

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the)
Dayton Power and Light Company for) Case No. 18-1875-EL-GRD
Approval of its Plan to Modernize its)
Distribution Grid.)

In the Matter of the Application of the) Case No. 18-1876-EL-WVR
Dayton Power and Light Company for)
Approval of a Limited Waiver of Ohio)
Adm. Code 4901:1-18-06(A)(2).)

In the Matter of the Application of the) Case No. 18-1877-EL-AAM
Dayton Power and Light Company for)
Approval of Certain Accounting)
Methods.)

In the Matter of the Application of the) Case No. 19-1121-EL-UNC
Dayton Power and Light Company for)
Administration of the Significantly)
Excessive Earnings Test Under R.C.)
4928.143(F) and Ohio Adm. Code)
4901:1-35-10 for 2018.)

In the Matter of the Application of the) Case No. 20-1041-EL-UNC
Dayton Power and Light Company for)
Administration of the Significantly)
Excessive Earnings Test Under R.C.)
4928.143(F) and Ohio Adm. Code)
4901:1-35-10 for 2019.)

In the Matter of the Application of The) Case No. 20-680-EL-UNC
Dayton Power and Light Company for)
a Finding that its Current Electric)
Security Plan Passes the Significantly)
Excessive Earnings Test and the More)
Favorable in the Aggregate Test in)
R.C. 4928.143(E).)

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

Bruce Weston (0016973)
Ohio Consumers' Counsel

Christopher Healey (0086027)
Counsel of Record (Case Nos. 20-680-EL-UNC and
19-1121-EL-UNC)

Angela D. O'Brien (0097579)
Counsel of Record (Case Nos. 18-1875-EL-GRD
and 20-1041-EL-UNC)

William J. Michael (0070921)

Amy Botschner O'Brien (0074423)

Ambrosia Wilson (0096598)

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor

Columbus, Ohio 43215

Telephone [Healey]: (614) 466-9571

Telephone [O'Brien]: (614) 466-9531

Telephone [Michael]: (614) 466-1291

Telephone [Botschner O'Brien]: (614) 466-9575

Telephone [Wilson]: (614) 466-1292

christopher.healey@occ.ohio.gov

angela.obrien@occ.ohio.gov

william.michael@occ.ohio.gov

amy.botschner.obrien@occ.ohio.gov

ambrosia.wilson@occ.ohio.gov

(willing to accept service by e-mail)

September 10, 2021

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**SECOND APPLICATION FOR REHEARING
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The Public Utilities Commission of Ohio (“PUCO”) has approved a settlement among the Dayton Power and Light Company d/b/a AES Ohio (“DP&L”) and others that will enrich DP&L’s shareholders and the signatory parties to the detriment of consumers.¹ Under the settlement, consumers will pay \$300 million in subsidies to DP&L’s shareholders, forego \$150 million in refunds after paying significantly excessive profits to DP&L, and pay an additional \$100 million in new charges for DP&L’s “smart grid” investments that will provide few tangible benefits and only speculative cost savings for consumers.

On July 16, 2021, the Office of the Ohio Consumers’ Counsel (“OCC”) filed an application for rehearing requesting that the PUCO reconsider its decision to approve the settlement.² On August 11, 2021, the PUCO issued an Entry on Rehearing granting OCC’s application for rehearing solely “for the purpose of further consideration of the matters raised in the applications for rehearing.”³ The PUCO otherwise failed to substantively address the issues raised in OCC’s application for rehearing. The PUCO’s August 11 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 failed to fulfill its duty to hear matters pending before it without unreasonable delay and with due regard to the rights and interests of Ohio consumers. The PUCO’s Entry permits it to evade a timely review and reconsideration of its order by the Ohio Supreme Court and prevents Ohio consumers 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.

¹ PUCO Opinion and Order (June 16, 2021) (“Settlement Order”).

² OCC Application for Rehearing (July 16, 2021).

³ PUCO Entry on Rehearing, August 11, 2021 (“August 11 Entry”).

