BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell Its Generation Assets.	))))	Case No. 13-2420-EL-UNC

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

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October 17, 2014

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

The Office of the Ohio Consumers' Counsel ("OCC") applies for rehearing of the September 17, 2014 Finding and Order ("September 17, 2014 Order" or "Order") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). This case involves the Dayton Power & Light Company's ("DP&L" or "Utility") proposal to divest its generation assets as required by the PUCO's Order in DP&L's electric security plan proceeding ("ESP").[1] The PUCO's Order would harm customers by allowing Dayton Power & Light Company ("DP&L") to defer transaction costs associated with generation-related assets that it would later seek to charge to customers. It could also be costly to customers by allowing DP&L to increase its debt financing, contrary to the terms of a PUCO approved stipulation.

Through this filing, OCC seeks rehearing of the PUCO's Orders pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35. The September 17, 2014 Order constituted error because:

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[1] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 12-0426-EL-SSO et al, Opinion and Order of September 4, 2013 at 27-28 and *Entry Nunc Pro Tunc* of September 6, 2013 at 2.

A. The PUCO's Order was unreasonable and unlawful in granting DP&L's request that a hearing be waived when there were unresolved issues creating potential harm to customers. The harm to customers made the PUCO's order contrary to the public interest, violating R.C. 4928.17. The PUCO should have held a hearing to address the issues.

B. The PUCO's Order was unreasonable and unlawful in allowing DP&L to defer costs associated with selling or transferring generation assets, violating R.C. 4928.02(H), R.C. 4928.38, R.C. 4909.15(A)(4), and Commission precedent.

C. The PUCO's Order was unreasonable and unlawful because it allowed DP&L to maintain an equity ratio of less than 50 percent through January 1, 2018 and potentially beyond. This contravened the terms of an earlier Stipulation approved by the PUCO in Case No. 11-3002-EL-MER, and is contrary to the public interest, violating R.C. 4928.17.

D. The PUCO's Order was unreasonable and unlawful because it granted DP&L the right to defer transaction costs and maintain an equity ratio of less than 50 percent, all without setting forth the reasons for its decisions, as required by R.C. 4903.09.

The bases for this Application for Rehearing are set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claims of error, the PUCO should modify or abrogate its September 17, 2014 Order.

Respectfully submitted,

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*/s/ Edmund "Tad" Berger*_____

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STANDARD OF REVIEW 3

III. LAW AND ARGUMENT 4

A. The PUCO's Order was unreasonable and unlawful in granting DP&L's request that a hearing be waived when there were unresolved issues creating potential harm to customers. The harm to customers made the PUCO's order contrary to the public interest, violating R.C. 4928.17. The PUCO should have held a hearing to address the issues. 4

B. The PUCO's Order was unreasonable and unlawful in allowing DP&L to defer costs associated with selling or transferring generation assets, violating R.C. 4928.02(H),R.C. 4928.38, R.C. 4909.15(A)(4), and Commission precedent. 6

C. The PUCO's Order was unreasonable and unlawful because it allowed DP&L to maintain an equity ratio of less than 50 percent through January 1, 2018 and potentially beyond. This contravened the terms of an earlier Stipulation approved by the PUCO in Case No. 11-3002-EL-MER, and is contrary to the public interest, violating R.C. 4928.17. 10

D. The PUCO's Order was unreasonable and unlawful because it granted DP&L the right to defer transaction costs and maintain an equity ratio of less than 50 percent, all without setting forth the reasons for its decisions, as required by R.C. 4903.09.....11

IV. CONCLUSION.....12

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Fourteen years ago the General Assembly required divestiture of Ohio electric utilities' generation assets.[2] But it was only last year that the Public Utilities Commission of Ohio ("PUCO" or "Commission") specifically ordered Dayton Power & Light Company ("DP&L" or "Utility") to complete its divestiture. It was ordered to do so by December 31, 2016. [3]

On December 30, 2013, DP&L filed an Application that it claimed was a "plan" that complied with such mandate. Neither the PUCO Staff nor the parties to this proceeding agreed. DP&L then filed a Supplemental Application on February 25, 2014. That Supplemental Application also suffered significant shortcomings pointed out by the PUCO Staff and other parties. DP&L then filed an Amended Supplemental Application

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[2] R.C. 4928.17(A)(1), effective October 5, 1999, required Ohio electric utilities to operate under a corporate separation plan which provided, "at a minimum" that competitive retail electric service (defined by R.C. 4928.03 to include "retail electric generation" as of such date) be provided "through a fully separated affiliate of the utility." Although R.C. 4928.17(C) permits the PUCO to allow "functional separation" in lieu of full structural separation "for an interim period" upon good cause shown, the time for such delay long ago passed.

