

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 the 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
	:	

**THE DAYTON POWER AND LIGHT COMPANY'S
MEMORANDUM IN OPPOSITION TO THE THIRD APPLICATION FOR
REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION AND SUMMARY

On April 18, 2014, The Dayton Power and Light Company ("DP&L") filed the Application for Rehearing of The Dayton Power and Light Company as to the Second Entry on Rehearing ("DP&L Application for Rehearing"), raising the two assignments of error:

"1. The Commission should grant rehearing on its decision in its Second Entry on Rehearing (pp. 17-18) to accelerate the deadline for DP&L to transfer its generation assets to January 1, 2016. The

Commission should restore the May 31, 2017 deadline that it established in its September 6, 2013 Entry Nunc Pro Tunc.

2. The Commission should grant rehearing on its decision in its Second Entry on Rehearing (pp. 18-19) to accelerate blending in the competitive bidding process. The Commission should restore the blending schedule that it established in its September 6, 2013 Entry Nunc Pro Tunc."

DP&L Application for Rehearing, pp. 2-3. The DP&L Application for Rehearing thus set forth both (1) the specific matters on which DP&L sought rehearing, including the specific pages of the entry at issue, and (2) the specific relief that DP&L requested.

The Office of the Ohio Consumers' Counsel ("OCC") opposed the DP&L Application for Rehearing, in part, on the same grounds that OCC now asserts in the Third Application for Rehearing by The Office of the Ohio Consumers' Counsel ("OCC Application for Rehearing"), *i.e.*, that the DP&L Application for Rehearing was not sufficiently specific under Ohio Rev. Code § 4903.10 and Ohio Admin. Code § 4901-1-35. April 28, 2014 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 ("OCC Memorandum Contra DP&L Application for Rehearing"), pp. 4-7.

Shortly thereafter, the Commission found that the DP&L Application for Rehearing warranted further consideration. May 7, 2014 Third Entry on Rehearing, ¶ 8. The Commission later denied rehearing on its decision to accelerate blending in the competitive bidding process, but granted rehearing on its decision to accelerate the deadline for DP&L to divest its generation assets. June 4, 2014 Fourth Entry on Rehearing, ¶¶ 10 and 12. In that entry, the Commission recognized that "there are terms and conditions in certain bonds that significantly impede upon [DP&L's] ability to transfer its generation assets to an affiliate before

September 1, 2016, and, due to adverse market conditions, DP&L will not have sufficient cash flow to refinance the bonds before 2017." Id. at ¶ 12. The Commission, therefore, modified its decision in the Second Entry on Rehearing and directed DP&L to divest its generation assets by January 1, 2017. Id.

The Commission also stated, "Any arguments on rehearing not specifically discussed herein have been thoroughly and adequately considered by the Commission and are hereby denied." Id. at ¶ 6. The Commission, therefore, rejected OCC's argument that the DP&L Application for Rehearing was not sufficiently specific under Ohio Rev. Code § 4903.10 and Ohio Admin. Code § 4901-1-35. OCC Memorandum Contra DP&L Application for Rehearing, pp. 4-7.

On July 1, 2014, the OCC Application for Rehearing was filed in response to the Fourth Entry on Rehearing. The OCC Application for Rehearing does not claim that the Commission's January 1, 2017 deadline for DP&L to divest its generation assets was unlawful or unreasonable.

Instead, OCC argues (p. 5) – for a second time – that the Commission erred in partially granting the DP&L Application for Rehearing because DP&L supposedly failed to provide in its application "*any grounds*" for rehearing under Ohio Rev. Code § 4903.10(B) and Ohio Admin. Code § 4901-1-35. That assertion is false. Moreover, OCC's arguments on this issue are contrary to established precedent of the Supreme Court of Ohio and the Commission.

Alternatively, even if the Commission were to find that DP&L did not set forth sufficiently specific grounds for a rehearing, the Commission nevertheless had the authority to grant the relief in the Fourth Entry on Rehearing under Ohio Rev. Code § 4903.10(B).