The reasons in support of this application for rehearing are set forth in the accompanying memorandum in support. Under R.C. 4903.10 and O.A.C. 4901-1-35, the PUCO should grant rehearing and abrogate or modify its Entry as requested by OCC.

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Angela D. O'Brien

Christopher Healey (0086027)
Counsel of Record (Case Nos. 20-680-EL-UNC and
19-1121-EL-UNC)

Angela D. O'Brien (0097579)
Counsel of Record (Case Nos. 18-1875-EL-GRD
and 20-1041-EL-UNC)

William J. Michael (0070921)

Amy Botschner O'Brien (0074423)

Ambrosia Wilson (0096598)

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor

Columbus, Ohio 43215

Telephone [Healey]: (614) 466-9571

Telephone [O'Brien]: (614) 466-9531

Telephone [Michael]: (614) 466-1291

Telephone [Botschner O'Brien]: (614) 466-9575

Telephone [Wilson]: (614) 466-1292

christopher.healey@occ.ohio.gov

angela.obrien@occ.ohio.gov

william.michael@occ.ohio.gov

amy.botschner.obrien@occ.ohio.gov

ambrosia.wilson@occ.ohio.gov

(willing to accept service by e-mail)

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. STANDARD OF REVIEW	2
III. ASSIGNMENT OF ERROR	3
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 failed to fulfill its duty to hear matters pending before it without unreasonable delay and with due regard to the rights and interests of Ohio consumers. The PUCO's Entry permits it to evade a timely review and reconsideration of its order by the Ohio Supreme Court and prevents Ohio consumers 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.....	3
IV. CONCLUSION.....	7

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The utility-friendly settlement approved by the PUCO in this case enriches DP&L and the signatory parties at the expense of consumers who are forced to pay unjust and unreasonable charges to DP&L. OCC presented ample evidence demonstrating that the settlement violates each of the three prongs of the test that the PUCO uses in evaluating settlements.⁴ OCC's evidence was largely ignored by the PUCO in the Settlement Order. More egregiously, the settlement harms consumers because it was the product of an unfair settlement process that gave DP&L superior bargaining power and "cash for signature" concessions to other signatory parties.⁵

To protect consumers from paying unjust and unreasonable charges to DP&L under the settlement, OCC filed an application for rehearing of the PUCO's Settlement Order. R.C. 4903.10 requires the PUCO to either grant or deny an application for rehearing within 30 days. In this case, the PUCO granted the applications for rehearing,⁶ but did not substantively address or rule on the issues raised in the applications. Instead, the PUCO stated that it granted rehearing for further consideration of the matters raised in the applications for rehearing.⁷ In other words, the PUCO granted the applications for rehearing to delay ruling on issues that directly impact the rates DP&L charges consumers.

The PUCO's act of granting itself an indefinite time period to rule on the applications for rehearing is grossly unfair to the consumers forced to pay DP&L's

⁴ See OCC Initial Brief (February 12, 2021); OCC Reply Brief (March 8, 2021).

⁵ See OCC Initial Brief at 37-44.

⁶ Even though the PUCO approved the settlement between DP&L and the signatory parties, DP&L filed an application for rehearing of the PUCO's Settlement Order as well.

⁷ August 11 Entry at ¶1.

charges. 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. The PUCO's delay in deciding the issues on rehearing and issuing a final appealable order harms consumers because DP&L will continue charging consumers unjust and unreasonable rates under the PUCO-approved settlement. Therefore, OCC seeks rehearing of the PUCO's August 11 Entry granting rehearing solely for the purpose of delaying a substantive resolution of the issues.

II. STANDARD OF REVIEW

After an order is entered, an intervenor in a PUCO proceeding has a statutory right to apply for rehearing "in respect to any matters determined in the proceeding."⁸ An application for rehearing must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."⁹

In considering an application for rehearing, R.C. 4903.10 provides that the PUCO may grant and hold rehearing if there is "sufficient reason" to do so. After such rehearing, the PUCO may "abrogate or modify" the order in question if the PUCO "is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted."¹⁰

The statutory standard for abrogating or modifying the Entry is met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing. The PUCO's ruling was unreasonable and unlawful in the following respects.

