

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY TO ESTABLISH A STANDARD
SERVICE OFFER IN THE FORM OF AN
ELECTRIC SECURITY PLAN.**

CASE NO. 16-395-EL-SSO

**IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY FOR APPROVAL OF REVISED
TARIFFS.**

CASE NO. 16-396-EL-ATA

**IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY FOR APPROVAL OF CERTAIN
ACCOUNTING AUTHORITY.**

CASE NO. 16-397-EL-AAM

FOURTH ENTRY ON REHEARING

Entered in the Journal on November 7, 2018

I. SUMMARY

{¶ 1} In this Fourth Entry on Rehearing, the Commission denies the application for rehearing filed by the Ohio Consumers' Counsel on October 19, 2018.

II. DISCUSSION

{¶ 2} The Dayton Power and Light Company (DP&L) is a an electric light company as defined by R.C. 4905.03(C) and a public utility as defined under R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission. On February 22, 2016, DP&L filed an application for a standard service offer pursuant to R.C. 4928.141. DP&L's application is for an electric security plan (ESP) in accordance with R.C. 4928.143. Additionally, DP&L filed accompanying applications for approval of revised tariffs and for approval of certain accounting authority.

{¶ 3} Thereafter, on October 11, 2016, DP&L filed an amended application for an ESP.

{¶ 4} On January 30, 2017, a stipulation and recommendation was filed by DP&L and various parties. Subsequently, on March 14, 2017, an amended stipulation and recommendation was filed by DP&L and various parties, including additional parties that were not part of the first stipulation.

{¶ 5} On October 20, 2017, the Commission issued its Opinion and Order in this proceeding, modifying and approving the amended stipulation.

{¶ 6} On November 17, 2017, an application for rehearing was filed by The Ohio Environmental Council and the Environmental Defense Fund (OEC/EDF). Further, on November 20, 2017, applications for rehearing were filed by Murray Energy Corporation and Citizens to Protect DP&L Jobs (Murray), Ohio Consumers' Counsel (OCC), DP&L, Industrial Energy Users-Ohio (IEU-Ohio), Retail Energy Supply Association (RESA), IGS Energy, Inc. (IGS), Ohio Manufacturers' Association Energy Group (OMAEG), and The Kroger Co. (Kroger).

{¶ 7} On December 6, 2017, the Commission granted the applications for rehearing filed by the parties for further consideration of the matters specified in the applications for rehearing.

{¶ 8} Subsequently, on January 5, 2018, OCC filed an application for rehearing of the Commission's December 6, 2017 decision to grant rehearing. The Commission issued the Second Entry on Rehearing in this proceeding on January 31, 2018, denying rehearing on OCC's January 5, 2018 application for rehearing.

{¶ 9} The Commission issued the Third Entry on Rehearing in this proceeding on September 19, 2018. In the Third Entry on Rehearing, the Commission granted, in part, and denied, in part, the application for rehearing filed by DP&L on November 20, 2017.

Further, the Commission denied the application for rehearing filed on November 17, 2017, by the Ohio Environmental Council and the Environmental Defense Fund and the applications for rehearing filed on November 20, 2017, by Murray, OCC, DP&L, IEU-Ohio, RESA, IGS, OMAEG, and Kroger.

{¶ 10} R.C. 4903.10 states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

{¶ 11} On October 19, 2018, OCC filed an application for rehearing regarding the Third Entry on Rehearing. DP&L filed a memorandum contra the application for rehearing on October 29, 2018.

{¶ 12} In its first assignment of error, OCC claims that the Commission erred when comparing the cost of the ESP in the aggregate to the cost of an MRO pursuant to R.C. 4928.143(C)(1) (ESP/MRO Test). OCC claims that the Commission improperly relied upon R.C. 4905.31 as creating independent authority for a public utility to charge consumers for advanced metering. OCC quotes R.C. 4905.31 as stating, in relevant part, that a public utility may enter into a "*reasonable arrangement with another public utility or with one or more of its customers, consumers, or employees* providing for . . . [a]ny other financial device that may be practicable or advantageous to the *parties* interested . . . [which] may include . . . any acquisition and deployment of advanced metering," OCC claims, therefore, that R.C. 4905.31 does not create independent authority for a public utility to charge consumers for advanced metering; instead, according to OCC, R.C. 4905.31 permits only certain "reasonable arrangements" *between* parties, and there must be two parties to such reasonable arrangements.

{¶ 13} In its second assignment of error, OCC claims that the Third Entry on Rehearing is unreasonable and unlawful because the Commission's improper reliance upon R.C. 4905.31 results in a misapplication of the ESP/MRO Test. OCC posits that the

Commission's ESP/MRO Test analysis was inherently unreasonable and unlawful due to the Commission's misinterpretation of R.C. 4905.31.

{¶ 14} In its memorandum contra, DP&L responds that OCC's application for rehearing should be denied. DP&L claims that OCC has already conceded, in OCC's initial post-hearing brief, that costs recovered under the Smart Grid Rider would be available under an MRO through a distribution rate case. Since the Commission made the same finding in considering the ESP/MRO Test, irrespective of cost recovery under R.C. 4905.31, DP&L contends that OCC has not shown that the Third Entry on Rehearing is unlawful or unreasonable.

{¶ 15} DP&L also claims that OCC has waived this issue. DP&L notes that, when OCC challenged that ESP/MRO Test in its application for rehearing filed on November 20, 2017, OCC argued that certain riders, including the Smart Grid Rider, had been set to zero and thus imposed unknown costs, but OCC did not argue that Smart Grid Rider costs would not be recoverable under an MRO. DP&L argues that, since that issue could have been raised at that time, OCC has waived the issue and cannot raise it now. R.C. 4903.10; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 865 N.E.2d 213, ¶ 75 (holding that OCC waived issue by not setting forth specific ground in its first application for rehearing).

{¶ 16} Finally, DP&L argues that the Commission is correct that costs under the Smart Grid Rider could be recovered under an MRO through R.C. 4905.31. DP&L asserts that the statute expressly provides that public utilities may file a schedule providing for a device to recover costs incurred in conjunction with any acquisition and deployment of advanced metering, without limiting such schedules to agreements with third parties, as OCC erroneously contends.

III. CONCLUSION

{¶ 17} The Commission finds that the application for rehearing filed by OCC should be denied as procedurally improper. R.C. 4903.10 does not allow persons who enter appearances to have “two bites at the apple” or to file rehearing upon rehearing of the same issue. *Ormet Primary Aluminum Corp., et al. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CSS, et al., Second Entry on Rehearing (Sept. 13, 2006) at 3-4; *In re The East Ohio Gas Co. d.b.a. Dominion East Ohio and Columbia Gas of Ohio, Inc.*, Case No. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at 4.

{¶ 18} In the Opinion and Order, the Commission determined that the ESP was more favorable in the aggregate than the expected results of an MRO. Opinion and Order at ¶ 89. The Commission specifically rejected OCC’s claim that certain riders, or their equivalents, would not be available under an MRO. *Id.* at ¶ 90. In its November 20, 2017 application for rehearing, OCC claimed that the Opinion and Order was unlawful because, in applying the ESP/MRO Test, the Commission could not have considered the cost of several riders created under the ESP but initially set at zero. According to OCC, because these riders have unknown costs, the Commission could not find that the ESP passed the ESP/MRO Test. In the Third Entry on Rehearing, we denied rehearing on this assignment or error, ruling that the record in this case demonstrates that certain zero-based riders created under the ESP will recover costs that are either recoverable in a distribution rate case or are otherwise recoverable under a hypothetical MRO. Such costs, therefore, are a wash. Third Entry on Rehearing at ¶ 80.

{¶ 19} OCC’s October 19, 2018 application for rehearing revisits this denial of rehearing, claiming that, in our consideration of the ESP/MRO Test, the Commission improperly determined that one of the zero-based riders, the Smart Grid Rider, could recover advanced metering and infrastructure costs under an MRO, leading to a misapplication of the ESP/MRO Test. However, OCC improperly seeks rehearing upon rehearing of the same issue. The Commission has already rejected, in the Third

Application for Rehearing, OCC's claims that an equivalent to the Smart Grid Rider could not recover advanced metering and infrastructure costs under a hypothetical MRO and that the Commission erred in its consideration of the ESP/MRO Test. Third Application for Rehearing at ¶ 80. OCC improperly seeks rehearing on an issue upon which rehearing has already been denied. Accordingly, rehearing on both assignments of error should be denied.

{¶ 20} Even if OCC's application for rehearing were proper, which it was not, rehearing on OCC's first assignment of error would be denied. OCC's arguments in support of the first assignment of error misleadingly ignore the plain language of R.C. 4905.31.

{¶ 21} As a preliminary matter, the Commission notes that R.C. 4905.30 requires each public utility in this state to file with the Commission tariffs, or "schedules," containing all rates and charges for public utility services:

A public utility shall print and file with the public utilities commission *schedules* showing all rates, joint rates, rentals, tolls, classifications, and charges for service of every kind furnished by it, and all rules and regulations affecting them. The *schedules* shall be plainly printed and kept open to public inspection. The commission may prescribe the form of every such *schedule*, and may prescribe, by order, changes in the form of such *schedules*. The commission may establish and modify rules and regulations for keeping such *schedules* open to public inspection. A copy of the *schedules*, or so much thereof as the commission deems necessary for the use and information of the public, shall be printed in plain type and kept on file or posted in such places and in such manner as the commission orders.

R.C. 4905.30(A) (emphasis added). Further, R.C. 4905.32 require public utilities to charge all customers the rates and charges provided for in such schedules:

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified *in its schedule filed with the public utilities commission* which is in effect at the time. No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

R.C. 4905.32 (emphasis added). Thus it is clear that, according to R.C. 4905.30 and 4905.32, public utilities are required to file with the Commission “schedules” containing their rates and charges and that public utilities must charge all customers in the same customer class the rates and charges contained in such “schedules.”