[3] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan,* Case No. 12-0426-EL-SSO et al, Opinion and Order of September 4, 2013 at 27-28 and *Entry Nunc Pro Tunc* of September 6, 2013 at 2.

on May 23, 2014. Comments and Reply Comments to that last application were filed on June 30, 2014 and July 15, 2014 respectively.

In their Comments and Reply Comments filed to each of DP&L's three Applications, OCC and a number of other parties requested a hearing.[4] The Industrial Energy Users of Ohio ("IEU-Ohio) and OCC also filed a Motion for a Hearing in this matter on May 30, 2014. The PUCO's decision to waive a hearing in the face of unresolved factual issues was unreasonable.

Although OCC supports the PUCO's disposition of certain issues[5] in this matter, the PUCO's disposition of other issues was unreasonable and unlawful. In particular, the PUCO authorized DP&L to defer the transaction costs it incurs associated with its divestiture of generation assets. That PUCO action was unlawful and unreasonable. The PUCO also erred in allowing DP&L to maintain an equity ratio of less than 50 percent through January 1, 2018 and potentially beyond. Instead it should have denied this request or it should have held customers harmless from the effects of DP&L's changed capital structure. Moreover, its ruling contravened the terms of a stipulation approved by the PUCO in Case No. 11-3002-EL-MER. Finally, the PUCO erred in unlawfully failing

[4] Even after DP&L's third application – its Amended Supplemental Application – was filed, DP&L's divestiture plan remained vague and undefined, causing most parties to continue to request a hearing. Further, at the time of the PUCO's order, significant discovery aimed at filling in the gaps in DP&L's claims was outstanding. Although the Attorney Examiner had earlier addressed an initial discovery dispute, at the time of the PUCO's Finding and Order in this matter, OCC had advised DP&L of its concerns over the non-responsiveness of DP&L to OCC's further discovery and that it would file a Motion to Compel in the near future if those issues could not be resolved amicably. OCC had also advised DP&L that it wished to depose witnesses who provided discovery responses in this matter and had requested DP&L provide dates of availability for such depositions.

[5] OCC agrees in particular with the PUCO's decision denying DP&L the right to retain or defer costs associated with environmental liabilities related to the generating assets to be sold or transferred. Similarly, OCC agrees with the PUCO's rejection of DP&L's proposal to authorize deferral of costs DP&L incurs associated with its contractual entitlement in Ohio Valley Electric Corporation.

to make findings of fact or issue a written opinion setting forth the reasons for its decisions. R.C. 4903.09. These assignments of error will be discussed in detail below.

II. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute 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."[6] 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."[7]

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."[8] 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 * * *."[9]

OCC meets both the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10 and the requirements of the PUCO's rule on applications for

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[6] R.C. 4903.10.

[7] R.C. 4903.10(B).

[8] *Id.*

[9] *Id.*

rehearing.[10] Accordingly, OCC respectfully requests that the PUCO grant rehearing on the matters specified below.

III. LAW AND ARGUMENT

A. The PUCO's Order was unreasonable and unlawful in granting DP&L's request that a hearing be waived when there were unresolved issues creating potential harm to customers. The harm to customers made the PUCO's order contrary to the public interest, violating R.C. 4928.17. The PUCO should have held a hearing to address the issues.

R.C. 4928.17(B) provides that the "commission shall afford a hearing upon those aspects of the plan that the commission determines reasonably require a hearing." R.C. 4928.17(E) also specifically requires the PUCO to approve an electric distribution utility's ("EDU") proposal to "sell or transfer any generating asset it wholly or partly owns at any time."

Under Ohio Admin. Code 4901:1-37-09(D), the PUCO may schedule a hearing if the application "appears to be unjust, unreasonable, or not in the public interest." Under that same provision, however, the PUCO's rules require a hearing "with respect to any application that proposes to alter the jurisdiction of the commission over a generation asset."

This is a proceeding in which the utility's application "appears to be unjust, unreasonable, or not in the public interest." It is also an application that "proposes to alter the jurisdiction of the commission over a generation asset." It is an application under which Ohio Admin. Code 4901:1-37-09(D) requires a hearing. DP&L, however,

[10] *See* Ohio Adm. Code 4901-1-35.

requested waiver of the hearing requirement. That request was opposed by virtually all of the parties.