II. THE DP&L APPLICATION FOR REHEARING COMPLIED WITH THE SPECIFICITY REQUIREMENTS OF OHIO REV. CODE § 4903.10 AND OHIO ADMIN. CODE § 4901-1-35 BY IDENTIFYING THE SPECIFIC MATTERS ON WHICH DP&L SOUGHT REHEARING AND THE SPECIFIC RELIEF THAT DP&L REQUESTED

Under Ohio Rev. Code § 4903.10(B), an application for rehearing must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." The Ohio Administrative Code echoes this requirement and further provides that applications 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." Ohio Admin. Code § 4901-1-35(A).

If an application for rehearing identifies what an applicant "consider[s] problematic with the Commission's decision and what [the applicant] want[s] the ultimate Commission decision to conclude," then the application satisfies the specificity requirements of § 4903.10(B) and § 4901-1-35(A). In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Services, et al., Case Nos. 94-987-GA-AIR et al., Entry on Rehearing, ¶ 11 (June 9, 2004) (application for rehearing was sufficiently specific when "a plain reading of the document indicate[d] that it set forth the items with which the . . . applicants took issue").

The Commission has further recognized that when an application for rehearing does not require the Commission "to examine the document minutely, merely to discover the questions raised," the application satisfies § 4903.10(B) and § 4901-1-35(A). In the Matter of the Complaint of Yerian, Case No. 02-2548-EL-CSS, Entry on Rehearing, ¶ 15 (May 19, 2004) (citing Agin v. Public Util. Comm., 12 Ohio St.2d 97, 99, 232 N.E.2d 828 (1967) (application for rehearing was not sufficiently specific when it was necessary "to examine minutely an applicant's

complaint before the commission, the order of the commission, appellant's application for rehearing" and other documents "merely to discover what questions [were raised] on appeal").

In each case cited by OCC, the application for rehearing failed to identify the specific matters on which a rehearing was requested and the specific relief sought by the applicant. They are, therefore, distinguishable from the DP&L Application for Rehearing and their rulings thus do not control the outcome here.

For example, in one case cited by OCC, the Commission found that an application was not sufficiently specific when the application did not contain any grounds for a rehearing. 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, Case No. 09-391-WS-AIR ("Ohio American"), Entry on Rehearing, ¶ 6 (June 23, 2010). The entire application read:

"Pursuant to Ohio Revised Code Section ('R.C.') 4903.10, the Ohio American Water Company ('Ohio American' or 'Company') respectfully requests that the Public Utilities Commission of Ohio ('Commission') grant this Application for Rehearing of the May 5, 2010 Opinion and Order ('Order') in the above-captioned proceeding. The reasons supporting Ohio American's Application for Rehearing are contained in the accompanying Memorandum in Support."

Ohio American, Ohio American Water Company's Application for Rehearing, p. 1 (June 4, 2010). OCC's reliance on that decision is plainly misplaced. That application did not identify either the portion of the Commission's decision that was at issue, or the relief that the applicant sought.

OCC also relies on 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, Case No. 08-1125-WW-UNC ("Aqua Ohio"), Entry on Rehearing, ¶ 5 (Oct. 14, 2009). That case is also distinguishable because, similar to the application for rehearing in Ohio American, Aqua Ohio's application for rehearing simply stated:

"Now comes Aqua Ohio, Inc. and moves the Commission pursuant to Ohio Revised Code Section 4903.10 and Ohio Administrative Code Section 4901-1-35 for a rehearing on the decision of the Commission on August 19, 2009 assessing a civil penalty against Aqua. A memorandum in support of this motion is attached."

Aqua Ohio, Aqua Ohio, Inc.'s Application for Rehearing, Aqua Case, p. 1 (Sept. 18, 2009).