⁸ R.C. 4903.10.

⁹ R.C. 4903.10(B). *See also* Ohio Admin. Code 4901-1-35(A).

¹⁰ R.C. 4903.10(B).

III. ASSIGNMENT OF ERROR

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 failed to fulfill its duty to hear matters pending before it without unreasonable delay and with due regard to the rights and interests of Ohio consumers. The PUCO's Entry permits it to evade a timely review and reconsideration of its order by the Ohio Supreme Court and prevents Ohio consumers 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.”¹¹ 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.”¹²

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.¹³ Yet while the Entry on Rehearing is not a final appealable order,

¹¹ *State ex rel. Columbus Gas & Fuel Col. v. Pub. Util. Comm.* (1930), 122 Ohio St. 473, 475.

¹² *See, e.g., Moeller v. Moeller* (C.A. 9th Dist.), 1993 Ohio App. LEXIS 50, *7 (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.”)

¹³ *See* R.C. 4903.11.

consumers are paying charges that are being challenged on rehearing.¹⁴ Unfortunately, that means DP&L can charge consumers regardless of the fact that OCC is challenging the charges 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.¹⁵ 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,¹⁶ the Court's ruling has been unreasonably applied in a manner that disrupts timely judicial

¹⁴ 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."

¹⁵ See, e.g., *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. 08-1094-EL-SSO *et al.* Fourth Entry on Rehearing (February 14, 2020) (granting rehearing for the purpose of allowing PUCO more time to consider OCC's application for rehearing). The PUCO issued a substantive Entry on Rehearing over a year later on June 16, 2021, after OCC filed a complaint for writ of procedendo with the Supreme Court of Ohio. *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). Substantive entry on rehearing issued almost three years later, on March 21, 2018. *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 (September 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). Substantive entry on rehearing issued over four years later, on April 10, 2019.

¹⁶ See, *State ex rel. Consumers' Counsel v. Pub. Util. Comm.*, 102 Ohio St.3d 301, 304 (2004).

review of PUCO rulings, which prejudices would-be appellants. Indeed, in *Consumers' Counsel*, while the Court upheld a PUCO entry on rehearing that provided additional time to rule, the PUCO's final denial of the applications for rehearing in that case was issued within 30 days.¹⁷ By contrast, the PUCO has adopted the practice of regularly granting itself more time to consider applications for rehearing and delaying a final order until months or years down the road,¹⁸ while in the meantime consumers are forced to pay uneconomic, unjust and unreasonable charges.¹⁹ That practice defeats the intended purpose of the 30-day timeframe set forth in R.C. 4903.10 and allows the PUCO to evade timely judicial review of its decisions. Nowhere in *Consumers' Counsel* does the Court hold that R.C. 4903.10 permits the PUCO to delay final appealable decisions on rehearing for months or years on end. To do so would create an unjust and absurd result contrary to the purpose of R.C. 4903.10.²⁰

Further, delaying judicial review matters to consumers because of Court precedent²¹ that generally precludes refunds to consumers for rates already collected. Each day that the PUCO delays issuing a final order is a day that rates are charged to consumers without an opportunity to stop the unnecessary collections and without a likely recourse to a refund for consumers.

¹⁷ *Id.* at 303 (PUCO entry on rehearing granting it more time issued on February 11, 2004 and denial of applications for rehearing was subsequently issued on March 11, 2004).

¹⁸ *See supra* note 15.

¹⁹ 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.

²⁰ *See e.g. Mishr v. Board of Zoning Appeals of Village of Poland*, (1996) 76 Ohio St.3d 238, 240 (quoting *Slater v. Cave* (1853) 3 Ohio St. 80, 83-84 (“It is a cardinal rule of statutory construction that a statute should not be interpreted to yield an absurd result” and where literal construction of a statute leads to “great absurdity or injustice” it “may be rejected.”)).

²¹ *Keco Industries v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957).