The need for a hearing exists because there are at least two claims raised by DP&L that may harm customers, and thus, would not be in "the public interest" contrary to R.C. 4928.17. First, as discussed below, DP&L requested that it be allowed to defer the transaction costs associated with its generation asset transfer (or sale). Second, DP&L requested that the PUCO waive the requirement imposed by a PUCO-approved stipulation in Case No. 11-3002-EL-MER. That requirement is that DP&L maintain an equity ratio of at least 50% through 2018.

Because these claims could harm customers, the PUCO should have held a hearing before ruling upon DP&L's application. It was unreasonable for the PUCO to deny a hearing when DP&L's application could harm customers. That potential harm to customers makes the generation transfer not in the public interest, contrary to R.C. 4928.17.

Customers may be harmed by the PUCO's approval of both of these requests. First, while the PUCO is not required to authorize a utility to collect costs that the utility has been allowed to defer, the PUCO's approval of deferral accounting has significance. It conveys to the accounting community that there is a reasonable assurance that it will collect such costs. Deferral accounting, as the Supreme Court has stated, is typically a "prelude" to rate increases for a utility's customers related to the deferred costs.[11] Since the grant of deferral accounting establishes a greater probability that costs will be

[11] *Ohio Consumers' Counsel*, 111 Ohio St. 3d 384, 392, 2006-Ohio-5853, 856 N.E. 2d 940.

permitted to be charged to customers, then the PUCO's deferral authorization is a current harm to customers.[12]

Second, DP&L's request to vary from the requirement of at least a 50% equity ratio established in Case No. 11-3002-EL-MER may also harm customers. Increased debt financing of DP&L's operations, especially for an extended period of time, could increase DP&L's cost of capital which could have implications for DP&L's standard service offer customers. And DP&L fails to provide an adequate explanation of why the affiliate transferee of the assets (or their mutual parent) would not pay DP&L for such assets, allowing it to reduce its debt burden. The PUCO should have ruled that customers will be held harmless from any increase in DP&L's debt ratio. But it did not. That makes the PUCO's decision unreasonable.

In light of these issues, it appears that the transfer as approved is not in the public interest, as required by R.C. 4928.17. The PUCO should have denied DP&L's application as contrary to the public interest because of its harm to customers. Failing to do so, the PUCO should have at least held a hearing to consider the implications of DP&L's proposals. It was unreasonable for the PUCO not to do so. Rehearing should be granted.

B. The PUCO's Order was unreasonable and unlawful in allowing DP&L to defer costs associated with selling or transferring generation assets, violating R.C. 4928.02(H),R.C. 4928.38, R.C. 4909.15(A)(4), and Commission precedent.

In its Order, the PUCO allowed DP&L to defer the costs it incurs in selling or transferring generation assets, including "all financing costs, redemption costs,

[12] *Id.; See also Elyria Foundry Co. v. Pub. Util. Comm.,* 114 Ohio St. 3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶¶ 50, 57.

amendment fees, investment banking fees, advisor costs, taxes, and related costs."[13] As discussed above, this decision may potentially harm customers. The PUCO's decision is unreasonable and unlawful because it ignores state electric services policy under R.C. 4928.02, and Commission precedent.

By allowing DP&L to defer the costs associated with the transfer of generation assets, the Commission contradicted Ohio's electric services policy. Under R.C. 4928.38, since 2005, DP&L is to be "on its own" in the competitive generation market. Further, under R.C. 4928.02(H), the policy of the state includes ensuring "effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service."[14] In particular, R.C. 4928.02(H) seeks to ensure effective competition by "prohibiting the recovery of any generation-related costs through distribution or transmission rates."[15]

Because generation is a competitive retail electric service in Ohio and DP&L is to be "on its own" in providing such service, DP&L cannot seek to collect transaction costs for the sale or transfer of generating assets from transmission or distribution service charges. This would be a subsidy of DP&L's generating assets by DP&L's noncompetitive retail electric services, i.e. T&D. The transfer of generation assets should be considered a "generation-related cost" and, therefore, not collected from customers in distribution or transmission rates. Left as it is, the PUCO's Order may cause customers to subsidize DP&L's competitive generation service with dollars collected

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[13] *In the Matter of the Application of The Dayton Power & Light Co. for Authority to Transfer or Sell its Generation Assets*, Case No. 13-2420-EL-UNC, Finding and Order at 13 (Sept. 17, 2014).

