

**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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November 14, 2016

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APPLICATION FOR REHEARING

The Office of the Ohio Consumers' Counsel ("OCC") files this application for rehearing 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 above market subsidies (through a so-called stability charge) to prop up DP&L's aging uneconomic power plants. The Ohio Supreme Court ("Court"), however, found the PUCO should not have approved DP&L's \$9.86 per month stability charge. The Court ruled that the

stability charge is an unlawful transition charge that customers should no longer pay.¹ It is up to the PUCO to carry out that Court decision.

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 current electric security plan ("ESP") rates, and instead charge rates to customers that include a \$6.05 monthly stability charge from the Utility's previous ESP.² 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 OCC filed an application for rehearing from the PUCO's August 26, 2016 on September 26, 2016. On October 12, 2016, the PUCO issued a Finding and Order. In that Finding and Order the PUCO granted rehearing "for the limited purpose of further consideration of the matters specified in the applications for rehearing."³ The PUCO's Finding and Order of October 12, 2016 was unreasonable or unlawful in the following respects:

Assignment of Error 1: The PUCO erred by not granting and holding rehearing on the matters specified in OCC's application for rehearing.

Assignment of Error 2: The PUCO erred by granting rehearing to allow itself more time to issue a final appealable order. By doing so, the PUCO fails to fulfill its duty to hear matters pending before it without unreasonable delay and with due regard to the

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.

² *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, Sixth Entry on Rehearing (Aug. 26, 2016).

³ *Id.*, Finding and Order at ¶6 (Oct. 12, 2016).

rights and interests of all litigants before it. The PUCO's Order permits it to evade a timely judicial review of its order and precludes parties from exercising their rights to appeal a PUCO order to the Court -- a right that is established, inter alia, under R.C. 4903.10 and 4903.13.

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 Court found to be unlawful transition charges. Unfortunately for consumers paying those unwarranted 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. In DP&L's hybrid approach it resurrected a stability charge of \$6.05 per month that it proposed to charge its customers. The PUCO approved DP&L's plan.

Since September 1, 2016, DP&L customers have been forced to pay new standard service offer charges, including the \$6.05 stability charge. On September 26, 2016, OCC applied for rehearing on the PUCO Order, maintaining that the PUCO violated Ohio law. The PUCO issued an Entry on Rehearing on October 12, 2016, granting rehearing so that it could further consider the issues raised by the parties' applications for rehearing.

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 PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Opinion and Order of October 12, 2016. The PUCO’s ruling was unreasonable or unlawful in the following respects.

III. ERRORS

Assignment of Error 1: The PUCO erred in not granting and holding rehearing on the matters specified in OCC's application for rehearing.

The PUCO ruled that rehearing should be granted for the limited purpose of further considering the matters raised in the applications for rehearing.⁴ The PUCO was wrong in doing so because it should have granted OCC rehearing on the matters specified in its Application for Rehearing.

OCC requested rehearing alleging that the PUCO violated the law (R.C. 4928.143(C) (2)(a), which permitted DP&L to go back to its most recent standard service

⁴ Entry on Rehearing at ¶6.

rates that include an unlawful stability charge. The OCC also argued that in allowing DP&L to reinstate a prior stability charge, it was circumventing the Court's ruling.

It was not reasonable or 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. The error was clear. The PUCO should have granted rehearing

Assignment of Error 2: The PUCO erred by granting rehearing to allow itself more time to issue a final appealable order. By doing so, the PUCO fails to fulfill its duty to hear matters pending before it without unreasonable delay and with due regard to the rights and interests of all litigants before it. The PUCO's Order permits it to evade a timely review and reconsideration of its order by the Ohio Supreme Court and precludes parties from exercising their rights to appeal a PUCO order to the Ohio Supreme Court -- a right that is established, inter alia, under R.C. 4903.10 and 4903.11 and 4903.13.

The Court has held that "[i]t is the duty of the commission to hear matters pending before the commission without unreasonable delay and with due regard to the rights and interests of all litigants before that tribunal." *State ex rel. Columbus Gas & Fuel Col. v. Pub. Util. Comm.* (1930), 122 Ohio St. 473, 475. This duty is described, with defined parameters, under R.C. 4903.10.

Under R.C. 4903.10, the General Assembly established a thirty day process for the PUCO to either grant or deny rehearing. Under the statute, if the PUCO does not grant or deny the applications within thirty days, the applications are denied by operation of law. This provision was meant to ensure that the PUCO resolved applications in a timely manner--thirty days under the statute.

