

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

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

**THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN
OPPOSITION TO THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
APPLICATION FOR REHEARING**

I. INTRODUCTION AND SUMMARY

The Office of the Ohio Consumers' Counsel ("OCC") filed a second Application for Rehearing¹ even though the Commission has not decided the merits of its first Application for Rehearing.² Despite its professed concern (p. 6) for "[e]ach day that the PUCO delays issuing a final order," OCC decided to burden the Commission and the parties with a dual-track rehearing process that only wastes their time, energy and resources. Any resulting delay is at the hands of OCC. As it repeatedly has done before, the Commission should reject this tactic.

On October 20, 2017, the Commission issued an Opinion and Order modifying and approving a stipulated ESP for The Dayton Power and Light Company ("DP&L"). Several parties filed Applications for Rehearing, including DP&L; OCC; the Ohio Environmental

¹ Jan. 5, 2018 Application for Rehearing by The Office of the Ohio Consumers' Counsel.

² Nov. 20, 2017 Application for Rehearing by The Office of the Ohio Consumers' Counsel.

Council and Environmental Defense Fund; Murray Energy Corporation and The Citizens to Protect DP&L Jobs; Industrial Energy Users-Ohio; Retail Energy Supply Association; Interstate Gas Supply, Inc.; Ohio Manufacturers' Association Energy Group; and The Kroger Company.³ Shortly thereafter, the Commission granted those Applications for Rehearing only "for further consideration of the matters specified" in them. Dec. 6, 2017 Entry on Rehearing, ¶ 11.

The Entry on Rehearing is consistent with longstanding Commission practice, statutory authority, and precedent of the Supreme Court of Ohio. Ohio Rev. Code § 4903.10; State ex rel. Consumers' Counsel v. Pub. Util. Comm., 102 Ohio St.3d 301, 2004-Ohio-2894, 809 N.E.2d 1146, ¶ 19. This procedure allows the Commission to review the myriad of complex issues facing Ohio's diverse public utilities, particularly where several applications for rehearing have been filed. Feb. 1, 2017 Seventh Entry on Rehearing, ¶ 13, (Case No. 14-1297-EL-SSO).

The Commission ultimately should deny OCC's first Application for Rehearing, which relies on the false premise that the Distribution Modernization Rider subsidizes generation service, an argument that OCC needlessly shoehorns into its second Application for Rehearing (pp. 1, 6). DP&L demonstrated why OCC's argument fails in its December 4, 2017 Application for Rehearing. Setting that matter aside, it was lawful and reasonable for the Commission to take additional time to consider the issues raised not only in OCC's initial application, but also in the eight other applications filed by DP&L and other parties. Thus, the Commission should deny OCC's second Application for Rehearing and issue a final decision on rehearing in due course.

³ Nov. 17, 2017 Application for Rehearing of the Opinion and Order, Entered October 20, 2017, by the Ohio Environmental Council and Environmental Defense Fund; Nov. 20, 2017 The Dayton Power and Light Company's Application for Rehearing; Nov. 20, 2017 Application for Rehearing of the Opinion and Order Entered October 20, 2017 by Intervenor Murray Energy Corporation and The Citizens to Protect DP&L Jobs; Nov. 20, 2017 IEU-Ohio's Application for Rehearing; Nov. 20, 2017 Application for Rehearing of the Retail Energy Supply Association; Nov. 20, 2017 Application for Rehearing of Interstate Gas Supply, Inc.; Nov. 20, 2017 Application for Rehearing of the Ohio Manufacturers' Association Energy Group; Nov. 20, 2017 Application for Rehearing of The Kroger Company.

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

The Commission frequently grants applications for rehearing for the limited purpose of allowing additional time to consider the issues raised in those applications.⁴ 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). Rehearing may be granted for various purposes, and the Commission may reverse an order that is "unjust or unwarranted, or should be changed" after rehearing is granted and additional evidence is taken. Id. Granting an application for rehearing for further consideration is entirely consistent with that statutory framework.

Moreover, as OCC concedes (p. 5 & n.11), the Supreme Court of Ohio expressly upheld this practice in State ex rel. Consumers' Counsel v. Pub. Util. Comm., 102 Ohio St.3d

⁴ 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).

301, 2004-Ohio-2894, 809 N.E.2d 1146. In that case, various parties filed applications for rehearing from a Commission order that denied an interim rate increase and established a procedural schedule. *Id.* at ¶ 2. The Commission initially 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 Supreme 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).

Although OCC cites (p. 4) another Supreme Court decision 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 own 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 second Application for Rehearing 46 days after its first Application for Rehearing, and 30 days after the Commission issued its Entry on Rehearing – well within the 106 days that did not warrant intervention in Columbus Gas. In addition, the cases that OCC cites (p. 5 & n.10) in which the Commission has not issued a final decision for several months after taking additional time for consideration on rehearing do not support OCC's position that the Commission should hasten its decision in this case. Instead, they demonstrate only that this proceeding is not an "extreme case." Columbus Gas, 122 Ohio St. at 475.

OCC's accusation (p. 5) 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, multi-party complex litigation involving complicated statutory schemes and technical subjects is time-consumptive.

As the Commission explained in rejecting OCC's nearly-identical⁵ Application for Rehearing in FirstEnergy's recent ESP case:

"Given the vast number of applications for rehearing, witnesses, exhibits, and associated briefings filed in the docket, this case is the quintessential example of why the Ohio Supreme court has established long-standing precedent that provides us the authority to grant rehearing for the limited purpose of further consideration. To issue a decision without a thorough review of the arguments raised in the applications for rehearing would be irresponsible and would be of no value to any of the parties to this proceeding, including the residential customers whom OCC is representing."

⁵ Compare Jan. 6, 2017 Application for Rehearing by The Office of the Ohio Consumers' Counsel, Assignment of Error 2 (p. 4) (Case No. 14-1297-EL-SSO) with Jan. 5, 2018 Application for Rehearing by The Office of the Ohio Consumers' Counsel, Assignment of Error 1 (p. 4) (raising the exact same assignment of error). OCC also raised that assignment of error in its November 11, 2016 Application for Rehearing (Case No. 08-1094-EL-SSO), which the Commission likewise denied. Dec. 14, 2016 Third Entry on Rehearing (Case No. 08-1094-EL-SSO).

Feb. 1, 2017 Seventh Entry on Rehearing, ¶ 13(Case No. 14-1297-EL-SSO) (emphasis added).

Finally, it is unavailing for OCC to argue (p. 7) that the Commission has prevented OCC from exercising its "rights to appeal." Any such "right" must be consistent with the statutory framework for appeals from Commission orders. 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 issuing a final decision, State ex rel. Consumers' Counsel, 102 Ohio St.3d 301, 2004-Ohio-2894, 809 N.E.2d 1146, at ¶ 19, OCC does not have a "right" to appeal until the Commission has issued a final decision denying all applications for rehearing. 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

The Commission should reject OCC's dual-track rehearing process and deny its second Application for Rehearing. The Commission should then proceed in due course with consideration of the remaining Applications for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to The Office of the Ohio Consumers' Counsel's Application for Rehearing has been served via electronic mail upon the following counsel of record, this 16th day of January, 2018:

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Summary: Memorandum The Dayton Power and Light Company's Memorandum in Opposition to The Office of the Ohio Consumers' Counsel's Application for Rehearing electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company