{¶ 22} In its first assignment of error, OCC argues that R.C. 4905.31 does not create independent authority for a public utility to charge consumers for advanced metering. According to OCC, R.C. 4905.31 permits only certain “reasonable arrangements” between parties, but OCC supports this claim by selectively quoting R.C. 4905.31. OCC alleges that the relevant part of R.C. 4905.31 states that a public utility may enter into a “*reasonable arrangement with another public utility or with one or more of its customers, consumers, or employees* providing for . . . [a]ny other financial device that may be practicable or advantageous to the *parties* interested . . . [which] may include . . . any acquisition and deployment of advanced metering,” However, in its quotation of the statute, OCC

misleadingly omits all references in R.C. 4905.31 to the term "schedules." R.C. 4905.31 states, in actual relevant part:

Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., 4927., 4928., and 4929. of the Revised Code do not prohibit a public utility from filing a *schedule* or establishing or entering into any reasonable arrangement with another public utility or with one or more of its customers, consumers, or employees * * * providing for any of the following:

* * *

(E) Any other financial device that may be practicable or advantageous to the parties interested. In the case of a *schedule or arrangement* concerning a *public utility electric light company*, such other financial device may include a device *to recover costs* incurred in conjunction with * * * any acquisition and deployment of advanced metering, including the costs of any meters prematurely retired as a result of the advanced metering implementation * * *. No such *schedule or arrangement* is lawful unless it is filed with and approved by the commission pursuant to an application that is submitted by the public utility or the mercantile customer or group of mercantile customers of an electric distribution utility and is posted on the commission's docketing information system and is accessible through the internet. Every such public utility is required to conform its schedules of rates, tolls, and charges to such arrangement, sliding scale, classification, or other device, and where variable rates are provided for in any such *schedule or arrangement*, the cost data or factors upon which such rates are based and fixed shall be filed with the commission in such form and at such times as

the commission directs. Every such *schedule or reasonable arrangement* shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission.

R.C. 4905.31 (emphasis added). Thus, according to the plain language of the statute, DP&L may file a tariff or “schedule” which provides for the recovery of costs related to the acquisition and deployment of advanced metering, subject to the approval of the Commission. For that reason, the Commission did not err in determining, in the Third Entry on Rehearing, that under a hypothetical MRO, DP&L could recover the costs of deploying advanced metering infrastructure pursuant to R.C. 4905.31 and that, for purposes of the ESP/MRO Test such costs are a wash as they could be recovered both under the ESP and under a hypothetical MRO.

{¶ 23} OCC’s second assignment of error claims that the Commission’s misinterpretation of R.C. 4905.31 led to a misapplication of the ESP/MRO Test. Even if OCC’s application for rehearing were proper, which it was not, rehearing on OCC’s second assignment of error would be denied because the second assignment of error explicitly relies upon OCC’s specious arguments in its first assignment of error, which the Commission rejected above.

{¶ 24} Accordingly, the Commission finds that rehearing on the two assignments of error raised by OCC in the application for rehearing filed on October 19, 2018, should be denied.

IV. ORDER

{¶ 25} It is, therefore,

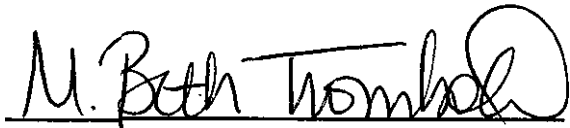
{¶ 26} ORDERED, That the application for rehearing filed by OCC on October 19, 2018, be denied. It is, further,

{¶ 27} ORDERED, That a copy of this Fourth Entry on Rehearing be served upon each party of record.

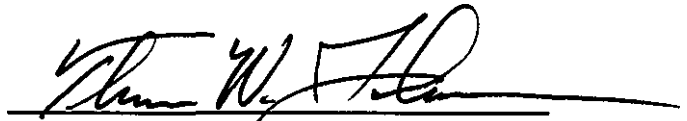
THE PUBLIC UTILITIES COMMISSION OF OHIO



Asim Z. Haque, Chairman



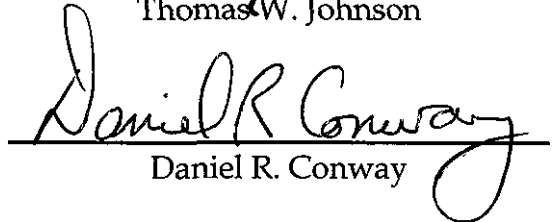
M. Beth Trombold



Thomas W. Johnson



Lawrence K. Friedeman

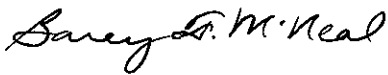


Daniel R. Conway

GAP/sc

Entered in the Journal

NOV 07 2018



Barcy F. McNeal
Secretary