

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Plan to Modernize Its Distribution Grid	:	CASE NO. 18-1875-EL-GRD
	:	
In the Matter of the Application of The Dayton Power and Light Company for Approval of a Limited Waiver of Ohio Adm.Code 4901:1-18-06(A)(2)	:	CASE NO. 18-1876-EL-WVR
	:	
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Methods	:	CASE NO. 18-1877-EL-AAM
	:	
In the Matter of the Application of The 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	:	CASE NO. 19-1121-EL-UNC
	:	
In the Matter of the Application of The 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	:	CASE NO. 20-1041-EL-UNC
	:	
In the Matter of the Application of The Dayton Power and Light Company for a Finding That Its Current Electric Security Plan Passes the Significantly Excessive Earnings Test and More Favorable in the Aggregate Test in R.C. 4928.143(E)	:	CASE NO. 20-0680-EL-UNC
	:	

**THE DAYTON POWER AND LIGHT COMPANY D/B/A AES OHIO'S
MEMORANDUM IN OPPOSITION TO OFFICE OF THE OHIO CONSUMERS'
COUNSEL'S SECOND APPLICATION FOR REHEARING**

I. INTRODUCTION AND SUMMARY

For at least the seventh time in the past five years,¹ The Office of the Ohio Consumers' Counsel ("OCC") has sought rehearing from a Commission order that granted applications for rehearing for further consideration of the matters specified in those applications for rehearing. Second Application for Rehearing by Office of the Ohio Consumers' Counsel (Sept. 10, 2021) (seeking rehearing from the Entry on Rehearing (Aug. 11, 2021)). Despite its professed concern (p. 5) for "[e]ach day that the PUCO delays issuing a final order," OCC again 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.

The Entry on Rehearing is consistent with longstanding Commission practice, statutory authority, and precedent of the Supreme Court of Ohio. R.C. 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 in complex matters such as this one where several proceedings were resolved, including the grid modernization plan of The Dayton Power

¹ *In re The Dayton Power and Light Co.*, Case No. 16-359-EL-SSO, *et al.* ("ESP III Case"), Application for Rehearing by The Office of the Ohio Consumers' Counsel (Jan. 5, 2018), p. 2 (**denied** by Second Entry on Rehearing (Jan. 31, 2018), ¶¶ 15-18); *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, *et al.*, Fourth Application for Rehearing by The Office of the Ohio Consumers' Counsel (Feb. 3, 2017), pp. 4-5 (**denied** by Sixth Entry on Rehearing (Feb. 23, 2017), ¶¶ 18-19); *In re The Dayton Power and Light Co.*, 08-1094-EL-SSO, *et al.* ("ESP I Case"), Application for Rehearing by The Office of the Ohio Consumers' Counsel (Nov. 14, 2016), p. 2 (**denied** by Third Entry on Rehearing (Dec. 14, 2016), ¶ 38); *In re Ohio Edison Co.*, Case No. 14-1297-EL-SSO, Application for Rehearing by The Office of the Ohio Consumers' Counsel (Jan. 6, 2017), p. 2 (**denied** in Seventh Entry on Rehearing (Feb. 1, 2017), ¶¶ 12-13); *In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, *et al.*, Second Application for Rehearing by The Office of the Ohio Consumers' Counsel (July 20, 2018), p. 3 (**denied** in Second Entry on Rehearing (Aug. 1, 2018), ¶¶ 92-93); *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, *et al.*, Application for Rehearing by The Office of the Ohio Consumers' Counsel (Jan. 20, 2017), p. 3 (**denied** in Fourth Entry on Rehearing (Feb. 8, 2017), ¶¶ 21-22).

and Light Company d/b/a AES Ohio ("AES Ohio" or the "Company"), the Company's quadrennial review under R.C. 4928.143(F), and two separate retrospective significantly-excessive-earnings-test cases under R.C. 4928.143(E). Opinion and Order (June 16, 2021) (approving and adopting the Stipulation and Recommendation (Oct. 23, 2020)).

The Commission ultimately should deny OCC's July 16, 2021 Application for Rehearing from the June 16, 2021 Opinion and Order.² Setting that matter aside, it was lawful and reasonable for the Commission to take additional time to consider the issues raised in the applications for rehearing filed by OCC and the Company. Thus, the Commission should deny OCC's Second Application for Rehearing and issue a final decision on rehearing in due course.

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.³ This practice is permitted by R.C. 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

² See Memorandum of The Dayton Power and Light Company d/b/a AES Ohio in Opposition to The Office of the Ohio Consumers' Counsel's Application for Rehearing (July 30, 2021).

