

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
The Dayton Power and Light Company for) Case No. 16-395-EL-SSO
Approval of Its Electric Security Plan)

In the Matter of the Application of)
The Dayton Power and Light Company for) Case No. 16-396-EL-ATA
Approval of Revised Tariffs)

In the Matter of the Application of)
The Dayton Power and Light Company for) Case No. 16-397-EL-AAM
Approval of Certain Accounting Authority)
Pursuant to Ohio Rev. Code § 4905.13)

**MEMORANDUM OF INDUSTRIAL ENERGY USERS-OHIO
OPPOSING THE THIRD ASSIGNMENT OF ERROR OF THE APPLICATION FOR
REHEARING OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

The Public Utilities Commission of Ohio (“Commission”) issued an Opinion and Order (“Order”) approving an electric security plan for The Dayton Power and Light Company (“DP&L”) on October 20, 2017. Included in the approved provisions of the plan are EDR credits, the cost of which is recovered from customers through a nonbypassable rider, and other economic incentives that are shareholder funded. Order at 8-11 (summarizing the incentives). As part of a broader discussion concerning whether the Amended Stipulation and Recommendation benefits customers and the public interest, the Commission found that the economic development provisions support state policy. Order at 41.

Parties sought review of the Order by filing applications for rehearing on November 20, 2017. In the third assignment of error in its application for rehearing, the Office of the Ohio Consumers' Counsel ("OCC") alleged that the Order was unreasonable and unlawful because it requires customers to subsidize economic incentives, apparently a reference to the EDR credits.¹ Application for Rehearing by the Office of the Ohio Consumers' Counsel at 2 (Nov. 20, 2017) ("OCC Application for Rehearing").

OCC's rationale supporting its third assignment of error narrows as it progresses from the assignment of error to the supporting memorandum. In the assignment of error, OCC broadly alleges that the Order lacked evidentiary support as required by R.C. 4903.09, R.C. 4928.143(B)(2)(i), and case law. *Id.* In its supporting memorandum, OCC narrows its argument and alleges that the PUCO should not approve the economic development incentives without a demonstration of need or specific commitments by those receiving the incentives and then claims that that demonstration has not been made. *Id.* at 6.

OCC is required to demonstrate in its assignment of error that the Order was unreasonable or unlawful. R.C. 4903.10. Because OCC's argument in support of the third assignment of error is based on unsupported factual and legal claims, OCC has not done so. Accordingly, the Commission should not grant rehearing based on OCC's third assignment of error.²

¹ OCC's complaint regarding the economic development provisions addresses whether customers should be required to "subsidize" the incentives. Based on its focus on "subsidies," OCC apparently does not oppose the shareholder supported Economic Development Grant Fund also recommended by the supporting parties. Stipulation at 10-12.

² Although this memorandum addresses only OCC's third assignment of error, the failure to respond to OCC's other assignments of error does not indicate support of them.

II. OCC'S THIRD ASSIGNMENT OF ERROR FAILS TO DEMONSTRATE THAT THE ORDER AS IT RELATES TO THE EDR CREDITS IS UNREASONABLE OR UNLAWFUL

A. The Commission's finding that the EDR credits support state policy is supported by the record

The Commission reviews stipulations under a three-part test. *Consumers' Counsel v. Pub. Utils. Comm'n of Ohio*, 64 Ohio St. 3d 123, 126 (1992). Under the second part of the test, the Commission is to determine if the settlement, as a package, benefits ratepayers and the public interest. Order at 16. In this instance, the record supports the Commission's finding that the economic development provisions benefit customers and the public interest.

As part of its discussion under the second part of the three-part test, the Commission reviewed the provisions of the Stipulation benefiting customers and the public interest including the EDR credits. It found that these economic development incentives support state policy by facilitating the State's effectiveness in the global economy. Order at 41.³ In support of that finding, the Commission provided specific citations to the Stipulation and Exhibits concerning the incentives including the EDR credits. *Id.*, citing DP&L Ex. 3 at 12-13 and Joint Ex. 1 at 9-12 & 33. The Commission might also have pointed to testimony in response to cross examination of Ms. Schroder, a witness for DP&L and a proponent of the Stipulation, who explained that the EDR credits were designed to assist businesses to retain existing business and hire new employees. Tr. Vol. II at 256. She also testified that there would be a multiplier effect. *Id.* Contrary to OCC's broad claim that the EDR credits are not supported by the record in violation of

³ Additionally, the Commission noted that the programs would address the joblessness affecting the Dayton area. *Id.* at 57.

R.C. 4903.09, the Commission's finding that economic development incentives, including the EDR credits, is supported by the hearing record.

