

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

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**I. INTRODUCTION AND SUMMARY**

The latest Application for Rehearing by The Office of the Ohio Consumers' Counsel ("OCC")<sup>1</sup> 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 Rehearing<sup>2</sup> in response to that Finding and

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

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

Order, which allowed DP&L to withdraw its ESP application.<sup>3</sup> While the Commission granted the initial Application for Rehearing "for the limited purpose of further consideration,"<sup>4</sup> 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,<sup>5</sup> 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 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.

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<sup>3</sup> The Commission separately authorized temporary rates consistent with rates authorized in Case No. 08-1094-EL-SSO until a new SSO is approved. Aug. 26, 2016 Finding and Order (Case No. 08-1094-EL-SSO).

<sup>4</sup> Oct. 12, 2016 Sixth Entry on Rehearing, ¶ 6.

<sup>5</sup> 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 Manufacturers' Association Energy Group, The Kroger Company, and the Ohio Energy Group.

## 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.<sup>6</sup> 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

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<sup>6</sup> 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 was held to be not "extreme" in Columbia Gas. In addition, the litany of cases that OCC cites (p. 5 & 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,

/s/ Charles J. Faruki

Charles J. Faruki (0010417)

(Counsel of Record)

Jeffrey S. Sharkey (0067892)

FARUKI IRELAND & COX P.L.L.

110 North Main Street, Suite 1600

Dayton, OH 45402

Telephone: (937) 227-3705

Telecopier: (937) 227-3717

Email: cfaruki@ficlaw.com

jsharkey@ficlaw.com

Attorneys for The Dayton Power  
and Light Company

## **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 upon the following counsel of record, this 25th day of November, 2016:

Frank P. Darr, Esq.  
Matthew R. Pritchard, Esq.  
MCNEES WALLACE & NURICK LLC  
21 East State Street, 17th Floor  
Columbus, OH 43215-4225  
fdarr@mwncmh.com  
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

Maureen R. Willis, Esq.  
Michael E. Idzkowski, Esq.  
OFFICE OF OHIO CONSUMERS' COUNSEL  
10 West Broad Street, Suite 1800  
Columbus, OH 43215  
Maureen.willis@occ.ohio.gov  
idzkowski@occ.ohio.gov

Attorneys for Office the Ohio Consumers; Counsel

Colleen L. Mooney, Esq.  
OHIO PARTNERS FOR AFFORDABLE  
ENERGY  
231 West Lima Street  
P.O. Box 1793  
Findlay, OH 45839-1793  
cmooney@ohiopartners.org

Tony G. Mendoza, Staff Attorney (pro hac vice)  
Sierra Club Environmental Law Program  
2101 Webster Street, 13<sup>th</sup> Floor  
Oakland, CA 94612  
Email: tony.mendoza@sierraclub.org  
Attorneys for Sierra Club

James F. Lang, Esq.  
N. Trevor Alexander, Esq.  
Mark T. Keaney, Esq.  
CALFEE, HALTER & GRISWOLD LLP  
1200 Huntington Center  
41 South High Street  
Columbus, OH 43215  
jlang@clafee.com  
talexander@calfee.com  
mkeaney@calfee.com

Attorneys for City of Dayton and  
Honda of Amerca Mfg, Inc.

David Boehm, Esq.  
Michael L. Kurtz, Esq.  
BOEHM, KURTZ & LOWRY  
36 East Seventh Street Suite 1510  
Cincinnati, OH 45202-4454  
dboehm@BLKlawfirm.com  
mkurtz@BLKlawfirm.com

Attorney for Ohio Energy Group, Inc.

David I. Fein, Esq.  
Cynthia A. Fonner Brady, Esq.  
CONSTELLATION ENERGY GROUP INC.  
550 West Washington Blvd., Suite 300  
Chicago, IL 60661  
david.fein@constellation.com  
cynthia.brady@constellation.com

Matthew W. Warnock  
Dylan F. Borchers  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, OH 43215-4291  
Email: [mwarnock@bricker.com](mailto:mwarnock@bricker.com)  
[dborchers@bricker.com](mailto:dborchers@bricker.com)

Richard L. Sites, Esq.  
General Counsel and Senior Director of  
Health Policy  
Ohio Hospital Association  
155 East Broad Street, 15th Floor  
Columbus, OH 43215-3620  
[ricks@ohanet.org](mailto:ricks@ohanet.org)

Gregory J. Poulos, Esq.  
EnerNOC, Inc.  
471 East Broad Street  
Columbus, OH 43215  
Telephone: (614) 507-7377  
[gpoulos@enernoc.com](mailto:gpoulos@enernoc.com)

Attorney for EnerNOC, Inc.

