established in its September 6, 2013 Entry *Nunc Pro Tunc*.¹⁷ DP&L’s Application for Rehearing was void of the words “unlawful” and “unreasonable.”¹⁸

R.C. 4903.10 addresses the application for rehearing only. It does not refer to the filing of a memorandum in support of an application for rehearing.¹⁹ 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*.”²⁰ DP&L’s reliance, if any, on its Memorandum in Support cannot and did not cure the Application’s statutory defect of failing to state, in accordance with R.C. 4903.10, the grounds on which DP&L considered the PUCO’s March 19, 2014 Second Entry on Rehearing to be unreasonable or unlawful.

¹⁵ Ohio Adm. Code 4901-1-35(A). (Emphasis added).

¹⁶ DP&L’s Application for Rehearing.

¹⁷ DP&L’s Application for Rehearing.

¹⁸ See DP&L’s Application for Rehearing.

¹⁹ See R.C. 4903.10.

²⁰ Ohio Adm. Code 4901-1-35(A). (Emphasis added).

The PUCO has acknowledged followed the well-established precedent of the Ohio Supreme Court discussed above. For example, in October 2009, the PUCO denied an Application for Rehearing filed by Aqua Ohio because the Application did not present the specific grounds on which rehearing was warranted.²¹ 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 4901-1-35.²²

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.²³

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.”²⁴ In that case, the application merely stated “that the company requests rehearing” and referred “to the attached memorandum in support for the specific

²¹ 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).

²² See *id.*

²³ *Id.*

²⁴ *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).

grounds upon which Ohio American considers the May 5, 2010, opinion and order to be unreasonable or unlawful.”²⁵

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,²⁶ and OAW’s Application for Rehearing,²⁷ DP&L’s Application should have been denied. DP&L’s Application failed to comply with the specificity requirement of R.C. 4903.10²⁸ and the PUCO’s specificity requirement mandated in Ohio Adm. Code 4901-1-35. Instead, the PUCO granted, in part, DP&L’s request for rehearing. Such PUCO action was unlawful and unreasonable. OCC’s request for rehearing should be granted so that the PUCO can correct that error.

V. CONCLUSION

The unlawful outcome of the June 4, 2014 Fourth Entry on Rehearing should not stand. Accordingly, the PUCO should grant OCC’s Third Application for Rehearing.

²⁵ *Id.*

²⁶ *See id.*

²⁷ Entry on Rehearing at 2 (June 23, 2010), PUCO Case No. 09-391-WS-AIR.

²⁸ *See Office of Consumers' Counsel v. Public Util. Comm.* (1994), 70 Ohio St. 3d 244, 247-248 (citations omitted); *see 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.”).

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Third Application for Rehearing* was served via electronic transmission, to the persons listed below, on this 1st day of July, 2014.

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Summary: App for Rehearing Third 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.