

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of : Case No. 08-1094-EL-SSO
The Dayton Power and Light Company for
Approval of Its Electric Security Plan. :

In the Matter of the Application of : Case No. 08-1095-EL-ATA
The Dayton Power and Light Company for
Approval of Revised Tariffs. :

In the Matter of the Application of : Case No. 08-1096-EL-AAM
The Dayton Power and Light Company for
Approval of Certain Accounting Authority :
Pursuant to Ohio Rev. Code §4905.13.

In the Matter of the Application of : Case No. 08-1097-EL-UNC
The Dayton Power and Light Company for
Approval of Its Amended Corporate :
Separation Plan.

**MEMORANDUM IN OPPOSITION OF THE DAYTON POWER AND
LIGHT COMPANY TO THE NOVEMBER 14, 2016 APPLICATION FOR
REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION AND SUMMARY

The latest Application for Rehearing by The Office of the Ohio Consumers' Counsel ("OCC")¹ is a transparent attempt to shove its way to the front of the Commission's busy docket. To keep its arguments front and center, OCC has burdened the Commission and the parties with a dual-track rehearing process relating to the August 26, 2016 Finding and Order in this proceeding. OCC filed its initial Application for Rehearing² in response to that Finding and Order, which allowed DP&L to implement temporary rates consistent with rates authorized in

¹ Nov. 14, 2016 Application for Rehearing by The Office of the Ohio Consumers' Counsel.

² Sept. 26, 2016 Application for Rehearing by The Office of the Ohio Consumers' Counsel.

this proceeding until a new SSO is approved.³ While the Commission granted the initial Application for Rehearing "for the limited purpose of further consideration,"⁴ OCC now argues that the Commission should have issued a substantive decision instead.

OCC fails to appreciate the Commission's longstanding practice of granting applications for rehearing for further consideration, which allows the Commission to review the myriad of complex issues facing Ohio's diverse public utilities. This practice not only is consistent with Ohio Rev. Code § 4903.10, but also is expressly permitted by the Supreme Court of Ohio. State ex rel. Consumers' Counsel v. Pub. Util. Comm., 102 Ohio St.3d 301, 2004-Ohio-2894, 809 N.E.2d 1146, ¶ 19.

Although the Commission ultimately should deny rehearing as to its August 26 Finding and Order,⁵ it was lawful and reasonable for the Commission to take additional time to consider the issues raised not only in OCC's initial Application for Rehearing, but also in the applications for rehearing filed by Ohio Partners for Affordable Energy, the Edgemont Neighborhood Coalition, Industrial Energy Users-Ohio, The Kroger Company, Ohio Energy Group, and the Ohio Manufacturers' Association Energy Group. Thus, the Commission should deny OCC's latest Application for Rehearing, and issue a final decision on rehearing in due course.

³ The Commission separately allowed DP&L to withdraw its ESP application in Case No. 12-426-EL-SSO. Aug. 26, 2016 Finding and Order (Case No. 12-426-EL-SSO).

⁴ Oct. 12, 2016 Sixth Entry on Rehearing, ¶ 6.

⁵ See Oct. 3, 2016 Opposition of The Dayton Power and Light Company to Applications for Rehearing of Ohio Partners for Affordable Energy and the Edgemont Neighborhood Coalition; Oct. 6, 2016 Memorandum in Opposition of The Dayton Power and Light Company to Applications for Rehearing of Industrial Energy Users-Ohio, The Office of the Ohio Consumers' Counsel, the Ohio Energy Group, the Ohio Manufacturers' Association Energy Group, and The Kroger Company (Case Nos. 08-1094-El-SSO).

II. THE COMMISSION HAS WIDE DISCRETION TO GRANT REHEARING FOR FURTHER CONSIDERATION

The Commission frequently grants applications for rehearing for the limited purpose of further consideration of issues raised in such applications.⁶ This practice is permitted by Ohio Rev. Code § 4903.10(B), which states that "[i]f the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law." While the statute requires the Commission to act on applications for rehearing within 30 days, it does not require a final decision within that time frame:

"If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.

If, 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."

Id. (emphasis added). Thus, rehearing may be granted for various purposes, and the Commission may reverse an order that is "unjust or unwarranted, or should be changed" after such rehearing.

Id. Granting an application for rehearing for further consideration is entirely consistent with this statutory framework.

