

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 MOTION TO REOPEN PROCEEDING**

I. INTRODUCTION AND SUMMARY

More than six months ago, the Commission issued its final order in this case, which among other things, modified and approved the Reconciliation Rider proposed by The Dayton Power and Light Company ("DP&L") and other parties in the March 14, 2017 Amended Stipulation and Recommendation ("Amended Stipulation"). Oct. 20, 2017 Opinion and Order. The Commission expressly found that the Reconciliation Rider, as modified, is lawful and in the public interest. *Id.*, ¶ 63, 119. Ohio Environmental Council, Sierra Club, Environmental Law & Policy Center, and Environmental Defense Fund (collectively, "Conservation Groups") did not challenge those findings in their post-hearing briefs or in any application for rehearing; however, they now seek to reopen this proceeding to attack that charge.¹

¹ Apr. 26, 2018 Motion to Reopen Proceeding by Ohio Environmental Council, Sierra Club, Environmental Law & Policy Center, and Environmental Defense Fund ("Motion").

Their Motion is procedurally barred and substantively flawed. Pursuant to Ohio Admin. Code § 4901-1-34(A), the Commission may reopen a case only "prior to the issuance of a final order." As the Commission already has issued a final order in this case, the record cannot be reopened. In the Matter of the Application of Verizon North Inc., Case No. 08-989-TP-BLS, 2009 Ohio PUC LEXIS 388, at *33-35 (Entry on Rehearing, June 3, 2009). Accord: Ohio Rev. Code § 4903.10 (allowing applications for rehearing "within thirty days after the entry of any final order . . . of the commission"). The Motion is nothing more than an untimely application for rehearing, which the Commission has no authority to grant. In the Matter of the Application of The East Ohio Gas Company, Case No. 07-829-GA-AIR, 2009 Ohio PUC LEXIS 566, at *4-5 (Entry, July 29, 2009); Greer v. Pub. Util. Comm., 172 Ohio St. 361, 362, 176 N.E.2d 416 (1961) (holding that the Commission has "no power to entertain an application for rehearing filed after the expiration of such 30-day period" from a final order). The Commission should deny the Conservation Groups' Motion for this reason alone.

Separately, even if the Motion were timely, the Conservation Groups have failed to show good cause for revisiting the Reconciliation Rider. Ohio Admin. Code § 4901-1-34(A). Relying on speculation and hearsay, they ask the Commission (p. 10) to consider the "risk that DP&L customers may pay more on the Reconciliation Rider"² due to the recent request by FirstEnergy Solutions Corp. ("FES") to reject the Intercompany Power Purchase Agreement ("ICPA") with the Ohio Valley Electric Corporation ("OVEC") as part of its bankruptcy case. However, the "facts" they cite (p. 12) – which reflect updated projections by third-parties for future OVEC costs – are insufficient to reopen a closed case, particularly when attacking an

² Notably, the Conservation Groups do not assert that any of them are DP&L customers who would pay the Reconciliation Rider.

Order that adopted a Stipulation found to be the product of serious bargaining among capable and knowledgeable parties. Oct. 20, 2017 Opinion and Order, ¶ 20. The Commission should deny their Motion for this reason as well.

II. THE COMMISSION CANNOT REOPEN THIS PROCEEDING BECAUSE IT ALREADY HAS ISSUED A FINAL ORDER

The Conservation Groups concede that the Commission may reopen a proceeding only "before the issuance of a final order 'for good cause shown.'" Motion, p. 8 (quoting Ohio Admin. Code § 4901-1-34(A)). However, they ignore the fact that the Commission already has issued a final order in this case – the October 20, 2017 Opinion and Order.

The Commission has held that a "final order" under § 4901-1-34(A) is an order that affects "a substantial right," including one that implicates an "immediate pecuniary interest." In the Matter of the Application of Verizon North Inc., Case No. 08-989-TP-BLS, 2009 Ohio PUC LEXIS 388, at *33-34 (Entry on Rehearing, June 3, 2009) (citing Ohio Rev. Code § 2505.02 and Ohio Domestic Violence Network v. Pub. Util. Comm., 65 Ohio St.3d 438, 406 N.E.2d 13 (1992)). In Verizon, the Commission ruled that its Finding and Order, which provided a utility with "authority to restructure rates" was a final order; thus, the proceeding no longer could be reopened under § 4901-1-34(A). Id. at *34 ("the most obvious application of Rule 4901-1-34, O.A.C., is between the close of a hearing and the issuance of an order").