The timely resolution of applications for rehearing (within 30 days) is important because an order of the PUCO cannot be appealed as a "final order" until the PUCO has

ruled on all rehearing applications or the rehearing has been denied by operation of law.⁵ Yet the Order upon which rehearing is being sought is "effective," with customers being charged rates that are challenged on rehearing.⁶ That means DP&L can charge (and is charging) customers rates that include a \$6.05 stability charge, regardless of the fact that OCC is challenging that charge before the PUCO. This is a consequence of the statutory process, under which the PUCO has authority to implement its Order, regardless of challenges to the order made through the rehearing process. The law (R.C. 4903.10) makes clear that the filing of an application for rehearing does not excuse compliance with the order or operate to stay or postpone enforcement of the order.

The PUCO, however, has recently been side-stepping the thirty-day review process, by instead employing a process under which rehearing has been extended by months, and in some cases, even years.⁷

⁵ See R.C. 4903.11.

⁶ There are few exceptions to this. The exceptions provide that through a special order of the PUCO, the filing of an application may stay the order. Also if parties file an application prior to the effective date of the order the order is stayed, "unless otherwise ordered by the commission."

⁷ See, e.g., *In the Matter of the Application of Ohio Power Company*, Case No. 13-2385, Third Entry on Rehearing (July 27, 2015)(granting rehearing allowing PUCO more time to consider OCC and others' application for rehearing). A substantive Entry on Rehearing was finally issued on November 3, 2016, more than a year later. *In re: Duke Energy Ohio*, Case No. 14-841-EL-SSO, Entry on Rehearing (May 28, 2015) (granting rehearing allowing PUCO more time to consider OCC and others' application for rehearing). No substantive Entry on Rehearing has been issued. *In the Matter of the Application of The Dayton Power and Light Company for Authority to Issue and Sell and Amount Not to Exceed \$490 Million of First Mortgage Bonds, Debentures, Notes, or Other Evidences of Indebtedness or Unsecured Note*, Case No. 13-0893-EL-AIS, Entry on rehearing (Sept. 4, 2013) (Granting application for rehearing filed by OCC for the limited purpose of further consideration) No final entry. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013-2015*, Case Nos. 12-2190-EL-POR, 12-2191-EL-POR, and 12-2192-EL-POR, Entry on rehearing (Jan. 14, 2015)(Granting the application for rehearing by FirstEnergy, OCC, OMAEG, and Environmental Groups be granted for further consideration) No final entry. *In the Matter of the Application of Ohio Power Company to Adopt a Final Implementation Plan for the Retail Stability Rider*, Case No. 14-1186-EL-RDR, Entry on Rehearing (May 28, 2015)(Granting application for rehearing by The Kroger Company and Joint Applicants, including OCC, for further consideration) No Final Entry.

And while the Court has ruled that the PUCO may grant applications for rehearing for the limited purpose of allowing additional time to consider them,⁸ the Court's ruling is being unreasonably applied in a manner that disrupts timely judicial review of PUCO rulings to the detriment of would-be appellants. The PUCO can thwart (and evade) judicial review by granting itself more time to consider the applications and issuing a final order months or years down the road, while at the same time subsidies are being collected from Ohioans.⁹ Evading judicial review matters to Ohioans because of Court precedent¹⁰ that generally precludes refunds to customers for rates already collected. Each day that the PUCO delays issuing a final order, is a day that rates are charged to customers without an opportunity to stop future collections and without a likely recourse to a refund.

Rehearing should be granted (or denied) and a final order should be issued. Granting more time to consider issues raised on rehearing unreasonably delays the issuance of a final order. Under the PUCO's practice, there is no denial of the application for rehearing, either by law or by entry. Thus, there is no final order. This makes it impossible for parties to exercise their rights under R.C. 4903.11 and 4903.13 to appeal PUCO decisions to the Court. And because the PUCO has not ordered a stay of the rates, or ordered rates be collected subject to refund, its dilatory rulings provide immediate material harm to customers.

⁸ See, *State ex rel. Consumers' Counsel v. Pub. Util. Comm.*, (2004), 102 Ohio St.3d 301, 304.

⁹ A factor that contributes to harm to customers is that the PUCO as a matter of course denies requests to stay rates or collect rates subject to refund. A ruling granting a stay of rates, or collecting rates subject to refund would potentially limit the harm to customers that is occurring when the PUCO delays issuing a final order. Typically the PUCO has not ordered such relief.

¹⁰ *Keco Industries v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 3d 254, 257, 141 N.E.2d 445 (1957).

The PUCO should not be able to evade judicial review of its decisions by failing to issue a timely final appealable order. Rehearing should be granted, with a final appealable order being issued. This will allow parties to exercise their statutory rights to appeal the PUCO's decisions.

IV. CONCLUSION

To protect customers, the PUCO should grant rehearing and abrogate or modify its Finding and Order. This would ensure that parties, including OCC, can exercise their statutory right to appeal the PUCO decisions in a timely manner and helps protect the interests of the residential customers that OCC represents.

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 14th day of November 2016.

/s/ Maureen Willis
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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.