

**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. 08-1094-EL-SSO |
| |) |) |) |
| In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs. |) |) |) |
| |) |) | Case No. 08-1095-EL-ATA |
| |) |) |) |
| In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code Section 4905.13. |) |) |) |
| |) |) | Case No. 08-1096-EL-AAM |
| |) |) |) |
| In the Matter of the Application of The Dayton Power and Light Company for Approval of its Amended Corporate Separation Plan. |) |) |) |
| |) |) | Case No. 08-1097-EL-UNC |
| |) |) |) |

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

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Maureen Willis
Maureen Willis, (0020847)
Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: Willis (614) 466-9567
maureen.willis@occ.ohio.gov
(will accept service via email)

TABLE OF CONTENTS

| | PAGE |
|---|-------------|
| I. INTRODUCTION | 1 |
| II. STANDARD OF REVIEW | 2 |
| III. ERRORS | 3 |
| ASSIGNMENT OF ERROR 1: THE PUCO UNLAWFULLY AND UNREASONABLY APPROVED DP&L'S REQUEST TO COLLECT A RATE STABILIZATION CHARGE ("RSC") FROM CUSTOMERS AS PART OF CONTINUING DP&L'S MOST RECENT STANDARD SERVICE OFFER. THE RSC CHARGE PERMITS THE UTILITY TO COLLECT AN UNLAWFUL TRANSITION CHARGE OR EQUIVALENT REVENUES, VIOLATING R.C. 4928.38, 4928.39, AND 4928.40. | 3 |
| ASSIGNMENT OF ERROR 2: THE PUCO UNLAWFULLY AND UNREASONABLY PERMITTED DP&L TO IMPLEMENT A STABILITY CHARGE IN DIRECT VIOLATION OF THE OHIO SUPREME COURT’S RECENT ORDER. | 6 |
| ASSIGNMENT OF ERROR 3: THE PUCO UNLAWFULLY AND UNREASONABLY RULED THAT P WERE PRECLUDED FROM RE-LITIGATING THE RETAIL STABILITY CHARGE DUE TO THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL. | 7 |
| A. The retail stability charge was not actually and directly litigated in prior proceedings. | 7 |
| B. The PUCO's holding is unreasonable because it is contrary to the principle that the PUCO can modify earlier orders so long as it explains the change and the new regulatory course is permissible. <i>In re: Application of Ohio Power Co.</i> , 144 Ohio St.3d 1, 2015-Ohio-2056, ¶16, 17 (citations omitted). | 8 |
| ASSIGNMENT OF ERROR 4: THE PUCO UNREASONABLY AND UNLAWFULLY APPROVED DP&L'S REQUEST TO COLLECT A RATE STABILIZATION CHARGE AS A PROVIDER OF LAST RESORT (“POLR”) OBLIGATION..... | 10 |
| A. The PUCO erred by charging customers now for POLR service that DP&L is currently not providing those customers. | 10 |
| B. There is no evidentiary support for allowing DP&L to charge customers \$76 million per year for POLR when DP&L does not currently provide POLR service to those customers. | 11 |
| IV. CONCLUSION..... | 13 |

**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. 08-1094-EL-SSO |
| |) |) | |
| In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs. |) |) | Case No. 08-1095-EL-ATA |
| |) |) | |
| In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code Section 4905.13. |) |) | Case No. 08-1096-EL-AAM |
| |) |) | |
| In the Matter of the Application of The Dayton Power and Light Company for Approval of its Amended Corporate Separation Plan. |) |) | Case No. 08-1097-EL-UNC |
| |) |) | |

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

The Office of the Ohio Consumers' Counsel ("OCC") files this application to protect customers from paying another illegal subsidy to the Dayton Power and Light Company ("DP&L"). Like DP&L's so called "stability" charge the Ohio Supreme Court recently struck down,¹ the "Rate Stabilization Charge" that the PUCO recently authorized is an unlawful transition charge that Ohio law precludes.

¹ *In re: Application of Dayton Power & Light Co.*, Slip. Op. No. 2016-Ohio-3490, S.Ct. Case No. 2014-1505 (June 20, 2016).