The Conservation Groups cite two cases (p. 8) to support the proposition that the Commission may reopen this proceeding: In the Matter of the Application of Delmas Conley DBA Conley Trucking for A Contract Motor Carrier Permit, Case No. 90-1568-TR-ACO and In the Matter of Columbia Gas of Ohio, Inc., Case No. 07-478-GA-UNC. In neither case, however, did the Commission issue its Opinion and Order before reopening the record. Delmas Conley

(Entry reopening case issued Nov. 15, 1991; Opinion and Order issued May 21, 1992); Columbia Gas (Entry reopening case issued Jan. 10, 2008; Opinion and Order issued Apr. 9, 2008). The cases do not show that the Commission may reopen this proceeding six months after its Opinion and Order authorized DP&L to begin collecting the Reconciliation Rider. Oct. 20, 2017 Opinion and Order, ¶ 142.

Indeed, the Conservation Groups' Motion is nothing more than an untimely application for rehearing. In the Matter of the Application of The East Ohio Gas Company, Case No. 07-829-GA-AIR, 2009 Ohio PUC LEXIS 566, at *7 (Entry, July 29, 2009) (finding that a motion to reopen a proceeding following a final order "essentially equate[d] to an application for rehearing"). Pursuant to Ohio Rev. Code § 4903.10, "[a]fter any order has been made by the public utilities commission, any party . . . may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission." (Emphasis added.) The Commission has "no power to entertain an application for rehearing filed after the expiration of such 30-day period." Greer v. Pub. Util. Comm., 172 Ohio St. 361, 362, 176 N.E.2d 416 (1961). Accord: In the Matter of the Application of The East Ohio Gas Company, Case No. 07-829-GA-AIR, 2009 Ohio PUC LEXIS 763, at *8-9 (Entry on Rehearing, Sept. 23, 2009) ("The Commission does not have the authority to waive the statutory deadline for the filing of an application for rehearing"). In this case, the deadline for applications for rehearing was November 20, 2017. Ohio Rev. Code § 4903.10.

Thus, the Conservation Groups' Motion is untimely under Ohio Admin. Code § 4901-1-34(A) and – to the extent it constitutes an application for rehearing – Ohio Rev. Code

§ 4903.10, as well. Greer, 172 Ohio St. at 162. For these reasons alone, the Commission should deny the Motion as procedurally barred.

III. THE CONSERVATION GROUPS HAVE FAILED TO SHOW GOOD CAUSE TO REOPEN THE PROCEEDING

The Commission should deny the Conservation Group's Motion for the separate and independent reason that they have not shown "good cause" for reopening this case, much less why the evidence they seek to present "could not, with reasonable diligence, have been presented earlier in the proceeding." Ohio Admin. Code § 4901-1-34(A) and (B).

In attacking the Reconciliation Rider, the Conservation Groups ask to present speculation and hearsay regarding FES's request to reject the ICPA with OVEC as part of its bankruptcy case; FES's request has not yet been approved. The Conservation Groups thus can identify no facts – only speculation about what might happen in future FERC and bankruptcy court proceedings.

Further, the "facts" that the Conservation Groups rely upon – projections of future costs made by other parties in other cases – are simply hearsay that would not be admissible in DP&L's ESP case. In other words, the fact that a witness for FES has filed projections in another case would not be an admissible fact in DP&L's ESP case.

The Commission should reject the proposition that updated forecasts and events occurring months after a final order is issued constitute new evidence that justify reopening closed records under § 4901-1-34, particularly when a case has been resolved by a Stipulation found to be the product of serious bargaining among capable and knowledgeable parties. Oct. 20, 2017 Opinion and Order, ¶ 20. Otherwise, litigants unhappy with the state of the record

could simply update their numbers to take another bite at the apple. Rewarding such behavior could dissuade settlement by offering the possibility of new factual records in the future, delay Commission orders by subjecting more cases to reopening, and undermine the finality Commission orders that eventually are reached.