³ See, *supra*, n. 1.

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. 4 & n.16), the Supreme Court of Ohio expressly upheld this practice in *State ex rel. Consumers' Counsel v. Pub. Util. Comm.*, 102 Ohio St.3d 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 R.C. 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. at ¶ 19 (emphasis added).

Although OCC cites (p. 3) 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.* at 474 (case stayed by Commission on March 4, 1930; decided by Supreme Court on June 18, 1930).

Here, OCC filed its Second Application for Rehearing 56 days after its initial 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. 4 & n.15) 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 evade timely judicial review of its decisions," is without factual support. On the contrary, multi-party complex litigation involving complicated statutory schemes and technical subjects is inherently time-consuming, and warrants thoughtful consideration by the Commission.

As the Commission explained in rejecting a nearly-identical Application for Rehearing by OCC:

"Given the vast number of applications of 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."⁴

Finally, it is unavailing for OCC to argue (p. 7) that the Commission has prevented OCC from exercising its right 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 R.C. 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*, 2004-Ohio-2894, at ¶ 19, OCC does not have any "right" to appeal until the Commission has issued a final decision denying all applications for rehearing. *Accord: In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶

⁴ *In re Ohio Edison Co.*, Case No. 14-1297-EL-SSO, Seventh Entry on Rehearing (Feb. 1, 2017), ¶ 13 (emphasis added). *See also ESP I Case*, Application for Rehearing by The Office of the Ohio Consumers' Counsel (Nov. 14, 2016), p. 2 (denied by Third Entry on Rehearing (Dec. 14, 2016), ¶ 38); *ESP III Case*, Application for Rehearing by The Office of the Ohio Consumers' Counsel (Jan. 5, 2018), p. 4 (denied by Second Entry on Rehearing (Jan. 31, 2018), ¶¶ 15-18).

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 pending Applications for Rehearing.

Respectfully submitted,

/s/ Michael J. Schuler

Michael J. Schuler (082390)

AES OHIO

1065 Woodman Drive

Dayton, OH 45432

Telephone: (937) 259-7358

Telecopier: (937) 259-7178

Email: michael.schuler@aes.com

/s/ Jeffrey S. Sharkey

Jeffrey S. Sharkey (0067892)

(Counsel of Record)

D. Jeffrey Ireland (0010443)

Christopher C. Hollon (0086480)

FARUKI PLL

110 North Main Street, Suite 1600

Dayton, OH 45402

Telephone: (937) 227-3747

Fax: (937) 227-3717

Email: jsharkey@ficlaw.com

djireland@ficlaw.com

chollon@ficlaw.com

Counsel for AES Ohio

(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company d/b/a AES Ohio's Memorandum in Opposition to Office of the Ohio Consumers' Counsel's Second Application for Rehearing, has been served via electronic mail upon the following counsel of record, this 20th day of September, 2021:

Steven L. Beeler
Robert A. Eubanks
Thomas G. Lindgren
OFFICE OF THE
OHIO ATTORNEY GENERAL
PUBLIC UTILITIES SECTION
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
steven.beeler@ohioattorneygeneral.gov
robert.eubanks@ohioattorneygeneral.gov
thomas.lindgren@ohioattorneygeneral.gov

*Counsel for Staff of the
Public Utilities Commission of Ohio*

Matthew R. Pritchard
Todd J. Long
MCNEES WALLACE & NURICK LLC
21 E. State Street, 17th Floor
Columbus, Ohio 43215
mpritchard@mcneeslaw.com
tlong@mcneeslaw.com

Counsel for Industrial Energy Users - Ohio

Christopher Healey
William J. Michael
Amy Botschner O'Brien
Angela O'Brien
OFFICE OF THE
OHIO CONSUMERS' COUNSEL
65 East State Street, 7th Floor
Columbus, Ohio 43215
christopher.healey@occ.ohio.gov
william.michael@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov
angela.obrien@occ.ohio.gov

Michael D. Dortch
Justin M. Dortch
KRAVITZ, BROWN & DORTCH, LLC
64 E. State Street, Suite 200
Columbus, Ohio 43215
mdortch@kravitzllc.com
jdortch@kravitzllc.com

*Counsel for Office of the
Ohio Consumers' Counsel*

Kimberly W. Bojko
Jonathan Wygonski
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Bojko@carpenterlipps.com
Wygonski@carpenterlipps.com

*Counsel for Ohio Manufacturers'
Association Energy Group*

Steven D. Lesser
N. Trevor Alexander
Mark T. Keaney
Kari D. Hehmeyer
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP
41 South High Street, Suite 2600
Columbus, Ohio 43215-6164
slesser@benschlau.com
talexander@benschlau.com
mkeaney@benschlau.com
khehmeyer@benschlau.com

*Counsel for the City of Dayton and
Honda of America Mfg., Inc.*

Angela Paul Whitfield
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215

Counsel for The Kroger Co.