B. R.C. 4928.143(B)(2)(i) provides for provisions permitting economic incentives in an electric security plan, but it does not require a demonstration of customer "need" or "commitments" to support such a provision

In its supporting memorandum urging rehearing of the EDR credits, OCC narrows its argument and alleges that approval of the credits was "improper" because the Commission approved the credits "without any demonstration of need or specific commitments." *Id.* at 6. Ohio law, however, does not require proponents of the EDR credits to make such a showing. Thus, the failure to find that the proponents needed the EDR credits or had made commitments for them is not a basis for granting rehearing.

Because the Commission is a creature of statute, the Commission may not add to or subtract from the applicable legal requirements regarding the provisions of an electric security plan. *In re Application of Columbus Southern Power Co.*, 128 Ohio St. 3d 512, 519-20 (2011); *see, also, Time Warner Axs v. Pub. Utils. Comm'n of Ohio*, 75 Ohio St. 3d 229, 234 (1996) (Commission is a creature of statute). Thus, the terms of the statute govern the "demonstration" a proponent must make to support adoption of a provision of an electric security plan. *In re Application of Columbus Southern Power Co.*, 138 Ohio St. 3d 448, 453-54 (2014) (rejecting the claim that utility had the burden of proving that costs were "necessary" under R.C. 4928.143(B)(2)(d) because the division did not require such a showing).

R.C. 4928.143(B)(2)(i) provides the governing language for a term of an electric security plan addressing economic development. Under that subdivision, the Commission may authorize as a term of an electric security plan provisions "under which

the electric distribution utility may implement economic development [and] job retention.” Further, the “provisions may allocate program costs across all classes of customers of the utility.” Contrary to OCC’s claim, R.C. 4928.143(B)(2)(i) does not contain any requirement for the proponent of a provision authorized by that subdivision to demonstrate either “need” or “commitments.”

The Commission’s rule concerning the filing requirements applicable to R.C. 4928.143(B)(2)(i) also does not provide OCC any support for its claim. The Commission’s rule addressing what the electric distribution utility must provide in support of a provision of the plan under R.C. 4928.143(B)(2)(i) states:

Division (B)(2)(i) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for economic development, job retention, and energy efficiency programs. *Pursuant to this section, the electric utility shall provide a complete description of the proposal, together with cost-benefit analysis or other quantitative justification, and quantification of the program’s projected impact on rates.*

Rule 4901:1-35-03((C)(9)(h), OAC (emphasis added). Completely absent from the rule is any reference to a requirement that there be a demonstration of customer “need” or “commitments.”⁴

Moreover, OCC itself does not explain in either its assignment of error or the supporting memorandum what supports its legal claim that proponents must demonstrate “need” or “commitments.” OCC Application for Rehearing at 6. In substance, then, OCC is asking the Commission to superimpose an additional requirement for approval of economic development provisions of an electric security plan. The Commission must reject this request because the Commission is without authority to expand the “plain

⁴ OCC’s position apparently confuses the requirements regarding reasonable arrangements under Commission rules with the requirements for economic development provisions under an electric security plan. Compare, e.g., Rule 4901:1-38-03, OAC, with Rule 4901:1-35-03(C)(9)(h), OAC.

language of the statute.” *In re Application of Columbus Southern Power Co.*, 128 Ohio St. 3d at 520.

Based on its attempt to have the Commission unlawfully rewrite R.C. 4928.143(B)(2)(i), OCC further compounds its legal error by claiming that there is no “record support” of “need” or “commitments” that would justify approval of the economic development programs. OCC Application for Rehearing at 6. The Commission, however, was not required by R.C. 4928.143(B)(2)(i) to make a finding regarding “need” or “commitments” of the proponents of the EDR credits since they were irrelevant to the decision.⁵ *In re Application of Columbus Southern Power Co.*, 138 Ohio St. 3d at 453-54.

OCC’s narrower claim that the Order is unlawful and unreasonable because the Commission approved the credits “without any demonstration of need or specific commitments” is based on a flawed legal claim and flawed logic based on that claim. Accordingly, the Commission should reject OCC’s narrower claim that the record does not support the Order’s findings.

III. CONCLUSION

Because OCC’s third assignment of error is based on misstatements of law and fact, it does not state lawful grounds for rehearing and should be denied.

⁵ OCC’s argument is an example of the strawman fallacy. Having set up as a strawman a faulty legal standard that the Commission must make a finding of “need” or “commitments,” OCC then proceeds to knock down the strawman it created. For a discussion of the strawman fallacy, see <http://www.fallacyfiles.org/strawman.html> (“As the ‘straw man’ metaphor suggests, the counterfeit position attacked in a Straw Man argument is typically weaker than the opponent’s actual position, just as a straw man is easier to defeat than a flesh-and-blood one.”).

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Memorandum of Industrial Energy Users-Ohio Opposing the Third Assignment of Error of the Application for Rehearing of the Office of the Ohio Consumers' Counsel* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 4th day of December 2017, via electronic transmission.

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Summary: Memorandum Memorandum of Industrial Energy Users-Ohio Opposing the Third Assignment of Error of the Application for Rehearing of the Office of the Ohio Consumers' Counsel electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio