

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the Dayton )  
Power and Light Company for Approval of its ) Case No. 16-0395-EL-SSO  
Electric Security Plan. )

In the Matter of the Application of the Dayton )  
Power and Light Company for Approval of ) Case No. 16-0396-EL-ATA  
Revised Tariffs. )

In the Matter of the Application of the Dayton )  
Power and Light Company for Approval of ) Case No. 16-0397-EL-AAM  
Certain Accounting Authority Pursuant to Ohio )  
Rev. Code § 4905.13. )

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

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In this case, the Public Utilities Commission of Ohio (“PUCO”) has authorized Dayton Power and Light Company (“DP&L”) to charge consumers hundreds of millions of dollars to subsidize old, uneconomic coal plants that cannot compete in a market deregulated by the Ohio General Assembly over 16 years ago. Since November 1, 2017, DP&L's customers have been paying new electric security plan rates that include a so-called distribution modernization rider – a total \$105 million for a year, now .0089 per kWh for residential customers -- that is an unlawful transition charge. On November 20, 2017, the Ohio Consumers’ Counsel (“OCC”) filed an application for rehearing requesting that the PUCO reconsider its decision to allow DP&L to charge customers this unlawful and unreasonable generation subsidy. On December 6, 2017, the PUCO issued an Entry on Rehearing granting rehearing, but failed to substantively rule on the issues. The December 6, 2017 Entry was unreasonable and unlawful in the following respects:

**Assignment of Error 1: 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 under R.C. 4903.10 and 4903.11 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 its Entry as requested by OCC.

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

The Order in this electric security plan (“ESP”) proceeding has only confirmed what consumers have long known—that ESPs and settlements are bad for consumers and the State of Ohio. And while the typical ESP is bad, this one is even worse given that it has authorized a utility to charge customers above market prices to subsidize old, uneconomic coal plants, which can no longer compete in the competitive marketplace. This is contrary to competition and the intent of S.B. 3.<sup>1</sup>

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<sup>1</sup> See Ohio Senate Bill 3, as passed by the 123rd General Assembly, 1999.

Just as bad, the Order was the product of a settlement process that gives the utility unfair bargaining power by virtue of its veto power over any PUCO modifications.<sup>2</sup> To protect consumers, the PUCO should eliminate ESPs and reform the settlement process in order to create a more just and reasonable process.

Given the harm to consumers that could result from the Order, the OCC, and several other parties, submitted applications for rehearing. On December 6, 2017, the PUCO granted all of the filed applications for rehearing, but it did not substantively rule on the issues in the applications. Instead, the PUCO stated that it needed more time to consider the matters.<sup>3</sup> Because the PUCO did not substantively rule on the issues in the applications for rehearing, there is not a final order that can be appealed to the Ohio Supreme Court while DP&L is authorized to collect from captive distribution customers above-market subsidies.<sup>4</sup> This delay violates Ohio law and the policy underlying the law. Therefore, OCC seeks 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

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<sup>2</sup> See *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company, for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Second Opinion and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part (Mar. 25, 2009) at 1-2 (“In the case of an ESP, the balance of power created by an electric distribution utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore. I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission.”).

<sup>3</sup> See December 6, 2017 Entry at 3.

<sup>4</sup> See *supra* n.7.

matters determined in the proceeding.” OCC filed a motion to intervene in this proceeding on March 18, 2016, which was granted.<sup>5</sup> 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 Entry on Rehearing of December 6, 2017. The PUCO’s ruling was unreasonable or unlawful in the following respects.

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<sup>5</sup> See August 8, 2016 Entry at 5.

### III. ERRORS

**Assignment of Error 1: 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 under R.C. 4903.10 and 4903.11 and 4903.13.**

The Ohio Supreme Court ("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."<sup>6</sup> This duty is described, with defined parameters, under R.C. 4903.10.

Under R.C. 4903.10, the General Assembly established a 30-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 30 days, the applications are denied by operation of law. This provision is to ensure that the PUCO resolves applications in timely manner--30 days under the statute. The statute is designed to enforce the axiom that "justice delayed is justice denied."<sup>7</sup>

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 substantively ruled on all rehearing applications or the rehearing has been denied by operation of law.<sup>8</sup> Yet while the Entry on Rehearing is not a final appealable order,

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<sup>6</sup> *State ex rel. Columbus Gas & Fuel Col. v. Pub. Util. Comm.* (1930), 122 Ohio St. 473, 475.

