

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)	
Dayton Power and Light Company for)	Case No. 12-426-EL-SSO
Approval of its Market rate Offer.)	
In the Matter of the Application of The)	
Dayton Power & Light Company of Approval)	Case No.12-427-EL-ATA
of Revised Tariffs.)	
In the Matter of the Application of The)	
Dayton Power and Light Company for)	Case No. 12-428-EL-AAM
Approval of Certain Accounting Authority.)	
In the Matter of the Application of The)	
Dayton Power and Light Company for The)	Case No. 12-429-EL-WVR
Waiver of Certain Commission Rules.)	
In the Matter of the Application of The)	
Dayton Power and Light Company to)	Case No. 12-672-EL-RDR
Establish Tariff Riders.)	

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

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TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. STANDARD OF REVIEW	2
III. ERRORS	3
ASSIGNMENT OF ERROR 1: The PUCO erred in allowing DP&L to withdraw and terminate its electric security plan after charging customers under the plan for 32 months.	3
A. The PUCO’s ruling is inconsistent with R.C. 4928.143(C)(2)(b), which requires the PUCO to continue the utility's most recent standard service offer.	4
Assignment of Error 2: The PUCO erred by allowing DP&L to circumvent the Ohio Supreme Court's decision protecting customers from unlawful and unreasonable transition charges.	6
Assignment of Error 3: The PUCO failed to comply with R.C. 4903.09 when it merely noted (but did not address parties' arguments) and summarily concluded that DP&L could withdraw its application at any time, all without setting forth the reasons prompting its decisions.	6
IV. CONCLUSION	7

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APPLICATION FOR REHEARING

The Office of the Ohio Consumers' Counsel ("OCC") files this application to protect customers who have paid plenty to DP&L over the past three years for standard service offer rates. Customers in the Dayton area --where there is financial distress and a poverty level of 35%-- paid approximately \$285 million in subsidies (through a so-called stability charge) to prop up DP&L's power plants. The Ohio Supreme Court, however, found the PUCO should not have approved DP&L's \$9.86 per month stability charge. It

ruled that the PUCO should carry out its judgment that the stability charge is an unlawful transition charge that customers should no longer pay.¹

But instead of requiring DP&L to reduce rates by excluding the \$9.86 per month stability charge, the PUCO allowed DP&L to circumvent the Court's Order. The PUCO ruled that DP&L could withdraw its plan and charge new rates to customers that include a \$6.05 monthly stability charge. So instead of getting a full \$10 per month reduction, as the Court ordered, customers will only see a fraction of the reduction (\$4.00 per month), with DP&L pocketing the difference.

The PUCO was wrong in allowing DP&L to withdraw its current rates and set new rates that contained another unlawful stability charge. The PUCO's Order of August 26, 2016, permitting DP&L to withdraw and terminate its electric security plan application was unreasonable and unlawful in the following respects:

Assignment of Error 1: The PUCO erred, under R.C. 4928.143(C)(2)(a) , in allowing DP&L to withdraw and terminate its electric security plan after it charged customers under the plan for 32 months.

- A. The PUCO's ruling is inconsistent with R.C. 4928.143(C)(2)(b), which requires the PUCO to continue the utility's most recent standard service offer.

Assignment of Error 2: The PUCO erred by allowing DP&L to circumvent the Ohio Supreme Court's decision protecting customers from unlawful and unreasonable transition charges.

¹ *In the Matter of the Application of the Dayton Power & Light Company for Approval of its Market Rate Offer*, Slip Op. 2016-Ohio-3490. See also *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608 at ¶ 25, 38.

Assignment of Error 3: The PUCO failed to comply with R.C. 4903.09 when it merely noted (but did not address parties' arguments) and summarily concluded that DP&L could withdraw its application at any time, all without setting forth the reasons prompting its decisions.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its Opinion and Order as requested by OCC.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

From the outset of DP&L's current electric security plan (established under case no. 12-426-EL-SSO) the Utility was charging customers so-called stability-like charges that the Ohio Supreme Court found to be unlawful transition charges. Unfortunately for consumers paying those transition charges (which DP&L inaptly named stability charges), the charges could not likely be returned (and were not) to consumers under Court precedent. But the Court in an unprecedented manner issued its decision within a week of the oral argument in an effort to stop future collections of the stability charge from customers. That decision was reached on June 20, 2016.