Likewise, the remaining cases cited by OCC do not support its argument. First, in Discount Cellular, Inc. v. Pub. Util. Comm., 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, the Supreme Court of Ohio found that appellants could not challenge the standard that the Commission used to dismiss a complaint because the appellants did not raise the use of that standard as a ground for rehearing in their application. Id. at ¶60. Instead, the appellants had stated in their application only that "[t]he commission erred in dismissing the complaint because the commission is required by R.C. 4905.26 to hear complaints alleging violations of Ohio utility law." Id. at ¶57. Second, in Ohio Consumers' Counsel v. Pub. Util. Comm., 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, the Court merely declined to consider the Commission's use of a three-part reasonableness test for reviewing settlement stipulations because OCC had failed to set forth that issue in its application for rehearing. Id. at ¶40. Finally, in Office of Consumers' Counsel v. Pub. Util. Comm., 70 Ohio St.3d 244, 638 N.E.2d 550 (1994), the Court did not even analyze whether an application for rehearing was sufficiently specific. Id. at 247.

Further, OCC's argument would elevate form over substance. There is no dispute that (a) the DP&L Application for Rehearing identified the specific decision (including a citation to the pages at which that decision occurred) from the Commission's Second Entry on Rehearing that DP&L disputed, as well as the specific relief that DP&L requested; and (b) DP&L's memorandum supporting the DP&L Application for Rehearing contained arguments as to why the Commission should grant the relief that DP&L requested. Adopting OCC's argument would elevate form over substance.

Indeed, OCC's argument would demonstrate that its own applications for rehearing were inadequate. For example, on October 4, 2013 in this case, OCC filed a six-page application for rehearing and a sixty-page memorandum in support. OCC's memorandum contained innumerable assertions that were not contained in OCC's application. If OCC's argument were to be adopted here, then OCC should be precluded from making any of the arguments that are contained in its memorandum but are not contained in its application.

Finally, OCC cites no authority for the proposition (p. 5) that an application for rehearing must contain the magic words "unreasonable" or "unlawful." The Commission should, therefore, follow the Columbia Gas case and find that the DP&L Application for Rehearing was sufficiently specific under § 4903.10 and § 4901-1-35 because it identified both (1) the specific matters on which DP&L sought a rehearing and (2) the specific relief that DP&L requested.

III. THE COMMISSION HAD AUTHORITY UNDER OHIO REV. CODE § 4903.10(B) TO MODIFY ITS MARCH 19, 2014 SECOND ENTRY ON REHEARING TO GRANT DP&L THE RELIEF THAT IT REQUESTED

Under Ohio Rev. Code § 4903.10(B), when the Commission "is of the opinion that [an] 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" following rehearing. (Emphasis added.) Thus, even if the Commission were to conclude that DP&L did not sufficiently identify the grounds on which it sought rehearing in the DP&L Application for Rehearing, then the Commission nevertheless had the authority to alter its order "in any respect."

IV. THE COMMISSION HAS ALREADY REJECTED THE ARGUMENTS IN THE OCC APPLICATION FOR REHEARING

The OCC Application for Rehearing relies exclusively on the same specificity arguments that OCC raised in the OCC Memorandum Contra the DP&L Application for Rehearing. For example, OCC previously argued that the DP&L Application for Rehearing "[did] not state *any* grounds on which DP&L considers the PUCO's March 19, 2014 Second Entry on Rehearing to be unreasonable or unlawful" (p. 4) (emphasis in original), and that the DP&L Application for Rehearing was "void of the words 'unlawful' and 'unreasonable'" (p. 5). The OCC Application for Rehearing (p. 5) argues the same points. In addition, the OCC Application for Rehearing and the OCC Memorandum Contra the DP&L Application for Rehearing rely on the same caselaw.

The Commission stated in its Fourth Entry on Rehearing: "Any arguments on rehearing not specifically discussed herein have been thoroughly and adequately considered by the Commission and are hereby denied." June 4, 2014 Fourth Entry on Rehearing, ¶ 6. The Commission considered the arguments raised in the OCC Memorandum Contra the DP&L Application for Rehearing and rejected OCC's specificity requirement. Fourth Entry on Rehearing, ¶ 6. The Commission should reach the same result here and deny rehearing.