[14] R.C. 4928.02(H).

[15] R.C. 4928.02(H).

through transmission and distribution rates. This is unreasonable and unlawful as it is contrary to state policy, and violates R.C. 4928.38 and R.C. 4928.02(H).

This aspect of the Order should also be reversed because it contradicts PUCO precedent. In an Ohio Power Company ("AEP Ohio") corporate separation proceeding, the PUCO approved AEP Ohio's application subject to several conditions, one being that "[g]eneration-related costs associated with implementing corporate separation shall not be recoverable from customers."[16] By allowing DP&L to defer costs incurred in the transfer of generation assets, the PUCO deviated from its own precedent. The PUCO treated DP&L's costs associated with implementing corporate separation differently than AEP Ohio's costs, but gave no explanation for its preferential treatment of DP&L. Without any reasonable distinction between AEP Ohio's structural separation and DP&L's structural separation, the PUCO should follow its precedent as the Supreme Court has previously instructed.[17] To reach differing results in these cases, as the Commission did here, is unreasonable and unlawful.

The PUCO's decision to allow DP&L to defer the costs incurred in the transfer of generation assets is also unreasonable and unlawful because such costs are not normal and recurring costs of providing regulated transmission and distribution service under Ohio's ratemaking statute. R.C. 4909.15(A)(4) requires that a utility show that the costs it

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[16] *In the Matter of the Application of Ohio Power Co. for Approval of an Amendment to its Corporate Separation Plan*, Pub. Util. Comm. No. 11-5333-EL-UNC, Finding and Order at 19 (Jan. 23, 2012).

[17] As the Supreme Court stated in a 2011 case, "we have instructed the commission to 'respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.'" *In re Columbus S. Power Co.*,128 Ohio St. 3d 512, 523,2011-Ohio-1788, P52,947 N.E.2d 655, 667,2011 Ohio LEXIS 957, 26(Ohio2011), *quoting Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1975), 42 Ohio St. 2d 403, 431, 71 O.O.2d 393, 330 N.E.2d 1, superseded on other grounds by statute as recognized in *Babbit v. Pub. Util. Comm.* (1979), 59 Ohio St. 2d 81, 89, 13 O.O.3d 67, 391 N.E.2d 1376.

is seeking to recover are a "cost to the utility of rendering the public utility service" during the test year in a rate proceeding. Under R.C. 4909.15(A)(4), any cost that a utility seeks to recover must be a normal and recurring cost associated with providing regulated utility service during such period. Even if transaction costs associated with transfer of generation assets could somehow be considered a cost of providing regulated transmission and distribution services (which they are not), the transfer of generation assets, and any cost incurred during and after that process, is not a normal and recurring cost to DP&L of providing regulated service to DP&L's customers during the test period in a rate proceeding.

Additionally, although the electric security plan ("ESP") statute allows "provisions regarding single issue ratemaking" for a *utility's distribution service* in the context of an ESP case,[18] it does not otherwise authorize such single issue ratemaking. And as discussed above generation related transfer costs are unrelated to DP&L's distribution service. Regardless, DP&L has not presented a legal basis for charging customers for such costs and never made a claim for transaction costs in its ESP case (Case No. 12-0426-EL-SSO). Since the ESP statute's "better in the aggregate" test (R.C. 4928.143(C)(1)) requires consideration of all of the costs (and benefits) of the ESP, DP&L's claim for generation related costs cannot properly be considered outside of an ESP proceeding.

Because the PUCO's decision to allow DP&L to defer the costs incurred in the transfer of generation assets violates Ohio's electric services policy, statutory provisions

[18] R.C. 4928.143(B)(2)(H).

for charging costs to customers, and Commission precedent, it is unreasonable and unlawful. Rehearing should be granted.

C. The PUCO's Order was unreasonable and unlawful because it allowed DP&L to maintain an equity ratio of less than 50 percent through January 1, 2018 and potentially beyond. This contravened the terms of an earlier Stipulation approved by the PUCO in Case No. 11-3002-EL-MER, and is contrary to the public interest, violating R.C. 4928.17.

In Case No. 11-3002-EL-MER[19] the PUCO approved a condition that required DP&L to maintain an equity ratio of at least 50%. However in this proceeding, the PUCO changed its Order in Case No. 11-3002-EL-MER.without complying with the law. This it cannot do.