Here, the Commission weighed the evidence in the record – a record that the Conservation Groups were free to develop – and found that the Reconciliation Rider would "benefit customers because it will act as a hedge which will mitigate spikes in market prices." Id. ¶ 63. Since the Conservation Groups did not present evidence to the contrary, and the new "facts" are simply speculation about what will happen in future FERC and bankruptcy court proceedings and projections made in other cases that are not admissible in DP&L's ESP case, they should not be allowed to unwind the Commission's Opinion and Order.

IV. CONCLUSION

For these reasons, the Motion to Reopen Proceeding by Ohio Environmental Council, Sierra Club, Environmental Law & Policy Center, and Environmental Defense Fund should be denied.

Respectfully submitted,

/s/ Jeffrey S. Sharkey

Jeffrey S. Sharkey (0067892)

(Counsel of Record)

D. Jeffrey Ireland (0010443)

Christopher C. Hollon (0086480)

FARUKI IRELAND COX RHINEHART &
DUSING PLL

110 North Main Street, Suite 1600

Dayton, OH 45402

Telephone: (937) 227-3747

Telecopier: (937) 227-3717

Email: jsharkey@ficlaw.com

djireland@ficlaw.com

chollon@ficlaw.com

Attorneys for The Dayton Power
and Light Company

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to the Motion to Reopen Proceeding by Ohio Environmental Council, Sierra Club, Environmental Law & Policy Center, and Environmental Defense Fund has been served via electronic mail upon the following counsel of record, this 11th day of May, 2018:

Thomas McNamee
Natalia Messenger
Public Utilities Commission of Ohio
30 East Broad Street, 16th Floor
Columbus, OH 43215-3793
Email:
thomas.mcnamee@ohioattorneygeneral.gov
natalia.messenger@ohioattorneygeneral.gov

Attorneys for PUCO Staff

William J. Michael (Counsel of Record)
Kevin F. Moore
Zachary E. Woltz
Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, OH 43215-4203
Email: william.michael@occ.ohio.gov
kevin.moore@occ.ohio.gov
zachary.woltz@occ.ohio.gov

Attorneys for the Ohio Consumers' Counsel

Kimberly W. Bojko
Brian W. Dressel
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, OH 43215
Email: bojko@carpenterlipps.com
dressel@carpenterlipps.com

Attorneys for The Ohio Manufacturers'
Association Energy Group

Frank P. Darr (Counsel of Record)
Matthew R. Pritchard
McNees Wallace & Nurick
21 East State Street, 17th Floor
Columbus, OH 43215
Email: fdarr@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users – Ohio

David F. Boehm
Michael L. Kurtz
Kurt J. Boehm
Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Email: dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
kboehm@BKLawfirm.com
jkylercohn@BKLawfirm.com

Attorneys for The Ohio Energy Group

Joseph Olikier (Counsel of Record)
Matthew White
Evan Betterton
IGS Energy
6100 Emerald Parkway
Dublin, OH 43016
Email: joliker@igsenergy.com
mwhite@igsenergy.com
ebetterton@igsenergy.com

Attorney for IGS Energy

Kevin R. Schmidt
88 East Broad Street, Suite 1770
Columbus, OH 43215
Email: schmidt@sppgrp.com

Attorney for The Energy Professionals of Ohio

Jeffrey W. Mayes
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Valley Forge Corporate Center
Eagleville, PA 19403
Email: jeffrey.mayes@monitoringanalytics.com

Attorneys for Monitoring Analytics, LLC as
The Independent Market Monitor for PJM

Trent Dougherty
1145 Chesapeake Ave., Suite 1
Columbus, OH 43212-3449
Email: tdougherty@the OEC.org

Attorney for Ohio Environmental
Council

Miranda Leppla
Ohio Environmental Council
1145 Chesapeake Ave., Suite 1
Columbus, OH 43212-3449
Email: mleppla@the OEC.org

Attorney for the Environmental Defense Fund

Michael D. Dortch
Richard R. Parsons
Kravitz, Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, OH 43215
Email: mdortch@kravitzllc.com
rparsons@kravitzllc.com

Attorneys for Calpine Energy Solutions LLC

Evelyn R. Robinson
2750 Monroe Boulevard
Audubon, PA 19403
Email: evelyn.robinson@pjm.com

Attorney for PJM Interconnection, L.L.C.

Joel E. Sechler (Counsel of Record)
Carpenter Lipps & Leland
280 N. High St., Suite 1300
Columbus, OH 43215
Email: sechler@carpenterlipps.com

Attorneys for EnerNOC, Inc.