V. **CONCLUSION**

The Commission should find that the DP&L Application for Rehearing set forth grounds for rehearing with sufficient specificity under Ohio Rev. Code § 4903.10(B) and Ohio Admin. Code § 4901-1-35. Alternatively, the Commission should find that it had the authority to grant the relief that DP&L sought in the DP&L Application for Rehearing pursuant to the Commission's authority to modify "unjust or unwarranted" orders. Section 4903.10(B).

Respectfully submitted,

/s/Judi L. Sobecki
Judi L. Sobecki (0067186)
THE DAYTON POWER AND
LIGHT COMPANY
1065 Woodman Drive
Dayton, OH 45432
Telephone: (937) 259-7171
Telecopier: (937) 259-7178
Email: judi.sobecki@dplinc.com

/s/Jeffrey S. Sharkey
Charles J. Faruki (0010417)
(Counsel of Record)
Jeffrey S. Sharkey (0067892)
FARUKI IRELAND & COX P.L.L.
500 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, OH 45402
Telephone: (937) 227-3747
Telecopier: (937) 227-3717
Email: cfaruki@ficlaw.com
jsharkey@ficlaw.com

Attorneys for The Dayton Power
and Light Company

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to the Third Application for Rehearing by The Office of The Ohio Consumers' Counsel has been served via electronic mail upon the following counsel of record, this 11th day of July, 2014:

Samuel C. Randazzo, Esq.
Frank P. Darr, Esq.
Matthew R. Pritchard, Esq.
MCNEES WALLACE & NURICK LLC
21 East State Street, 17th Floor
Columbus, OH 43215-4225
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

Philip B. Sineneng, Esq.
THOMPSON HINE LLP
41 South High Street, Suite 1700
Columbus, OH 43215
Philip.Sineneng@ThompsonHine.com

Amy B. Spiller, Esq.
Deputy General Counsel
Jeanne W. Kingery, Esq.
Associate General Counsel
DUKE ENERGY RETAIL SALES, LLC and
DUKE ENERGY COMMERCIAL ASSET
MANAGEMENT, INC.
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Amy.Spiller@duke-energy.com
Jeanne.Kingery@duke-energy.com

Attorneys for Duke Energy Retail Sales, LLC and
Duke Energy Commercial Asset Management, Inc.

Mark A. Hayden, Esq.
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com

James F. Lang, Esq.
Laura C. McBride, Esq.
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Avenue
Cleveland, OH 44114
jlang@calfee.com
lmcbride@calfee.com

N. Trevor Alexander, Esq.
CALFEE, HALTER & GRISWOLD LLP
1100 Fifth Third Center
21 E. State St.
Columbus, OH 43215-4243
talexander@calfee.com

David A. Kutik, Esq.
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

Allison E. Haedt, Esq.
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215-2673
aehaedt@jonesday.com

Attorneys for FirstEnergy Solutions Corp.

Robert A. McMahon, Esq.
EBERLY MCMAHON LLC
2321 Kemper Lane, Suite 100
Cincinnati, OH 45206
bmcmahon@emh-law.com

Rocco O. D'Ascenzo, Esq.
Associate General Counsel
Elizabeth Watts, Esq.
Associate General Counsel
DUKE ENERGY OHIO, INC.
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Elizabeth.Watts@duke-energy.com
Rocco.D'Ascenzo@duke-energy.com

Attorneys for Duke Energy Ohio, Inc.

David F. Boehm, Esq.
Michael L. Kurtz, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street Suite 1510
Cincinnati, OH 45202-4454
dboehm@BKLLawfirm.com
mkurtz@BKLLawfirm.com

Attorneys for Ohio Energy Group

Gregory J. Poulos, Esq.
EnerNOC, Inc.
471 East Broad Street
Columbus, OH 43215
Telephone: (614) 507-7377
Email: gpoulos@enernoc.com

Attorney for EnerNOC, Inc.