In its Opinion and Order of August 26, 2016, the Public Utilities Commission of Ohio ("PUCO") granted DP&L's motion to implement the provisions of its first electric security plan ("ESP") until a subsequent standard service offer is authorized by it. This order was made in conjunction with an order allowing DP&L to withdraw and terminate its ESP application.²

The Opinion and Order was unreasonable and unlawful in the following respects:

ASSIGNMENT OF ERROR 1: The PUCO unlawfully and unreasonably approved DP&L's request to collect a rate stabilization charge ("RSC") from customers as part of continuing DP&L's most recent standard service offer. The RSC charge permits the Utility to collect an unlawful transition charge or equivalent revenues, violating R.C. 4928.38, 4928.39, and 4928.40.

ASSIGNMENT OF ERROR 2: The PUCO unlawfully and unreasonably permitted DP&L to implement a stability charge in direct violation of the Ohio Supreme Court's recent order.

ASSIGNMENT OF ERROR 3: The PUCO unlawfully and unreasonably ruled that parties were precluded from re-litigating the retail stability charge due to the doctrines of res judicata and collateral estoppel.

A. The retail stability charge was not actually and directly litigated in prior proceedings.

B. The PUCO's holding is unreasonable because it is contrary to the principle that the PUCO can modify earlier orders so long as it explains the change and the new regulatory course is permissible.

In re: Application of Ohio Power Co., 144 Ohio St.3d 1, 2015-Ohio-2056, ¶16, 17 (citations omitted).

ASSIGNMENT OF ERROR 4: The PUCO unreasonably and unlawfully approved DP&L's request to collect a rate stabilization charge as a provider of last resort ("POLR") obligation.

A. The PUCO erred by charging customers now for POLR service that DP&L is not currently providing.

² See *In the Matter of the Application of the Dayton Power & Light Company for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO et al., Finding and Order (Aug. 26, 2016).

B. There is no evidentiary support for allowing DP&L to charge customers \$76 million per year for POLR when DP&L does not currently provide POLR service.

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,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Maureen Willis

Maureen Willis, (0020847)
Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: Willis (614) 466-9567
maureen.willis@occ.ohio.gov
(will accept service via email)

**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. 08-1094-EL-SSO |
| |) |) | |
| In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs. |) |) | Case No. 08-1095-EL-ATA |
| |) |) | |
| In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code Section 4905.13. |) |) | Case No. 08-1096-EL-AAM |
| |) |) | |
| In the Matter of the Application of The Dayton Power and Light Company for Approval of its Amended Corporate Separation Plan. |) |) | Case No. 08-1097-EL-UNC |
| |) |) | |

MEMORANDUM IN SUPPORT

I. INTRODUCTION

At a time when 500,000 customers of Dayton Power and Light Company ("DP&L" or "Utility") should be receiving long overdue rate decreases, the PUCO has allowed DP&L to avoid fully reducing rates to customers. Since January 1, 2014, DP&L has taken approximately \$285 million in subsidies from customers in the Dayton area-- where there is financial distress, a poverty level of 35%, and insecure access to food³-- through its inaptly named service stability charge ("Rider SSR").

³ Map the Meal Gap 2016. Feeding America <http://www.feedingamerica.org/hunger-in-america/our-research/map-the-meal-gap/data-by-county-in-each-state.html?referrer=https://www.google.com/>.

The Supreme Court ordered the PUCO to carry out its judgment that Rider SSR is an unlawful transition charge that DP&L's customers should not be paying.⁴ But instead of complying with the Supreme Court decision and eliminating the \$10 per month stability charges to customers, the PUCO allowed DP&L to terminate its plan and continue its prior ESP rates (ESP II). Under those rates, DP&L will be collecting more unlawful stability charges -- this time charging customers \$6.05 per month (\$76 million per year) in above-market transition charges.

The PUCO's Order permitting DP&L to collect a rate stabilization charge is unlawful. Rehearing should be granted.