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

Attorney for The Kroger Co.

Colleen Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793
Email: cmooney@ohiopartners.org

Attorney for Ohio Partners for Affordable
Energy

Madeline Fleisher
Kristin Field
Environmental Law & Policy Center
21 West Broad Street, Suite 500
Columbus, OH 43215
Email: mfleisher@elpc.org
kfield@elpc.org

Attorneys for The Environmental Law &
Policy Center

Richard C. Sahli
Richard C. Sahli Law Office, LLC
981 Pinewood Lane
Columbus, OH 43230-3662
Email: rsahli@columbus.rr.com

Tony G. Mendoza, Staff Attorney (pro hac vice)
Kristin Henry, Senior Staff Attorney (pro hac vice)
Gregory E. Wannier, Staff Attorney (pro hac vice)
Sierra Club Environmental Law Program
2101 Webster Street, 13th Floor
Oakland, CA 94612
Email: tony.mendoza@sierraclub.org
kristin.henry@sierraclub.org
greg.wannier@sierraclub.org

Attorneys for Sierra Club

Michelle Grant
Dynergy Inc.
601 Travis Street, Suite 1400
Houston, TX 77002
Email: michelle.d.grant@dynergy.com

Attorneys for Dynergy Inc.

Michael J. Settineri
Gretchen L. Petrucci
Ilya Batikov
William A. Sieck
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, OH 43215
Email: mjsettineri@vorys.com
glpetrucci@vorys.com
ibatikov@vorys.com
wasieck@vorys.com
Attorneys for Dynergy Inc.,
PJM Power Providers Group, and
Retail Energy Supply Association

Lisa M. Hawrot
Spilman Thomas & Battle, PLLC
Century Centre Building
1233 Main Street, Suite 4000
Wheeling, WV 26003
Email: lhawrot@spilmanlaw.com

Derrick Price Williamson
Spilman Thomas & Battle, PLLC
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
Email: dwilliamson@spilmanlaw.com

Carrie M. Harris
Spilman Thomas & Battle, PLLC
310 First Street, Suite 1100
P.O. Box 90
Roanoke, VA 24002-0090
Email: charris@spilmanlaw.com

Steve W. Chriss
Senior Manager, Energy Regulatory Analysis
Greg Tillman
Senior Manager, Energy Regulatory Analysis
Wal-Mart Stores, Inc.
2001 SE 10th Street
Bentonville, AR 72716-0550
Email: Stephen.Chriss@walmart.com
Greg.Tillman@walmart.com

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

Steven D. Lesser
James F. Lang
N. Trevor Alexander
Mark T. Keaney
Calfee, Halter & Griswold LLP
41 South High Street
1200 Huntington Center
Columbus, OH 43215
Email: slesser@calfee.com
jlang@calfee.com
talexander@calfee.com
mkeaney@calfee.com

Attorneys for The City of Dayton and
Honda of America Mfg., Inc.

Glen Thomas
1060 First Avenue, Suite 400
King of Prussia, PA 19406
Email: gthomas@gtpowergroup.com

Sharon Theodore
Electric Power Supply Association
1401 New York Ave. NW 11th Floor
Washington, DC
Email: stheodore@epsa.org

Laura Chappelle
201 North Washington Square, Suite 910
Lansing, MI 48933
Email: laurac@chappelleconsulting.net

Attorneys for PJM Power Providers Group

Ellis Jacobs
Advocates for Basic Legal Equality, Inc.
130 West Second Street, Suite 700 East
Dayton, OH 45402
Email: ejacobs@ablelaw.org

Attorney for Edgemont Neighborhood Coalition

Jeanne W. Kingery
Elizabeth H. Watts
Duke-Energy Ohio, Inc.
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Email: jeanne.kingery@duke-energy.com
elizabeth.watts@duke-energy.com

Attorneys for Duke-Energy Ohio, Inc.

