

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
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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
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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
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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
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**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,

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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:

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Summary: Memorandum The Dayton Power and Light Company D/B/A AES Ohio's
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