The delay in ruling upon OCC's application for rehearing harms consumers because they are required to pay unjust, unreasonable charges that are not paid subject to refund or not stayed. This is prejudicial, and manifestly unfair.²² 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 relief²³ from the Court, even without a ruling on rehearing, that relief is generally beyond OCC's grasp. This is because it is likely that the Court will deny such relief on the theory that OCC has a so-called "adequate remedy at law": an appeal from the PUCO's final order, when and if it is ever issued.

That is exactly what happened when OCC recently filed a complaint for writ of procedendo seeking relief for consumers when the PUCO deferred substantively ruling on OCC's application for rehearing of the PUCO's Second Finding and Order in PUCO Case No. 08-1094-EL-SSO.²⁴ In that case, the PUCO issued an entry on February 14, 2020, granting OCC's application for rehearing for the purpose of giving the PUCO more time to issue a substantive ruling. But after waiting *well over a year* for the PUCO to act to decide the matters, OCC filed a writ of procedendo with the Court on April 14, 2021.²⁵ Once OCC filed the writ, the PUCO issued its substantive ruling on the matters two months later on June 16, 2021.²⁶ Subsequently, the Court dismissed OCC's complaint on

²² 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.

²³ Through a writ of procedendo or prohibition.

²⁴ See *State of Ohio ex rel. Office of the Ohio Consumers' Counsel v. Jenifer French Chairperson Public Utilities Commission of Ohio et al.*, Supreme Court of Ohio Case No. 2021-0456, OCC Complaint for Writ of Procedendo (April 14, 2021).

²⁵ *Id.*

²⁶ See *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. 08-1094-EL-SSO *et al.*, Fifth Entry on Rehearing (June 16, 2021).

August 18, 2021.²⁷ While the PUCO ultimately issued a ruling addressing the issues raised by OCC in the application for rehearing, consumers were still required in the interim to pay DP&L charges that OCC challenges as unlawful. This is not an isolated occurrence for the PUCO. As noted above,²⁸ the PUCO often takes *years* to issue a final appealable order on rehearing, routinely disregarding the 30-day timeframe set forth in R.C. 4903.10.

To protect consumers, the PUCO should act to substantively address or deny issues on rehearing within the 30-day timeframe set forth in R.C. 4903.10. A final appealable order should be issued to allow parties to exercise their rights under R.C. 4903.11 and 4903.13 to appeal PUCO decisions to the Court. Granting more time ostensibly to consider issues raised on rehearing unreasonably delays the issuance of a final order all the while customers are forced to pay higher, unnecessary charges. 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.

IV. CONCLUSION

To protect customers from unjust and unreasonable charges, the PUCO should grant rehearing and abrogate or modify its August 11 Entry on Rehearing to address the issues raised by OCC in its application for rehearing. This would enable OCC to exercise its statutory right to appeal the PUCO decisions on behalf of DP&L's residential consumers in a timely manner.

²⁷ See *State of Ohio ex rel. Office of the Ohio Consumers' Counsel v. Jenifer French Chairperson Public Utilities Commission of Ohio et al.*, Supreme Court of Ohio Case No. 2021-0456, Merit Decision Without Opinion, (August 18, 2021) (Granting PUCO's motion to dismiss OCC's complaint).

²⁸ *Supra* note 15.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Angela D. O'Brien

Christopher Healey (0086027)
Counsel of Record (Case Nos. 20-680-EL-UNC and
19-1121-EL-UNC)

Angela D. O'Brien (0097579)
Counsel of Record (Case Nos. 18-1875-EL-GRD
and 20-1041-EL-UNC)

William J. Michael (0070921)

Amy Botschner O'Brien (0074423)

Ambrosia Wilson (0096598)

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor

Columbus, Ohio 43215

Telephone [Healey]: (614) 466-9571

Telephone [O'Brien]: (614) 466-9531

Telephone [Michael]: (614) 466-1291

Telephone [Botschner O'Brien]: (614) 466-9575

Telephone [Wilson]: (614) 466-1292

christopher.healey@occ.ohio.gov

angela.obrien@occ.ohio.gov

william.michael@occ.ohio.gov

amy.botschner.obrien@occ.ohio.gov

ambrosia.wilson@occ.ohio.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Second Application for Rehearing was electronically served via electric transmission on the persons stated below this 10th day of September 2021.