Carl Tamm, President
Classic Connectors, Inc. 382 Park Avenue East
Mansfield, OH 44905
Email: crtamm@classicconnectors.com

John R. Doll
Doll, Jansen & Ford
111 West First Street, Suite 1100
Dayton, OH 45402-1156
Email: jdoll@djflawfirm.com

Attorneys for Utility Workers of
America Local 175

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

Attorneys for The Ohio Hospital Association

Terrence N. O'Donnell
Raymond D. Seiler
Christine M.T. Pirik
William V. Vorys
Dickinson Wright PLLC
150 East Gay Street, Suite 2400
Columbus, OH 43215
Email: todonnell@dickinsonwright.com
rseiler@dickinsonwright.com
cpirik@dickinsonwright.com
wvorys@dickinsonwright.com

Attorneys for Mid-Atlantic Renewable
Energy Coalition

John F. Stock
Orla E. Collier
Benesch, Friedlander, Coplan & Aronoff LLP
41 South High Street, 26th Floor
Columbus, OH 43215
Email: jstock@beneschlaw.com
ocollier@beneschlaw.com

Attorneys for Murray Energy Corporation and
Citizens to Protect DP&L Jobs

Mark Landes
Brian M. Zets
Isaac Wiles Burkholder & Teetor, LLC
Two Miranova Place
Suite 700
Columbus, OH 43215
Email: mlandes@isaacwiles.com
bzets@isaacwiles.com

Attorneys for Adams County Commissioners

Laura Chappelle
201 North Washington Square, Suite 910
Lansing, MI 48933
Email: laurac@chappelleconsulting.net

Attorneys for PJM Power Providers Group

Ellis Jacobs
Advocates for Basic Legal Equality, Inc.
130 West Second Street, Suite 700 East
Dayton, OH 45402
Email: ejacobs@ablelaw.org

Attorney for Edgemont Neighborhood Coalition

C. David Kelley, Prosecutor
Dana N. Whalen
110 West Main Street
West Union, OH 45693
Email: prosecutorkelley@usa.com
dana.whalen@adamscountyoh.gov

Attorneys for Monroe Township, Ohio, Sprigg
Township, Manchester Local School District,
and Adams County Ohio Valley School
District

Devin D. Parram
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
Email: dparram@bricker.com

Attorney for People Working
Cooperatively, Inc.

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

Attorneys for The Ohio Hospital Association

Amy B. Spiller
Jeanne W. Kingery
Elizabeth H. Watts
Duke-Energy Ohio, Inc.
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Email: amy.spiller@duke-energy.com
jeanne.kingery@duke-energy.com
elizabeth.watts@duke-energy.com

Attorneys for Duke-Energy Ohio, Inc.

Carl Tamm, President
Classic Connectors, Inc. 382 Park Avenue East
Mansfield, OH 44905
Email: crtamm@classicconnectors.com

John F. Stock
Orla E. Collier
Benesch, Friedlander, Coplan & Aronoff LLP
41 South High Street, 26th Floor
Columbus, OH 43215
Email: jstock@beneschlaw.com
ocollier@beneschlaw.com

Attorneys for Murray Energy Corporation and
Citizens to Protect DP&L Jobs

Mark Landes
Brian M. Zets
Isaac Wiles Burkholder & Teetor, LLC
Two Miranova Place
Suite 700
Columbus, OH 43215
Email: mlandes@isaacwiles.com
bzets@isaacwiles.com

Attorneys for Adams County Commissioners

Terrence N. O'Donnell
Raymond D. Seiler
Christine M.T. Pirik
William V. Vorys
Dickinson Wright PLLC
150 East Gay Street, Suite 2400
Columbus, OH 43215
Email: todonnell@dickinsonwright.com
rseiler@dickinsonwright.com
cpirik@dickinsonwright.com
wvorys@dickinsonwright.com

Attorneys for Mid-Atlantic Renewable
Energy Coalition

C. David Kelley, Prosecutor
Dana N. Whalen
110 West Main Street
West Union, OH 45693
Email: prosecutorkelley@usa.com
dana.whalen@adamscountyoh.gov

Attorneys for Monroe Township, Ohio, Sprigg
Township, Manchester Local School District,
and Adams County Ohio Valley School
District

Devin D. Parram
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
Email: dparram@bricker.com

Attorney for People Working
Cooperatively, Inc.

/s/ Christopher C. Hollon
Christopher C. Hollon

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Summary: Memorandum The Dayton Power and Light Company's Memorandum in
Opposition to the Motion to Reopen Proceeding electronically filed by Mr. Jeffrey S Sharkey
on behalf of The Dayton Power and Light Company