To circumvent the Court's decision, DP&L requested permission from the PUCO to withdraw and terminate its ESP, and return consumers – in part -- to pricing from its earlier ESP. But that earlier pricing cannot be implemented fully and completely. Rather DP&L proposed to leave in place certain pricing from its current ESP and certain prices from its prior ESP. The PUCO allowed DP&L's hybrid approach to be implemented. That approach however is not contemplated in the ESP statute, and cannot be entertained by the PUCO.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "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." OCC filed a motion to intervene in this proceeding on April 16, 2012 which was granted. OCC also filed testimony regarding the Application and participated in the evidentiary hearing on the Application.

R.C. 4903.10 requires that an application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." In addition, Ohio Adm. Code 4901-1-35(A) states: "An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing."

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear." The statute also provides: "[i]f, after such rehearing, the commission is of the opinion that the

original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.”

The statutory standard for abrogating some portions of the Order and modifying other portions is met here. The Commission should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Opinion and Order of August 25, 2016. The PUCO’s rulings were unreasonable and unlawful in the following respects.

III. ERRORS

Assignment of Error 1: The PUCO erred in allowing DP&L to withdraw and terminate its electric security plan after charging customers under the plan for 32 months.

The PUCO ruled that it had no choice but to grant DP&L's motion and accept the withdrawal of ESP II.² The PUCO was wrong.

A utility's right to withdraw an ESP application is not unlimited. The PUCO itself has recognized this when in the past it has determined that the filing of tariffs consistent with its Opinion and Order (modifying the ESP) is to be deemed as acceptance of the Order (thereby precluding later withdrawal).³ Therefore, the PUCO should have decided that it was unlawful, under R.C. 4928.143(C)(2)(a), for DP&L to withdraw and terminate its electric security plan.

² Finding and Order at ¶14.

³ See *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 106 (Mar. 31, 2016); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order at 86 (Mar. 31, 2016).

The only way the most recent standard service rates can continue is if the right to withdraw is exercised within a relatively short period of time after implementing its ESP plan. That would allow the provisions of R.C. 4928.143(C)(2)(b) to be implemented as written and intended by the General Assembly. Withdrawal of an ESP application after 32 months of charging customers is inconsistent with the law requiring the PUCO to issue an order continuing the utility's prior ESP rates. The PUCO should grant rehearing and reverse.

A. The PUCO's ruling is inconsistent with R.C. 4928.143(C)(2)(b), which requires the PUCO to continue the utility's most recent standard service offer.

That the Utility's opportunity to withdraw an electric security plan is limited in duration is seen by another aspect of the PUCO's unlawful decision to allow withdrawal, as follows. In order for DP&L to withdraw and terminate its current ESP, R.C. 4928.143(C)(2)(b) requires the Utility to return to prior rates. The PUCO's ruling violated that law. It is impossible for DP&L to return fully and completely to its prior rates given the passage of time since the approved ESP rates went into effect and began to be charged to customers. Customers began paying new ESP rates on January 1, 2014. Customers have paid these rates for the past 32 months.

Under R.C. 4928.143(C)(2)(b), if the utility withdraws an application or if the PUCO disapproves the application, then the provisions, terms, and conditions of the utility's most recent standard service offer must be continued. Because DP&L's withdrawal was so late into the term of the electric security plan (32 months into a 45 month term), it is impossible to go back to the most recent standard service offer.