Colleen L. Mooney, Esq.
OHIO PARTNERS FOR AFFORDABLE
ENERGY
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793
cmooney2@columbus.rr.com

Attorney for Ohio Partners for Affordable Energy

Jay E. Jadwin, Esq.
AMERICAN ELECTRIC POWER
SERVICE CORPORATION
155 W. Nationwide Blvd., Suite 500
Columbus, OH 43215
jejadwin@aep.com

Attorney for AEP Retail Energy Partners LLC

M. Anthony Long, Esq.
Senior Assistant Counsel
HONDA OF AMERICA MFG., INC.
24000 Honda Parkway
Marysville, OH 43040
tony_long@ham.honda.com

Attorney for Honda of America Mfg., Inc.

Richard L. Sites, Esq.
General Counsel and Senior Director of
Health Policy
OHIO HOSPITAL ASSOCIATION
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Thomas J. O'Brien, Esq.
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
tobrien@bricker.com

Attorneys for Ohio Hospital Association

Thomas W. McNamee, Esq.
Assistant Attorney General
Devin D. Parram, Esq.
Assistant Attorneys General
180 East Broad Street
Columbus, OH 43215
Thomas.mcnamee@puc.state.oh.us
devin.parram@puc.state.oh.us

Attorneys for the Staff of the Public Utilities
Commission of Ohio

Mark S. Yurick, Esq.
(Counsel of Record)
Zachary D. Kravitz, Esq.
TAFT STETTINIUS & HOLLISTER LLP
65 East State Street, Suite 1000
Columbus, OH 43215
myurick@taftlaw.com
zkravitz@taftlaw.com

Attorneys for The Kroger Company

Mark A. Whitt, Esq. (Counsel of Record)
Andrew J. Campbell, Esq.
WHITT STURTEVANT LLP
The KeyBank Building
88 East Broad Street, Suite 1590
Columbus, OH 43215
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com

Vincent Parisi, Esq.
INTERSTATE GAS SUPPLY, INC.
6100 Emerald Parkway
Dublin, OH 43016
vparisi@igsenergy.com
mswhite@igsenergy.com

Attorneys for Interstate Gas Supply, Inc.

Trent A. Dougherty, Esq. Counsel of Record
Cathryn N. Loucas, Esq.
OHIO ENVIRONMENTAL COUNCIL
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
trent@theoec.org
cathy@theoec.org

Attorneys for the Ohio Environmental Council

Melissa R. Yost, Esq., (Counsel of Record)
Maureen R. Grady, Esq.
Assistant Consumers' Counsel
Office of The Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
yost@occ.state.oh.us
grady@occ.state.oh.us

Attorneys for Office of the Ohio Consumers'
Counsel

Christopher L. Miller, Esq.
(Counsel of Record)
Gregory H. Dunn, Esq.
Christopher W. Michael, Esq.
ICE MILLER LLP
250 West Street
Columbus, OH 43215
Christopher.Miller@icemiller.com
Gregory.Dunn@icemiller.com
Christopher.Michael@icemiller.com

Attorneys for the City of Dayton, Ohio

M. Howard Petricoff, Esq.
Stephen M. Howard, Esq.
VORYS, SATER, SEYMOUR AND
PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com

Attorneys for the Retail Energy Supply
Association

Stephen Chriss (Counsel of Record)
Wal-Mart Corporation
702 Southwest 8th Street
Bentonville, AR 72716-021
Stephen.Chriss@wal-mart.com

Attorneys for Wal-Mart Stores East, LP
and Sam's East, Inc.