Trent A. Dougherty, Esq.  
OHIO ENVIRONMENTAL COUNCIL  
1207 Grandview Avenue, Suite 201  
Columbus, OH 43212-3449  
[trent@theoec.org](mailto:trent@theoec.org)

Attorneys for the Ohio Environmental Council

Craig I. Smith, Esq.  
Attorney at Law  
15700 Van Aken Blvd., Suite 26  
Cleveland, OH 44120  
[Wis29@yahoo.com](mailto:Wis29@yahoo.com)

Attorney for Cargill, Incorporated

Tasha Hamilton  
Manager, Energy Policy  
CONSTELLATION ENERGY GROUP, INC.  
111 Market Place, Suite 600  
Baltimore, MD 21202  
[tasha.hamilton@constellation.com](mailto:tasha.hamilton@constellation.com)

Larry Gearhardt, Esq.  
Chief Legal Counsel  
OHIO FARM BUREAU FEDERATION  
280 North High Street  
P.O. Box 182383  
Columbus, OH 43218-2383  
[lgearhardt@ofbf.org](mailto:lgearhardt@ofbf.org)

Attorney for The Ohio Farm Bureau  
Federation

Gary A. Jeffries, Esq.  
Dominion Resources Services, Inc.  
501 Martindale Street, Suite 400  
Pittsburgh, PA 15212-5817  
[Gary.A.Jeffries@dom.com](mailto:Gary.A.Jeffries@dom.com)

Christopher L. Miller, Esq.  
Gregory H. Dunn, Esq.  
Nell B. Chambers, Esq.  
SCHOTTENSTEIN ZOX & DUNN CO., LPA  
250 West Street  
Columbus, OH 43215  
[cmiller@szd.com](mailto:cmiller@szd.com)  
[gdunn@szd.com](mailto:gdunn@szd.com)  
[aporter@szd.com](mailto:aporter@szd.com)

Attorneys for Dominion Retail, Inc.

Ellis Jacobs  
Advocates for Basic Legal Equality, Inc.  
333 West First Street, Suite 500B  
Dayton, OH 45402  
[ejacobs@ablelaw.org](mailto:ejacobs@ablelaw.org)

Attorney for The Edgemont Neighborhood  
Coalition



Barth E. Royer, Esq.  
BELL & ROYER CO., LPA  
33 South Grant Avenue  
Columbus, OH 43215-3927  
BarthRoyer@aol.com

Todd Williams, Esq.  
4534 Douglas Road  
Toledo, OH 43613  
Williams.toddm@gmail.com  
Philip B. Sineneng, Esq.  
THOMPSON HINE LLP  
41 South High Street, Suite 1700  
Columbus, OH 43215  
Philip.Sineneng@ThompsonHine.com

Amy B. Spiller, Esq.  
Deputy General Counsel  
Jeanne W. Kingery, Esq.  
Associate General Counsel  
DUKE ENERGY RETAIL SALES, LLC and  
DUKE ENERGY COMMERCIAL ASSET  
MANAGEMENT, INC.  
139 East Fourth Street  
1303-Main  
Cincinnati, OH 45202  
Amy.Spiller@duke-energy.com  
Jeanne.Kingery@duke-energy.com

Attorneys for Duke Energy Retail Sales, LLC and  
Duke Energy Commercial Asset Management, Inc.

Stephen Chriss, Esq.  
Wal-Mart Corporation  
702 Southwest 8th Street  
Bentonville, AR 72716-021  
Stephen.Chriss@wal-mart.com

Attorneys for Wal-Mart Stores East, LP  
and Sam's East, Inc.

Mark A. Hayden, Esq.  
FIRSTENERGY SERVICE COMPANY  
76 South Main Street  
Akron, OH 44308  
haydenm@firstenergycorp.com

James F. Lang, Esq.  
Laura C. McBride, Esq.  
CALFEE, HALTER & GRISWOLD LLP  
1400 KeyBank Center  
800 Superior Avenue  
Cleveland, OH 44114  
jlang@calfee.com  
lmcbride@calfee.com

David A. Kutik, Esq.  
JONES DAY  
North Point  
901 Lakeside Avenue  
Cleveland, OH 44114  
dakutik@jonesday.com

Attorney for FirstEnergy Solutions Corp.