For DP&L to return to prior rates would have meant (among other things) going back to a standard service offer that is priced based on DP&L supplying the power,

instead of the auction-based standard service. But DP&L has procured power for standard service through May 31, 2017 by way of auctions held much earlier. Those auctions cannot be undone. In fact, in attempting to implement the terms and conditions of DP&L's most recent standard service offer, the PUCO did not undo the existing contracts with competitive suppliers for standard service.⁴

But, the PUCO is a creature of statute. *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St. 3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St. 2d 181, 22 Ohio Op. 3d 410, 429 N.E.2d 444 *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St. 2d 153, 21 Ohio Op. 3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St. 2d 302, 18 Ohio Op. 3d 478, 414 N.E.2d 1051. It may only exercise the authority conferred on it by the General Assembly. The PUCO must follow the law.

Continuing DP&L's most recent standard service offer rates (after a utility withdraws 32 months later) is not feasible of execution. But that is what R.C. 4928.143(C)(2)(b) requires. The PUCO lacks discretion in this regard. If the PUCO is right that a utility can withdraw at any time, after accepting the benefits of the ESP, then one would have to assume that the General Assembly enacted laws that are not feasible of being executed. This is contrary to the Ohio rules of statutory construction.⁵

⁴ *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. 08-1094-EL-SSO, Finding and Order at ¶21 (Aug. 26, 2016).

⁵ See R.C. 1.47(D) stating that in enacting a statute, inter alia, a result feasible of execution is intended.

Assignment of Error 2: The PUCO erred by allowing DP&L to circumvent the Ohio Supreme Court's decision protecting customers from unlawful and unreasonable transition charges.

The PUCO's Order is unreasonable and unlawful, because it circumvents the Ohio Supreme Court's recent order for that acceptance, DP&L should be precluded from withdrawing its electric security plan as a response to the Court's mandate.

For one matter, it is not reasonable and lawful for the PUCO to have replaced a charge that the Court just declared to be wrongful to collect from customers, with an identical charge from a few years ago. For another matter, in approving DP&L's request, the PUCO precluded customers from receiving the reduced rates ordered by the Ohio Supreme Court. DP&L has reaped the benefits of increased revenues under the plan for the past 32 months, in the matter that was before the Court. Now at a time when the Ohio Supreme Court determined DP&L should not be charging customers for a transition charge, the PUCO allowed DP&L to terminate the plan and bill customers for another transition charge. The PUCO erred. It should grant rehearing on these issues.

Assignment of Error 3: The PUCO failed to comply with R.C. 4903.09 when it merely noted (but did not address parties' arguments) and summarily concluded that DP&L could withdraw its application at any time, all without setting forth the reasons prompting its decisions.

OCC and others presented arguments against accepting DP&L's motion to withdraw and terminate.⁶ OCC and others specifically challenged the utility's assertion that it could withdraw, at any time, an ESP that was modified and approved by the PUCO. The PUCO described these arguments as "the parties argue it would be an

⁶ See, e.g., OCC Memorandum Contra (Aug. 11, 2006).

unreasonable reading of the statute to find that it provides DP&L with an everlasting right to withdraw an ESP that was modified and approved by the Commission."⁷

Nonetheless after noting the arguments against DP&L's motion, the PUCO concluded it "had no choice but to grant DP&L's motion and accept the withdrawal of ESP II."⁸ It offered no explanation of its conclusion beyond this bare pronouncement. By not explaining its decision as to why it had no choice and not addressing parties' arguments, the PUCO violated R.C. 4903.09. Without sufficient detail, the Court will be unable to determine how the PUCO reached its decision. Thus, the purpose of R.C. 4903.09 will be thwarted and the review that OCC is entitled to, under R.C. 4903.09 and 4903.10 cannot occur. The PUCO should grant rehearing on this matter and modify its Order on this issue.

IV. CONCLUSION

To protect customers and allow them to receive the rate reductions the Ohio Supreme Court ordered, the PUCO should grant rehearing and abrogate or modify its Finding and Order.

⁷ Finding and Order at ¶11.

⁸ Id. at ¶14.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was electronically served via electric transmission on the persons stated below this 26th day of September 2016.

/s/ Maureen Willis

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Summary: App for Rehearing Application for Rehearing by The Office of the Ohio Consumers
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