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 October 27, 2008, which was granted by Entry dated February 5, 2009. 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:

⁴ See *In the Matter of the Application of the Dayton Power & Light Company for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO et al., Supreme Court mandate (July 19, 2016).

“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 2, 2016.

III. ERRORS

ASSIGNMENT OF ERROR 1: THE PUCO UNLAWFULLY AND UNREASONABLY APPROVED DP&L'S REQUEST TO COLLECT A RATE STABILIZATION CHARGE ("RSC") FROM CUSTOMERS AS PART OF CONTINUING DP&L'S MOST RECENT STANDARD SERVICE OFFER. THE RSC CHARGE PERMITS THE UTILITY TO COLLECT AN UNLAWFUL TRANSITION CHARGE OR EQUIVALENT REVENUES, VIOLATING R.C. 4928.38, 4928.39, AND 4928.40.

The PUCO approved DP&L's request to implement a rate stabilization charge as part of continuing its standard service offer rates. In approving the charge, the PUCO relied upon its 2012 Opinion and Order, adopting a stipulation with the rate stabilization charge. There, the PUCO maintained that it determined "that the RSC and EIR were both

fair, reasonable and supported by the record."⁵ The PUCO also claims that in its subsequent decision, it approved another stipulation that continued the stability charge (and the EIR) finding them to be a "valid provision, term, or condition of [DP&L's] ESP I."⁶

But the PUCO fails to acknowledge that since its earlier holdings approving stipulations that included the rate stabilization charge (RSC), the Ohio Supreme Court has struck down two similar stability charges.⁷ The stabilization charge here is, like the other illegal stability charges, an unlawful transition charges.

The rate stabilization charge was paid by customers starting on January 1, 2007.⁸ The charge was originally described (in 2003) as relating to increased costs of production, physical security, and cybersecurity for power plants owned by DP&L and its affiliates.⁹ In this case, parties stipulated to extend DP&L's rate plan through December 31, 2012 and continue the RSC as a non-bypassable charge to customers.¹⁰

In 2012 when DP&L filed its application for a market rate offer, it sought to continue its RSC charge but decided to change the name to an "electric service stability charge (ESSC)." In its application it noted that the ESSC charge would "equal the rate

⁵ *In the Matter of the Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 08-1094-EL-SSO et al., Finding and Order at ¶5 (Aug. 26, 2016).

⁶Id. at ¶25.

⁷ *In re: Application of Dayton Power & Light Co.*, Slip. Op. No. 2016-Ohio-3490, S.Ct. Case No. 2014-1505 (June 20, 2016); *In re: Application of Columbus S. Power Co.*, Slip Op. No. 2016-Ohio-1608.

⁸ *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order (Dec. 28, 2005)(adopting Stipulation with rate stabilization charge).

⁹ *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, Stipulation at 13-14 , ¶IX E (May 28, 2003).

¹⁰ *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Stipulation and Recommendation at 4 (Feb. 24, 2009).

formerly charged as the rate stabilization charge."¹¹ DP&L described the rate as compensating the company "for maintaining electric service stability for the Company and its customers."¹²

Later that year, DP&L withdrew its application for a market rate offer, and filed an ESP with a "service stability rider" to "ensure the Company's financial integrity."¹³ That proposed service stability charge was essentially no different than the earlier RSC/ESSC stability charges. The service stability charge was the very same charge that the Ohio Supreme Court struck down as an unlawful transition charge.¹⁴

The "RSC" charge the PUCO recently reinstated is a transition charge designed to subsidize DP&L and its power plants. The RSC, arbitrarily set at 11% of the costs of DP&L's power plants, will collect \$76 million a year from customers.¹⁵ But under the law (R.C. 4928.38, 4928.39 and 4928.40), following the market development period, DP&L is supposed to be "fully on its own in the competitive market." The market development period ended for DP&L in 2005. There should be no more above-market subsidies paid by customers to support generation in Ohio.