Specifically, for the PUCO to modify its Order in Case No. 11-3002-EL-MER, DP&L would have had to file an Application for Rehearing in compliance with R.C. 4903.10. That filing would have had to be made within 30 days of the Order in that proceeding, or by December 22, 2011. But DP&L made no such application and the PUCO cannot properly modify its order outside of the statutory framework of R.C. 4903.10.

The PUCO's September 17, 2014 Order also contravenes the doctrine of collateral estoppel which precludes the re-litigation of issues determined in prior actions. [20] That doctrine applies to actions before the PUCO.[21]

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[19] *In the Matter of the Application of the AES Corporation, Dolphin Sub, Inc., DPL Inc. and the Dayton Power and Light Company for Consent and Approval for a Change of Control of the Dayton Power and Light Company*, Case No. 11-3002-EL-MER, Finding and Order (Nov. 22, 2011)(DP&L Merger Case).

[20] *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision*, 80 Ohio St. 3d 36, 41; 684 N.E.2d 312 (Oct. 8, 1997).

[21] *Superior's Brand Meats, Inc. v Lindley*, 62 Ohio St.2d 133, *403 N.E.2d 996, (1980), syllabus; Office of Consumers' Counsel v. Pub. Util. Comm., 16 Ohio St.3d 9, 10, 475 N.E.2d 782, (1985).*

Putting aside the lack of PUCO authority to change its order without a proper application for rehearing, and the principle of collateral estoppel, DP&L failed to establish why it needed to reduce its equity ratio below 50% and increase its debt financing. It failed to explain why no equity capital would be infused into DP&L as part of its transfer of its valuable generating assets. It is also failed to show that its earnings from its transmission and distribution operations would not be sufficient to pay down its debt. These are additional reasons why the PUCO erred in allowing DP&L to vary from its PUCO-approved Stipulation. Rehearing should be granted on this issue.

D. The PUCO's Order was unreasonable and unlawful because it granted DP&L the right to defer transaction costs and maintain an equity ratio of less than 50 percent, all without setting forth the reasons for its decisions, as required by R.C. 4903.09.

Despite overwhelming opposition to DP&L's request to defer transaction costs, the PUCO granted DP&L's request. Yet it provided no explanation for its action despite the fact that it had denied this same treatment to AEP Ohio, contradicting its own precedent.[22] Nor did the PUCO address how the Utility could collect generation-related transaction costs when it is prohibited from doing so under R.C. 4928.02(H) and 4928.38.

Similarly, while it authorized DP&L to vary from its stipulated 50% equity ratio, the PUCO only discusses the fact that DP&L's newly created entity will have limited debt-carrying capacity (presuming it is not backed by its parent) and that its divestment

[22] September 17, 2014 Order at 12-13. In *In re Columbus S. Power Co.*,128 Ohio St. 3d 512, 523,2011-Ohio-1788, P52,947 N.E.2d 655, 667,2011 Ohio LEXIS 957, 26 (Ohio2011), the Supreme Court stated that while the PUCO may revisit an earlier decision, "if it does change course, it must explain why." *Id. at citing, Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009 Ohio 6764, 921 N.E.2d 1038, ¶ 18; *Office of Consumers' Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St. 3d 21, 21-22, 16 Ohio B. 371, 475 N.E.2d 786.

of generating assets is a significant change in circumstance.[23] But the PUCO did not address why DP&L should be expected to transfer its generating assets without an infusion of equity/cash payment and without transferring the liabilities. Nor did it address why DP&L's earnings, including its earnings from its Service Stability Rider ("SSR"), would be insufficient to write down its debt obligations. All of these questions were raised by the intervenors and disregarded by the PUCO in reaching its decision.

R.C. 4903.09 requires the PUCO to make "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." In the absence of findings of facts and sound reasons tying the findings of fact to the decisions it makes, the PUCO's decision is unreasonable and unlawful. In this case, the PUCO made decisions to allow DP&L to defer transaction costs and to allow DP&L to maintain less than a 50% equity ratio. But the PUCO failed to make findings of fact to support its decision. Consequently, the PUCO should grant rehearing and issue appropriate findings of fact and a decision supported by such facts.

IV. CONCLUSION

For all the reasons discussed above, the PUCO should grant rehearing on OCC's claims of error and modify or abrogate its September 17, 2014 Finding and Order consistent with Ohio law and reason.

[23] September 17, 2014 Order at 18-19.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing* was served on the persons stated below via electronic transmission, this 17th day of October, 2014.

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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 Berger, Tad Mr.