Robert A. McMahon, Esq.  
EBERLY MCMAHON LLC  
2321 Kemper Lane, Suite 100  
Cincinnati, OH 45206  
bmcmahon@emh-law.com

Rocco O. D'Ascenzo, Esq.  
Associate General Counsel  
Elizabeth Watts, Esq.  
Associate General Counsel  
DUKE ENERGY OHIO, INC.  
139 East Fourth Street, 1303-Main  
Cincinnati, OH 45202  
Elizabeth.Watts@duke-energy.com  
Rocco.D'Ascenzo@duke-energy.com

Attorneys for Duke Energy Ohio, Inc.

Mark A. Whitt, Esq.  
Andrew J. Campbell, Esq.  
WHITT STURTEVANT LLP  
The KeyBank Building  
88 East Broad Street, Suite 1590  
Columbus, OH 43215  
whitt@whitt-sturtevant.com  
campbell@whitt-sturtevant.com

Vincent Parisi, Esq.  
INTERSTATE GAS SUPPLY, INC.  
6100 Emerald Parkway  
Dublin, OH 43016  
vparisi@igsenergy.com  
mswhite@igsenergy.com

Attorneys for Interstate Gas Supply, Inc.

Lt Col John C. Degnan  
Thomas A. Jernigan  
Ebony M. Payton  
Federal Executive Agencies (FEA)  
139 Barnes Drive, Suite 1  
Tyndall AFB FL 32403  
John.Degnan@us.af.mil  
Thomas.Jernigan.3@us.af.mil  
Ebony.Payton.ctr@us.af.mil

Attorney for Federal Executive Agencies

Matthew J. Satterwhite, Esq.  
Steven T. Nourse, Esq.  
AMERICAN ELECTRIC POWER SERVICE  
CORPORATION  
1 Riverside Plaza, 29th Floor  
Columbus, OH 43215  
mjsatterwhite@aep.com  
stnourse@aep.com

Attorneys for Ohio Power Company

Jay E. Jadwin, Esq.  
AMERICAN ELECTRIC POWER  
SERVICE CORPORATION  
155 W. Nationwide Blvd., Suite 500  
Columbus, OH 43215  
jejadwin@aep.com

Attorney for AEP Retail Energy Partners LLC

Christopher L. Miller, Esq.  
Gregory J. Dunn, Esq.  
Alan G. Starkoff, Esq.  
ICE MILLER LLP  
2540 West Street  
Columbus, OH 43215  
Christopher.Miller@icemiller.com  
Gregory.Dunn@icemiller.com

Direct Energy Services, LLC  
and Direct Energy Business, LLC

Thomas W. McNamee, Esq.  
Assistant Attorney General  
180 East Broad Street  
Columbus, OH 43215  
Thomas.mcnamee@ohioattorneygeneral.gov

Attorneys for the Staff of the Public Utilities  
Commission of Ohio

Stephen M. Howard, Esq.  
VORYS, SATER, SEYMOUR AND  
PEASE LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, OH 43216-1008  
smhoward@vorys.com

Attorneys for the Retail Energy Supply  
Association, Exelon Generation Company,  
LLC, Exelon Energy Company, Inc.,  
Constellation Energy Commodities Group, Inc.,  
and Constellation NewEnergy, Inc.

Mary W. Christensen, Esq.  
Christensen Law Office LLC  
8760 Orion Place, Suite 300  
Columbus, OH 43240-2109  
mchristensen@columbuslaw.org

Stephen Bennett, Manager  
State Government Affairs  
300 Exelon Way  
Kenneth Square, PA 19348  
stephen.bennett@exeloncorp.com

Attorneys for People Working Cooperatively, Inc.

Matthew R. Cox, Esq.  
MATTHEW COX LAW, LTD.  
4145 St. Theresa Blvd.  
Avon, OH 44011  
matt@matthewcoxlaw.com

Scott C. Solberg, Esq.  
Eimer Stahl LLP  
224 South Michigan Avenue, Suite 1100  
Chicago, OH 60604  
ssolberg@eimerstahl.com

Attorney for Exelon Generation Company, LLC

Attorney for the Council of Smaller Enterprises

Joel E. Sechler, Esq.  
Danielle G. Walter, Esq.  
CARPENTER LIPPS & LELAND LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, OH 43215  
Bojko@carpenterlipps.com  
ghiloni@carpenterlipps.com

Angela Paul Whitfield  
Carpenter Lipps & Leland LLP  
280 North High Street, Suite 1300  
Columbus, OH 43215  
Email: paul@carpenterlipps.com

Attorney for The Kroger Company

Attorneys for The Ohio Manufacturers'  
Association Energy Group and  
Attorneys for SolarVision, LLC

/s/ Jeffrey S. Sharkey  
Jeffrey S. Sharkey

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