The law prohibits the PUCO from approving the collection of transition revenues or "equivalent revenues" from DP&L's customers after 2005. The recent Supreme Court precedent¹⁶ affirmed this when it struck down both AEP Ohio's and DP&L's stability

¹¹ *In the Matter of the Application of the Dayton Power & Light Company for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO et al., Application at 9 (Mar. 30, 2012).

¹² *Id.*

¹³ *Id.* at 7. At the same time it proposed to withdraw the smaller RSC charge.

¹⁴ *In re: Application of Dayton Power & Light Co.*, Slip. Op. No. 2016-Ohio-3490, S.Ct. Case No. 2014-1505 (June 20, 2016).

¹⁵ *Id.*, Opinion and Order at 11 (Dec. 28, 2005).

¹⁶ *In re: Application of Dayton Power & Light Co.*, Slip. Op. No. 2016-Ohio-3490, S.Ct. Case No. 2014-1505 (June 20, 2016); *In re: Application of Columbus S. Power Co.*, Slip Op. No. 2016-Ohio-1608.

charge.¹⁷ The PUCO should abrogate its earlier ruling approving the RSC, given the Court's recent rulings.¹⁸ Rehearing should be granted, and the PUCO should reject the RSC charge because it is an unlawful transition charge.

ASSIGNMENT OF ERROR 2: THE PUCO UNLAWFULLY AND UNREASONABLY PERMITTED DP&L TO IMPLEMENT A STABILITY CHARGE IN DIRECT VIOLATION OF THE OHIO SUPREME COURT'S RECENT ORDER.

Less than three months ago the Ohio Supreme Court struck down DP&L's stability charge finding it to be an unlawful transition charge, violating R.C.4928.39. That should have meant that customers would no longer be paying for unlawful transition charges. But the PUCO then turned around and permitted the utility to reimplement stability charges that are no different than those the Court struck down. The PUCO ignored the Court's ruling. The PUCO's actions are both unreasonable and unlawful. The PUCO did not fulfill the Court's mandate. That was unlawful under R. C.4903.13. The Ohio Supreme Court reversed. A mandate was issued. The PUCO's actions failed to properly carry out the Court's mandate. Additionally, it was unreasonable for the PUCO to circumvent the Court's order. Rehearing should be granted.

¹⁷ Id.

¹⁸ See *In re: Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶16, 17 (citations omitted)(affirming that the PUCO can modify earlier Orders so long as the PUCO explains the change and the new regulatory course is permissible).

ASSIGNMENT OF ERROR 3: THE PUCO UNLAWFULLY AND UNREASONABLY RULED THAT P WERE PRECLUDED FROM RELITIGATING THE RETAIL STABILITY CHARGE DUE TO THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL.

A. The retail stability charge was not actually and directly litigated in prior proceedings.

The doctrine of res judicata (and collateral estoppel) is applicable to administrative proceedings, including those of the Commission. *In the Matter of the Complaint of Union Rural Electric Cooperative, Inc., Complainant, v. The Dayton Power and Light Company, Respondent, Relative to an Alleged Violation of the Ohio Electric Suppliers Certified Territory Act (“Alleged Violation”),* Case No. 88-947-EL-CSS, 1988 Ohio PUC LEXIS 776, Entry at 7 (August 16, 1988). Collateral estoppel applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action. *Thompson v. Wing*, 70 Ohio St.3d, 176, 183 (1994).

And although the PUCO can choose to apply the doctrine of collateral estoppel, it must do so carefully especially when the prior proceeding was one in which the PUCO was analyzing a settlement. A settlement, under the PUCO's review, is adjudicated as a package, not by way of the individual terms within the package. The mere fact that the prior settlement contained a stability provision does not mean that the stability provision itself was actually and directly litigated, thereby invoking collateral estoppel. Indeed, the PUCO did not (and cannot cite) to any finding that the retail stability charge itself was determined to be a reasonable, permissible provision of an electric security plan under Ohio law.