Joseph M. Clark, Esq., Counsel of Record
21 East State Street, Suite 1900
Columbus, OH 43215
joseph.clark@directenergy.com

Christopher L. Miller, Esq.
Gregory J. Dunn, Esq.
Alan G. Starkoff, Esq.
ICE MILLER LLP
2540 West Street
Columbus, OH 43215
Christopher.Miller@icemiller.com
Gregory.Dunn@icemiller.com

Attorneys for Direct Energy Services, LLC
and Direct Energy Business, LLC

M. Howard Petricoff, Esq.
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpeticoff@vorys.com
smhoward@vorys.com

Attorneys for Exelon Generation Company, LLC,
Exelon Energy Company, Inc., Constellation
Energy Commodities Group, Inc., and
Constellation NewEnergy, Inc.

Matthew J. Satterwhite, Esq.
Steven T. Nourse, Esq.
AMERICAN ELECTRIC POWER SERVICE
CORPORATION
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
mjsatterwhite@aep.com
stnourse@aep.com

Attorneys for Ohio Power Company

Ellis Jacobs, Esq.
Advocates for Basic Legal Equality, Inc.
333 West First Street, Suite 500B
Dayton, OH 45402
ejacobs@ablelaw.org

Attorney for Edgemont Neighborhood
Coalition

Stephanie M. Chmiel, Esq.
Michael L. Dillard, Jr., Esq.
THOMPSON HINE LLP
41 South High Street, Suite 1700
Columbus, OH 43215
Stephanie.Chmiel@ThompsonHine.com
Michael.Dillard@ThompsonHine.com

Attorneys for Border Energy Electric
Services, Inc.

Matthew W. Warnock, Esq.
J. Thomas Siwo, Esq.
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
mwarnock@bricker.com
tsiwo@bricker.com

Attorneys for The Ohio Manufacturers'
Association Energy Group

Kimberly W. Bojko, Esq.
Joel E. Sechler, Esq.
Mallory M. Mohler, Esq.
CARPENTER LIPPS & LELAND LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
Bojko@carpenterlipps.com
Sechler@carpenterlipps.com
Mohler@carpenterlipps.com

Attorneys for SolarVision, LLC

Matthew R. Cox, Esq.
MATTHEW COX LAW, LTD.
4145 St. Theresa Blvd.
Avon, OH 44011
matt@matthewcoxlaw.com

Attorney for the Council of Smaller Enterprises

Cynthia Fonner Brady, Esq.
Assistant General Counsel
EXELON BUSINESS SERVICES COMPANY
4300 Winfield Road
Warrenville, IL 60555
Cynthia.Brady@constellation.com

Attorney for Constellation
an Exelon Company

Edmund J. Berger, Esq. (admitted *pro hac vice*)
Office of The Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
berger@occ.state.oh.us

Attorneys for Office of the Ohio Consumers'
Counsel

Mary W. Christensen, Esq.
Christensen Law Office LLC
8760 Orion Place, Suite 300
Columbus, OH 43240-2109
mchristensen@columbuslaw.org

Attorneys for People Working Cooperatively, Inc.

Scott C. Solberg, Esq.(admitted *pro hac vice*)
Eimer Stahl LLP
224 South Michigan Avenue, Suite 1100
Chicago, OH 60604
ssolberg@eimerstahl.com

Attorney for Exelon Generation
Company, LLC

Stephen Bennett, Manager
State Government Affairs
300 Exelon Way
Kenneth Square, PA 19348
stephen.bennett@exeloncorp.com

Bill C. Wells, Esq.
AFMCLO/CL
Industrial Facilities Division
Bldg 266, Area A
Wright Patterson AFB, OH 45433
bill.wells@wpafb.af.mil

Christopher C. Thompson, Esq.
Staff Attorney (admitted *pro hac vice*)
USAF Utility Law Field Support Center
139 Barnes Drive, Suite 1
Tyndall AFB, FL 32403-5319

Attorneys for Federal Executive Agencies

/s/Jeffrey S. Sharkey
Jeffrey S. Sharkey

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Summary: Memorandum The Dayton Power and Light Company's Memorandum in Opposition to the Third Application for Rehearing by The Office of The Ohio Consumers' Counsel electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company