<sup>7</sup> See, e.g., *Moeller v. Moeller* (C.A. 9th Dist.), 1993 Ohio App. LEXIS 50 (finding that a similar statute, R.C. 2701.02, setting forth the time limit in which courts must render decisions on certain matters, was designed to enforce the axiom that "justice delayed is justice denied.")

<sup>8</sup> See R.C. 4903.11.

customers are paying charges that are being challenged on rehearing.<sup>9</sup> That means DP&L can charge customers regardless of the fact that OCC is challenging that charge before the PUCO. This happens because under Ohio law the PUCO has authority to implement its Order regardless of challenges 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 been side-stepping the 30-day review by instead employing a process under which rehearing has been extended by months and, in some cases, even years.<sup>10</sup> 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,<sup>11</sup> the Court's ruling is being unreasonably applied in a manner that disrupts timely judicial review of PUCO rulings, which prejudices would-be appellants. The PUCO can thwart (and evade) judicial review by granting itself more time to consider the applications and

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<sup>9</sup> 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."

<sup>10</sup> 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.

<sup>11</sup> See, *State ex rel. Consumers' Counsel v. Pub. Util. Comm.*, (2004), 102 Ohio St.3d 301, 304.

issuing a final order months or years down the road, while at the same time uneconomic, unwarranted, and unlawful subsidies are being collected from Ohioans.<sup>12</sup>

Delaying judicial review matters to Ohioans because of Court precedent<sup>13</sup> 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 these unnecessary collections and without a likely recourse to a refund for customers.

The delay in ruling upon OCC's application for rehearing harms customers because they are required to pay increased, unwarranted charges that are not paid subject to refund or not stayed. This is prejudicial, and manifestly unjust.<sup>14</sup> The delay in a substantive ruling on OCC's application for rehearing forecloses OCC from seeking relief from the Court. While OCC may pursue extraordinary relief<sup>15</sup> from the Court, even without a ruling on rehearing, that relief is generally beyond OCC's grasp. This is because it is likely that, based on past experience,<sup>16</sup> the Court will deny such relief on the theory that OCC has a so-called "adequate remedy at law": an appeal from the eventual PUCO final order.

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<sup>12</sup> 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.

<sup>13</sup> *Keco Industries v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 3d 254, 257, 141 N.E.2d 445 (1957).

<sup>14</sup> See, e.g., *Knox v. Knox*, (C.A. 5th Dist), 26 Ohio App. 3d 236, where the appellate court held that the trial court's delay in rendering a judgment was an abuse of discretion considering that the delay foreclosed the relief that appellant otherwise would have been afforded.

<sup>15</sup> Through a writ of procedendo or prohibition.

<sup>16</sup> See, e.g., *State of Ohio ex rel. OCC et al. v. Alan R. Schriber et al.*, Case No. 2009-0710, Entry (June 17, 2009) (denying the writ of prohibition because the issues raised in the complaint could be resolved on appeal).



Rehearing should be granted (or denied), substantively addressing OCC's application for rehearing. A final appealable order should be issued. Granting more time ostensibly to consider issues raised on rehearing unreasonably delays the issuance of a final order all the while customers are paying higher, unnecessary charges. 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 that the rates be collected subject to refund, its dilatory policies unduly delay any relief customers can seek, providing immediate and material harm to customers.

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 the PUCO issuing substantive findings on OCC's claimed errors, so that a final appealable order is issued. If needed, this will allow parties to exercise their statutory rights to appeal the PUCO's decisions.<sup>17</sup>

#### **IV. CONCLUSION**

To protect customers from unnecessary and unlawful charges, the PUCO should grant rehearing and abrogate or modify its December 6, 2017 Entry on Rehearing. 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.

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<sup>17</sup> At the very least, the PUCO should make DP&L's collection of the distribution modernization rider subject to refund.

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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 5<sup>th</sup> day of January 2018.

/s/ William J. Michael

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Assistant Consumers' Counsel

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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 Michael, William Mr.