The PUCO has in the past rejected collateral estoppel claims made pertaining to a settlement, insisting that the prior settlement must specifically address the issue: "In the absence of a specific provision addressing the issue in the RSP [Settlement], OCC has not shown that this issue has been actually and necessarily litigated in the prior action; therefore, collateral estoppel does not preclude DP&L from filing the application in this proceeding."¹⁹ The PUCO's holding here should be consistent with this prior ruling. Neither of DP&L's settlements specifically addressed the reasonableness of the stability charge. And neither settlement addressed whether the charge is a permissible provision of an electric security plan under Ohio law. Because the issue was not actually and necessarily litigated in the prior PUCO proceedings, collateral estoppel does not apply. The PUCO erred. Rehearing should be granted.

B. The PUCO's holding is unreasonable because it is contrary to the principle that the PUCO can modify earlier orders so long as it explains the change and the new regulatory course is permissible. *In re: Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶16, 17 (citations omitted).

The PUCO ruled that the parties' arguments against the stability charge are barred by doctrines of res judicata and collateral estoppel. The PUCO's ruling is wrong.

The PUCO has the discretion to change or alter its prior decisions.²⁰ The Ohio Supreme Court has on a number of occasions explained that the PUCO *can* revisit a

¹⁹ *In the Matter of the Application of The Dayton Power and Light Company for Approval of Tariff Changes Associated with a Request to Implement a PJM Administrative Fee*, No. 05-844,-EL-ATA, Entry on Rehearing at ¶8 (Mar. 7, 2008).

²⁰ See, e.g., *In re: Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶16, 17 (citations omitted)(affirming that the PUCO can modify earlier Orders so long as the PUCO explains the change and the new regulatory course is permissible).

particular decision, but must, if it changes course, explain why.²¹ The PUCO's power to change course is not limitless; it must explain why and the new course must be substantively reasonable and lawful.²²

Here due to the Ohio Supreme Court recent decisions striking down stability charges (including DP&L's), it is reasonable for the PUCO to revisit its earlier decisions approving a very similar, if not identical, stability charge for DP&L. And excluding stability charges from a utility's electric security plan rates is reasonable and lawful, as the Ohio Supreme Court has recently ruled against such charges.²³

The PUCO itself has recognized the doctrine of collateral estoppel does not impede its ability to alter its prior decisions. In an earlier PUCO case, in response to claims by OCC that collateral estoppel should prevent the utility (DP&L) from relitigating issues previously decided, the PUCO rejected OCC's claims:

The Commission notes that the doctrine of collateral estoppel relates to the ability of litigants to bring actions that would relitigate matters that have already been decided. It does not relate to the ability of the court or an administrative agency to alter prior decisions. Thus, to the extent that the opinion and order alters the outcome of the ETP and MDP cases, collateral estoppel is irrelevant to the Commission's determination.²⁴

²¹ *In re: Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, citing, e.g., *Util. Serv. Partners Inc. v. Public Util. Comm.*, 124 Ohio St.3d 284; *Ohio Consumers Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51.

²² *Id.*; see also *Fed. Communications Comm. V. Fox Television Stations, Inc.*, 556 U.S. 502, 515, (an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." [emphasis deleted]).

²³ *In re: Application of Dayton Power & Light Co.*, Slip. Op. No. 2016-Ohio-3490, S.Ct. Case No. 2014-1505 (June 20, 2016). (rejecting DP&L's stability charges which are very similar to the stability charges the PUCO approved in going back to DP&L's prior rates). See also *In re: Application of Columbus S. Power Co.*, Slip Op. No. 2016-Ohio-1608.

²⁴ *In the Matter of the Complaint of Dominion Retail, Inc. v. The Dayton Power & Light Company*, Case No. 03-2405-EL-CSS, et al., Entry on Rehearing at ¶10 ((Mar. 23, 2005). On appeal, the Court upheld the PUCO's modification of its earlier order. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio Sat. 3d 394, 2006-Ohio-4706.

Changing course or altering prior decisions to account for changes in facts and circumstances is something the PUCO should embrace, not run from. The PUCO has a duty to ensure just and reasonable rates for Ohioans, and must be flexible in reviewing its prior determinations. “[Res judicata] is not always applied in the same manner in administrative proceedings as in the courts, given the nature of ongoing regulatory responsibility of administrative agencies and their need to take into account changes in facts and circumstances in determining what is in the public interest at a particular point in time.” *Alleged Violation*, Entry at 7.