/s/ Angela D. O'Brien
Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

SERVICE LIST

Case No. 18-1875-EL-GRD, et al.

steven.beeler@ohioattorneygeneral.gov	ccox@elpc.org
Robert.eubanks@ohioattorneygeneral.gov	Michael.schuler@aes.com
Bethany.allen@igs.com	jsharkey@ficlaw.com
Joe.oliker@igs.com	djireland@ficlaw.com
Michael.nugent@igs.com	chollon@ficlaw.com
dstinson@bricker.com	fdarr@mwncmh.com
kherstein@bricker.com	mpritchard@mwncmh.com
jspottswood@bricker.com	mfleisher@dickinsonwright.com
jdunnlegal@gmail.com	cpirik@dickinsonwright.com
kevin.oles@thompsonhine.com	mkurtz@bkllawfirm.com
stephanie.chmiel@thompsonhine.com	kboehm@bkllawfirm.com
cmooney@opae.org	jkylercohn@bkllawfirm.com
whitt@whitt-sturtevant.com	Bojko@carpenterlipps.com
glover@whitt-sturtevant.com	Dressel@carpenterlipps.com
drinebolt@opae.org	Paul@carpenterlipps.com
nvijaykar@elpc.org	Dutton@carpenterlipps.com
glpetrucci@vorys.com	slessor@beneschlaw.com
dparram@bricker.com	talexander@beneschlaw.com
dstinson@bricker.com	mkeaney@beneschlaw.com

Attorney Examiners:

Patricia.schabo@puco.ohio.gov
gregory.price@puco.ohio.gov

Case No. 19-1121-EL-UNC

steven.beeler@ohioattorneygeneral.gov
Michael.schuler@aes.com
mkurtz@bkllawfirm.com
kboehm@bkllawfirm.com
talexander@beneschlaw.com

jkylercohn@bkllawfirm.com
bojko@carpenterlipps.com
paul@carpenterlipps.com
mpritchard@mcneeslaw.com
rglover@mcneeslaw.com

Attorney Examiners:

Patricia.schabo@puco.ohio.gov
gregory.price@puco.ohio.gov

Case No. 20-1041-EL-UNC

steven.beeler@ohioattorneygeneral.gov
Michael.schuler@aes.com
Bojko@carpenterlipps.com
Paul@carpenterlipps.com

mpritchard@mcneeslaw.com
rglover@mcneeslaw.com
talexander@beneschlaw.com

Attorney Examiners:

Patricia.schabo@puco.ohio.gov
Michael.williams@puco.ohio.gov

Case No. 20-680-EL-UNC

thomas.lindgren@ohioattorneygeneral.gov
dparram@bricker.com
dstinson@bricker.com
jspottswood@bricker.com
bojko@carpenterlipps.com
Bethany.allen@igs.com
Joe.oliker@igs.com
Michael.nugent@igs.com
Fdarr2019@gmail.com
paul@carpenterlipps.com
kevin.oles@thompsonhine.com
stephanie.chmiel@thompsonhine.com

jsharkey@ficlaw.com
djireland@ficlaw.com
chollon@ficlaw.com
michael.schuler@aes.com
mkurtz@bkllawfirm.com
kboehm@bkllawfirm.com
jkylercohn@bkllawfirm.com
mpritchard@mcneeslaw.com
rglover@mcneeslaw.com
slesser@beneschlaw.com
talexander@beneschlaw.com
mkeaney@beneschlaw.com
khehmeyer@beneschlaw.com

Attorney Examiners:

Patricia.schabo@puco.ohio.gov
Michael.williams@puco.ohio.gov

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Summary: App for Rehearing Second Application for Rehearing by Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J. Greene on behalf of O'Brien, Angela
D