Devin D. Parram
Dane Stinson
Jhay T. Spottswood
BRICKER& ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291
dparram@bricker.com
dstinson@bricker.com
Jspottswood@bricker.com

*Counsel for The Ohio Hospital
Association*

Christine M.T. Pirik
Madeline Fleisher
DICKINSON WRIGHT PLLC
150 East Gay Street, Suite 2400
Columbus, Ohio 43215
cpirik@dickinsonwright.com
mfleisher@dickinsonwright.com

Counsel for Mission:data Coalition

Michael L. Kurtz
Kurt J. Boehm
Jody Kyler Cohn
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
mkurtz@BKLawfirm.com
kboehm@BKLawfirm.com
jkylercohn@BKLawfirm.com

Counsel for Ohio Energy Group

Stephanie M. Chmiel
Kevin D. Oles
THOMPSON HINE LLP
41 South High Street, Suite 1700
Columbus, Ohio 43215
Stephanie.Chmiel@ThompsonHine.com
Kevin.Oles@ThompsonHine.com

Counsel for University of Dayton

David C. Rinebolt
OHIO PARTNERS FOR
AFFORDABLE ENERGY
P.O. Box 1793
Findlay, Ohio 45839

*Counsel for Ohio Partners
for Affordable Energy*

Robert Dove
KEGLER BROWN HILL + RITTER Co. L.P.A.
65 East State Street, Suite 1800
Columbus, Ohio 43215
rdove@keglerbrown.com

*Counsel for Natural Resources
Defense Council*

Madeline Fleisher
Christine M.T. Pirik
William Vorys
DICKINSON WRIGHT PLLC
150 East Gay Street, Suite 2400
Columbus, Ohio 43215
mfleisher@dicksoninwright.com
cpirik@dicksonwright.com
wvorys@dicksonwright.com

Counsel for Smart Thermostat Coalition

Nikhil Vijaykar
ENVIRONMENTAL LAW & POLICY CENTER
35 E. Wacker Dr., Suite 1600
Chicago, Illinois 60601
nvijaykar@elpc.org

*Counsel for Environmental
Law & Policy Center*

Dylan F. Borchers
Kara H. Hernstein
Jhay T, Spottswood
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
dborchers@bricker.com
khernstein@bricker.com
jspottswood@bricker.com

Counsel for Chargepoint, Inc.

Joseph Halso
SIERRA CLUB
ENVIRONMENTAL LAW PROGRAM
1536 Wynkoop Street
Denver, Colorado 80202
joe.halso@sierraclub.org
Richard C. Sahli
RICHARD SAHLI LAW OFFICE, LLC
981 Pinewood Lane
Columbus, Ohio 43230
rsahli@columbus.rr.com

Counsel for Sierra Club

Miranda Leppla
Trent Dougherty
Chris Tavenor
1145 Chesapeake Avenue, Suite I
Columbus, Ohio 43212
mleppla@theocc.org
tdougherty@theocc.org
ctavenor@theocc.org

Counsel for Ohio Environmental Council

Michael J. Settineri
Gretchen L. Petrucci
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, Ohio 43215
mjsettineri@vorys.com
glpetrucci@vorys.com

Drew Romig
Armada Power LLC
230 West Street, Suite 150
Columbus, Ohio 43215
dromig@armadapower.com

Counsel for Armada Power, LLC

Bethany Allen
Joseph Oliker
Michael Nugent
IGS ENERGY
6100 Emerald Parkway
Dublin, Ohio 43016
bethany.allen@igs.com
joe.oliker@igs.com
michael.nugent@igs.com

Frank P. Darr
6800 Linbrook Boulevard
Columbus, Ohio 43235
fdarr2019@gmail.com

Counsel for Interstate Gas Supply, Inc.

Mark A. Whitt
Lucas A. Fykes
WHITT STURTEVANT LLP
88 E. Broad Street, Suite 1590
Columbus, Ohio 43215
whitt@whitt-sturtevant.com
fykes@whitt0sturtevant.com

Counsel for Direct Energy, LP

/s/ Christopher C. Hollon
Christopher C. Hollon

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/20/2021 4:49:16 PM

in

Case No(s). 18-1875-EL-GRD, 18-1876-EL-WVR, 18-1877-EL-AAM, 19-1121-EL-UNC, 20-1041-EL-UNC

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