It was unreasonable for the PUCO to apply res judicata to prevent it from taking what now are known to be unlawful charges out of customers' rates. Rehearing should be granted.

ASSIGNMENT OF ERROR 4: THE PUCO UNREASONABLY AND UNLAWFULLY APPROVED DP&L'S REQUEST TO COLLECT A RATE STABILIZATION CHARGE AS A PROVIDER OF LAST RESORT (“POLR”) OBLIGATION.

A. The PUCO erred by charging customers now for POLR service that DP&L is currently not providing those customers.

The PUCO found that the stability charge is a non-bypassable provider of last resort charge (POLR) to allow DP&L to fulfill its POLR obligations.²⁵ The PUCO reasoned that even though POLR service is being provided by marketers during the ESP term, DP&L retains its obligation, "over the long term," to serve as provider of last resort. In this regard the PUCO notes that even though POLR service is being provided by competitive bidding process auction participants, there are no further competitive auctions schedule to procure energy and capacity after May 31, 2017. And it states that

²⁵ *In the Matter of the Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 08-1094-EL-SSO et al., Finding and Order at ¶23 (Aug. 26, 2016).

DP&L maintains a long term obligation to serve as POLR even while POLR service are being provided by competitive bidding auction participants in the short term.

But the PUCO has approved increased rates for customers (starting Sept. 1, 2016) that charge customers for POLR service that DP&L is not providing. As the PUCO noted, that service is being provided by the auction participants from now until at least May 31, 2017.²⁶ Allowing DP&L to charge customers now, for possible POLR service it may or may not provide after May 31, 2017, is unreasonable and unlawful. Rehearing should be granted on this issue.

B. There is no evidentiary support for allowing DP&L to charge customers \$76 million per year for POLR when DP&L does not currently provide POLR service to those customers.

The PUCO has ruled that POLR charges must be justified either on a cost basis or a non-cost basis before a utility can be compensated for being the POLR and carrying the risks associated with being the POLR.²⁷ The PUCO has further defined those risks to exclude migration risk, but include risks associated with standing ready to accept returning customers.²⁸

DP&L's RSC charge has not been justified as a POLR charge. At no stage during any of the prior proceedings, and at no time in DP&L's recent filing, did the Utility produce any cost based evidence related to POLR costs or the risks it bears associated with being the POLR. Obviously it could not do so, because the costs (or the obligation) do not exist for it during the remaining ESP term (September 2016 through May 31,

²⁶ Id.

²⁷ *In the Matter of the Ohio Power Company*, Case No. 08-917-EL -SSO, Opinion and Order at 40 (Mar. 18, 2009).

²⁸ *In the Matter of the Ohio Power Company*, Case No. 08-917-EL-SSO, Order on Remand at 32 (Oct. 3, 2011).

2017). DP&L is not providing POLR service. Instead the winning bidders in the SSO auction are providing that service and the rates customers pay likely reflect that POLR risk and/or cost.

And while POLR charges do not necessarily have to reflect cost, if they are non-cost based, they must be shown to be reasonable.²⁹ DP&L's POLR charge, established in 2005, was arbitrarily set at 11% of the standard service offer rate as of January 2014.³⁰ DP&L, through the testimony of Kurt Strunk, tried to justify the POLR charge by presenting a Black Scholes analysis. Mr. Strunk testified that the value to customers of the option to switch on and off DP&L's standard offer rate exceeded the rates being charged.³¹

Putting aside the PUCO's past findings rejecting the use of Black Scholes modeling for justifying POLR charges,³² the PUCO should conclude that there is no record to support DP&L charging customers for service that is not being provided. Here the record lacks sufficient and probative evidence to support charging customers for a POLR service that is not being provided by DP&L to its customers who are being asked to pay the charge. It is reversible error, under R.C. 4903.09, for the PUCO to make a decision that is not supported by findings of fact and reasons. Consistent with R.C. 4903.09, the PUCO should grant rehearing.