Moreover, as OCC concedes (p. 6 & n.8), the Supreme Court of Ohio expressly upheld this practice in State ex rel. Consumers' Counsel v. Pub. Util. Comm., 102 Ohio St.3d 301, 2004-Ohio-2894, 809 N.E.2d 1146. In that case, various parties filed applications for

⁶ E.g., May 11, 2016 Entry on Rehearing (Case No. 14-1297-EL-SSO) (granting rehearing on matters specified in applications for rehearing and contemplating an evidentiary hearing); May 25, 2016 Entry on Rehearing (Case No. 14-1693-EL-RDR (granting rehearing on matters specified in applications for rehearing); May 7, 2014 Third Entry on Rehearing (Case No. 12-426-EL-SSO); Oct. 23, 2013 Entry on Rehearing (Case No. 12-426-EL-SSO).

rehearing from a Commission order that denied an interim rate increase and established a procedural schedule. Id. at ¶ 2. The Commission granted those applications "for the limited purpose of allowing the Commission additional time to consider the issues raised on rehearing," but later affirmed its earlier decision. Id. at ¶ 3-6 (internal quotation marks omitted). OCC sought a writ of prohibition, arguing that the Commission lacked jurisdiction to consider the rehearing applications more than 30 days after they were filed, citing § 4903.10. Id. at ¶ 16. The Court rejected that argument, holding:

"R.C. 4903.10 did not expressly preclude the commission from considering the merits of the applications for rehearing. The commission acted within 30 days of the filing of the applications when it granted the applications on February 11 for the limited purpose of allowing additional time to consider them. Nothing in R.C. 4903.10 or precedent specifically prohibited the commission from so proceeding."

Id. (emphasis added).

Though OCC cites another Supreme Court case for the proposition that the Commission must "hear matters pending before the commission without unreasonable delay," it ignores the Court's holding in the same case that the Commission has wide discretion to set its schedule. State ex rel. Columbus Gas & Fuel Co. v. Pub. Util. Comm., 122 Ohio St. 473, 172 N.E. 284 (1930). The Court specifically held that "[t]he public utilities commission is invested with a discretion as to its order of business, and there is such a wide latitude of that discretion that this court may not lawfully interfere with it, except in extreme cases." Id. at 475 (emphasis added). Given that wide discretion, the Court refused to compel the Commission to proceed with a case that had been delayed only for 106 days. Id. (case stayed by Commission on March 4, 1930; decided by Supreme Court on June 18, 1930).

Here, OCC filed its latest Applications for Rehearing 49 days after its initial Applications for Rehearing were filed, and 33 days after the Commission issued its Entries on Rehearing – well within the 106 days that did not warrant intervention in Columbia Gas. In addition, the litany of cases that OCC cites (p. 6 & n.7) in which the Commission has not issued a final decision for several months after taking time for further consideration does not support OCC's position that the Commission should hasten its decision in this case. Instead, those cases show only that the far less time that the Commission has taken in this proceeding is well below what the Commission has deemed necessary in other cases.

OCC's accusation (p. 6) that the Commission's intent is to "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," is without factual support. On the contrary, be it in courts or in agencies, multiparty complex litigation involving experienced parties, complicated statutory schemes, and technical subjects is time-consuming.

Finally, it is unavailing for OCC to argue (p. 4) that the Commission has precluded its "rights to appeal." Any such "right" must be consistent with the statutory framework for appeals from the Commission. Ohio Constitution, Article IV, Section 2(B)(1)(d) ("The Supreme Court shall have . . . [s]uch revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law[.]") (emphasis added). Since appeals from the Commission require a final decision on pending applications for rehearing, Senior Citizens Coalition v. Pub. Util. Comm., 40 Ohio St.3d 329, 332-33, 533 N.E.2d 353 (1988) (per curiam), and since Ohio Rev. Code § 4903.10 allows the Commission to grant rehearing for the limited purpose of further consideration before it issues a final decision, State ex rel. Consumers' Counsel, 102 Ohio St.3d 301, 2004-Ohio-2894, 809 N.E.2d 1146, at ¶ 19,

OCC's "right" to appeal cannot supersede the Commission's right to take additional time for further consideration of the issues before it. Id. Accord: In re Application of Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 20 (holding that OCC's practical ability to stay a Commission decision "is a matter for the General Assembly to consider, not this court").

III. CONCLUSION

For the these reasons, the Commission should reject OCC's transparent attempt to jump to the front of the Commission's busy docket by denying its latest Application for Rehearing and proceeding in due course with consideration of the parties' September 26, 2016 Applications for Rehearing in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Opposition of The Dayton Power and Light Company to the November 14, 2016 Application for Rehearing by The Office of the Ohio Consumers' Counsel has been served via electronic mail or U.S. Regular Mail upon the following counsel of record, this 25th day of November, 2016:

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Summary: Memorandum Memorandum in Opposition of The Dayton Power and Light Company to the November 14, 2016 Application for Rehearing by The Office of the Ohio Consumers' Counsel electronically filed by Mr. Charles J. Faruki on behalf of The Dayton Power and Light Company