²⁹ Id. at 22.

³⁰ *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order at 2 (Dec. 28, 2005) (“RSC Case”); *see also Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, ¶4.

³¹ *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Testimony of Kurt G. Strunk in Support of the Stipulation and Recommendation at 2 (Nov. 4, 2005).

³² *In the Matter of the Ohio Power Company*, Case No. 08-917-EL-SSO, Order on Remand at 32 (Oct. 3, 2011).

IV. CONCLUSION

The PUCO erred when it permitted DP&L to charge customers another illegal subsidy that is aimed at protecting the utility's financial integrity. Like DP&L's so-called "stability" charge the Ohio Supreme Court recently struck down,³³ the "Rate Stabilization Charge" that the PUCO authorized on August 26, 2016 is also an unlawful transition charge that Ohio law precludes. To protect consumers from paying more unlawful charges, the PUCO should grant rehearing on this matter.

Respectfully submitted,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Maureen Willis

Maureen Willis, (0020847)
Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: Willis (614) 466-9567
maureen.willis@occ.ohio.gov
(will accept service via email)

³³ *In re: Application of Dayton Power & Light Co.*, Slip. Op. No. 2016-Ohio-3490, S.Ct. Case No. 2014-1505 (June 20, 2016).

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
Maureen Willis
Counsel of Record

SERVICE LIST

Thomas.Lindgren@ohioattorneygeneral.gov
thomas.mcnamee@ohioattorneygeneral.gov
cfaruki@ficlaw.com
jsharkey@ficlaw.com
joliker@mwncmh.com
sam@mwncmh.com
drinebolt@aol.com
cmooney@ohiopartners.org
Ned.Ford@fuse.net
ricks@ohanet.org
wis29@yahoo.com
smhoward@vssp.com
mjsettineri@vorys.com
BarthRoyer@aol.com
Gary.A.Jeffries@dom.com
Bojko@carpenterlipps.com
sechler@carpenterlipps.com
fdarr@mwncmh.com
jlang@calfee.com
talexander@calfee.com
mkeaney@calfee.com
mswhite@igsenergy.com

Attorney General:
Gregory.Price@puc.state.oh.us

Amy.spiller@duke-energy.com
Jeanne.kingery@duke-energy.com
Elizabeth.watts@duke-energy.com
haydenm@firstenergycorp.com
mjsatterwhite@aep.com
stnourse@aep.com
judi.sobecki@dplinc.com
jbentine@cwslaw.com
mwhite@cwslaw.com
henryeckhart@aol.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
jkyler@bkllawfirm.com
Cynthia.A.Fonner@constellation.com
LGearhardt@ofbf.org
cmiller@icemiller.com
gdunn@icemiller.com
trent@theOEC.org
cathy@theoec.org
Williams.toddm@gmail.com
ejacobs@ablelaw.org
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com
whitt@whitt-sturtevant.com
myurick@taftlaw.com
stephen.chriss@wal-mart.com

Attachment A
Residential Customer Impact of DP&L Proposal

| Rider Being Eliminated³⁴ | Cost Per Month³⁵ |
|--|------------------------------------|
| Service Stability Rider | \$9.85 |

| Riders Being Reinstated | Cost Per Month |
|--------------------------------|-----------------------|
| Environmental Investment Rider | \$11.87 |
| Rate Stability Charge | \$6.05 |
| Total | \$17.92 |
| | |
| Total Net Impact | \$8.07 |

³⁴ Based on a typical residential customer using 1,000 kWh per month.

³⁵ Although DP&L proposes to eliminate the Competitive Bid True up rider (\$5.49/month), DP&L has stated that, at the end of the period the tariffs are in place, the Standard Offer Generation rates will be trued-up to the actual auction supply costs. This results in only a deferral, not a total elimination of this Rider.

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/26/2016 5:27:21 PM

in

Case No(s). 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC

Summary: App for Rehearing Application for Rehearing by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Willis, Maureen Mrs.